

When Should You File a Fictitious Name? by Dale Alberstone, Esq.

Apartment owners often operate their buildings under fictitious business names, that is, names which do not identify the true owner of the property, such as Frances Wade Apartments, Sunset Beach Apartments and Pacific Breeze Apartments. Quite often, the individual owner of a building, the L.L.C., or the Corporation or the partnership owning the tenement will enter into leases, rental agreements or other contracts using the fictitious name of the building rather than their real name. Sections 17910-20 of the California Business and Professional Code require that every person or entity who regularly transacts business for profit under a fictitious name file an appropriate Fictitious Business Name Statement with the county clerk within 40 days from the time the name is first used in a business setting, and thereafter refile the statement every five years. The fictitious name must also be published in a local newspaper in the manner to be discussed.

The purpose of the law is to ensure that public notice is given and a public record made of the true names of all individuals doing business under a fictitious name, or all general partners of a partnership where the firm name does not disclose their names, and so forth. This enables those dealing with the fictitiously named business to be aware of who the true owners are. (Hydrotech v. Oasis, 52 C.3d 988.)

What is a Fictitious Name?

Fictitious names arise in three contexts:

- 1) With an individual owner of the property, a fictitious name is one that does not include the surname of the individual or does suggest the existence of additional owners. For example, if Jane Doe is the owner of "Luxury Manor", the building name is fictitious and Jane Doe must comply with the filing and publishing requirements.
- 2) With a partnership, a name that does not include the surname of each general partner, or a name which suggests the existence of additional owners ("Company," "& Company," "Company & Sons," "& Brothers"), is a fictitious name. If Steve Smith and Sherry Singer were general partners of a partnership, the name "Smith & Singer Apartments" would not be a fictitious name, whereas "Smith, Singer & Associates" would be.
- 3) In the case of a corporation or limited liability company, any name other than the corporate or company name stated in the articles of incorporation or organization is a fictitious one.

Filing and Publication

A Fictitious Business Name Statement must be filed with the county clerk in the county where the name is utilized within 40 days after commencing use of the fictitious name. The statement must be on a form setting forth the following information: the fictitious name, the full name of all persons doing business under the name (in the case of a partnership, only the names of the general partners need be set forth), the residence address of such persons (in the case of a corporation, only the state of incorporation need be stated), and the ownership structure of the business (e.g., individual ownership, partnership, or husband and wife).

Free blank forms for filing the required statement may be obtained from the Los Angeles Daily Journal by calling (213) 229-5300, ext. 3. The county clerk filing fee is about \$23.00.

Within 30 days after filing the Fictitious Business Name Statement, a similar statement must be published, one a week for four consecutive weeks, in a newspaper of general circulation in the county where the apartment building is located. The newspaper selected should be one that circulates in the local area of the buildings.

Duration of Fictitious Names

A Fictitious Business Name Statement expires at the end of five years from the date it is filed, at which time a new statement must be filed. At the expiration date, only a refiling is required; a newspaper publication is not necessary unless the information has changed since the first publication.

When the registrant terminates the use of the name, he should file a Statement of Abandonment of Use of Fictitious Business Name with the same county clerk who received the original statement. (The filing fee for an abandonment statement is about \$23.00.) Notice of the abandonment must be made in a newspaper of general circulation.

A general partner of a partnership that has been regularly transacting business under a fictitious name may, upon withdrawing as a general partner, file a Statement of Withdrawal from the partnership (filing fee \$23.00) and publish in a newspaper of general circulation. The withdrawal of a general partner does not cause a fictitious name statement to expire if the withdrawing partner files and publishes properly.

Failure to File

There are two adverse consequences for failing to file a fictitious name. First, the apartment owner may not sue in court in a matter arising from a contract dispute. Second, the owner may lose his presumptive right to use the name should another individual under that name.

With respect to the first consequence, suppose that Jane Doe enters into a rental agreement in the name of "Luxury Manor" with Tom Tenant. Tom later defaults in his rent payment and Jane desires to file an unlawful detainer action. Jane, however, failed to file or publish the proper fictitious name statement. Luxury Manor is clearly a fictitious name, as it does not contain Jane's surname. She could not bring the case to trial or have the tenant evicted until the statement has been filed and published.

Although Jane may not maintain an action arising from a contract until proper filing and publishing, she may nevertheless be sued, even though the statement was never filed in such a situation. The law would permit Jane to defend the lawsuit, but she could not take affirmative action by countersuing the other party until the statement has been filed and published.

The second consequence is the possible loss of the right to use the name. The law (Business and Professions Code Section 14411) says that the filing of a fictitious name statement establishes a rebuttable presumption that the registrant has the exclusive right to use the name in the county in which the statement is filed and published. This exclusive right applies against any other individual who desires to use the same name, providing that the fictitious name was used in business before the other person's name was used in business. Thus, if Jane were to file a "Luxury Manor" fictitious name statement and began doing business under that name before anyone else, the law would presume that Jane had the exclusive right to the use of the name and would likely prevent any competing partnership, company, or other individual from using it.

Persons who have neglected to file or publish the proper statement in a timely fashion may thereafter do so and preserve their rights from the date of such filing and publishing. There is no fine or other monetary penalty.

There is one reason that a person doing business under a fictitious name may not wish to file the statement. Sometimes the individual does not want his name to be readily identified, particularly if he has bad credit. In that instance, the person may decide not to file so that a creditor may not learn of his true identity simply by looking through the index of fictitious business names.

In general, filing a fictitious business name is required by law and should be accomplished promptly after the name is first used. The filing procedure is simple and inexpensive. And remember, apartment owners using a fictitious name must refile every five years to stay current.

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Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell, which is a registered certification of Reed Elsevier, Inc. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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