



Commercial Lease Enforcement in Virginia during the COVID-19 Pandemic

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While it is clear that the current COVID-19 crisis has touched every part of society and the economy, the governmental response and protections have not been uniform. The federal, state and local guidance has largely focused on residential lease obligations but has not expressly addressed commercial lease obligations. This article seeks to provide some clarity to commercial landlords about the current state-of-play under federal and state COVID-19 regulations and what lease enforcement actions currently are permitted.

Federal Treatment

The CARES Act does not address commercial leases. Section 4024 imposes a temporary moratorium on eviction filings, charging late fees and issuing notices to vacate as to a "covered dwelling." The defined terms in Section 4024, including covered dwelling, covered property and federally backed mortgage loans are all limited to residential properties and programs.

At this time, there is no federal COVID-related law governing commercial leases. The Paycheck Protection Program (PPP) allows businesses to use up to 25% of the funds to pay "rent, under lease agreements in force before February 15, 2020," which presupposes that commercial rent obligations will remain in place and that the government is willing to subsidize those payments for qualifying businesses. While the 25% rent limitation has proven difficult for small businesses in dense urban areas with modest payrolls and high rent costs,^[1] allowing PPP loan proceeds to be applied to rent payments appears to be the federal government's current preferred response to dealing with commercial rent issues. On April 17, Congresswoman Ilhan Omar introduced a bill titled the Rent and Mortgage Cancellation Act of 2020, which would "suspend obligations of residential renters and mortgagors to make payments during the COVID-19 emergency."^[2] The bill, which only addresses residential leases, is still in the Financial Services Committee and has received little congressional support to date. There is not any pending federal legislation addressing commercial leases.

State Treatment

Current Virginia COVID regulations effectively prohibit a commercial landlord from evicting a tenant through the judicial process but do not otherwise prohibit non-judicial commercial remedies and rights under a lease. The Governor's Executive Orders do not address landlord-tenant matters except for a general statement that state agencies shall work with housing partners to develop strategies to avoid evictions and foreclosures.[3] The primary regulation affecting commercial leases is the Virginia Supreme Court Order declaring a judicial emergency.

On March 6, the Virginia Supreme Court extended its declaration of a judicial emergency through June 7, which limits Virginia district and circuit courts to hearing only emergency matters. This was the second time the Court extended its judicial emergency declaration for a 21-day period. In its second order, which continued the emergency declaration from April 6 to April 26, the Court expressly stated that writs of eviction and unlawful detainers are non-emergency matters that cannot be heard until after the judicial emergency is over.[4] The order does not limit its scope to residential eviction or unlawful detainer, so it presumably applies to both residential and commercial proceedings. However, the Order is unclear as to whether evictions and unlawful detainer proceedings may be filed with the court during the judicial emergency. The Order says "[t]he court shall *continue* all civil, traffic and criminal matters, including jury trials, except for emergency and other matters as provided in this Order." In other words, the Order requires courts to *continue* non-emergency matters but does not say that courts must refuse to accept such filings. The Order gives judges the ability to "exercise their discretion as necessary in determining whether the matter is urgent and must be heard without delay." So, read as a whole, the Order does not appear to prevent a landlord from filing an eviction or unlawful detainer proceeding and getting in the queue to be heard once the judicial emergency is over.

Possession

The current legal framework does not prohibit a commercial landlord from declaring a lease in default, sending notice and subsequently terminating the lease in accordance with the lease terms. The difficulty then comes in seeking to enforce the lease termination and regain control of the property without timely judicial intervention.

Virginia law allows for self-help eviction without further legal process in the commercial context, provided that such eviction does not incite a breach of the peace.[5] However, a landlord taking possession of a property by self-help does not also gain the right to exercise its landlord lien over the tenant's personal property without judicial process.[6] The landlord must obtain a distress warrant from the court to exercise its landlord lien via attachment to and seizure of the tenant's property to sell at auction to satisfy outstanding rent obligations.[7] If a landlord does not go through the judicial process before seizing the tenant's property pursuant to its statutory landlord lien, the landlord could be liable for an unlawful seizure of the tenant's property.[8]

A commercial landlord could avoid the judicial process if the lease also creates a UCC security interest for the landlord, as opposed to the statutory landlord lien described in the preceding paragraph. If the lease does create a UCC security interest in the tenant's property (often in the tenant's furniture, fixtures and equipment or "FF&E") as collateral, it is possible for the landlord to repossess and dispose of the tenant's property through non-judicial means so long as it does not result in a breach of the

peace.[9] A landlord must use extreme caution in exercising self-help remedies, but it is at least possible for a commercial landlord with a UCC security interest in the tenant's FF&E to repossess the premises and dispose of the secured collateral under the UCC without intervention by a court.

Conclusion

Therefore, while commercial landlords retain the same legal rights during the COVID crisis as they had before, limitations on judicial proceedings may affect the timing and practicality of available remedies. Under the current federal and state regulation, a commercial landlord may terminate a lease for failure to pay but will not be able to rely on judicial eviction until the declared judicial emergency is over and the courts work through the backlog of non-emergency cases. A landlord pursuing self-help remedies should exercise extreme caution and consult with legal counsel before doing so.

[1] Yuka Hayashi, "For Small Businesses With High Rents, Coronavirus Aid Falls Short," *Wall Street Journal* (May 1, 2020).

[2] 2019 Cong. US HR 6515 (Apr. 17, 2020).

[3] E.O. 55, ¶ 6, March 30, 2020

[4] VA Order 20-0011, ¶ 1

[5] Va. Code § 55.1-1400(B).

[6] Va. Code § 8.01-130.6.

[7] Va. Code § 8.01-130.4

[8] See *In re Balistreri*, 8 B.R. 703, 704-05 (E.D. Va., Norfolk, 1981) (noting distress action is the remedy for properly enforcing a landlord's lien) (citing *United States v. Lawler*, 201 Va. 686, 112 S.E.2d 921 (1960)).

[9] Va. Code § 8.9A-609(b)(2).

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