

Residential and Commercial Landlords Beware

Related Professionals

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On Saturday, May 30, 2020, North Carolina Governor Roy Cooper issued Executive Order No. 142 and North Carolina Supreme Court Chief Justice Cheri Beasley issued Emergency Directives 17, 18, and 19. Professionals in the North Carolina real estate industry need to take note of the Executive Order and Emergency Directives because they (1) place a moratorium on most residential and commercial evictions in North Carolina through at least June 21, 2020 and (2) restrict other actions landlords can take when tenants fail to pay amounts due under leases or are late making payments due under leases.

A. Emergency Directives

Emergency Directive 17 provides that “[a]ll evictions pending in the trial divisions, whether summary ejection or otherwise, are hereby stayed until 21 June 2020. Sheriffs shall not be required to execute pending writs of possession of real property or make due return of such writs until 30 June 2020.” As a result of this Emergency Directive, the courts in essence remain closed for any type of eviction, residential or commercial, until June 21, 2020. Notably, Emergency Directive 17 does not speak to commercial self-help evictions. However, there is more on that to follow.

Emergency Directive 18 adds a new requirement that a plaintiff in a Summary Ejection proceeding filed on or after March 27, 2020 prove and obtain a finding that the property subject to the eviction is not a covered property by Section 4024(a)(1) of the CARES Act. Note - the term “Covered Property” is actually defined in Section 4024(a)(2) of the CARES Act, not Section 4024(a)(1) in Emergency Directive 18. “Covered Property” is defined in Section 4024(a)(2) of the CARES Act as any property that (A) participates in (1) a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a)); or (2) the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r); or (B) has a

federally backed mortgage loan or a federally backed multifamily mortgage loan.”

Emergency Directive 18 goes on to direct the Administrative Office of the Courts to create a form affidavit for plaintiffs to use to meet the new CARES Act requirement. We should receive clarity, when this form is created, that the Chief Justice actually meant Section 4024(a)(2) rather than Section 4024(a)(1). With regard to summary ejectments that are yet to be filed, this new affidavit will need to be filed at the time the summary ejectment complaint is filed. With regard to pending summary ejectments, the new affidavit will need to be filed before final judgment is entered by a magistrate.

Emergency Directive 19 provides for the creation of a new voluntary mediation program for summary ejectment actions. The Emergency Directive also requires the Dispute Resolution Commission to submit proposed rules for this new program no later than June 7, 2020.

B. Executive Order

Executive Order No. 142 includes several notable provisions and is split into two main parts: Residential Eviction Moratorium and Commercial Eviction Moratorium. Each of these Moratoriums are in place until June 20, 2020, unless extended by an additional Executive Order.

i. The Commercial Eviction Moratorium

The Commercial Eviction Moratorium prevents commercial landlords from:

- (i) Performing a self-help eviction of a commercial tenant,
- (ii) Requiring commercial tenants to vacate their facilities,
- (iii) Terminating any commercial tenant’s lease, or
- (iv) Taking any action, judicial or otherwise, to terminate a commercial tenant’s possession.

These actions are only barred when there is a late payment or nonpayment caused by the COVID 19 pandemic. While the Executive Order does not extend further to have any effect on evictions for reasons other than non-payments or late payments, the Executive Order does “strongly” encourage commercial landlords to work with tenants “to the best of their abilities” to avoid evictions in light of the COVID-19 State of Emergency.

During the period of the Commercial Eviction Moratorium, before doing any barred actions, a commercial landlord is required to inquire whether the late payment or nonpayment is caused by the COVID 19 pandemic and give the tenant a seventy-two (72) hour period to respond. If the commercial landlord fails to do this and instead moves forward with the barred actions, such action is voidable by the tenant. “Caused by the COVID 19 Pandemic” is defined as caused, in whole or in part, directly or indirectly, by the COVID 19 pandemic including not only “the medical effects of the COVID 19 pandemic, but also the disruptions to the economy that have arisen since the beginning of the COVID 19 pandemic and the economic effects of business closures and other public health restrictions instituted because of the COVID 19 pandemic.”

In determining whether the late payment or nonpayment is caused by the COVID 19 pandemic, the Executive Order clarifies that the commercial moratorium shall only apply if (1) the landlord is aware the tenant's late payment or nonpayment is caused by the COVID-19 pandemic and/or (2) the tenant provides the landlord with documentation or other evidence the late payment or nonpayment is caused by the COVID 19 pandemic.

In addition to barring actions to evict a commercial tenant, the Executive Order also bars commercial landlords from assessing interest, late fees, or other penalties for late payment or nonpayment of rent due during the period of the Commercial Eviction Moratorium. It also provides that if any interest, late fees, or other penalties for late payment or nonpayment of rent were already accruing as of May 30, 2020, that accrual is paused during the Commercial Eviction Moratorium.

The Executive Order also provides "[c]ommercial tenants shall be provided the opportunity to make reasonable payment arrangement to pay off, over at least a six (6) month period, any rent that came due" during the Commercial Eviction Moratorium and was not paid during the Commercial Eviction Moratorium. This six (6) month period does not commence until the end of the Commercial Eviction Moratorium. Moreover, a commercial landlord is not permitted to include interest, late fees or other penalties charged on arrearages that accrue in such six (6) month period. Notably, this payment arrangement requirement does not appear to apply to balances accrued prior to May 30, 2020.

On the brighter side for commercial landlords, the Executive Order does expressly provide that except for interest, late fees, and penalties that are expressly barred by the Executive Order (as discussed above), the tenants obligation to pay rent or perform any other obligations under commercial leases remain in place and are not waived. Tenants are encouraged to pay full rent when due. Also, the Executive Order encourages "all lenders to work with property owners to the best of their abilities to avoid foreclosures, in light of the COVID 19 State of Emergency." Presumably this provision was provided to help protect commercial landlords who are unable to make loan payments as a result of their tenants' failure to make rent payments.

ii. The Residential Eviction Moratorium

Similar to the Commercial Eviction Moratorium, the Residential Eviction Moratorium prevents residential landlords from:

- (i) Initiating or taking any action to further summary ejectments or other eviction proceedings against a residential tenants or
- (ii) Requiring residential tenants to vacate their dwelling units for reason of late payment or nonpayment.

Interestingly, the Executive Order also purports to actually modify all leases "to disallow evicting, or otherwise terminating the possession of, Residential Tenants for reason of late payment or nonpayment" during the Residential Eviction Moratorium.

The Executive Order also bars residential landlords from assessing interest, late fees, or other penalties for late payment or nonpayment of rent during the Residential Eviction Moratorium. It also provides that if any interest,

late fees, or other penalties for late payment or nonpayment of rent were already accruing as of May 30, 2020, that accrual is paused during the Residential Eviction Moratorium.

Also, as with the Commercial Eviction Moratorium, the Executive Order provides “[r]esidential tenants shall be provided the opportunity to make reasonable payment arrangement to pay off, over at least a six (6) month period, any rent that came due” during the Residential Eviction Moratorium and was not paid during that time. This six (6) month period does not commence until the end of the Residential Eviction Moratorium. A residential landlord is not permitted to include interest, late fees or other penalties charged on arrearages that accrue in such six (6) month period. Like the Commercial Eviction Moratorium, it appears this payment arrangement requirement does not apply to balances that had accrued prior to May 30, 2020.

If you need guidance on these directives or other commercial landlord/tenant issues, feel free to contact Brian Pearce at bpearce@maynardnexsen.com or another member of our Commercial Real Estate team.

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