Current Issues in Residential and Commercial Leasing

These are confusing times for landlords and tenants of both commercial and residential property. The purpose of this article is to provide some clarity to clients of Woodburn and Wedge and any other readers on current issues in leasing.

Following his declaration on March 12, 2020, of a state of emergency resulting from the outbreak of the Coronavirus Disease (COVID-19) in the State of Nevada, Governor Sisolak issued Declaration of Emergency Directive 008 (the "Directive") on March 29, 2020. The Directive had the effect of staying certain evictions and lockout proceedings, as well as foreclosure actions.

Contrary to what some of my landlord clients are telling me that their tenants apparently believe, the Directive did not effect a statewide moratorium on tenants' (whether commercial or residential) obligation to pay rent. In fact, Section 3 of the Directive specifically notes that nothing therein relieves a party, otherwise contractually obligated to do so, from paying their rent. What the Directive did do is to create a great deal of confusion regarding the rights and obligations of landlord and tenants following a default (whether in payment or otherwise). Unfortunately, this confusion has not been alleviated by the other state and local orders that have followed the Directive's publishing.

On March 31, 2020, the Nevada Supreme Court issued its Order Concerning Implementation by Justice Courts of Governor's Emergency Directive 008, Administrative Order 12 (the "Implementation Order"). In the Implementation Order, the Supreme Court provides a form order all justice courts in the State can use to individually implement the Directive. That form order was entered by the Chief Justices of the Peace of both the Reno Justice Court (Administrative Order 2020-4) and the Sparks Justice Court (Administrative Order 2020-3) on April 1, 2020.

One question that has arisen following the Directive, the Implementation Order and the individual administrative orders entered pursuant thereto, is whether landlords are prohibited from serving unlawful detainer notices altogether, or whether justice courts are simply prohibited from accepting for filing and hearing complaints for eviction. There is good reason for this confusion.

Before delving into this question in more detail, some background information is needed. In the State of Nevada, a tenant is not subject to eviction until the tenant is in unlawful detainer (unlawful possession) of commercial or residential premises. In addition, a tenant is not in unlawful detainer of the premises until it has received a statutory notice.[1] That's right, this means a tenant could do any number of things that violate a lease agreement (including failing to pay the rent due), and until the landlord serves the tenant with a notice requiring that the tenant cure its breach (i.e. pay the rent) or surrender the premises, the tenant is not in unlawful detainer

[1] A tenant might also be subject to removal as part of the relief requested by a landlord in a breach of contract action. But because this route is uncommon and painstakingly more difficult and more expensive than obtaining an eviction order by the traditional summary eviction proceeding, I don't address it here.

and, therefore, not subject to removal by the means set forth in NRS 40.215 *et seq.* This is where the Governor's Directive and the Supreme Court's Implementation Order (as well as the justice courts' administrative orders) are seemingly inconsistent with one another, creating confusion.

Section 1 of the Directive states in relevant part that: "No lockout, notice to vacate, notice to pay or quit, eviction . . . or other proceeding involving residential or commercial real estate based upon a tenant . . . default . . . may be initiated under any provision of Nevada law effective March 29, 2020, at 11:59 p.m." (Emphasis added). Because this section is written in the passive voice, it's impossible to know who exactly the Governor intended that it pertain to. "No Court may initiate any lockout, notice to vacate, etc." means something completely different than "No person may initiate any lockout, notice to vacate, etc."

There are convincing arguments on both sides of the debate of whether the Directive prohibits all eviction activity, including notices, or if it applies only to the actual filing of eviction cases. The distinction is important because it determines whether a landlord can start the process now (i.e. serve the unlawful detainer notice) and then immediately file its affidavit of complaint for summary eviction the day the state of emergency declaration expires; or, alternatively, whether the landlord needs to wait until the emergency declaration expires before serving any kind of notice.

Arguments in favor of the belief the prohibition on eviction notices applies only to the acceptance of eviction complaints by the courts (and not the service of unlawful detainer notices by landlords) point to the Directive's use of the catch-all "or other proceedings" to describe the prohibited notices/orders. A notice to pay rent or surrender premises is not a "proceeding" and thus—so the argument goes—the Governor did not intend to prohibit landlords from serving such notices. Other arguments in favor of this belief point to the Supreme Court's Implementation Order itself, as well as the individual justice court orders entered pursuant thereto, which clearly apply only to prohibit the filing of certain, non-emergency eviction actions.

These arguments notwithstanding, I tend to agree with the position that the Directive prohibits the service of all non-emergency unlawful detainer notices, as well as the filing of all but non-emergency eviction actions. Why do I agree with this position?

For starters, the "all other proceedings" catch-all appears to be more the result of poor drafting than any specific intent on the part of the Governor to limit the scope of prohibitions to just "proceedings." Moreover, neither a "notice to vacate" nor a "notice to pay or quit" are proceedings at all; in fact, their preparation and service requires no court filing, approval or other involvement whatsoever.

Moreover, the argument that the Implementation Order is limited to court proceedings themselves and does not include statutory notices, is a red herring. The Nevada Supreme Court simply does not have authority to prevent private citizens (such as landlords) from serving

notices on their tenants.[2] The Court has power and authority only over the administration of Nevada's court system—and it used that power to prohibit the courts from accepting non-emergency eviction filings while the emergency declaration remains in effect.

Furthermore, I think it clear from the recitals in the Directive, including the Governor's encouragement that landlords and tenants negotiate payment plans or other agreements within thirty days of the termination of the Directive to allow "tenants to cure any defaults or missed payments," that landlords will not be able to run to the courthouse on the first day following he termination of the Directive to obtain eviction orders. *See also* Section 7 of the Directive. It might be that landlords are required to certify in any filing made for several months that they have attempted in good faith to reach payment plan agreements with their tenants before a complaint will be accepted for filing.

One final note to commercial landlords. NRS 118C.200 gives commercial landlords the unique remedy of changing the door locks on the premises if a commercial tenant defaults on paying its rent. Again, there is an argument to be made that commercial landlords are free to proceed with this remedy because it is not specifically included in the stay reflected in the justice court administrative orders and, moreover, the administrative orders don't reflect that commercial summary eviction actions pursuant to NRS 40.2542 are stayed (leading some to believe that the courts are open for business when it comes to commercial tenant evictions). I disagree. Nothing in the Directive leads me to believe that commercial landlords are absolved of the prohibition on serving eviction-related notices to their tenants or from the obligation to come up with payment plans with their tenants within thirty days (if not sooner) of the Directive's termination. Finally, the form order promulgated by the Nevada Supreme Court and entered by each individual justice court in the State specifically carves out commercial tenant complaints for reentry pursuant to NRS 118C.210 as an action that may still be filed and heard.

In sum, whether commercial or residential, landlords are encouraged to (i) be in communication with their tenants, (ii) remind their tenants of their obligation to pay rent, and (iii) work in good faith with their tenants to come up with payment plan workout agreements (including agreements concerning the amount of and frequency of rent payments while the Directive remains in effect).

This subject is moving rapidly. Keep an eye out for further articles on tenant defenses to payment (what on Earth does force majeure mean anyway?), and an analysis of the resources available to both residential and commercial landlords and tenants.

Be well, and stay healthy.

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[2] The Governor certainly appears to have this power—having previously ordered on March 20, 2020 that all non-essential businesses close.