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No Rent? No Problem. Not Quite: An Analysis of Massachusetts' Moratorium on Foreclosures and Non-Essential Evictions

On Monday, April 20, 2020, Governor Baker of Massachusetts signed [Bill H4647](#) (the "Act"). The Act places a moratorium on all "non-essential" evictions from properties used for residential purposes and those occupied by commercial tenants qualifying as "small businesses" under the Act. The Act also prohibits foreclosures by lenders holding mortgages on certain residential properties located in Massachusetts. The moratorium on evictions and foreclosures will expire on the earlier of: (a) August 18, 2020, or (b) forty-five (45) days after the Governor rescinds the emergency declaration that he made on March 10, 2020. However, the Act permits the Governor to extend the moratorium on both non-essential evictions and foreclosures.

Eviction of Tenants

The Act applies to residential and commercial tenants. The Act breaks tenants into three categories. Residential tenants have the most protections, large scale commercial tenants have no protections, and "small business" tenants have limited protections under the Act.

What is covered by the Act? The moratorium prohibits all "non-essential" evictions, which includes evictions based on: (i) non-payment of rent, (ii) resulting from a foreclosure, (iii) for no fault or no cause, or (iv) for "cause" unrelated to health or safety.

What, then, is an "essential eviction" under the Act? There is a limited exception for evictions based on health and safety violations. A landlord may evict a tenant based on allegations of: (a) criminal activity that may impact the health or safety of other residents, health care workers, emergency personnel, persons lawfully on the subject property or the general public, or (b) lease violations that may impact the health or safety of other residents, health care workers, emergency personnel, persons lawfully on the subject property or the general public.

Who is covered by the Act? The Act applies to all residential tenants, but it only applies to certain commercial tenants with less than one hundred and fifty (150) full-time equivalent employees. ***Notably, a commercial tenant will not qualify as a "small business" subject to the moratorium if the tenant, (or a party that controls, is controlled by or is in common control with the tenant): (i) operates multi-state, (ii) operates multi-nationally, (iii) is publicly traded, or (iv) has not less than one hundred fifty (150) full-time equivalent employees.***

Since the definition of a "small business" tenant is multi-faceted, and includes an analysis of controlling entities, we strongly suggest that both commercial landlords and tenants consult with their attorneys before taking any action regarding an eviction. We can help you determine whether or not the Act applies and what protections, if any, that the Act may afford.

What remedies does a landlord have under the Act? Again, the Act draws distinctions between residential and commercial tenants. The Act expressly prohibits landlords from terminating a tenancy, sending any notice, including a notice to quit, requesting or demanding that the premises be vacated to tenants of a residential dwelling unit for purposes of non-essential evictions during the moratorium.[1] Moreover, no court actions may be pursued or initiated against residential tenants. In short, no actions may be taken by landlords against residential tenants, unless there is a health or safety emergency.

As to commercial tenants, if the tenant does not fall within the small business definition, then the landlord may proceed against that “large scale” commercial tenant without restriction if they fail to pay rent. The Act treats small business evictions differently during the moratorium. Although the Act does not specifically prohibit a landlord from defaulting small business tenants, the landlord’s ability to act on those defaults has been suspended. During the moratorium, the Act bans Massachusetts courts from accepting new complaints, entering judgments or default judgments, issuing executions or holding trials for non-emergency eviction processes for small business-occupied properties. Additionally, any deadlines for action by a party to a non-essential eviction, whether such deadline was established before or after the effective date of the Act, will be tolled.

In addition to the above, the Act prohibits landlords from: (i) imposing a late fee for non-payment of rent for a residential dwelling unit or a small business premises unit, and (ii) furnishing rental payment data to a consumer reporting agency related to the non-payment of rent so long as a tenant provides written notice and documentation to the landlord within thirty (30) days after the missed rent payment, that the non-payment of rent was due to a financial impact from COVID-19.

While the Act defines the terms “non-essential” and “small business”, it does not define the term “documentation”, leaving much up for interpretation. Notwithstanding the fact that the executive office of housing and economic development has been tasked with the development of forms and recommendations for the provision of notice and documentation to a landlord that the non-payment of rent due to a financial impact from COVID-19, it remains unclear whether they will provide guidance on certain pertinent items, including but not limited to, the authenticity and sufficiency of such documentation, and a landlord’s rights and remedies to contest same.

Foreclosure of Mortgages

The Act draws a bright line between residential and commercial properties. In most instances, residential property owners are protected from foreclosure and commercial property owners are not.

Can residential lenders foreclose during the moratorium imposed under the Act? No. For the purposes of foreclosure of a residential property that is not vacant or abandoned, lenders are prohibited from: (i) causing notice of a foreclosure sale to be published pursuant to M.G.L. c. 244, section 14, (ii) exercising a power of sale, (iii) exercising a right of entry, (iv) initiating a judicial or non-judicial foreclosure process, or (v) filing a complaint to determine the military status of a mortgagor under the federal Servicemembers Civil Relief Act.

Additionally, so long as the mortgagor of a residential property submits a request to the lender’s servicer affirming that the mortgagor has experienced a financial impact from COVID-19, the Act requires that such lenders grant forbearance of not more than one hundred eighty (180) days to mortgagors of residential properties.

The Act, however, does not relieve a mortgagor’s obligation to pay their mortgage or restrict the ability of a lender from recovering mortgage payments. Further, lenders are prohibited from furnishing negative payment information to consumer reporting agencies on the mortgages that are subject to forbearance under the Act during the forbearance period.

Can commercial lenders foreclose during the moratorium imposed by the Act? Yes. The Act does not extend protection from foreclosure to commercial landlords with mortgages, regardless of their tenant mix.

Conclusions

This legislation moved swiftly to tackle a critical issue foisted upon Massachusetts’ businesses and residents as a result of COVID-19 and provides guidance on how to proceed during the moratorium. The Act, however, is devoid of any direction on how landlords and tenants impacted by COVID-19 should proceed once the moratorium expires. To be clear, the Act does not relieve tenants from their rent obligations or prevent landlords from recovering rent, or from foreclosing eventually. Absent further legislative action and relief, the Act will inevitably create a future backlog of viable claims for a judicial system that already has an overwhelming inventory of cases to address.

Like everything in life, there are winners and losers. Undoubtedly, commercial landlords, particularly those with small business tenants, are at least the short term losers as a result of this Act. The Act leaves commercial landlords unable to collect rent from their small business tenants while granting no relief from their lenders. Without the ability to collect rent from many of their tenants, timely mortgage payments may become increasingly difficult for commercial landlords leading to potential loan defaults and foreclosures down the road. Despite the Act's prohibition of evictions as a result of foreclosure, it remains uncertain what other impact the dispossession of a commercial landlord's property as a result of a foreclosure may have on small business tenants. Ultimately, while the Legislature's focus on protection for small business tenants is laudable, the Act's failure to protect commercial landlords during these unique times may, unwittingly, adversely impact precisely those the Act is designed to protect.

We are well versed in the issues facing landlords and tenants and are available to assist you in navigating the issues presented by this Act.

[1] Landlords may use the final month's rent that was paid in advance, provided that such funds are used on expenses such as mortgage, utilities, and repairs and notify tenants in writing (i) of any decision to use such funds, (ii) that landlord remains obligated to apply said rent to its intended application as the final month's rent, and (iii) that the tenant is entitled to the same amount of interest from the landlord that would have accrued had the landlord not utilized such funds before the last month of the tenancy. The Act states that landlords may not use the final month's payment that was paid in advance to cover a month of unpaid rent.

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