Client Alert: Massachusetts Pauses Residential and Commercial Evictions and Residential Foreclosures During the COVID-19 State of Emergency

BY SAMANTHA P. MCDONALD • APRIL 21, 2020

As the Covid-19 global emergency continues, so does its economic impact. The Massachusetts legislature and Governor Baker have enacted numerous initiatives aimed at, among other things, Massachusetts' economic stability and recovery.

On April 20, 2020, Governor Baker signed into law "An Act Providing for a Moratorium on Evictions and Foreclosures during the COVID-19 Emergency" (the "Act".) The Act is a hybrid of competing House and Senate bills aimed at mitigating COVID-19's economic impact on residential and small business tenants and residential mortgage borrowers.

In accordance with its title, the Act imposes a temporary moratorium on: (1) eviction actions for residential properties and "small business premises unit[s]"; and (2) foreclosures on residential properties. The Act will remain in effect for either 120 days from its effective date (August 18, 2020) or 45 days after the termination of the Governor's March 10, 2020 state of emergency declaration, whichever is sooner. The Act also allows Governor Baker to extend the Act in 90-day increments, but not more than 45 days after termination of the March 10th state of emergency. The Act applies to all rental properties in Massachusetts (though not all commercial tenants) and has a broader impact than the eviction restrictions imposed by the federal CARES Act, applicable only to property owners whose mortgages are federally-backed, such as FHA loans.

The Act does not impose a rent or mortgage payment holiday and does not restrict the ability to (eventually) recover unpaid rent or mortgage payments. In fact, the Act specifically states that "[n]othing in this act shall . . . relieve a tenant from the obligation to pay rent, or restrict a landlord's ability to recover rent" and "[n]othing in this act shall be construed to relieve a mortgagor from the obligation to pay their mortgage or restrict the ability" of a mortgage holder or its agents from recovering mortgage payments." Act, sections 3(f) and 5(c).

The Act imposes a temporary moratorium on small business commercial and residential "non-essential evictions." The Act defines a "non-essential eviction" as any eviction: (i) for non-payment of rent; (ii) resulting from a foreclosure; (iii) for no fault or no cause; or (iv) for cause that does not involve or include allegations of criminal activity or lease violations that may impact the health or safety of other residents, healthcare workers, emergency personnel, persons lawfully on the subject property or the general public.

What is a "small business" under the Act? A "small business premises unit", is property occupied by a tenant for commercial purposes, whether for-profit or not-for-profit, that has less than 150 full time equivalent employees.

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However, the protections do not apply if a tenant (or a party that controls, is controlled by or is in common control with the tenant) has multi-state or multi-national operations or is publicly traded. One concern is that a small business may be considered to be operating "multi-state" and be excluded from the Act's protections. For example, if a business that may otherwise qualify operates in two locations, one in Haverhill and another in the bordering town of Plaistow, New Hampshire, they would seemingly be precluded from the Act's protections. If that same business had its second location in a Massachusetts town it would seemingly enjoy the Act's benefits. Notably, the Act excludes an eviction for a small business premises unit on account of a lease expiration or a default by the tenant that occurred before the declaration of the COVID-19 emergency.

For residential properties, landlords are barred from: (i) terminating a tenancy; or (ii) sending any notice, including a notice to quit, and (iii) requesting or demanding that a tenant of a residential dwelling unit vacate the premises. Additionally, for non-essential evictions relating to both residential and small business premises units, the Act restricts Massachusetts courts having summary process (eviction) jurisdiction from: (i) accepting for filing a writ, summons or complaint for summary process; (ii) entering a judgment or default judgment for a plaintiff for possession of a rented property; (ii) issuing an execution for possession of a rented property; (iv) denying a request from a tenant for a stay of execution or a request for a continuation of a summary process action; and (v) scheduling a court event, including a summary process trial. Deadlines for parties to pending summary process actions (regardless of whether the deadline was established before or after the Act's effective date) are tolled (paused or delayed) for the moratorium period and sheriff's and constables are barred from enforcing or levying executions for possession during the moratorium.

The Act bars landlords from reporting rent payments missed during the moratorium to "consumer reporting agencies". Further, the Act protects renters from late fees for rent payments missed during the moratorium provided the renter provides the landlord with "notice and documentation . . . that the non-payment of rent was due to a financial impact from COVID-19" within 30 days of the missed rent payment. The Act does not say what type of documentation is required to prove a financial impact resulted from the virus or if landlords will be obligated to notify tenants of this important requirement in order to take advantage of the rent deferral. The Commonwealth's Executive Office of Housing and Economic Development is required to issue emergency regulations as necessary to implement the Act's various directives relating to leased properties.

In addition to protections for tenants, the Act also allows some leeway for landlords. Specifically, the Act allows a landlord, after written notice to the tenant, to use rent payments held in escrow for the tenant's final month of tenancy (commonly known as "last month's rent") to offset expenses such as mortgage payments, utilities, repairs and required upkeep. The landlord may not apply such funds to missed rent payments and cannot assess an additional final month rent payment upon the tenant at the end of the lease. Further, the landlord remains responsible to the tenant for the full amount of the interest that would have accrued on the final month's rent amount as if the landlord has never used the funds. The Executive Office of Housing and Economic Development will be producing a form for landlords to notify tenants of the use of the last month's rent deposit.

The Act does not prohibit foreclosures on commercial properties, including those that may include residential tenants or small business premises units otherwise protected from eviction. Therefore, while tenants at these types of properties may be protected from eviction and their inability/ failure to pay rent leads to the landlord being unable to pay its mortgage, the landlord may find itself heading towards a foreclosure.

The Act also has a significant impact on parties to a residential mortgage. Specifically, the Act imposes a temporary moratorium on residential foreclosures. Residential mortgage holders are barred from: (i) publishing a notice of foreclosure; (ii) exercising a power of sale; (iii) exercising a right of entry; (iv) initiating any foreclosure process; or (v) filing a complaint to determine military status of a mortgagor. Further, the Act requires a creditor or mortgagee to grant a borrower forbearance if the borrower submits a forbearance request stating that the borrower has experienced

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financial impact from COVID-19. The forbearance shall not exceed 180 days and the mortgage creditor cannot assess fees, penalties or interest during the forbearance period beyond those calculated as if the borrower made all payments as the mortgage contract originally required. Lenders are also barred from reporting negative mortgage payment information about a borrower who has requested a forbearance.

It is worth noting that the Act treats repayment of deferred rent and deferred mortgage payments differently. Unpaid rent not paid during the moratorium may be due as a single payment when the moratorium period ends, but the Act does not restrict landlords and tenants from otherwise agreeing on how and when the postponed rent will be paid. Conversely, deferred mortgage payments are added to the end of the loan.

As communities, landlords, tenants, mortgage lenders, borrowers and others continue to address the fallout of COVID-19, Massachusetts has opted to make real estate stakeholders "take a breath" before addressing the pandemic's economic impact on commercial leases with small businesses, residential leases and residential mortgages. All of this is part of what some are calling the "new normal" and as we move forward COVID-19's overall impact on the real estate industry remains clouded in this new, albeit anything but normal, market.

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