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Virginia Commercial Landlord-Tenant Rights and Obligations During the COVID-19 Pandemic

By Melissa Sevier (July 30, 2020)

Significant attention has been directed at residential tenants' inability to pay rent due to their sudden loss of income during the COVID-19 pandemic. While perhaps less highlighted, commercial tenants' loss of business revenue during this health crisis has also substantially impacted their ability to pay rent. Many Virginia businesses have been ordered to cease - or at a minimum restrict - their operations thereby eliminating or impeding their income stream. Numerous businesses are now closed completely because their operations cannot be conducted in compliance with social distancing standards, while others have chosen to close for the safety of their employees. The Washington Post reported on May 8th that the D.C. metro area continued to see high numbers of fatalities and new infections.[1] The hope that the pandemic would be short-lived diminishes daily. This brief article will outline the rights, responsibilities, and options of commercial landlords and tenants in Virginia during the COVID-19 pandemic.

Government Pronouncements and State Actions[2]

Virginia Governor Ralph Northam's Executive Order 53 went into effect on March 24th and was extended by Executive Order 55 to run until June 10th, unless the Governor orders otherwise.[3] Under this Order:

- All non-essential recreational and entertainment businesses must close. Examples of businesses that must close are: theaters, museums, salons, barber shops, spas, racetracks, and bowling alleys.
- All restaurants, dining establishments, breweries, wineries, etc. which have any dining or congregation area must restrict their business to take-out or delivery and must adhere to social distancing guidelines while patrons are on site.
- All non-essential retail establishments must adhere to social distancing guidelines by having 10 patrons or less who remain six feet apart. Non-essential retail consists of all physical retail stores which have not been deemed essential. Essential stores include grocery, pharmacy, food and beverage, gas stations, automotive parts, home improvement, pet stores, office supplies, and laundromats.
- The Order requires essential businesses to adhere to social distancing guidelines to the extent possible. However, unlike the non-essential businesses, failure to adhere will not result in closure.
- Businesses which fail to adhere to the Order may be forced to close and charged with a Class 1 misdemeanor.

The Virginia Supreme Court has also declared a judicial emergency, currently effective through June 7th. During this time, all non-emergency hearings are postponed. Virginia courts will not issue new evictions or accept notice letters from landlords nor will the sheriff's department execute pending evictions. Thus, landlords cannot start the eviction process until the judicial emergency is lifted. However, this does not prevent landlords from proactively addressing their tenants' lease payment issues through non-judicial means.

Additional Actions Taken by the Federal, Virginia State, and Local Governments

- Emergency funds are available for businesses eligible to remain open. Such funds may be used for cleaning and emergency needs through the Workforce Innovation and Opportunity Act, including the Payroll Protection Program.
- Employers who cease operations will not be penalized for the increase in workers requesting unemployment benefits.
- Virginia small businesses and non-profits can qualify for Economic Injury Disaster Loans from the U.S. Small Business Administration to pay fixed debts, payroll, accounts payable, and other expenses, including rent. Some of these loans can be forgiven, but there are stipulations depending on the type of loan received. Information and applications are available at http://disasterloan.sba.gov/ela/
- Virginia Department of Taxation extended the due date for individual and corporate income tax until June 1st. However, interest will still accrue.

Rights and Obligations

Contractual obligations are not voided during the state of emergency; however, the ability to enforce certain contractual lease rights have been temporarily restricted. Commercial landlords and tenants should first look to their written lease agreement to ascertain their current rights and obligations. Your lease may contain a provision regarding what happens in the event of a natural disaster, i.e., a force majeure clause.[4] These clauses often require the submission of written notice that a force majeure event has occurred which will cause a delay in landlord or tenant action. Such clauses often specify whether the tenant will be required to continue to pay rent in the event of a natural disaster.[5] Be sure to check your specific lease as each lease will have distinctive language and a unique set of provisions which apply to the current situation.

Another important resource is the Virginia Code section regarding non-residential tenancies.[6] Unlike the Virginia Residential Landlord Tenant Act which offers substantial guidance on the rights and obligations of residential landlords and tenants, the Code section governing non-residential tenancies leaves many of these determinations to the contracting parties. Generally, Virginia is a strict contract state with respect to commercial leases and honors the terms set by the parties.

There are no recorded cases in Virginia dealing with a commercial tenant's inability to pay rent due to a government order or natural disaster. Therefore, we must assess the rights and obligations of commercial landlords and tenants based on their lease, general contract laws, and applicable legal arguments derived from analogous caselaw. For example, under the common law doctrine of impossibility, an argument can be made that it is impossible for either the landlord or the tenant under current conditions to perform under the lease.

I. Landlords

Rights:

- Though many are advocating for deferment or abatement of rent, there has been no governmental mandate that landlords must do so.[7]
- Landlords should check with their mortgage company to see if they qualify for payment deferral. Currently all federally insured mortgages qualify for deferred payment, but responses from private institutions vary.
- Landlords remain free to negotiate lease modifications, extensions, and temporary abatements with their tenants.
- As a practical matter, landlords will be unable to legally assert their right to possession upon failure to pay rent until the courts resume normal operations. This includes tenant evictions which were initiated before the judicial emergency was declared.
- After courts resume operations, if a landlord wishes to pursue eviction for lack of rent payment during enforcement of COVID-19 restrictions, they should be aware that a tenant may have several legal defenses . The law is not clear regarding the commercial tenant's responsibility to pay rent when a pandemic has been declared and they are mandated to close or restrict business. Some of these potential defenses are outlined below.

Obligations:

- Legally speaking, if a tenant cannot pay rent due to the pandemic, commercial landlords need only abide by the terms of the lease (including any force majeure clause) and, assuming they may evict , wait for the courts to re-open to begin unlawful detainer proceedings under Va. Code 8.01-126. It is unknown whether the courts will re-open on June 7th or extend the judicial emergency, so their closure may effect several months of rent. In the short term, self-help should be avoided if at all possible.[8]
- The Executive Order states that a violation of its provisions constitutes a Class 1 misdemeanor. While this applies to a business tenant who violates the Order, it also could be applied to a landlord who allows violations to continue on their property. For example, paragraph 4 of the Order requires "closure of all public access to recreational and entertainment businesses." This could clearly apply to the landlord as well as the Tenant.
- The Executive Order does not currently require commercial landlords to abate or forgive rent. However, a tenant may argue that rent forgiveness or abatement is required under lease provisions and/or sections of the Virginia Code which reduce rent when a tenant has been deprived of possession (generally due to the property's destruction).
- Most commercial businesses in Virginia have suffered as a result of the COVID-19 restrictions and will take time to recover. Owners of commercial property should consider how long it may take to find a new tenant if they evict their current tenant. While receiving less rent from your current tenant for a few months may seem arduous, it could be preferable to an empty building in the future.

II. Commercial Tenants

Rights:

- Just as landlords, tenants have all rights preserved to them under the lease. However, Virginia Code provisions regarding non-residential tenancies provide limited additional protections.
- Even if tenants have been unable to pay rent since March, no eviction processes can be initiated in Virginia until June 7th at the earliest. A landlord may provide notice of a tenant's default but will not be able to take further action through the courts or their local Sheriff's Department until the judicial emergency is lifted.
- Tenants may have legal defenses to eviction for non-payment of rent during the pandemic. Nevertheless, they should apply for all governmental aid available and discuss possible deficiencies with their landlord as early as possible.

Obligations:

- Unless the lease contains a tenant friendly force majeure provision, the tenant is may be contractually obligated to pay rent in full, and it may not be wise to rely on uncertain legal defenses. However, in the event your landlord does proceed with legal action, there are several potential defenses:
  - Virginia Code Section 55.1-1411 obligates landlords to reduce rent when the tenant is deprived of possession through no fault of their own. This section is generally applied to loss by fire or other destruction, but a government decree banning a tenant from operating may be construed by courts as within this code's purview.

– Impossibility of performance is a common law defense raised when one party in a contract cannot perform an action, such as fulfilling an order, because outside circumstances have made it impossible to do so. Historically, impossibility has been a difficult claim to prove. In the past, courts have ruled that the mere fear of contracting a serious illness does not make it "impossible" to perform contractual obligations. Nevertheless, a judge might agree that it is impossible to perform obligations under a lease when the state mandates a commercial tenant to close a business or restrict operations under penalty of criminal prosecution.

Additional Sources

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Notes

1. *"D.C. ties for most daily deaths as region sees 119 new coronavirus fatalities..": https://www.washingtonpost.com/dc-md-va/2020/05/08/coronavirus-dc-maryland-virginia-live-updates/*
2. *Virginia.gov/coronavirus*
3. *Update: Phase 1 of the reopening is expected to begin on May 15th, but businesses are still severely restricted, and Governor Northam has stated that we may pull back openings if the number of cases rise.*
4. *Virginia courts have already held that the COVID-19 pandemic qualifies as a natural disaster in the context of speedy trial motions. Additionally, the Virginia Supreme Court has looked to the definition of "disaster" in Va. Code Section 44-146.16, which outlines both man-made and natural disasters. Natural disasters include: "hurricane, tornado, storm, flood.... communicable disease of public health threat, or other natural catastrophe resulting in damage, hardship, suffering, or possible loss of life". See e.g. Boyd v. Commonwealth, 216 Va. 16 (1975) (discussing the legal validity of an executive order issued as a result of the Governor declaring a state emergency because of a shortage of motor vehicle fuel).*
5. *Example of standard provisions:*

   "Force Majeure". Often defined as any period of delay which arises from or through acts of God; strikes, lockouts or labor difficulty; explosion, sabotage, accident, riot or civil commotion; act of war; fire or other casualty; legal requirements (Tenant's failure to obtain permits shall not be Force Majeure); delays caused by the other party; and causes beyond the reasonable control of a party. Force Majeure shall not excuse payment as required by this Lease. Tenant must give Landlord written notice within two (2) Business Days of the commencement of any event Tenant believes constitutes Force Majeure.

   Inability to Perform. If either party fails to perform any of its obligations (other than payment obligations) under this Lease as a result of Force Majeure, such party shall not be liable for loss or damage for the failure, the other party shall not be released from any of its obligations under this Lease, and the period of delay or prevention shall be added to the time herein provided for the performance of any such obligation.
6. *Va. Code Section 55.1-1400, et. Seq.*
7. *See e.g. Alexandria Mayor's letter to multifamily property owners: https://www.alexandriava.gov/uploadedFiles/health/info/LandlordLetterCOVID19.pdf*
8. *Although self-help is generally allowed under Va. Code 55.1-1415, it is not always found to be proper. Landlords are occasionally found to have improperly terminated the lessee's right of possession based on lease provisions and the specific facts of each situation. Considering the uncertainties presented by the current situation, the safest choice would be to wait until an eviction/unlawful detainer can be instituted in court.*

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