KLG KASS LEGAL GROUP, PLLC

Newsletter

A newsletter on general legal matters

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PHASE 1 OF COVID-19 - HOW DOES THIS AFFECT D.C. CONDOMINIUM ASSOCIATIONS?

By: Michelle L. LaRue, Esq.

COVID-19 has affected everyone's lives in some manner. The good news is that many states are beginning to see improvement in limiting the spread of the virus. As a result, many jurisdictions are beginning to gradually reopen. The District of Columbia is getting ready to enter Phase 1 (of 4 phases) of its COVID-19 plan. This phase includes a partial reopening that eases restrictions on non-essential businesses, including restaurants and salons. The plan still limits gatherings to no more than ten people, and strongly encourages that individuals continue to work remotely.

What does this mean for condominium associations in the District of Columbia? Once the District has officially entered Phase 1 of the COVID-19 plan, there will still need to be limitations in place, and Boards must pay attention to these details. Residents, visitors, and contractors will need to follow these guidelines. For example, meetings should continue to be held remotely, and communications with on-site staff should be limited to telephone and electronic mail.

Most community amenities, such as rooftop patios, party rooms and gyms, have been closed since March 2020. Now that the District of Columbia is moving toward a gradual reopening, some

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COVID-19 PUBLIC HEALTH EMERGENCY IMPACTS ON D.C. RENTAL PROPERTY

By: John E. Arness, II, Esq.

There has been a deluge of emergency legislation advanced in connection with the novel coronavirus pandemic impacting both commercial and residential landlords and their property managers in the District of Columbia. The legislative efforts, while perhaps well intentioned, reveal both the difficulty and the failure to: a) balance valid legal interests of both landlords and tenants; and b) recognize practical weaknesses and unfortunate consequences in the regulations imposed.

At the present time, there are few real answers available to the question of when a landlord to a delinquent tenant can get its property back or get itself in a position to enforce a right to collect rent. It is possible that the best that can be achieved right now by a landlord may be to collect what money it can through reasonable agreed upon repayment terms

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associations may consider reopening some, if not all, of their community facilities. Perhaps one of the most popular condominium association facilities during this time of year is the pool. Condominium association Boards will need to determine when and how to open the association's pool and other facilities. It is important to communicate with the pool companies to work out a plan and ensure that they will be prepared to move forward with pool opening requirements and staffing if and when the pools are able to open. When allowed, Boards may decide to open the pool (or gym, etc.) but keep some of the social distancing guidelines in place even after the stay-at-home rules are lifted.

If and when the condominium association Boards decide they may reopen the pool and/or other common area facilities, they must determine how to do so, remain in compliance with the social distance requirements, and consider taking other safety precautions. These may include the following:

- Obtaining extra cleaning products and services from janitorial contractors.
- Supplying disinfectant wipes and/or antibacterial hand sanitizer.
- Posting notices instructing individuals to wipe down any high-touch surfaces, and to stay home if they feel sick.
- Removing all furniture and equipment from pool areas.
- Supplying disinfectant wipes in gyms. Posting notices instructing residents to wipe all surfaces that may have been touched by them.

Of course, residents, visitors and contractors should continue to follow CDC guidelines, which include:

- Staying home if you are feeling sick.
- Avoiding contact with individuals who are ill.
- Washing your hands often with soap and water for at least twenty seconds.
- Avoiding touching your eyes, nose, and mouth.
- Covering your mouth when coughing or sneezing.
- Cleaning and disinfecting frequently touched objects and surfaces.
- Following social distancing rules.

According to Mayor Muriel Bowser, the District of Columbia pools will not be permitted to open at all until Phase 3 of the plan, which she estimates will occur late summer at best. Even then, there will be restrictions in place, such as limited hours, no pool equipment or lounge chairs. The Boards should take this into consideration when making its decisions on whether to open its pool. The main goal at this time should be to keep the members of the community healthy and safe during this uncertain time. Hopefully, everyone will be able to go back to their "normal" lives soon.

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with a tenant and then just hope the city council lifts the emergency pandemic label and the courts reopen sooner rather than later. The doubt concerning when: a) the courts will open; b) cases can be filed; and c) hearings scheduled will make it difficult to evaluate the reasonableness of any specific repayment proposal.

In the meantime, here are some things landlords must be prepared to deal with:

No Access to Court. The D.C. Superior Court has issued advisories that dates in all cases supposedly already scheduled in the foreseeable future will be continued. The D.C. City Council has passed updated legislation which prohibits the filing of any new cases until 60 days after the state of emergency is lifted. There can be no notices to quit or to vacate for nonpayment of rent issued until the state of emergency has been lifted. It appears that currently the only items that can be processed and/or filed in landlord and tenant court are motions on cases already in court or with agreed upon court payment agreements. This category seemed to shrink with each passing week as supplemental legislation was rolled out. Even if a filing were permitted, getting the court to act on it is another matter entirely. Essentially, there will be no access to the court for at least several more weeks to seek to enforce non-emergency tenant obligations which do not relate to a health and safety issue.

No Rent Increase. This is probably the least of the worries to a landlord now, but there can be no commercial or residential rent increases noticed or implemented during a period for which a public health emergency has been declared, and for thirty (30) days thereafter. There seems to be a current exception to this prohibition for commercial tenancies occupying spaces in excess of 6,500 square feet in size. If an affected notice of rent increase has already been sent out, the landlord must issue a notice to the tenant that the increase notice is null and void. If it is determined that a housing provider knowingly demanded or received any rent increase prohibited by the emergency act or substantially reduced or eliminated related services previously provided for a rental unit, the housing provider may be subject to treble damages and for a rollback of the rent. Caution seems the safest course of action here. Also, no late fees can be assessed against a tenant during the emergency period.

If a housing provider owning five (5) or more rental units occupied or offered for rent temporarily stops providing an amenity that a tenant pays for in addition to the rent charged, then the housing provider shall refund to the tenant pro rata any fee charged to the tenant for the amenity during the public health emergency. If a service or facility that is lawfully included in the rent charged is temporarily restricted due to compliance with recommended emergency precautions and standards, then it appears (as of the drafting of this article) that the housing provider is not required to reduce the rent charged.

Cleaning Requirements. During the period of the declared public health emergency, the owner or representative of the owner of a housing accommodation shall clean the common areas of the housing accommodation on a regular basis, including surfaces that are regularly touched, such as doors, railings, seating, and the exterior of mailboxes. "Housing accommodation" has been defined to encompass “any structure or building in the District containing one or more residential units that are not occupied by the owner of the housing accommodation, including any apartment, efficiency apartment, room, access dwelling unit, cooperative, homeowner association,

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condominium, multifamily apartment building, nursing home, assisted living facility or group home".

Landlord Obligation to Offer Payment Plans

Recently enacted legislation identifies two categories of landlords subject to an obligation to offer tenant payment plans. They are identified as "Housing Providers" or "Non-Housing Providers". Both are included in the definition of "Provider". A Non-Housing Provider is a commercial landlord. A Housing Provider is a residential landlord that has five (5) or more residential units currently rented or available for rent.

All Providers are obligated to make a payment plan available to an eligible tenant or the payment of gross rent that comes due during the emergency program period and prior to the cessation of the tenancy. The "program period" has been defined as the time covering Mayor's declared public health emergency plus one year afterward. The payment plan availability must provide for a minimum repayment term length of one year unless a shorter payment plan term is requested by the eligible tenant. It must provide for the waiver of any fee, interest, or penalty that arises out of an eligible tenant entering into a payment plan. A Provider may not report the rent subject to the payment plan to a credit reporting agency as delinquent.

The payment plan must provide that an eligible tenant does not lose any rights under the lease due to a default on the monetary amounts due during the lease period as long as they do not default under the terms of the payment plan.

Of slight significance in this legislation, only "eligible tenants" have a right of access to a payment plan. As a practical matter, this seems to be a very low standard to meet, plus there are potential risks to a landlord making a declaration that a tenant is not "eligible". The issue may best be viewed as a means: a) to require a tenant to produce documentation to substantiate a claim to entitlement as a condition receiving the benefits of a plan, and b) to obtain and retain that information for possible future use. "Eligible tenant" means only "a tenant of a residential or commercial retail property rented from a provider that has notified a provider of an inability to pay all or a portion of the rent due as a result of the public health emergency" and is not a franchisee (unless the franchise is owned by a District resident).

Of greater significance, all Providers must notify all tenants of the availability, terms, and application process for its payment plan program. This may potentially entice performing tenants to seek to take advantage of the benefits of the emergency legislation when they otherwise would not. While perhaps stressful, that is the requirement.

As stated in recent legislation, "Tenants entering into a payment plan shall be required to make payments in equal monthly installments for the duration of the payment plan, unless a different payment schedule is requested by the tenant. A provider shall permit a tenant that has entered into a payment plan to pay an amount greater than the monthly amount provided for in the payment plan and shall not require or request a tenant to provide a lump-sum payment under a payment plan".

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If a rent payment plan is entered into, the provider is thereafter prohibited from filing any collection lawsuit or eviction for non-payment of rent as long as the tenant does not default on the terms of the payment plan.

Uncertainties abound.

At the risk of stating the obvious, these difficult times bring many uncomfortable short and long term issues for a landlord or property manager to consider. The legislation efforts have in many cases been rolled out haphazardly, and many implementation and procedural difficulties have not been addressed. There are nuances, caveats and additional details attached to each issue identified above. In addition, the provisions that have been enacted are constantly being reviewed, debated and revised, even within the same week. Superimposed over all of this are situations where tenants may be seeking to break their lease, or who just leave without a declaration that they are gone for good. If faced with such a situation, landlords must first make sure that a tenant has vacated with an intent to forever surrender possession and never to return. It is often only then that a landlord can move on in an effort to mitigate its damages by retaking possession and trying to re-lease the space.

This article seeks to inform generally and does not constitute legal advice or opinions of its author or Kass Legal Group. If you have concerns about the impact of recent legislation and court policies related to the pandemic, you may wish to contact your City Council member or ANC representative to make them known.

We at Kass Legal Group, PLLC are available to assist with the Covid-19 minefield, lease enforcement, dispute resolution, regulatory compliance or to evaluate policies, procedures, leases or other documents should those services be desired. Please let us know if we can help you or your organization. - John Arness can be contacted at arness@kasslegalgroup.com.

TIME FOR A WILL

By: Laurie Pyne O'Reilly, Esq.

These are unusual times. The coronavirus pandemic that hit so suddenly leaves no one unaffected. Whether we, a neighbor, a co-worker or a family member has contracted the virus or not, it has succeeded in disrupting all of our lives to a remarkable extent. The uncertainty of its future path of destruction leaves us all unsettled, and likely thinking more of our own mortality.

While anytime is a good time to prepare for our eventual demise, many are now feeling more urgency. The current situation we find ourselves in presents a good opportunity to make sure our affairs are in order. In doing so, one of the things that should be near the top of the list is making a Last Will and Testament.

Whether you are single, married, senior or not, it is important to have a Will. (Note that while a revocable trust--typically a more complex document than a Will--can function as a Will substitute, a simple Will serves the needs of most people and is what is addressed here.) If you die without a Will, you risk leaving the distribution of your estate to default provisions of the law. It would also result in certain family members who may not be your intended beneficiaries–or even the

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government, if you die with no heirs-- becoming the recipients of your estate. If you are married with children, it would result in your children inheriting a portion of your estate rather than all going to your spouse.

Without a Will, court involvement would be necessary to appoint someone–who may not be the person you would choose and could be a court-appointed lawyer--to administer your affairs. The administration of your estate could be supervised by the court, rather than unsupervised if you have a Will. Also, if you don't have a will with a bond waiver your court appointed administrator would have to be bonded at; an additional cost to your estate.

Another important function of a Will is for the designation of a trustee or custodian to hold and administer assets for a minor beneficiary. If a minor child, grandchild, niece or nephew, for example, inherits your property without the specific appointment of a trustee or custodian under the statutory transfer to minors laws, court involvement will be required for the appointment of a guardian to hold the property until the minor comes of age. With a Will, the testator can name a person of their choosing to manage the assets for the benefit of the child until an age the testator deems appropriate for the beneficiary to manage his or her own funds. Without a Will, your property would be paid over to the beneficiary at the age of eighteen, an age that many people consider too young to be handling valuable assets.

What is your "estate" that is subject to the provisions of your Will? For estate planning purposes, your assets fall into two categories: probate assets, those governed by your Will, and non-probate assets, those that pass outside of your Will. An example of a probate asset is a bank account owned by a single individual. However, if that bank account is held jointly or has a "pay on death" beneficiary named on it, then it passes automatically upon death to the joint owner or beneficiary, and is a non-probate asset. Only probate assets pass through your Will.

As part of the estate planning process, it is important to ascertain which assets are probate assets and which are non-probate and make sure beneficiary designations for non-probate assets are as you wish them to be. Your Will should designate the beneficiaries for the remainder of your assets. You should also take into account that non-probate assets, such as jointly held real estate that pass automatically upon the death of the first owner to die, will become a probate asset upon the death of the survivor and will pass through the survivor's Will or, if they do not have one, through the applicable intestacy succession statues. Also, accounts with beneficiary designations, such as an Individual Retirement Account or 401(k)s may pass through your Will if the beneficiary designation fails for some reason. This could happen, for example, if your named primary beneficiary predeceases you and you did not name an alternate.

Since the onset of the coronavirus pandemic, each jurisdiction in the DC metro area (a/k/a the DMV), has passed emergency legislation to address the issue of remote signing. Because of the concerns with transmission of the disease during Will signing, which includes two or three witnesses in addition to the testator and the attorney, each jurisdiction has put its own version of temporary procedures in place to allow for remote Will signing. For example, in Virginia, remote notarizing of the Self-Proving affidavit that accompanies a Will is allowed, but the witnesses

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must be physically present. In DC and MD, the testator may validly sign in the "electronic presence" of witnesses, but certain certifications must be included in the Will. Whether or not there will be additional authentication issues that arise when the Will is offered for probate remains to be seen.

Wills can still be signed in person with witnesses in the room employing social distancing and other precautions, and can even be signed out of doors. The important thing is to have one.

The pandemic--we hope and expect--will eventually be over and we will go on with our normal lives. Having your affairs in order and a Will in place when it's done, will be one more thing to cross off your list.

STAY SAFE

AND

HEALTHY!

Schedule Your Complimentary Estate Planning Consultation Today!

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