

Commonly Asked COVID-19 Related Questions from Our Commercial Real Estate Developer & Owner Clients

As COVID-19 continues to send shockwaves throughout our country, we have had a number of Clients this past week alone ask us essentially the same questions. Here are a few of those questions and our answers.

My tenant has asked (or is going to ask) for a rent abatement or deferral. How should I handle it?

The answer to this question depends in part upon the parties' contractual rights related to payment and/or collection of rent. The specific terms of the lease will govern the rights of the parties in this situation, almost entirely, if not entirely.

Rent payment provisions and any exceptions in the lease are a general starting point. "Force Majeure" is the most likely potentially applicable payment exemption provision that could come into play when dealing with COVID-19. Based upon our drafting and review of countless leases that contain "Force Majeure" provisions, it is unlikely that a tenant would be relieved from paying rent, generally speaking, based upon a "Force Majeure" provision. Nevertheless, "Force Majeure" provisions vary in their precise wording, and each situation is different. There could be other lease provisions that could apply to give the tenant an argument that it is relieved of its rent payment obligations. There could also be equitable principles that a tenant may assert to excuse rent payment for some period of time. Generally, a commercial real estate property owner will have the upper hand in a rent payment default situation, unless it has a poorly drafted lease.

Many of our developer and owner Clients are planning to work with certain tenants for a month or two, so long as it is financially justifiable in the short term for each property's financials. That could be the better course of action, from a long-term

perspective, rather than evicting a tenant, and then pursuing collection that may prove futile. However, if you make alternative payment arrangements with a tenant, make sure those alternative payment arrangements are well documented in the form of a lease amendment that aligns with other provisions of the lease. Over the years, we have had developer and owner Clients agree to modify lease terms and not document that understanding well, and that led to major problems when there were questions of interpretation or of effect on other lease provisions at some point in the future.

If I decide to pursue eviction against my tenant, will I be able to?

For commercial real estate, eviction is an available option, but the process will take longer than usual. FHA, Fannie Mae, and Freddie Mac have temporarily suspended, for 60 days, foreclosures and evictions of borrowers who received loans that those organizations guaranteed. Ohio courts have likewise stayed foreclosure cases for a minimum of 60 days. Just a few Ohio courts have suspended eviction actions, though. However, as a practical matter, most courts in Ohio have recently limited their operations. Thus, while an eviction action involving commercial property could be filed, and it could move forward, there will likely be no court appearance, or an eviction hearing, until courts return to normal operations. At this point, we don't know when that will be. Keep in mind that most courts deal with most issues in Ohio real estate cases by way of motions and other filings with the court. Therefore, a court appearance or eviction hearing may not be necessary, in order for an owner of commercial real estate to obtain a favorable outcome in an eviction case.

Nevertheless, many of our commercial real estate owner Clients are still planning to work with their tenants to avoid court proceedings, if possible, and we generally believe that is a wise move, given the overall present state of affairs. Just make sure you document your agreement with the tenant well, and if the tenant does not comply, then it probably makes sense to file an action in court, even if you ultimately end-up reaching an alternative resolution with the tenant while the case

is pending. If you wait too long to initiate a court proceeding against the tenant, then you may be sitting on property that is not generating revenue for much longer than you would have wanted, and that could lead to unexpected financial distress for you or for that property.

What about my payment obligations to my lender? Is there any way I could avoid them or modify them for a few months?

With respect to an owner's obligations to its lender, the legal options are even more limited, but there are often worthwhile viable options as a practical matter right now. Promissory notes, loan agreements, and mortgages contain no "Force Majeure" clauses that could excuse an owner/borrower from making loan payments. During the Great Recession, many commercial real estate owners got into disputes with their lenders and ended-up entering into loan modifications to avoid foreclosure. Because COVID-19 has struck so suddenly, its effects have not been completely felt yet by the commercial real estate market, and the government is encouraging lenders to work with their borrowers, many lenders are willingly engaging in conversations with borrowers that inquire about short term loan modifications in the range of 30-90 days.

If any loan modification is agreed to, make sure it is clearly memorialized in writing, to help avoid questions of interpretation or other problems in the future. We don't know how long COVID-19 is going to wreak havoc on the economy, so to be safe, you should have counsel involved to help finalize the terms of a loan modification, or at least to make sure the loan modification is properly documented to protect your interests.

Bottom line—it is vital to ensure that whatever resolution you reach with a lender and/or a tenant is properly and well documented to protect your short term and long term interests. You will not want to face arguments in the future that you are currently not thinking of. Every time one of our Clients faces a situation like that, it deeply regrets not having had counsel involved to make sure it covered its bases at the appropriate time. Even if the

lender or tenant ends-up losing the argument against you or your company, most often you could have completely avoided having to face that argument at all with well-worded proper documentation at the appropriate time – before the agreement is finalized.

For over 16 years, Sikora Law has been there for its Clients in times of need. While this is an unprecedented time, we have faced all of these legal issues before for our Clients, and we plan to continue to be there to help our Clients in their times of need, however we can.

