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APRIL 7, 2020 | PUBLICATION

Client Alert: Considerations for Florida Commercial Landlords and Tenants During the COVID-19 Crisis

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Due to the recent coronavirus outbreak, many non-essential Florida businesses have been forced to temporarily close. Other businesses have been forced to scale back operations, such as restaurants being limited to offering take out options only. These changes have caused issues for commercial tenants trying to comply with their obligations under their leases, as well as the landlords who own these properties. On April 2, 2020, Governor DeSantis signed Executive Order 20-94, which suspended residential evictions and foreclosures for 45 days. While Executive Order 20-94 does not apply to commercial tenants and further provides that nothing in it "shall be construed as relieving an individual from their obligation to make mortgage payments or rent payments"—in reality, COVID-19 means that many commercial tenants will have difficulty meeting their rent obligations. The purpose of this article is to outline considerations for landlords and tenants when encountering a default under the applicable lease.

The starting point for any discussion regarding obligations under a lease is, of course, the lease itself. Tenants should be conscious of any notices they are required to give to their landlord if they anticipate that they may be unable to meet their rent obligations, or are potentially in breach of some other obligation under the lease, such as maintaining certain operating hours, due to restrictions imposed by government authorities. Similarly, if a landlord has a tenant which is in default under the terms of the lease, make sure that all notice requirements to the tenant giving notice of the default and any required opportunity to cure are followed to the letter.

As always, communication is key. Publix recently made headlines after it announced that it was offering rent relief to businesses operating in Publix-owned shopping centers that have closed due to the coronavirus pandemic. Other landlords who may not have the ability to reduce or defer collection of rent may need to consider whether a modified payment schedule might be feasible. Here too, it is imperative that any requirements of the lease be strictly followed. Many leases include provisions requiring that in order to be effective, any modification to the lease must be in writing signed by both the landlord and the tenant, as well as, any ancillary parties, such as guarantors. In this current climate, neither party should be content to rely upon a

handshake deal. It is critical that any changes to the lease be clearly documented and confirmed by all parties—while safely social distancing, of course.

Prior to engaging in negotiations, landlords should consider a few things. It would be best to obligate the tenant to keep negotiations and documentation between landlord and tenant confidential. Outstanding debt instruments tied to the property should be reviewed in case notice or consent of landlord's lender is required prior to making changes to the lease. Also, landlords should consider nonmonetary changes to the lease, such as the tenant waiving claims against the landlord for tenant's use of the property while services are not in place due to new regulations or releasing the landlord from liability for damages or delays related to shut downs. These measures will assist willing landlords with keeping lease modifications on track.

If modifying the obligations under the lease is not possible, eviction remedies normally available may be seriously curtailed due to the patchwork of court closures across the state and limited operations among those courts which are still open. Florida law provides for "summary procedure" in an eviction action, which means that procedures are quick and failure to respond to the lawsuit can result in a waiver of the tenant's right to challenge the eviction proceedings. A defaulted tenant who is served with a lawsuit for eviction must submit all past due rent to the court in order to challenge the eviction. If the tenant fails to respond to the eviction lawsuit and does not deposit the past due rent within five days of being served with the lawsuit, the landlord is entitled to a final judgment for possession of the property. Upon the entry of a final judgment for possession, the clerk of court is obligated to issue "forthwith" a writ of possession, the final process to remove tenant from possession of the property. However, on March 24, 2020, the Florida Supreme Court issued an emergency order temporarily suspending the requirement that the clerk issue a writ of possession "forthwith" and on April 6, 2020, this order was extended through May 29, 2020. Thus, obtaining such a writ, and finding a sheriff's deputy who can serve the writ, might be challenging and time consuming. The problem with delays under these circumstances is that the landlord will be without recourse if the tenant uses this opportunity to remove fixtures, furniture, or other equipment upon which the landlord has a lien for rent. In light of these concerns, proceeding with eviction anytime within the next six weeks is uncertain and therefore, all available options under the lease should be carefully weighed and thoroughly considered.

Shumaker's attorneys frequently represent landlords and tenants in lease negotiations and lease disputes. If you need assistance understanding your rights and obligations under a lease or are considering whether a lease needs to be modified in light of issues related to COVID-19, please contact one of our attorneys.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.

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