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2021: Happy New Year!

CCAH extends its sincerest wishes for good health to all!

Due to the ongoing Covid-19 pandemic, affordable housing professionals have had to change and comply with all sorts of new policies and procedures. "Spontaneous flexibility" is not a concept this industry is typically accustomed to, so we issue this Newsletter with hopes of providing clarification and insights into some of our most pressing issues.

Also, after much consideration, we must sadly announce that the 2021 Annual Meeting in Myrtle Beach, SC, has been cancelled. However, we will be offering several opportunities for members to use their PTE credits throughout the year, so stay tuned for upcoming events. We also hope to conduct a virtual Members Business Meeting this summer. More details on this will follow.

In the meantime, please know that we are here for you. Safety is our utmost concern, and with the help of technology and a bit more patience, we'll stay closely in touch and plan to see you all at the beach in April, 2022.



WHAT'S HAPPENING NOW

GOOD TO KNOW FROM the North Carolina Housing Finance Agency:

- The Compliance Guidance related to COVID has been updated.
https://www.nchfa.com/sites/default/files/page_attachments/COVID19ComplianceGuidance.pdf
The guide includes tons of valuable information regarding 2021 training requirements and dates for online opportunities,
Updates on physical inspections, file reviews, income verifications, certification requirements and more! Please take a few minutes to review.

RURAL DEVELOPMENT CHANGES

In October, 2020, the Rural Development Multifamily office finalized its structural realignment. The realignment in some cases redistributed existing portfolios to servicing Specialists within the new Field Operations Division. The following link is a complete sortable list if you are looking for the Specialist for your property <https://www.sc.gov.usda.gov/data/MFH.html>

The Field Operations Division maintains local relationships with the four regionally organized service teams to handle day to day servicing. North and South Carolina are both in the Southern Region. Byron Waters is the Regional Director.

COVID-19 has brought about many changes. The eviction moratoriums have possibly had one of the largest impacts on the housing industry. Stephanie M D'Atri, with Hatch Little and Bunn, LLP (Raleigh, NC) gives us tips and information to navigate through these uncharted territories in the following article *Navigating the CDC and 2020 Landlord-Tenant Law.*

Navigating the CDC and 2020 Landlord-Tenant Law

By: Stephanie M. D'Atri, Attorney and Landlord Litigation Partner at Hatch, Little & Bunn, LLP (Raleigh, North Carolina)

Our ever-changing landlord-tenant laws have been and will continue to be driven by shifts in our political landscape, judicial interpretations of current regulations, and ongoing science for COVID-19. While I would love to provide sound, conclusive legal direction about how to proceed with evictions and landlord-tenant matters in the coming few months, the reality is that I cannot. As a close second, however, below is some guidance on the CDC regulation that has been at the forefront of landlord-tenant law since September, along with some best practices for how to navigate the regulation now and if it is extended.

Covered Persons Under the CDC's Agency Regulation

As many of you know, the Centers for Disease Control and Prevention ("CDC"), i.e. an agency of our federal government, announced an eviction moratorium in September 2020 that presently extends through December 31, 2020. The CDC's regulation was published on the Federal Register on September 4, 2020. While the CARES Act was limited to certain covered properties (Section 8, federally backed mortgages, low-income housing tax credit properties, etc.), the CDC regulation essentially applies to *all* residential landlords who receive qualifying declarations from their tenants. Specifically a tenant is "covered" and will be protected from being evicted during the pendency of the CDC regulation if he or she provides a declaration ("declaration") to his or her landlord (or agent thereof) containing all of the following attestations made under penalty of perjury:

- (1) "The individual has used best efforts to obtain all available government assistance for rent or housing;
- (2) The individual either (i) expects to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;
- (3) the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;
- (4) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses;
- (5) eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options."

See Order establishing Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,293 (Sept. 4, 2020) (to be codified at 42 C.F.R. 70.2)

Importantly, tenants do *not* have to use the CDC declaration form located on the CDC's website and may instead use their own handwritten document or other form, etc., as long as it contains the five (5) required attestations set forth above and as long as such declaration is given under penalty of perjury. A statement under penal-

ty of perjury is considered sworn testimony and carries criminal penalties if the individual lied or omitted material information at the time provided.

Enforcement of the CDC's Regulation

The language of the CDC regulation requires tenants to certify *at the time they signed the declaration* that they are/were "using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses." Thus, while rent continues to be due per the lease, and tenants *should* make as many partial payments as possible given their circumstances, the required attestation is likely not a future promise to actually make partial payments and is instead a current statement as to their efforts made at the time the declaration was signed. This is an important distinction because the CDC regulation does not appear to compel a tenant to make future payments between now and December 31, 2020 (or for as long as the CDC regulation is in effect). If the CDC intended for tenants to actually make partial payments during the pendency of the CDC regulation, then it would have specifically said that tenants "shall" and/or were "required" to make partial payments. Such a desired obligation, however, is completely absent from the regulation. The CDC regulation simply reiterates that rent continues to accrue, presumably if unpaid. As a result, you cannot compel the tenant to make a partial payment while the CDC regulation is in effect. If the tenant does not make a partial payment, you are left without much relief.

Another issue arising from the CDC regulation is whether you can inquire about when tenants can or will make partial payments and whether you can question tenants as to the veracity of their declaration. Of note, the CDC regulation omits a procedure allowing the landlord to question the tenant and instead relies on possible criminal penalties that exist if the tenant is not telling the truth. The intended consequence for giving a false declaration thus seems to be criminal prosecution for perjury and not eviction. The CDC regulation does not directly prohibit a landlord from making inquiries into the tenant's ability to make partial payments or requesting proof of the tenant's reduced income; however, if the tenant refuses to provide such requested information, the only relief you will have is seeking criminal relief when you believe the tenant actually lied under penalty of perjury. The burden of proving this will fall on the landlord since the tenant is presumed to be telling the truth at the time he or she gave the declaration. By way of example, if the tenant purchased a new car immediately before providing the declaration, you would have a good faith basis to seek criminal prosecution.

Some courts are allowing landlords to make inquiries into a tenant's declaration if given during the pendency of court proceedings; however, the parameters of such inquiries are usually jurisdiction specific and will depend on the facts of your case. If you are in the middle of eviction proceedings and believe that your tenant has falsely given a declaration, you should contact your specific attorney to see how best to address this scenario since each venue will be different.

Eviction Activity Prohibited by the CDC

The CDC regulation is not clear in defining what an “eviction” is. It simply prohibits a landlord from evicting a covered tenant (i.e. one who provides a declaration as explained above) and states that an eviction “means *any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.*” The CDC recently published its own “guidance” on this issue (see link below). In its unofficial and nonbinding guidance, it has said that landlords can proceed with a court judgment even after receiving a CDC declaration, but that they may not allow the physical eviction, i.e. lockout, to occur until *after* the regulation expires. Unfortunately, many judges are not accepting such “guidance” because it is not actual law. As a result, the presumptive language of the CDC regulation published on the Federal Register is controlling the dialogue. Regardless of what the CDC “guidance” says, however, it is prudent for landlords to immediately “halt” the process for any nonpayment eviction whenever they receive a declaration to err on the side of caution and to prevent possible criminal penalties and civil fines associated with any violation.

Each state has different eviction processes (i.e. filing the eviction or detainer paperwork, having an eviction trial, obtaining a writ or other paperwork to have law enforcement perform the lockout, etc.). In evaluating how to handle any such process, the following is best practice for how to deal with this issue:

- (1) If you receive the CDC declaration before you would file the eviction, then you should not file the eviction until after December 31, 2020 (or after the date on which it ultimately expires, if extended).
- (2) If you receive a declaration after the eviction has been filed, but before an eviction trial, then you should not request or obtain a judgment and instead you should request a *continuance* of the trial until after the expiration of the CDC regulation.
- (3) If you do not receive a CDC declaration before you file or before any eviction trial, but you receive it after both, then you cannot request or proceed with the process for physically removing the tenant (e.g. having the Sheriff perform the lockout).

Importantly, the CDC applies *until* the final lockout (i.e. physical eviction). Thus, if you receive a declaration at any point before that final step in the process occurs, you must stop the process immediately.

Prohibited v. Permissible Evictions

Notably, the CDC regulation only prohibits evictions that are “related to” nonpayment of rent or fees and expressly allows other types of evictions (criminal activity, breach of lease for having an unauthorized occupant, etc.). If you have a basis to evict a tenant for something other than nonpayment, then you should be able to move forward through the eviction process. Each state has different local regulations for how evictions can be processed right now. For example, in North Carolina, the

Governor has issued an Executive Order (No. 171) requiring all landlords to provide a blank copy of the CDC declaration form to their tenant before proceeding with an eviction trial regardless of the basis for the eviction. Thus, if you are filing a holdover case or a case due to the tenant’s breach of lease for having an unauthorized occupant, you must still provide the form. Then, if you receive a completed copy from your tenant, you must provide a written response as to why the CDC doesn’t apply and a judge must conduct a hearing to decide whether to allow you to proceed. While a blank CDC regulation is not required to be provided to every tenant in every state, a landlord may not go through the eviction process in North Carolina unless and until he or she provides the blank form.

In addition to many other issues with the CDC, there is a question as to whether a landlord can non-renew a tenancy if the tenant owes rent. The answers vary and will depend on the facts of your case. Typically, failing to pay rent or other monies owed under a subsidized lease (project-based Section 8, low-income housing tax credit properties, etc.) will amount to a material violation and thus good cause to non-renew the tenancy; however, the CDC regulation seemingly removes nonpayment as a basis for “good cause” because of the words “related to.” Thus, if there is a reason to non-renew the tenant for something other than nonpayment (i.e. the tenant is loud and disturbing the neighbors, the tenant has an unauthorized occupant, etc.), then you should speak with your attorney about whether such basis will support an eviction if the tenant also owes rent. Many advocates are challenging evictions for something other than nonpayment of rent and claiming that it is really an underhanded way to circumvent the CDC regulation; as such, proceeding with such a claim may backfire if the evidence and timing of the alleged breach do not support it.

For additional information on the CDC regulation, you might find the following helpful:

- Blank CDC form: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>
- Guidance from the CDC on its own regulation: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>
- Guidance from the National Housing Law Project (NHLP): <https://www.nhlp.org/wp-content/uploads/CDC-Eviction-Analysis-Revised.pdf>
- Guidance from the UNC School of Government for NC specific properties: <https://civil.sog.unc.edu/summary-ejection-in-the-time-of-covid-part-2-the-cdc-order-and-eo-171/>