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EVICTION PAYMENT AGREEMENTS

To: Firm Clients
From: Tschetter Sulzer, P.C.
Re: Eviction Payment Agreements.
Date: Revised 03/27/2020

Eviction payment agreements have been requested due to the unprecedented economic impact of the COVID virus. Historically, we have recommended against this type of arrangement. However, the unprecedented circumstances and the rental industry's strong desire to work with tenants undergoing eviction has created a need for this type of arrangement. Accordingly, we have created a Payment Agreement to be utilized during the eviction process. The goal of the Payment Agreement is to give hard pressed tenants more time to pay while preserving landlord rights to the extent possible.

A payment agreement entered into during the eviction process is not and should not be viewed as a replacement for your lease agreement. Accordingly, we strongly recommend landlords not use these eviction payment agreements to stretch payment over more than the current and subsequent rental period. As discussed, there is simply no guarantee these agreements will be enforced. But in the current economic climate, if the eviction payment agreement is judiciously used to stretch payment over 1 month, Courts are likely to enforce a default of the agreement rather than view them as a waiver. However, Courts are not likely to enforce the agreements when they attempt to cover more than the rent owed at the time of eviction and the subsequent month (in other words start to become a replacement for the lease). If an eviction payment agreement is not enforceable, you have to start all over. Meaning, your current eviction case is dismissed, you have to serve a new 10-Day Demand for Rent or Possession, and file a new eviction case.

 Payment agreements entered into during an eviction are known as "Payment Agreements", "Partial Payment Agreements", "Non-Waiver Agreement", or "AREs" (Agreement Regarding Eviction). A Stipulation is an agreement between the parties (the landlord and tenant) that is filed with the Court and becomes a Court order. Because Tschetter Sulzer eviction payment agreements will be drafted as Stipulations and filed with the Court for enforcement in the event of default, this memo refers to all such agreements as Eviction Payment Stipulations or EPSs.

The primary goal of an EPS is to give a tenant more time to pay and hopefully avoid an eviction. The secondary goal of the EPS is to keep the eviction process moving along if the tenant fails to honor the agreement by making the agreed upon payments. Accordingly, the key

points to an EPS are the tenant's acknowledgement of a rent default, promise to pay, and acknowledgement that the Landlord can keep an eviction moving if the tenant fails to pay.

As a rule, the Firm does not recommend EPSs because the enforceability of EPSs in court is not and has never been a settled issue. Under normal circumstances, TS cannot recommend agreements that lack near certainty in Court. Some judges may enforce an EPS. Some judges may not enforce an EPS. However, these are unprecedented times that justify the risk in using an EPS. We provide this memo to all firm clients using EPSs so that they clearly understand the possibility of an EPS not being enforced in court.

The Arguments for the Enforcement of an EPS

Any lawsuit may be settled by agreement (Stipulation) of the parties. The EPS is a negotiated agreement to resolve the eviction case. Pursuant to an EPS, tenants are given additional time and opportunity to pay the rent due under the Lease. If the Court refuses to enforce an EPS, we will be quick to point out to the Court that non-enforcement thwarts society's goal to help tenants by giving them more time to pay because of the current economic calamity. Given all of these circumstances, we would expect and hope that Courts will approve the EPSs as a negotiated settlement of the eviction case and enforce the stipulated agreement (the EPS) between the parties when EPSs are submitted to the Court. The challenge for the Courts will be when there has been a default on the EPS. For this reason, our EPS contains specific provisions and procedural mechanisms to have the default of an EPS determined by the court while preserving a tenant's due process rights (notice and an opportunity to be heard).

The Arguments against the Enforcement of an EPS.

A substantial body of Colorado law supports an argument the landlord must refile a case if the landlord accepts any rent after posting of a ten-day (10-Day Demand for Rent or Possession) and filing of an eviction case. Specifically, case law and the eviction statute hold that no lease provision can override a tenant's right to at least a ten day demand for rent or possession on any outstanding balance. C.R.S., §13-40-104(d). In short, the law supports the argument that by accepting any payment, the landlord has waived its right to proceed and must start over. If this argument is raised and accepted by the Court, you will have to start over. Accordingly, use of an EPS is not without risk.

Proper Use of and Key Points About EPSs

- Only use an EPS after an eviction case has been filed.

- The payment agreement (payment plan) contained in the EPS can only include the current month and next month's rent, plus other amounts due or that become due as a result of the eviction, i.e. attorneys' fees and court costs.

- EPSs should not contain complicated or multiple payment plans. The more payments in the plan, the more likely the Court will invalidate the original default, forcing you to start over. We recommend no more than 3 payments in total.

- EPS payment plans should not push payments too far off into the future. Most courts will not let an eviction remain open for more than 30 - 45 days from the date of filing. Consequently, regardless of what the EPS provides, the Court may not enforce the EPS the longer the EPS stretches out over time, and thus, EPSs that extend over 60 days are likely not to be enforced.

- EPS Timeline And Procedure

  - Eviction Case is filed.
  - At any time during the eviction case, the client informs TS to prepare an EPS in the case (keep in mind that nearly 100% of EPS will be prepared either before or on the eviction court date, or shortly thereafter. EPS will rarely if ever be prepared after the eviction court date).
  - TS generates an EPS and transmits to the client (The EPS is a form. Preparing the EPS means generating the form and completing all parts of the form except the payment terms, tenant phone number, and tenant e-mail).
  - Client inserts payment amounts and terms into the EPS.
  - Client Signs the EPS and will also obtain the signatures of each and every leaseholder.
  - TS files the completed and signed EPS with the Court.
  - Tenant either pays or breaches the EPS:
    - If tenant breaches, TS engages in default procedures as set forth in the EPS to obtain a writ of restitution (A writ of restitution is necessary to complete the physical move out).
    - If tenant pays in full, the case is dismissed

- EPS should include any amounts that come due pursuant to the Lease during the payment plan period. Accordingly, you should be careful to make certain those payments are included in the EPS because once the EPS is paid, the tenant gets a fresh start and only owes what becomes due going forward. Please always remember that TS does not determine or insert monetary amounts into an EPS. Further, TS would have no way to determine the amounts inserted into an EPS are accurate.

- Be sure that all parties on the Lease sign the EPS. Pursuant to the EPS, it will not be enforceable unless all tenants named as Defendants in the eviction case sign the EPS.

- Promptly notify Tschetter Sulzer if there is a breach of the EPS or if the tenant pays in full.