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MEMORANDUM

Date: March 18, 2020

To: Tschetter Sulzer Clients

From: Mark N. Tschetter

Subject: The COVID-19 Crisis - Grace & Forgiveness Policies, Court Status, and Processing Delinquencies & Evictions

OVERVIEW

Obviously, with the current economic turmoil and upheaval, many tenants will not pay their rent on time. Additionally, the crisis has significantly impacted the operation of the courts. This memo discusses why grace & forgiveness policies are needed, how they should be adopted, and how they interact with the current court crisis.

Additionally, this memorandum is intended to assist Tschetter Sulzer clients in dealing with delinquencies and evictions while the COVID-19 crisis unfolds and is ultimately resolved. As always, we encourage clients to try and work with tenants to find a resolution to non-payment of rent issues. Given the unique nature of the current crisis, we want to assist you in developing and setting up a framework to work with tenants.

The situation with the courts and the filing of evictions is evolving almost daily. There is a lot of misinformation regarding evictions. We will continue to update clients regarding the appropriate next steps as the situation evolves. While evictions may be delayed due to Court procedures, or delays with the sheriff, it is important to realize that the Courts are still accepting cases and allowing cases to be filed. While we strongly recommend that clients work with tenants, we recommend that you do so in a manner that is enforceable by the Court and that avoids to the extent possible the inevitable backlog of eviction system if in the unfortunate event your tenant does not or cannot resolve their delinquency.

NEED FOR GRACE & FORGIVENESS POLICIES

Given the extent of the current economic crisis, countless tenants will have difficulty paying their rent on time. The following reasons support the adoption of some form of a grace and forgiveness policy. One, it's the right thing for landlords to do to support their fellow Americans during the crisis. Some have said that landlords can either voluntarily help or they

will be compelled to help. Two, given the number of potential rent defaults, landlords should be trying to limit tenant turnover. Three, court operations have been significantly impacted by the crisis (see below for a specific discussion of how the crisis has impacted court operations and the filing of eviction cases). Even though most courts are still open and accepting the filing of eviction cases, the result is that most courts will not be entering eviction judgments anytime soon. Even if you are able to obtain a judgment, many sheriffs are not scheduling physical moves for the foreseeable future. Alternatively stated, non-paying tenants aren't going anywhere in the short run and given the crisis landlords should be good humanitarians and help their fellow citizens, limit turn over, maximize revenue to the extent possible, and place themselves in the strongest possible situation to move forward when the crisis clears.

POLICIES LANDLORDS ARE CONSIDERING

1. Waiving or Limiting Late Fees. TS highly recommends waiving all late fees for COVID-19 impacted tenants as long as the tenant is willing to enter into and honors either a pre-eviction filing payment agreement or a post-eviction filing payment agreement (see below).
2. Accepting Partial Payments (Payment Agreements). TS does not recommend accepting partial payments in the absence of a written payment agreement.
3. Discounting Rent for advance payment of multiple months, i.e. if the tenant is prepared to pay March and April, landlord will reduce the April rent payment by 25%.
4. Reducing rent amounts across the board by a nominal amount.
5. Allowing Tenants to sign promissory notes for past due or current rent. TS is not sold on this idea because accepting a promissory note in lieu of rent means that the tenant has paid the rent. If the tenant doesn't pay or otherwise defaults on the the promissory note, the landlord's remedy is to sue the tenant for non-payment. Landlords would not have the right to evict the tenant for non-payment of the promissory note.

One of the biggest policy decisions landlords will have to make is will the policy apply to all tenants or just those economically impacted by the COVID-19 crisis? Both positions have significant advantages and disadvantages. A significant disadvantage of only allowing forgiveness and grace to tenants impacted by COVID-19 is having to verify and monitor. Specifically, if grace is limited to those impacted, landlords will have to verify that every tenant that claims to be impacted has in fact been affected. A significant disadvantage to giving grace to all tenants is that some tenants have not been impacted by the crisis and are fully capable of paying the full amount on time. Thus, landlords could be foregoing a significant amount of money to help offset the losses from non-paying tenants.

Overall, we recommend limiting grace and forgiveness to those tenants impacted. Some might say or argue that this is a fair housing violation, however, in our opinion it is not. The

disparate treatment is not based on protected class status but rather based on economic impact. The fact that some tenants have been impacted by the COVID-19 crisis is a legitimate non-discriminatory business reason for the different treatment.

Assuming your policy is limited to those tenants impacted by the crisis, you will have to develop written qualifying criteria. The goal of your criteria should be to strike a balance between preventing abuse of your grace and making sure that qualifying tenants are not blocked from receiving grace.

1. Require a written statement from the tenant's employer that they have been let go, or otherwise their income has been significantly reduced.

Sounds good in theory, but may not be that useful in practice. If the tenant has been let go due to the crisis the last thing the employer may want to do is fill out a piece of paper stating this. The employer might not even be around or reachable.

2. Allow the tenant to submit a pay-stub identifying the employer and then you could contact the employer.
3. Accepting the tenant's statement if you are already certain of who the tenant worked for and are certain that the tenant has lost this job.
4. If you know that the tenant works for a restaurant, bar, casino, movie theater, or other business that has been significantly impacted by the crisis.
5. Documentation of unemployment benefits filing with the Colorado Department of Labor and Employment.

WHY THESE POLICIES SHOULD BE IN WRITING

As with every policy, we strongly recommend that your policy be in writing. Reducing the policy to writing will eliminate discretion and ensure the policy is consistently enforced. Upon adoption, the policies should be published to all tenants and to all management and leasing staff. As always, we are here for you and available to review your grace and forgiveness policies.

HOW THE CRISIS HAS IMPACTED THE OPERATION OF THE COURTS AND THE FILING OF EVICTION CASES

Residential evictions are filed in county court. The Chief Justice of the Colorado Supreme Court gave the Chief Judge of every county the discretion to adopt their own rules. This means every county court has adopted different rules for how evictions will move forward during the crisis. Evictions have also been impacted by the actions of the Denver Mayor and various county sheriff departments.

While the rules in every county are different, an easy way to understand the new eviction rules is to remember the following points.

1. Every county is allowing the filing of evictions. However, those evictions will be continued until the dates set forth in #3 below.
2. Every court has pushed back court dates for the initial return date. The return date is the date by which the tenant has to either contest the case or sign an agreement. If the tenant does neither, then the court enters a judgment for possession.
3. Counties have pushed back return dates anywhere from April 3rd until June 1st. This means the soonest you can get into court depending on the county is April 3rd to June 1st. As discussed in #1 above, you can file an eviction, you just won't be in court at the earliest start of April or latest start of June.

HOW WILL EVICTIONS BE PROCESSED IN CONNECTION WITH YOUR POLICIES

In the March 18, 2020 Webinar, various options for processing your evictions were discussed.

1. Serve 10-Day Rent Demands and wait to file until you can actually get into court.

TS is not recommending this option for a variety of reasons. First, the whole purpose of filing an eviction is to create a sense of urgency to resolve the non-payment. Second, as discussed at length during the Webinar, if you serve a 10-Day Rent Demand and wait for 40 to 60 days, a variety of things could happen that end up waiving the demand. For example, the tenant might text you and say "I can pay by Friday". You reply "OK". The tenant doesn't pay on Friday but you have waived the demand by agreeing to accept payment after expiration of the demand. We file a case based on the original demand, but the tenant brings this up in court. In the current environment, Judges will likely dismiss your current case and you will end up at the back of the line in the cases which are backlogged. Further, if you have already served March rent demands, two more months of rent (April & May) might come due before you could be in court. When the courts go back to a regular schedule (we are anticipating that they do in May), there is going to be a significant backlog of cases. By waiting to file, or errantly serving a new demand, you will end up at the end of the line both from the court's perspective and the sheriff's schedule. This will be referred to as the "Backlog Disadvantage". Specifically, given the delays with the Court and the Sheriff regarding evictions, this will create a significant backlog of eviction cases that could take weeks or even months to resolve. Once evictions start moving again on a more regular schedule, we anticipate based on their statements that the Courts will address cases in order of filing. Thus, it likely will be advantageous to file sooner than later.

2. The Pre-Eviction Payment Agreement (signed after the expiration of the 10 Day Rent Demand but before an eviction is filed).

TS will make available payment agreements to all clients. These payment agreements come in 2 forms: 1) Non-Eviction Filing and 2) Eviction Filing. We will provide both forms of Payment Agreements to Clients upon request. They will be available Monday, March 23, 2020. The Pre-Eviction Payment Agreement is a Non-Eviction Filing payment agreement. The payment agreement states payment amounts and if not paid on time, then you must serve another 10-Day Rent Demand. This is the main disadvantage of this type of payment agreement. The main advantage is that you don't incur eviction attorneys fees and costs. But similar to Option 2, you are also very likely to experience the Backlog Disadvantage.

3. Serve Rent Demands as usual, File as Soon As Possible, and Resolve Case with a Post-Eviction Payment Agreement.

Under this option, it is business as usual. You serve demands on schedule, and file on schedule. There will be a significant delay getting into court due to court delays. The county determines the amount of the delay.

Given the unprecedented nature of this crisis, we truly are in uncharted territory and cannot guarantee the success of any plan or result. However, the main goal under this plan is to avoid the Backlog Disadvantage to the greatest extent possible by signing a Stipulation Resolving Eviction (Post-Eviction Payment Agreement). The Stipulation would cover not only the back rent but the rent that becomes due during the gap (the delay period to get in court). Further, the Stipulation can further incentivize payment by extending further grace if obligations are met. If the tenant defaults on the Stipulation (doesn't pay), we could then seek a possession order at the earliest possible point. This date will be down the road, but will be at the start of the process when cases begin again. An illustration demonstrates how this Option would work and why it is advantageous.

Right now Jefferson County has said the earliest new return date is May 5. If your tenant didn't pay the rent for March, we would file a case and try to resolve it with the Post-Eviction Stipulation. The Stipulation would cover the rent due for March, April, and May. The tenant is either going to pay or isn't going to pay. If the tenant doesn't pay, you are no worse off than you are right now. For every payment the tenant makes, you are better off. If the tenant doesn't pay, we move for entry of judgment and the issuance of a writ of restitution on May 5. If you file for May 5th, the tenant could file an answer and the trial is likely to be later than the normal 7 days due to the Backlog Disadvantage. If the tenant doesn't pay, the difference is getting a writ of restitution over to the sheriff early May versus perhaps not even getting a judgment until late May or even June, and then having to schedule the sheriff causing additional weeks of delay.

THE IMPACT ON CURRENT EVICTION CASES THAT HAVE ALREADY BEEN FILED WITH THE COURT

These cases are generally being automatically continued by the courts to a later date. We may have to notice the cases and the tenants back into court. We will continue to update clients on timelines as information becomes available.

THE IMPACT ON EVICTION CASES ALREADY SCHEDULED WITH THE SHERIFF

If your eviction already has a set date with the Deputy or Sheriff, you should contact your Deputy, if you have not already. Some currently scheduled evictions are being performed on a limited basis. Some jurisdictions and deputies have already been reassigned to other duties and those eviction dates may be postponed. If your *currently scheduled* eviction date is being postponed, please contact the Evictions Department for further information.

CONCLUSION

We strongly recommend that you adopt appropriate grace and forgiveness policies.

If tenants haven't paid the rent, we recommend serving 10-Day Rent Demands as usual. If you have already served March and we have filed a case DO NOT serve a demand for April's or May's rent.

Finally, regardless of when you can get back into court, we recommend proceeding with filing the eviction case and resolving with a Post-Eviction Payment Agreement in order to avoid the Backlog Disadvantage to the greatest extent possible.

Please feel free to contact us with any questions or concerns, or discuss specific grace and forgiveness policies. If many clients are seeking clarification or have questions, we might hold another Webinar on these specific topics as early as Monday, March 23, 2020.