BORNSTEIN LAW
BAY AREA REAL ESTATE ATTORNEYS

LANDLORDING ON THE OTHER SIDE OF THE PANDEMIC

Some considerations and action items for rental housing providers as California's eviction moratorium expires on September 30

Never has our community been asked to digest so much legal information as it relates to managing landlord-tenant relationships than during the long, dark winter of COVID-19.

While Bornstein Law has done a lot of commiserating and empathizing with clients, we often stated that with ever-extending moratoria and a lack of access to the courts, we did not see the light at the end of the tunnel.

Until now.

After several iterations of state law designed to deal with the economic fallout of the pandemic which culminated in AB 832, we finally have a clear path moving forward.

Rental housing providers would not have the stomach to endure yet another eviction moratorium, but neither do lawmakers have the appetite to prolong the misery of landlords. By adjourning and heading back home before the deadline passes, legislators have signaled that it is time to move on and cement the September 30th date.

The law is always cleaner on the page than it is in real life and so you can expect a bumpy transition.

While we can't predict the future, we can suggest some steps to take to comply with the law, maximize your chances of prevailing in court if a matter escalates, and offer some strategies in optimizing rental income.

First and foremost, we want you to seek rental assistance funds and work cooperatively with tenants to complete the application process.

Failure to make a good-faith effort to tap into the billions of dollars available to recoup rent debt will lead to consequences for rental property owners down the road.

However burdened our community feels by these added tasks, it is what the law prescribes and we point out that, with more diligence in seeking funds, the greater likelihood it is for the landlord to reach a positive resolution.

Rental assistance programs have been sold as voluntary, but in practical terms, they are not.

The most compelling reason to participate in rental assistance programs is that money is available to recoup COVID-related rent debt through government funds. The prospect of recovering rental arrears through other means can be dismal.

Yet the cards are stacked against landlords who do not get with the program. In order to progress with an eviction for nonpayment of rent, the owner has to attest that the landlord engaged in a concerted campaign to educate the renter on stimulus dollars available and proactively seek these funds.

If and when the landlord goes to the civil courts to recoup rent debt, the amount of damages can be reduced unless the court is shown that the owner did everything humanly possible to tap into a stockpile of money designated to make landlords whole and avert the displacement of tenants.

Whether or not the tenant is cooperative or burrows their head in the sand doesn't matter.

We understand that there are many tenants who will not apply for rental relief on their own and ignore the entreaties of landlords to fill out a joint application. If the tenant goes radio silent, we want the landlord to do two things:

Complete an application for rental assistance on their own.

A period of time will elapse when the landlord will receive sorely needed funds even if the tenant does not do his or her part.

Document correspondence with the tenant

The narrative we want to build is that despite the outreach efforts of the landlord, the tenant is recalcitrant. We want to document the outreach efforts made by the landlord, and if these entreaties are refused, the landlord exhausted all possibilities in having a constructive, fluid dialogue.

It's been said that you can lead a horse to water but can't make it drink. In cases when the tenant is uncommunicative, we want to show that the landlord did their best in leading renters to the trough.

We want the rental unit to be maintained in livable condition, irrespective of the payment status.

Pandemic or not, rental housing providers are required to keep the premises in livable condition. It may be a hard pill to swallow, but this core responsibility does not change if the tenant is not paying rent. That's right - even non-paying renters are entitled to a habitable dwelling.

Although the rental unit need not be in pristine condition, it must meet certain minimal standards. A favorite gambit that tenants' attorneys use in the defense of an unlawful detainer action is to claim that the landlord failed to provide safe, sanitary, and secure housing and, by landlords not fulfilling their end of the bargain, rent is not owed.

If there are any defects in the property, we want you to address them now, or you may lose your ability to evict.

When the pandemic was raging, there was difficulty getting access to rental units because of the fear of contagion.

Landlords and property managers were caught between a rock and a hard place. They had a duty to maintain the property in habitable condition and also conduct preventative maintenance to ensure the building did not atrophy. While refusing access to enter the premises to effectuate repairs is normally a "just cause" to evict, residents had a legitimate objection to others crowding around their apartment.

At times, we would even advise clients to put tenants up in a motel to gain access to the rental unit, but since the reopening of California, the worries of contagion have largely subsided.

When looking at what repairs are necessary and which ones are optional, we can turn to California's implied warranty of habitability. Is a defect minor, or does it materially affect a tenant's safety and health?

Life or death, or life with discomfort?

During a pandemic, home-repair professionals have not been asked to put away their tools but business practices have shifted to meet the moment. If the washing machine won't wash or the screen door won't seamlessly slide, that's one thing. But there are certain obligations landlords must get on top of.

- Effective waterproofing and weather protection of roof and exterior walls.
- Well-maintained plumbing and gas facilities compliant with law in effect at the time of installation.
- Water supply compliant with applicable law that is capable of producing hot and cold running water.
- Well-maintained heating facilities compliant with applicable law at the time of installation.
- Well-maintained electrical lighting compliant with applicable law at the time of installation.
- Building grounds, and apparatuses kept sanitary and free from debris and vermin at the time of rent or lease.
- Sufficient number of receptacles for garbage.
- Well-maintained floors, stairways, and railings.
- Locks conforming to code

As we emerge on the other side of COVID, we want to ensure that the rental unit is in livable condition and not give tenants' attorneys any reason to assert otherwise.

Document, document, document.

Whenever clients come into our office with paperwork, we can instantly get a gut feeling for how organized a system they have. Some clients maintain excellent records in perfect chronological order, complete with a log of correspondence with tenants, receipts, dates of rent increases, meticulous notes, and so forth. Other clients have a hurricane of papers and are missing key documents.

If you are in the latter category, please understand that now is the time to get organized and build a storyline, from A-Z, of what has happened throughout the life of the tenancy. In order to have an informed conversation and build a case if a matter is enlarged, please compile as many details as you can.

Key items to put together in a tidy fashion:

Any and all notices served

In order to prove that we've filled our obligations, we like to take a photo of the envelope if we've mailed the notice. If a notice is posted on the door, it is prudent to take a digital photo of it posted.

Some laggards have failed to serve proper notices like the one-time Notice from the State of California due long ago. Better late than never - if you are tardy, serve any missing notices you neglected to send and take a picture when possible.

Likewise, we want to collect any hardship declarations that the tenant returned in response to notices.

Is the tenant in arrears part of a "high-income" household that earns 130% or more of the Area Median Income? If so, the landlord has the prerogative to ask for verifiable information from the tenant who asserts a COVID-19 related hardship. Any documentation submitted by the well-to-do renter showing financial distress should of course be preserved.

Correspondence with the tenant

We would like to see a record of the communication - or lack of it - between landlords and tenants. Whether it is written correspondence, emails, or text messages, it is helpful to chronicle what type of information has been exchanged between the two parties and get an overall feel for the status of the rental relationship. If there are phone calls made, summarize the substance of the conversation.

A ledger of when rent became due and what rent is owed

A hallmark of good landlording and property management is excellent bookkeeping, and this competency will prove to be especially vital when seeking the recovery of rent debt and/or possession of the unit.

We would like to forensically go back in time to examine the payment status surrounding the tenancy, with special attention to four key time periods.

Key dates to keep in mind

Rent due:
Prior to March 1, 2020

Rent due:
March 1, 2020 - August 31, 2020

Rent due:
September 1, 2020 - September 30, 2021

Rent due:
October 1, 2021 - March 31, 2022

Beginning October 1, a key question to ask:

For any amounts due between **September 1, 2020, through September 30, 2021**, has the tenant paid

25%

of the total arrears?

Now that you have your financial house in order and come equipped with some hard and fast numbers, one final suggestion.

Assembling documentation relating to the application for rental assistance

Since a landlord's ability to evict for nonpayment of rent and fully recover unpaid rent in civil courts is hinged on their pursuit of rental assistance dollars, save your application number and print out any docs, decisions or correspondence relating to applications for rent relief, whether it is sought by the landlord, the tenant, or ideally, both parties. If any "final decision" is rendered on the application, this will be consequential moving forward.

Armed with a snapshot of everything that has occurred during the lifetime of the tenancy, Bornstein Law can now focus on strategy that will achieve your intended goal, whether it is to get paid back rent, recovery of possession, or both.

Contact us to think smartly and strategically →

Let's move on to some potential pitfalls.

Have you perfected your right to evict for nonpayment of rent?

We need to ensure that your 3-day notices (excluding Saturdays, Sundays, and judicial holidays) are compliant with the law.

Our notices need to clearly spell out the dollar amount of the rent demanded and when the dates on which these amounts became due.

The notices have to be transparent about how the tenant could apply for rental assistance and include statutorily-required language.

We have to make sure that the notice is properly prepared and served. Moreover, if the rental agreement was negotiated in a language other than English, the requisite notices and disclosures must be translated into the tenant's native tongue.

Landlords must attest to efforts made in seeking rental assistance and verify some facts in this pursuit. For non-payment of rent cases filed October 1, 2021 - March 31, 2022, the court will not issue a summons if the complaint does not meet these requirements.

In every time and season, improper notices have been a surefire way for landlords to lose an unlawful detainer action. Now, with added requirements, the chances for missteps in preparing the notice is all the more likely. We need to be certain that all of the I's are dotted and the T's are crossed.

There is a phalanx of tenants' attorneys who stand ready to assist their clients in pointing out any number of procedural blunders, making it imperative that landlords consult with an attorney before making an attempt to serve a notice or commence an unlawful detainer action.

What if a tenant did not return a declaration of hardship?

The public policy behind tenant protections and the spirit of the law is to give renters the opportunity to proclaim a financial hardship by notifying the landlord of some sort of economic impact by COVID.

Assuming that the landlord furnishes a declaration form in the 15-day notice to pay rent or quit, it is the responsibility of the tenant to then check some boxes in order to indicate that he or she has been adversely impacted by the pandemic. The tenant must then return the hardship document to the landlord. But the tenant could profess ignorance.

Even after a court summons, the tenant staring at an imminent eviction can in fact make a last-ditch effort to stay housed by claiming that the failure to return the declaration was owed to "mistake, inadvertence, surprise, or excusable neglect."

A court hearing will determine the merits of this argument and may very well put a screeching halt to what would otherwise be a clear-cut victory for the landlord. This “second chance” maneuver can only be used by tenants who owe rent that has accrued between March 1, 2020, and September 30, 2021.

Don’t risk getting your unlawful detainer case being dismissed because the tenant feigns ignorance of their obligation to return a declaration of hardship.

Contact Bornstein Law to discuss any unusual facts surrounding the service of a 15-day notice or any other impediments in communication. By showing that proper notice and outreach efforts have been made, we can defeat the tenant’s desperate attempt. It should become clear, by this point, on why it is important to document every interaction with tenants to build a narrative that you did everything in your power to work cooperatively with the tenant and inform the tenant of their rights.

Other defenses tenants can raise in an unlawful detainer action

New answer forms issued by the Judicial Council makes it easy for tenants to assert defenses to eviction actions by pointing out procedural missteps.

Landlord demands improper rent amounts, asks tenants to pay late fees on COVID-related rent debt, increases fees for pre-pandemic services, or concocts new fees for services that were once free.

In every time and season, notices that demand improper rent amounts have tanked many an eviction action. Fast forward to the pandemic.

The optics of raising rents during a public health crisis were never good and in many municipalities, have been prohibited as part of local ordinances.

Some landlords nonetheless have raised the rent, perhaps to recoup lost rental income from other, non-performing units or because of a false sense of exuberance over the purported "roaring back" of California's economy.

If there was an improper rent increase, we have to deal with it.

Enter late fees, which might be acceptable in ordinary times, but are now banned if the resident has submitted a declaration of COVID-19-related financial distress. Has the tenant attested to a hardship due to the pandemic? No late fees can ever be charged for rent debt that accrued during the pandemic.

In another attempt to make up for lost revenue, frustrated landlords can be inventive in charging fees for a service like parking or other amenities that were free before the pandemic hit. This is prohibited.

It may be tempting to raise the price for a service that residents paid less for in a pre-COVID world. For example, if parking was $20 prior to the pandemic, there may be an itch to raise it now to $50. This hike, too, is prohibited. There are no end-runs around recovering lost revenue.

Notices are in violation of local ordinances

Where is the rental property located? What we need to recognize is that there may be local ordinances that have their own rules to comply with and protections that are stricter than state law.

Improper application of payments

Here’s when good accounting pays off. Landlords cannot apply payments to any COVID-related rent debt other than for a clearly spelled out time period. Moreover, security deposits cannot be deducted for COVID-related rent debt.

The overarching goal, of course, is to get cash flowing again. In those circumstances when governmental rental assistance cannot be obtained, tenant buyout agreements remain a viable option to effectuate a vacancy and re-rent the unit at market rate.

While our strong preference is to seek rental assistance, there are some unfortunate circumstances when these programs won't work or there is an urgency to sell the property vacant or re-rent the unit without it being occupied by a tenant.

In many cases, the tenant will not qualify because the household income exceeds eligibility requirements. There is a bill being considered in the Capitol that would pay landlords even if the tenant is deemed to be earning high-income, but its passage is not guaranteed.

Quite possibly, the landlord has submitted an incomplete application or applied to the wrong governmental rental assistance program, blunders that will delay the process of obtaining sorely-needed dollars.

Another scenario is that the rental assistance program simply runs out of money and there are no funds to be paid out. We think that with billions of dollars available, it is unlikely that the well will run dry, but that is a remote possibility.

Many landlords have been left in the lurch because a tenant broke the lease prematurely and moved elsewhere. These "runaway" tenants have relocated because they are seeing a cheaper place to live due to economic hardship, want to upgrade to a new dig, or their employer allows them to work remotely.

Under AB 832, the state legislature and governor promised that rental property owners will be made whole even if the unit is not occupied by the absconding tenant. However, there are no protocols in place yet to recoup rent arrears when the renter no longer resides in the unit - stay tuned, as we expect forms and procedures to be forthcoming.

While tenant buyouts have always had their appeal, they can be even more attractive now.

There is no government edict that prevents the landlord from entering into an arrangement whereby the tenant agrees to voluntarily vacate the premises in exchange for monetary compensation, a rent waiver, return of the security deposit, or a combination of incentives.

If the tenant owes substantial rent debt that has accrued during the pandemic and does not want their credit to be tarnished through a judgment, a forgiveness of all or a portion of the rent arrears can be used as a bargaining chip to have a leveraged discussion.

In depth:
More on tenant surrender of possession agreements on our website →

Dedicated to helping you think smartly and strategically about your real estate investments and powering through your challenges taking into account time, risk and attorneys' fees.

Our community is in uncharted waters and while we can't predict the future and do not profess to have all the answers - no one does - we can do the next best thing by providing sound counsel so that you can make the most informed decisions in optimizing your rental income, cauterizing risk, and managing landlord/tenant relationships as we turn the page in the most unprecedented of times.

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