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Before you evict, know your local rule

As states start to relax restrictions around COVID-19, property managers should understand the risks associated with two related but separate concepts – self-help evictions and implied right to quiet enjoyment. As discussed below disregarding these concepts may expose property managers to liability, and in some states, criminal prosecution.

Despite emergency government assistance through stimulus payments and increased unemployment benefits, thousands of tenants still struggle to make rent payments. Owners of rental properties have faced stressful decisions not only regarding the plight of their tenants, but also on how to satisfy their own mortgage requirements without the anticipated rental revenues. It is in this current environment that some landlords are taking matters into their own hands – sometimes at their own peril. Let's briefly go back to late-March 2020.

A brief history

Two days before the passage of the CARES Act, the Urban Institute published statistics in support of an argument to protect vulnerable renters.[1] Even without a deep-dive on the numbers or methodology, the basic underlying assumptions were not what one would consider 'provocative' – renters have lower incomes, renters have small or no emergency savings, renters have lower job/income stability. When the CARES Act was passed, it instituted a freeze on evictions from specified properties as a matter of public health. State, county and city governments that had not already instituted similar policies quickly followed suit. These moratoria were instituted so that residents would not become homeless during a global pandemic, and to limit the spread of the virus. However, the state and federal provisions were (and still are) largely uncoordinated in application and duration.

Where are we today?

Fast forward two-plus months of stay-at-home orders and record unemployment numbers. State-level moratoria have started to expire, and the federal version under CARES Act affecting some properties financed by federal funding expired July 27 (FHFA-backed units have until August 31 for now). Many tenants are still behind on rent due to lack of employment/sufficient income. It is with this dynamic in mind that property managers are encouraged to remember two related but separate concepts – self-help evictions and implied right to quiet enjoyment.

Issues with *self-eviction*

Almost every state in the union has an express prohibition on self-help eviction. These laws prevent a landlord from performing acts like changing locks, shutting off utilities, removing a tenant's personal property, or any other hostile act which has the effect of forcing a tenant to leave involuntarily. Property managers who are alleged to have engaged in self-help eviction face civil liability exposure which may lead to requests for relief such as: multiple months' rent, actual or punitive damages, return of security deposit, court-determined damages where judges have discretion to determine relief as they see fit, court costs and attorneys' fees. Many state statutes give the tenant the right to stay in the property. In a handful of states, self-help evictions may also result in the person responsible being charged with a criminal misdemeanor.

[1] *'We Must Act Quickly to Protect Millions of Vulnerable Renters'*, March 25, 2020, www.urban.org/urban-wire/we-must-act-quickly-protect-millions-vulnerable-renters *(last visited June 15, 2020).*

Issues with *quiet enjoyment*

Other strong-arm tactics – such as delaying responses to repair requests and harassing communications – may interfere with a tenant's right to quiet enjoyment of the premises. Quiet enjoyment may be expressly stated within the lease terms but is often an implied covenant between landlord and tenant. Effectively this is the tenant's right to not be unreasonably disturbed by the property manager. Property managers who create an unwelcoming environment or allow a tenant's space to fall into a condition such that a tenant is forced to find other accommodation may be civilly sued for violating a tenant's right to enjoyment. Some examples of offending behavior may include: not repairing windows or doors in a prompt fashion (which may lead to more significant issues if a unit is broken into and additional property damage or bodily injury occurs), multiple daily phone calls about late rent before the lease-defined grace period has expired, allowing entry to show the unit without requisite notice, or failing to fix appliances or fixtures which limit the livability of the unit (which may lead to additional exposures such as mold, harmful fumes or other risk of injury).

Other issues? *Discrimination*.

Another reason why these types of tactics are problematic is they can lead to more serious allegations, namely discrimination. Under the Federal Housing Act, discriminatory housing practices include acts which coerce, intimidate, threaten or interfere with persons protected. If a tenant can show basic facts to support an allegation of wrongful eviction, those same facts may be used to support a federal (or state) discrimination claim if the property manager's actions can be tied to disparate treatment of a protected class (race, religion, national origin, sex, disability, family status). State discrimination statutes may expand protections to other classes of individuals not listed in the federal Act, such as sexual orientation or military/veteran status.

What to do now?

As the response to COVID-19 continues to evolve, property managers should continue to seek out clarity on eviction rules and timelines in force where their property is located. Although many states are in various phases of "reopening", these state steps are largely geared towards businesses and economic considerations. Eviction freezes may still be pending (and early signs pointing to an extension of the CARES Act moratorium are inconclusive at best) as a matter of public health. The potential "second wave" is still yet to be defined, and existing or expired eviction freezes may be extended or reinstated as circumstances require.

Conclusion

Filing an eviction action may be driven by decisions made by local courts or law enforcement. Knowing when an eviction is appropriate is key – it is even arguable knowingly or intentionally starting the eviction process when not permitted carries the risk of being construed as harassment. Property managers should also evaluate when actions other than those permitted by the lease or local landlord/tenant law cross the line. Acts which are tantamount to a self-help eviction and/or which unreasonably interfere with a tenant's right to quiet enjoyment may expose the property manager to civil claims and, in some states, criminal prosecution.

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