

PRACTICAL CONSIDERATIONS FOR LANDLORDS, MORTGAGEES AND LITIGATION DURING COVID-19

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American business was functioning rather well prior to the Covid-19 pandemic. Contracts were predictable to follow based upon ordinary operations and expectations. Covid-19 changed all of that, and overnight American business was faced with local and state executive orders to stay at home, engage in social distancing, and substantially limit if not cease certain business operations. Many companies have experienced a downturn in business, with some closing and others resorting to video consultations based on shelter in place orders. These events have caused a decrease in income for many businesses. Some tenants, such as Pier I, filed for Chapter 11 protection. Other businesses sought to challenge the municipal and state executive orders on Constitutional grounds. Connecticut's stay at home and related executive orders have yet to be successfully challenged by business owners. A decision discusses Connecticut's executive orders and held that one restaurant and bar owner did not demonstrate sufficient evidence to support a temporary restraining order to stay enforcement of the orders. Amato v. Elicker, 2020 U.S. Dist. Lexis 87758. Indeed, given the severity of the health crisis, successful challenges in hard hit states may be few and far between. It is noteworthy that the Governor of Wisconsin's orders were reversed entirely on procedural grounds, due to a failure to follow that state's rulemaking procedure in an emergency¹. Private parties, however, have litigation options beyond challenging governmental orders, such as resort to legal proceedings.

In the Pier I Chapter 11², the debtor, a tenant, sought to delay its rent obligations for a short period of time, by invoking the equitable powers of the Bankruptcy Court under Section 105. The landlords naturally objected, but the Court sided with the debtor, and noted the delayed rent payments would still be due, and insurance, utility and related payments would continue to be made by the debtor. It was also interesting the Bankruptcy Court noted the following:

While landlords may be able to take advantage of the funding recently made available under the Coronavirus Economic Stabilization Act of 2020 (the "CARES Act"), the Debtors are unable to obtain such funding due to certain eligibility and solvency requirements associated with receiving funding under the CARES Act promulgated by the Small Business Administration.

Courts will continue to be faced with exercising equitable powers to administer bankruptcy and other cases, involving leases and other contracts. The doctrines of frustration of purpose, impossibility of performance, and force majeure may provide relief to parties who were unable to perform contractual obligations during the Covid-19 pandemic.

For investors with commercial mortgages or private paper residential loans that may be in default, many state courts are either not permitting foreclosure judgments to enter or are not currently accessible

¹ Wisconsin Legislature v. Palm, 20201 WI 41.

² In Re Pier I Imports, 2020 Bankr. Lexis 1242.



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for court proceedings. This is troubling to say the least, because access to the judicial system is typically a state Constitutional right, as reflected in the following provision of the Connecticut Constitution-

article first, 10, provides: "all courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Connecticut, through its Judicial Branch, extended sale and law dates sua sponte from mid-March until September of this year. These extensions applied to commercial foreclosures, such as office buildings, shopping malls, apartment buildings, tax and condominium foreclosures. Contrast this situation with the federal courts. The Bankruptcy Courts have continued in their operations. At least one Bankruptcy Court- during the height of the pandemic in New England- approved an auction of property³. That case involved a luxury single family home on waterfront property. The Court approved the auction, over an objection from the property owners about the impact of the pandemic on an auction. In approving the auction, the Court stated as follows:

Perhaps on the sunniest of summer days, when potential buyers would be wearing not just dark tinted glasses, but rose-colored ones as well, such circumstances may converge to yield a substantially higher sale price. However, absent the presence of such optimal conditions, and given the administrative expense burn rate and the Debtor's corresponding inability to cover those administrative costs, the stayed state court foreclosure, the major economic disruptions caused by the Covid-19 pandemic, and the logistical and health concerns associated with attempting to re-market and auction a substantially encumbered trophy property under the present circumstances, the Objectors claims are simply not founded in credible evidence or common sense. Most importantly, they are not founded upon any admissible testimony or recognized empirical data.

Indeed, foreclosures may be filed in federal court, provided that the lender can satisfy the requirements of diversity jurisdiction under 28 USC 1332. A trustee of a mortgage backed securitization is a real party in interest for diversity purposes, provided that the trustee has the power to hold, manage and dispose of assets of the trust.⁴ The citizenship of the trustee is measured by where it conducts its principal place of business. As lenders are faced with non-performing assets during the pandemic, forum selection may be an important part of the overall strategy to address these assets. Regardless, access to the legal system is an important Constitutional right, which should not be disregarded in any situation, including a health crisis.

³ Barnes v. Barnes, 2020 Bankr. Lexis 991

⁴ United States Bank National Association v. Nesbitt Bellevue Property, LLC, 859 F. Supp. 2d 602 (2012).