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Pandemic leaves landlords in a difficult position - by Gary Vogel

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The coronavirus pandemic is affecting everyone. Many businesses are shut down, or are minimally operating. The CARES Act recently adopted by Congress with over two trillion dollars of emergency funding will provide a lifeline for many businesses. Especially important is the SBA Payroll Protection Program (PPP) loans that provide forgivable loans for an amount of up to 8 weeks payroll for qualifying businesses. The program has proven so popular that as of April 16th, applications for the entire \$349 billion of PPP funding have been made and the SBA announced that it would not accept any more applications, unless Congress approves additional funding. While the PPP loan program is enabling many business to survive, and to pay their staff, for many companies the PPP isn't a good fit, because their business is too big, may not have enough payroll, compared to other essential expenses or may need more than eight weeks of payroll covered in order for them to survive.

Left out of the discussion at Congress is the impact the shutdown is having on landlords. MEREDA members include many residential and commercial landlords, and MEREDA has both heard from and reached out to members to be able to understand what is happening to landlords in this pandemic. Property owners are businesses that are frankly essential to our economy, providing the real estate for businesses to operate. Most property owners will not qualify for PPP loans, since they tend to not have employees, or if they do, the payroll cost is a very small percentage of their operating expense, when compared to taxes, mortgage payments, utility charges, insurance and the like. The impact of the PPP loans and the ability of businesses receiving those loans to keep employees paid, as well as the impact of enhanced unemployment benefits for unemployed workers has enabled most residential tenants to pay their rent, and residential landlords in Maine in an informal survey report receiving 80 to 90% of April rent. Commercial landlords report lesser amounts of April rent payments. In addition, on April 16, governor Mills issued an executive order prohibiting or limiting evictions for a period extending until 30 days after the expiration of the Covid-19 State of Emergency. While few if any landlords will want to be evicting tenants who cannot pay rent due to disruptions caused by the coronavirus, many landlords are concerned that the prohibition on evictions may be viewed by tenants as a basis for not paying rent.

While the governor's executive order makes it clear that the order does not relieve tenants of their obligation to pay rent while the tenant continues to occupy the real estate, it does not address what constitutes "occupation of the real estate" in this circumstance and leaves several questions unanswered.

What should landlords be doing when faced with nonpayment of rent by tenants?

First and foremost, landlords should talk to their tenants to find out what tenants can do and what relief tenants need so that the landlord can understand what rent payments they can expect during this period. Every situation is somewhat different, and there is typically no "one size fits all" solution. Tenants need to understand that the rent obligation doesn't go away just because they are unable to operate, unless the lease so provides, and that is highly unusual. Tenants also need to understand that the rent obligation doesn't go away during the period of time that evictions are limited. Landlords have fixed expenses that don't stop just because a business is temporarily closed. If a tenant says that they are giving up and going out of business that is very different from a tenant who is just trying to weather the storm and to reopen when they are able. If a tenant is going to close up for good, the landlord should get the tenant to surrender the space back to the landlord, so that the landlord does not need to evict the tenant to be able to have the space available to rent to others. This is especially important while the courts are closed to evictions.

Landlords should find out what federal resources the tenants have been able to obtain, and whether the tenants plan on using some of those funds to pay rent. Under the PPP, businesses can use 25% of the funds to pay rent, utilities, debt service payments and some other expenses while still having 100% of the loan remain forgivable. For tenants that have not applied for PPP loans, the tenants should be alerted to do so if and when more funding is available.

Once the Landlord understands the shortfalls in rent payments that the tenant anticipates, the landlord should talk to its lenders and explain the situation that the landlord is in. Some landlords may have enough tenants who are paying rent to enable them to pay their mortgages; others may not. Lenders understand what is happening and will work with borrowers. Lenders will need current information in order to help. That is part of the reason why getting good information from tenants is important.

If necessary, landlords can also apply for loans using the SBA or FAME loan programs. These loans are not forgivable, and landlords will not want to take on additional debt to provide support to their tenants, but for some there may be no other options.

If landlords know that tenants will be unable to pay rent for the duration of a shutdown, the landlord may want to enter into a lease amendment with the tenant to provide when the unpaid rent will be due, which may have the unpaid rent payable over a period of months together with the rent due for those months. For example, the deferred rent could be repayable 1/12 each month for a period of 12 months once the shutdown ends, or 30 days after the shutdown ends, with the current rent for that month. It is better to have an enforceable agreement that everyone can live with, rather than just

leaving unpaid rent with a tenant in default. This is better for the landlord, and it is also better for the tenant, so that the tenant can have an arrangement that is workable from a cash flow perspective.

In summary, landlords are placed in a difficult situation as a result of the impact of the coronavirus. While more PPP funding may be available to tenants who may be able to use those funds to pay rent, the ability and willingness of tenants to use these funds for rent payments may vary widely, and landlords may not see a great deal of relief, directly or indirectly, from the CARES Act or from future federal relief. Landlords need to work proactively with tenants and lenders to make sure that they can weather the storm. If the coronavirus causes the real estate market to suffer greatly, that will only make recovery more difficult for everyone, including property owners.

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