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"Eviction of Tenants from Federally Assisted Housing Providers: Don't Do the Crime if You Can't Do the Time"

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On November 2, 2015, the U.S. Department of Housing and Urban Development Office of Public Housing and Indian Housing ("HUD") issued Notice PIH 2015-19 to provide notification to Public Housing Authorities and owners of other federally-assisted housing that "arrest records may not be the sole basis for denying admission, terminating assistance or evicting tenants" and to further remind owners that HUD does not require a "One Strike" policy with regard to criminal conduct. On its face, it appears that the practical effect would be to further hinder federally-subsidized landlords from evicting a tenant if they committed and were arrested for a criminal act. This of course would prove to be an incredible burden and hurdle to the landlord's obligation to provide a safe and secure community, and to further ensure the health, safety and welfare of the residents in general as the arrest of a tenant, or guest of a tenant, is considered by many *prima facie* evidence that the criminal act was actually carried out by the arrestee. However, the actual effect of this new mandate by HUD will depend on how landlords, who own federally-assisted communities, have handled eviction proceedings and what evidence they have relied upon in such proceedings.

Any landlord who handles summary possession actions must be aware and cognizant of not only what they must prove when they enter the court room, but, equally important, must know and understand the threshold of proof they must reach in order for a judge to enter judgment in their favor.

It is further of note that while this memo specifically regards Federally Assisted Housing Providers, the procedures and process contained herein are equally applicable to market rental communities and manufactured housing.[1] While evictions for each of those types of housing may be a bit different, the general principals are the same. A judge is unlikely to grant possession to a landlord simply because a tenant was arrested. It is imperative for market and manufactured housing to prove the underlying conduct as required by HUD and not simply demonstrate a tenant or guest was arrested.

A. The Civil Standard: Burden of Proof

Any landlord who handles summary possession actions must be aware and cognizant of not only what they must prove when they enter the court room, but, equally important, must know and understand the threshold of proof they must reach in order for a judge to enter judgment in their favor. Fortunately for landlords, the threshold for a civil summary possession action is substantially less than a criminal matter. A

[1] Specifically, the Delaware Manufactured Housing Act only allows evictions when a tenant is **convicted** of a crime. Despite this limitation, the exception discussed in this newsletter still applied to manufactured housing communities.

landlord need only show that the alleged conduct/violation occurred by a preponderance of the evidence. To state this in a more understandable way, the landlord must prove their case by showing the criminal conduct more likely than not occurred. An arrest on its own does not meet this burden!

The purpose of HUD's recent notification is to confirm that a landlord must prove its case in order to evict for criminal conduct. The distinction between the civil burden and much higher criminal burden is critical. This difference will become an all too important factor as all too often, the criminal charges will be dismissed or will not be prosecuted. **This does not mean your case is sunk!** While the State may not be able to meet its much higher criminal burden, that does not automatically mean the landlord cannot meet their own lessor burden. The plea of the tenant to reconsider the eviction proceeding because the charges have been dropped is not the death rattle of the eviction action. The fact charges were dropped does not mean the conduct did not occur. In most instances, it simply means that there was not enough evidence for the State to proceed. A savvy landlord will use this knowledge to its benefit.

In summary, it is the crime itself, not the arrest that should be the focus of your possession action.

B. So I Can't Rely Solely on the Arrest Record, Now What?

To clearly state this point, the arrest of a tenant does not prove the tenant committed the criminal conduct by either the civil or criminal burdens of proof. This is the core of HUD's reasoning in issuing Notice PIH 2015-19. It is the landlord's obligation when seeking to terminate a tenant for criminal conduct to prove the conduct, not simply the arrest. To prove the conduct, a landlord must obtain any criminal records regarding the incident. These include affidavits of probable cause and certified criminal histories. A landlord must question and subpoena, if necessary, any witness who has personal knowledge of the incident. This includes police officers, parole officers, or other residents. If there is physical evidence, for example marijuana remnants or paraphernalia, the landlord must ensure the custodian of that evidence, which is often a police officer, brings the evidence with him. Without proper testimony from the officers or firsthand witnesses of the incident, a landlord faces a steep uphill battle to evict.

Given this heavier burden on the landlord, it is best and easiest to focus on criminal conduct that occurred at, on, or near the rental property. If the criminal activity is occurring at the rental unit, the landlord may have firsthand evidence of the crime by way of security camera footage. Further, the landlord is likely to have a relationship with firsthand witnesses as it is likely other tenants will have witnessed the crime and reported it to management. The catch is finding tenants who are willing to testify as these tenants often fear retaliation. That being said, the police officers involved may be very helpful witnesses, especially if the criminal case was dismissed as this will be another chance for the officer to prove what happened. Yet, the officers do not get credit for assisting with evictions, so they may be uncooperative witnesses, and thus, they will need to be subpoenaed.

One Small Mistake…

Even one small mistake may mean the loss of your case, and it is particularly easy to make a procedural or substantive mistake when trying to evict a tenant for criminal conduct.

While it is certainly not necessary for a landlord to retain an attorney when trying to evict a tenant for criminal conduct, it is certainly highly recommended. The procedures and preparation necessary are significantly higher than a simple rent case. Indeed, there are multiple procedural and evidentiary hurdles a landlord must overcome in order to win its case. Moreover, a landlord must be able to elicit relevant facts and information from officers and witnesses.

A landlord will need to investigate the incident and ensure they have all necessary witnesses and documentation ready to allow them to prove the underlying conduct and be successful.

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COMING SOON:

- LOOK FOR OUR FIRM IN THE 2017 FACES OF DELAWARE ARTICLE IN THE DELAWARE TODAY MAGAZINE, JANUARY 2017

Thank you for reading our newsletter.
If you have any topics that you would like to see addressed in future newsletters, please email David Zerbato at dzerbato@michaelpmorton.com