

# Law of the Land - Real Estate Litigation Newsletter

November 16, 2020

Volume I, Issue IV

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## **Trending Now**

On October 17, 2020, the Baker Administration's moratorium on certain residential and small business eviction and foreclosures expired. However, also on October 17, Massachusetts adopted a new moratorium, established by the Center for Disease Prevention and Control ("CDC").

Originally issued on September 4, 2020, this moratorium (the "CDC Order")<sup>[1]</sup> will prevent evictions for non-payment for qualified residential tenants who submit a written declaration to their landlord concerning the tenants' qualifications for relief under the CDC Order, the tenants' efforts to obtain government assistance for rent, the tenants' efforts to make timely partial rent payments, and the tenants' acknowledgment that rent is still required and that they could be subject to repayment following the end of the CDC Order. Courts will accept filings and process cases and may enter judgments, but will not issue an order of execution until after the expiration of the CDC order. This protection will be limited to households who meet certain income and vulnerability criteria and does not extend to foreclosures on home mortgages.

## **Impact of Moratorium on Court Procedures: Massachusetts District Courts & Boston Municipal Court**

With the Baker-imposed restrictions lifted but a new moratorium in effect, Massachusetts District Courts recently adopted Standing Order 10-20, which went into effect on October 19, 2020. This Order impacts landlords and tenants, specifically those involved with matters concerning summary process and eviction.

Order 10-20 outlines certain procedural restrictions for cases filed on or after October 19, 2020, as the Courts continue to limit the number of persons entering courthouses. Please click [here](#) to see the new procedural requirements.

Boston Municipal Court ("BMC") adopted a substantially similar order, Order 11-20, that also went into effect on October 19, 2020. It imposes largely the same procedural restrictions imposed by District Court Order 10-20. Please click [here](#) to see the new procedural requirements for BMC.

## **Baker Administration's Financial Assistance Following Termination of the Eviction Moratorium**

On October 12, 2020, the Baker Administration announced a comprehensive set of resources, entitled the "Eviction Diversion Initiative," to support residential tenants and property owners facing fiscal challenges arising from COVID-19. The Baker Administration has pledged \$171 million this

fiscal year, with \$112 million of new funding to support new and expanded housing stability programs during the remainder of the fiscal year. Some ways the funds will be allocated include the following:

1. \$100 million to expand the capacity of the Residential Assistance for Families in Transition (RAFT) program to provide relief to renters and landlords impacted by COVID-19;
2. \$48.7 million to HomeBASE and other rapid rehousing programs for when tenants are evicted and face the risk of homelessness;
3. \$12.3 million to provide tenants and landlords with access to legal representation and related services prior to and during the eviction process, as well as community mediation to help tenants and landlords resolve cases outside of court;
4. \$6.5 million for Housing Consumer Education Centers (HCECs); and
5. \$3.8 million for the Tenancy Preservation Program (TPP) to provide case management support and to act as a neutral party to help tenants and landlords come to agreement.

The Baker Administration also seeks to update the RAFT program with new investments to expand the capacity of the program and increase the maximum benefit available from \$4,000 to \$10,000 per household. Additionally, the Administration will update the RAFT program by imposing new policies including, but not limited to, streamlining the application process for both the RAFT and Emergency Rental and Mortgage Assistance (ERMA) programs for low- to moderate-income households and allowing landlords who own fewer than 20 units to apply directly for RAFT and ERMA with consent from their tenants.

## **Cases of Note**

### **No Rent Relief for NY Restaurant**

*BKNY1, Inc. v. 132 Capulet Holdings, LLC, 2020 WL 5745631 (N.Y. Sup. Ct. Sep. 23, 2020)*

A New York court recently held that a restaurant's closure due to state-mandated orders imposed as a result of the COVID-19 pandemic did not excuse the restaurant of its obligations to pay rent. In so holding, the Court rejected the restaurant's invocation of the doctrines of impossibility and frustration of purpose as defenses for its failure to pay rent. The decision is equally significant for commercial tenants and landlords as it demonstrates that such tenants may be obligated to pay rent despite facing mandated closures of their businesses arising from COVID-19, and certain common-law doctrines may be unavailable as defenses to excuse such failures. Tenants and landlords should contract around such rent-payment commitments, and specifically include such language in their leases, if parties to leases wish to avoid such strict financial covenants.

In *BKNY1*, defendant 132 Capulet Holdings, LLC ("Defendant") sought to terminate the lease of restaurant-plaintiff BKNY1, Inc. ("Plaintiff") for failure to pay rent for April and May 2020. The Defendant asked the Court to vacate an injunction previously entered in favor of the Defendant that tolled the period in which Plaintiff had to pay its April and May 2020 rent. While Plaintiff's

failure to pay rent was undisputed, the Court had granted the injunction (known in New York as a *Yellowstone* injunction) due to Plaintiff's representation that it would pay rent.

In vacating the injunction, the Court acknowledged there was no provision in the applicable lease between Plaintiff and Defendant that excused Plaintiff from timely and fully paying its rent during a state-mandated closure of its business. The Court also noted that the nine-year lease term only lasts through September 2021. Moreover, the Court rejected defenses raised by Plaintiff, in particular the doctrines of frustration of purpose and impossibility.

The Court declared that the doctrine of frustration of purpose is available to parties only when a change in circumstances makes one party's performance virtually worthless to the other. Challenges rising from financial hardship, however, do not excuse performance of a contract. Here, the Court believed that a temporary closure of Plaintiff's business in the penultimate year of its lease term did not frustrate the overall purpose of the lease.

Additionally, the doctrine of impossibility was unavailable to Plaintiff because once a party to a contract has made a promise, the party must perform or pay damages for its failure, even when unforeseen circumstances make performance burdensome. Unless there is lease language allowing a party to escape performance under certain specified circumstances, compliance will be required. Here, as previously mentioned, there was no such relief language in the lease between Plaintiff and Defendant, and in fact, the lease specifically provided that Plaintiff's obligation to pay rent would not be affected, impaired, or excused as a result of its inability to fulfill any of its lease obligations due to government preemption or restrictions.

Thus, the Court ordered Plaintiff to pay Defendant the rent due from April and May 2020. Plaintiff's failure to do so will enable Defendant to renew its motion to vacate Plaintiff's *Yellowstone* injunction.

### **Clarification Provided for Public-Private Partnerships and Prior Public Use Doctrine**

*Town of Sudbury v. Massachusetts Bay Transportation Auth.*, 485 Mass. 774 (2020)

In a recent decision, the Massachusetts Supreme Judicial Court (the "SJC") held that a private electric company's proposed use of a right of way was not a public use, and therefore that the doctrine of prior public use (which provides that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion) did not preclude defendant Massachusetts Bay Transportation Authority ("MBTA") from entering into an option agreement with the electric company for an easement underneath a disused right of way. This decision is extremely important to public landholders across Massachusetts as it provides certainty to such parties that the "prior public use" doctrine applies *only* to transfers concerning public entities, not to transfers between public and private entities.

In November 2017, plaintiff Town of Sudbury ("Sudbury") filed a complaint in the Land Court seeking to prevent the MBTA from entering into an option agreement with a private electric company, NSTAR Electric Company d/b/a Eversource Energy ("Eversource"), for an easement to install an electric transmission line under a disused right of way ("ROW"), part of which ran through Sudbury. Sudbury argued the prior public use doctrine precludes the MBTA from transferring public land to another public entity for an inconsistent use, here changing the use of the ROW from the

extension and operation of mass transportation services to the installation and maintenance of underground electric transmission lines, absent legislative authorization.

The SJC agreed with the Land Court (Piper, J.) who rejected Sudbury's efforts to characterize the project as one of public use, holding that Eversource's proposed use of the MBTA ROW to construct and operate underground transmission lines is not a public use as Eversource privately owns and operates its electric transmission and distribution systems. More importantly, however, the SJC determined that the transaction between the MBTA and Eversource was one between public and private entities for a subsequent private use of land. Sudbury failed to demonstrate that the benefits of expanding the prior public use doctrine to encompass subsequent inconsistent private uses outweigh the value of adhering to the long-standing precedent of *never* applying the doctrine to bar a subsequent private use carried out by a private entity. Moreover, the SJC acknowledged the many "deleterious consequences," including new challenges to clear prior to developing public land and future lawsuits, that such an expansion of the prior use doctrine would create, implicating "countless prior transfers of interests in land."

*If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our [Real Estate Litigation Group](#).*

*This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*

[1] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (September 4, 2020).