Real Estate Industry Alerts Tracker - June 12, 2020 Issue

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New York Senator Schumer Pushes for Rent Relief Package

Last month, the U.S. House of Representatives passed the Emergency Rental Assistance and Rental Market Stabilization Act, as part of the HEROES Act. Majority Leader Mitch McConnell has stated his opposition and the bill has stalled in the Senate. New York Senator and Senate Minority Leader, Chuck Schumer is pressuring Senator McConnell to approve the bill, noting that it would benefit low income communities of color that were hardest hit by the pandemic. The bill would authorize $100 billion for an Emergency Rental Assistance program to help families and individuals pay their rent and utility bills and remain stably housed during and after the COVID-19 crisis. In order to facilitate the efficient and effective distribution of funds, the program would generally utilize the existing framework of the Emergency Solutions Grant (ESG) program, which is a federal homeless assistance program that provides temporary rental and utility payment assistance to households. Renters would be able to receive assistance with future rent and utility payments, unpaid rent or utility bills that have accumulated, and other services, such as case management and tenant-landlord mediation, to help them remain stably housed. The maximum amount of rental assistance that may be provided to a household per month is the greater of: (a) 120% of the fair market rent; and (b) the small area fair market rent for the area. The sum could be greater if HUD determines a higher amount is needed to cover market rents in the area.

Additional information may be found here.

New York Permits Mandatory Temperature Screening for Office Employees and Retail Patrons

With the recent phased reopening of businesses, New York Governor Andrew Cuomo’s June 6, 2020, Executive Order No. 202.38 authorized commercial building owners, retail store owners and “those authorized on their behalf to manage public places within their buildings, and businesses (collectively, “Operators”) to conduct temperature screenings of individuals through July 6, 2020."

Such Operators are also permitted to deny entry to individuals who have a temperature reading that is higher than 100.4 degrees Fahrenheit and also those who refuse to be screened. Under the executive order, Operators are released from liability, provided the screenings are administered in a non-discriminatory fashion and "applied in a manner consistent with the American with Disabilities Act and any provision of either New York State or New York City Human Rights Law." While the EEOC has previously announced that employers are permitted to conduct temperature screenings, Governor Cuomo's order extends this right to commercial building and retail store owners and allows such owners to deny entry under the aforementioned circumstances.

A copy of Executive Order No. 202.38 may be found here.

Retail Giant Sues Landlord Seeking Cancellation of Lease and Reimbursement of Rent and Other Fees

In a case that raises important questions regarding the impact of COVID-19 related closures on retail tenant defaults and the enforceability of retail leases, on June 8, 2020 a retail lingerie giant filed a complaint with the New York County Supreme Court against an affiliate of a large New York landlord. The tenant's complaint seeks among other things a declaratory judgment that the lease and an accompanying lease guaranty are rescinded based on "the legal doctrines of frustration of purpose and impossibility of performance." The landlord is alleged to have delivered the tenant a series of notices stating that the tenant is in default under the lease for nonpayment of April and May rent, claiming amounts due to the landlord under the lease and the lease guaranty, terminating the lease, and demanding that the tenant vacate the leased premises. In its complaint, the tenant alleges among other things that the lease and the lease guaranty have been rescinded and the landlord's efforts to enforce the lease cannot proceed. The tenant claims that the "unforeseeable" order issued by Governor Cuomo on March 17, 2020 that mandated the closure of the tenant's store for 83 consecutive days (through the date of the filing of the complaint) and counting has frustrated the purpose of the lease (i) because the tenant is legally prohibited from operating at the leased premises a retail store and/or any other permitted use under the lease and (ii) because of the significant long-term changes to retail activity arising in the wake of the COVID-19 closures. The tenant further alleges that the Governor's order constitutes an intervening governmental activity that renders performance impossible and excuses further performance under the lease. In addition to its rescission claims, the tenant asserts causes of action based on reformation of the lease, breach of contract, money had and received, and unjust enrichment.

A copy of the complaint may be found here.

New York Real Estate Industry Groups Establish Guidelines for Phased Re-Opening

This week, the Real Estate Board of New York, the Building Construction Trades Council of Greater New York, and the Building Trades Employers Association released their official safety guidelines for construction sites as New York emerges from the pandemic. For construction sites, the new protocols require face masks to be worn at all union construction sites, for work density to be reduced by utilizing staggered start times, and for regular cleaning and disinfecting to be undertaken.

Additional information may be found here.

Heard Around the Industry

Demand for Industrial Space Increases as a Result of COVID-19: Pandemic-related travel restrictions have had an impact on business supply chains and with the overall concern that COVID-19 disruptions will continue for the foreseeable future, businesses are beginning to adapt to this new reality by creating new distribution centers closer to consumers. A new report from a leading commercial real estate services firm estimates that there will be demand for 400 million to 500 million square feet of industrial space in response to the supply chain disruptions caused by the pandemic.

Additional information may be found here.

Multifamily Property Turnover Lowest in Decades: According to a report by a commercial real estate services company, landlords of multifamily properties are reporting their lowest turnover rates in more than two decades. The report shows that the percentage of total rental units that are not renewed each year fell from 47.5% in 2019 to 42.1% as of April. The reduction in turnover is attributable to the COVID-19 outbreak, as fewer tenants are willing or able to move in the middle of a pandemic. However, the trend was not consistent among all geographic regions, as regions hit hardest by the pandemic (such as the New York Metropolitan area, District of Columbia, and areas within the Northeast and Midwest) saw lower turnover rates while the South and West saw higher turnover rates. The news is not all bad for landlords, as rent increases are generally higher for renewals than for new leases. Additionally, with more renewals, landlords save on the expenses to prepare dwellings for new occupants.

Additional information may be found here.

Early June Rent Collections Show Real Estate Hasn't Cratered Yet but the Pain is Far from Over: As restrictions are being lifted across the country, the economy is beginning to show signs of recovery in many sectors, but not so much in the real estate industry. Real estate is often a lagging indicator of the broader economic picture and the impact on the industry could likely be felt in the coming months. Commercial property owners across the retail, office, multifamily, and industrial sectors were surveyed about their early June rent collections as compared to collections for April and May. Although many had previously feared that the economic decline triggered by the pandemic would show fully in June, it appears that June rent collections were actually in line with April and May collections. While some owners are optimistic, others expect recovery to be long and arduous. Owners of retail properties have expressed frustration that national chains that were once reliable investments are now the most consistent non-payers. According to one analyst, nearly half of all retail businesses did not pay rent in April or May. Apartment owners appear be doing better, reporting rent collections from about 90% to nearly 100%, but they acknowledge that the rent payments are tied to the relief tenants are receiving under the CARES Act and are not necessarily an indicator of a healthy economy.

Additional information may be found here.

Real Estate Developers See Slight Improvement in May but Believe Business Interruption Will Last Longer: In a survey completed by 461 developers for the Commercial Real Estate Development Association (NAIOP), 62% noted that they're seeing permitting or entitlement delays and 57% are experiencing lower leasing activities. However, both figures are improvements as compared to the group's April survey. Delays or shortages in construction supplies also declined, with 19% of respondents experiencing such delays or supply shortages in May, compared with 31% in April. Survey respondent also reported a 7% increase from April to May in new developments of industrial buildings, a 5% increase in acquisitions of existing industrial buildings, a 4.7% increase in development of multifamily properties and a 10% increase in acquisitions of existing multifamily properties. The report noted that while the improved metrics suggested that lending is stabilizing and lenders are now better able to price deals, still over 40% of respondents within the industrial sector reported no new deal activity. In the other sectors it was even worse with 60% of respondents in the multifamily sector, 70% in the office sector and 85.6% in the retail sector all reporting they have witnessed no new deal activity. Developers are also concerned about the length of business disruptions due to the pandemic. While 55% of developers polled believe the impact of the pandemic will fade in less than a year, the rate of developers who believe that pandemic related disruptions will last more than a year increased from 36% in April up to 46% in May.

Investments in Distressed Loans: During the last economic downturn, the Great Recession of 2008, investors looking to invest in distressed commercial real estate loans turned to the CMBS market. However, according to new data from Real Capital Analytics, that same investment strategy may not be the best to use for the pandemic. At the start of the last financial crisis, 64% of distressed commercial restate loans were originated in the CMBS market. However, in 2019, CMBS loans only accounted for 21% of distressed commercial real estate loans while banks issued 53% of the distressed loans. Investors looking to identify distressed properties can more easily find distressed CMBS loans than bank loans because banks tend to be less transparent about distressed loans. Once a CMBS borrower defaults and the special servicer gets involved, it is easier for potential investors to find troubled loans. For troubled bank loans, when banks have sufficient capital on hand and regulators ease up on capital reserve requirements, banks do not have the same incentive to sell distressed debt. Instead, banks tend to wait it out before looking to unload the distressed debt. The analyst suggests that investors looking to buy distressed debt from banks need to do their homework, first to determine which bank having been making risky loans and then building up relationships with those banks.