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How the Coronavirus and COVID-19 Will Affect Your Real Estate Investment in Florida

by:

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Our law firm specializes in handling real estate and business transactions including real estate closings, mortgage loan closings and mortgage refinances in addition to litigation involving real estate. We have been responding to clients' concerns in regards to a number of topics involving the coronavirus, specifically COVID-19, an issue which everyone is facing.

We have received the following questions from clients:

1. I have a pending Contract to buy a house in Florida and I have already put down a deposit. How do I cancel the Contract and try to salvage some of my deposit?
2. I am a Seller of real estate and the Buyer wants to close but I don't want to move from my home at this time. How can I solve this problem without breaching the Contract?
3. I am a Property Manager/Property Owner and I have both residential tenants (or commercial tenants). My tenant(s) indicate that it is going to be difficult to maintain rental payments even though they have been a good tenant in the past. What are my rights as a Landlord and what is the approach that I should take to address these issues?
4. I am a commercial property tenant and my business has been forced to close. I can no longer maintain rent payments. How do I address this with my landlord? What rights and remedies do I have as it relates to a forced closing of my business?
5. I have sold my home and I am under a Contract to purchase another home. However, I am unable to consummate my mortgage based upon the fact that I am applying for a non-qualified mortgage as a self-employed individual and that market sector has shut down. How do I salvage my Contract and find a secure place to live without having to either cancel the Contract or lose my deposit?
6. I have a Purchase Contract for the construction of a home from a developer and have put down a substantial deposit on the Purchase Contract. Should I try to cancel the Purchase

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Contract? What other rights do I have to recapture deposit based upon the COVID-19 issue? Is this considered force majeure, or “act of God” under contract law?

7. I am having a home built on property that I own and it is not yet completed. How can I protect myself if there is a continuing economic downturn?

We are here to address these questions and will do so further in this article. We want to advise that both authors have *Juris* Doctorate Degrees, not Medical Degrees. Therefore, this letter should not be relied upon as far as opinions to the coronavirus or COVID-19. This letter should be viewed from the perspective of both authors who are Florida Board-Certified Real Estate Attorneys (making them experts in the field of real estate in Florida) and the impact of COVID-19 on real estate and business matters.

Attorney Kara Jursinski Murphy also holds an LL.M. (Master of Laws) in Real Estate Development. She is the only attorney in Southwest Florida who has earned an LL.M. and a Board Certification in Real Estate.

Attorney Kevin F. Jursinski is a Board-Certified Specialist and expert in Real Estate Law, Construction Law and Business Litigation. He is one of only nine (9) Attorneys in Florida (out of 110,000) who is triple Board-Certified.

In addition, both authors have handled more than four thousand (4,000) real estate closings and more than four thousand (4,000) litigation cases involving real estate, real estate contracts and construction contracts.

Our law firm, Kevin F. Jursinski, P.A. and our title company, Title Masters, LLC will remain open for business and will continue to remain open during this pandemic.

You can also find additional information on our website, www.kfjlaw.com, in regards to the COVID-19 protocol response of our law firm and title company. Our office falls into the category of an essential business under the U.S. Treasury mandate as of March 22, 2020, we are following the directives as specified therein.

The financial services sector is identified as “*a critical infrastructure sector by the Department of Homeland Security.*” The directive further identifies that state and local officials are to work to protect our communities while ensuring continuity of critical functions to public health and safety as well as economic and national security.

The U.S. Federal Guidelines also advise that if a business works, “*in a critical infrastructure sector as defined by the U.S. Homeland Security, you have a special responsibility to maintain your normal work schedule.*”

The essential critical infrastructure workforce for the financial sector includes business that are needed to process and maintain financial transaction and services, clearing and settlement services, and other matters that fall within certain aspects of our practice including the above-referenced loan transactions, mortgage transactions, closings, etc. all within such guidelines.

We intend to meet our responsibilities and continue to assist our clients in their business and real estate transactions while providing the very best protection we can for them which includes having mobile closings along with mobile notaries and transaction closers equip with sanitized pens, masks, and or gloves along with other safety measures to protect the spread of the coronavirus or COVID-19 and virtual meetings. Our office also is very large which allows for safe social distancing for any in-person needs. We can also provide attendees with protective masks, sanitizers, and other means to provide for a safe environment.

With that said, and with our staff's dedication to follow the directive specified by the U.S. Federal Government and the U.S. Treasury, the authors would like to address some of the issues facing clients at this time.

Prospective Medical Crisis Not Economic Crisis

You may recall, Southwest Florida was the “epicenter” of the mortgage foreclosure crisis during the span of 2008 to 2014. However, it is the authors’ opinion that this current crisis will not have the same negative effect in real estate given the fact that this coronavirus crisis is a medical problem and not a financial problem.

The national and local economy were extremely sound before the COVID-19 outbreak. Both have been impacted by the governmental shut down. This was not as a result of the failure of the fundamentals of our local real estate economy since Southwest Florida is (and was) experiencing the greatest construction booms in recent history.

Further, the Federal Reserve has taken steps to reduce the interest rates leading to significantly low interest rates to fuel an outstanding opportunity to acquire real estate with very low interest on the money borrowed. There are certain segments of the economy (see Non-Qualified Mortgages which will have to be put on pause for the time being) but overall, not only mortgages but loans will be readily available to many small businesses. This demonstrates a positive outlook that relief is on the way and with the right advice and guidance, which our office can provide, we can assist in navigating these troubled times with you.

Review of Florida Real Estate Economy

Our office is very bullish on real estate economy in Florida. In fact, we had our best years during the economic downturn when we created, trademarked and developed a program which proactively resolved mortgage foreclosures.

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This program, titled “Deed and Reduction” designed by Attorney Kevin F. Jursinski, established an efficient and positive way to address mortgage foreclosures which created a win/win/win situation benefitting the borrower or lender and the real estate society. This Deed and Reduction program was featured in the Florida Bar Journal article “The Mortgage Crisis: a 21st Century Solution” written by Attorney Kevin F. Jursinski. You can find the article here:

<https://www.kfjlaw.com/wp-content/uploads/sites/2868/2019/12/The-Mortgage-Foreclosure-Crisis-in-Florida.pdf>

The authors also have sound ideas and concepts to address the current issues relating to COVID-19 but more importantly, point out the fact that Florida may be the beneficiary of a substantial and significant uptick in real estate sales-based center factor. Initial studies have shown that the heat and humidity in Florida can have a negative affect on the coronavirus. While these reports are preliminary, there is some positive hope. If there are some positive effects to this because of the Florida heat and humidity, this may play a role in regards northerners selling their homes and moving to Florida.

Here are some links to some of the studies that have been conducted by MIT (Massachusetts Institute of Technology) and others for your consideration:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556998

<https://www.washingtonpost.com/weather/2020/03/24/warm-humid-weather-coronavirus/>

For example, if you have a New York City townhome and wanted to sell your townhome and move to Florida, you may find some additional motivation to sell that New York City townhome after hearing some positive news about Florida’s heat and humidity and its impact on slowing the spread of the coronavirus. If studies prove that heat and humidity have an even larger impact on slowing the spread or even resisting the coronavirus, imagine the impact this would have on our real estate industry.

That could lead many to strongly consider owning real estate in Florida. This could also be an outstanding investment for savvy investors to get excited about similar to buying positions in various companies which are valued extremely low (airline industry stock, hotel industry, travel and leisure, etc.).

Our firm represents some very intelligent business people who are very bullish on buying value stocks at this time. That’s an area outside of our expertise, but we feel that certain sectors of our real estate economy in Florida are clearly going to be value investments in the future.

Client Concerns and Questions

With that in mind, let’s address the various topics that our clients are concerned about.

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1. *I have a pending Contract to buy a house in Florida and I have already put down a deposit. How do I cancel the Contract and try to salvage some of my deposit?*

If you have a Contract that is pending and your deposit is now at risk (which means that all of your contingencies for inspections, appraisals, financing contingencies, etc. have been met), and the only issue left is to close and consummate the transaction, it is the authors' opinion that you cannot assert that the coronavirus pandemic is an excuse for you not to close the transaction on a typical real estate contract.

The reality is, barring an inability to obtain financing (see further discussion below regarding current status of non-qualified mortgages), the Buyer does not have a force majeure ("act of God") defense to allow them to cancel the contract and not close the transaction.

2. *I am a Seller of real estate and the Buyer wants to close but I don't want to move from my home at this time. How can I solve this problem without breaching the Contract?*

The authors detail this in an article addressing Pre-Closing and Post-Closing Occupancy Agreements whereby the Seller of the home closes the transaction and consummates the deal and then leases the property for a period of time enabling a) the Seller to remain in the home and b) the Buyer to receive a reasonable rental value for the property.

There are a number of factors that go into this and careful consideration must be made when it comes to Pre-Closing and Post-Closing Occupancy Agreements. The detailed article can be found at the following link on our website: <https://www.kfjlaw.com/news/published-articles/>.

3. *I am a Property Manager/Property Owner and I have both residential tenants (or commercial tenants). My tenant(s) indicate that it is going to be difficult to maintain rental payments even though they have been a good tenant in the past. What are my rights as a Landlord and what is the approach that I should take to address these issues?*

We recommend that commercial landlords be pragmatic and problem-solving. If a tenant fails to pay rent, the initial reaction is that this is a default and that default carries with it the right for the landlord to pursue a claim for eviction or damages.

However, this may be self-defeating if the basis for the default and payment of rent is a result of the impact of the coronavirus pandemic. For example, the business may have suffered a downturn in revenues based upon a lack of customers due to COVID-19 or, as in the case of a residential tenancy, the tenant may have been laid off, hours cut back, or is permanently terminated of the job only as a result of the fact of the impact of COVID-19.

In either case, a pragmatic and proactive solution may be to agree upon a reduction of rent or abatement in rent, depending upon the circumstances, which would enable the tenant to maintain occupancy and then recommence payments once government relief was available to

small business and/or individuals and, thereafter, amortized against prospective rentals. Another alternative: reduce the rent with the value of the reduction amortized into future lease payments to start in six (6) months.

Hopefully, this would enable the tenant to get back on their feet and make payments rather than the commercial or residential landlord losing a tenant, having zero income, and be forced to initiate legal proceedings in a situation in which collectability may be questionable.

This idea of a more pragmatic and positive approach can also be utilized by the commercial or residential tenant in that they could propose some ideas to the landlord.

In either situation, the authors strongly recommend that the transaction or agreement be documented in writing so that the legal rights of the parties are specified in the event of any future enforcement rights, rights will be clearly delineated.

4. *I am a commercial property tenant and my business has been forced to close. I can no longer maintain rent payments. How do I address this with my landlord? What rights and remedies do I have as it relates to a forced closing of my business?*

We previously indicated that force majeure (“acts of God”) would most likely not be able to be utilized for certain purchasers of real estate. However, the same may not be true as it relates to force majeure/acts of God when it comes to leases in which the government shut down has effectively closed the business. It is important to review the lease terms.

For example, and dependent upon the commercial lease, if the tenant is, let’s say a restaurant, is forced to close its doors by governmental shut down (please note that at the time of the writing of this article and force majeure, we are still waiting on certain governmental responses as it relates to a complete lockdown on most non-essential businesses), then clearly the ability of the tenant to perform and occupy the premises has been limited by a specific governmental regulation outside the control of the tenant.

Currently, they are invoking this defense at this time and could be available for certain businesses and addressing other issues similar to those above for various clients.

As always, our firm prides itself on its ability to pivot and react to events occurring in our local economy and providing legal services necessary to create positive and proactive approaches for our clients to solve current problems.

5. *I have sold my home and I am under a Contract to purchase another home. However, I am unable to consummate my mortgage based upon the fact that I am applying for a non-qualified mortgage as a self-employed individual and that market sector has shut down. How do I salvage my Contract and find a secure place to live without having to either cancel the Contract or lose my deposit?*

In this regard, you may want to consider a Pre-Closing Occupancy Agreement in which you have an agreement with the Seller for you to become a tenant prior to closing. You sign a Lease Agreement, the parties identify a fair and reasonable rent, a term for the lease, and the parties agree to cooperate in good faith to try and close and consummate the transaction.

This is also addressed in the Pre-Closing and Post-Closing Occupancy Agreement, as mentioned above, at the following link on our website:

<https://www.kfjlaw.com/news/published-articles/>.

It is estimated that Pre-Closing be approximately six (6) months under these circumstances to allow all of the contingencies to be met and addressed and then a closing takes place.

Another situation can arise. If a borrower is unable to refinance a loan, which has ballooned due to the fact that a market segment that the borrower is relying upon has been closed down to the coronavirus, then the Court should fashion some type of remedy to address the situation from a nettable standpoint. By way of example, if a residential borrower, who is self-employed, has applied for and has preliminary approval for a mortgage loan but while the loan was in process, a non-qualified mortgage industry made an abrupt decision to terminate all future and pending loans, how is it fair to allow the lender to close when the borrower cannot pay off the lender?

Using the example above and assuming the borrower has made all payments under the mortgage loan and had sought proactively to obtain a refinance to pay off the existing lender and their loan was in process but since the non-qualified lender of the mortgage industry terminated all operations based upon the impact of the bond market, the availability for the non-qualified mortgage evaporated thereby precluding borrower, through no fault of the borrower, from being able to refinance.

Keep in mind, a mortgage foreclosure action is based upon a Court sitting in equity. The Court can recognize and take judicial notice of the issues affecting our economy because of COVID-19 and could fashion a remedy to prevent the lender from being hurt but nonetheless preclude the borrower from losing property and forcing foreclosure, especially in a situation where the borrower has equity. In that situation, the Court can require the borrower to make monthly payments (if possible) to the lender so the lender would, at least, be recapturing interest payments on its loan while at the same time, affording the borrower some opportunity to reapply when the markets reopen.

Otherwise, a wholly inequitable situation would occur whereby a borrower could lose its ability to refinance, be foreclosed upon, lose its home, and be thrust into the market and start the cycle again of problem foreclosures in our system, none of which is good nor helpful to our overall economy and our economy's health let alone devastating to the homeowner.

Also, it should be noted that, in certain situations, some private lenders want to foreclose to capture the equity in the home and use the crisis as a way to enhance their leverage. These lenders are sometimes referred to as “hard money lenders.” In that situation, the Courts should be truly cognizant of not allowing for the abuse by these private lenders to take advantage of situations in which the borrower, through no fault of its own, cannot obtain the financing to meet its needs based upon the underwriting criteria.

6. *I have a Purchase Contract for the construction of a home from a developer and have put down a substantial deposit on the Purchase Contract. Should I try to cancel the Purchase Contract? What other rights do I have to recapture deposit based upon the COVID-19 issue? Is this considered a force majeure, or “act of God” under contract law?*

One consideration on your Purchase Contract is whether your builder will be able to complete the project. Depending on the specifics in the contract, you may also have to factor in what the developer might be willing to do.

I am assuming that many national developers are pragmatic and might consider either a) an extension of the Purchase Contract until the market stabilizes to allow you to avoid having to close and commit and still giving you the option of capturing your deposit or b) potentially negotiating a settlement in which you walk away from the Purchase Contract but recapture part of your deposit, or the last option, c) simply demanding performance or claiming your deposit.

We advise our clients that those conversations should take place sooner rather than later, especially if the builder is moving forward on the construction of a home with specific home options identified in particular by the purchaser.

7. *I am having a home built on property that I own and it is not yet completed. How can I protect myself if there is a continuing economic downturn?*

In a situation in which a home is being built on your property, you will need to review the Contract since there can be a great disparity in the type of home construction contracts and the remedies available to the builder in the event of a default.

The property owner must also consider the stage of development and a) what impact and effect this is going to have on the work already completed, b) what impact and effect this will have in relation to the permit issued, and c) what impact and effect would take place in reference to the actual construction contract with the builder and the damages sought by the builder.

In these particular situations, unlike the contract with the buyer of a national developer’s single-family home, the builder generally stays slightly ahead of the homeowner as far as draw payments. As such, there are more detailed considerations to be studied in this

situation versus this situation involving a single-family home being purchased from a national builder.

By the client retaining our firm, we can assess an individual homeowner's situation, review the language within the contract, and provide a comprehensive review for the homeowner, along with a strategy and options to address the issue.

Reaffirmation of Positive Thoughts on the Florida Real Estate Economy

Florida, prior to the coronavirus, was one of the fastest growing states in the nation. We have, on average, 900 new residents each day, resulting in an average of around 330,000 new residents each year with a projection that Florida will be at 22,000,000 by 2021¹. This is fueled in part by our tremendous climate, relatively priced real estate, as well as no state income tax.

As set forth above and factoring in the added attribute of Florida heat and humidity as it pertains to defeating or slowing the progression of COVID-19, it is the authors' opinion that these factors will have a direct impact on a non-Florida resident moving to Florida. Increased migration to Florida will result in an increase of our economy and an increase in property values based upon the increased demand.

It is our hope that the comments above were helpful during these troubling times. Again, our office will remain open during this crisis. We are here to serve you. Please feel free to call or email us and we can provide further information:

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We recognize the challenges that you face and it is our hope and prayer that we all get through this positively. Stay healthy!

Disclaimer as to legal advice: *Please consider the above article as a general discussion of issues surrounding real estate. Each particular client is unique. The information contained in this article is intended as general guide legal issues involving real estate. This article should not be relied upon as legal advice provided to the reader but only as general and not specific information. Before making any decisions, it is suggested that the reader retain appropriate legal counsel to provide specific advice on their particular issue and not intended to provide specific legal advice to any particular reader of this article on his/her specific situation.*

¹ Florida Demographic Estimating Conference. Note: Florida had the largest population growth in 2018 adding 322,000 residents.