Landlords ask Supreme Court of Virginia to make eviction proceedings easier

By Ned Oliver - October 12, 2020

A group that represents landlords around the state is asking the Supreme Court of Virginia to make it easier for them to move eviction lawsuits through the court system.

In a letter late last week to Chief Justice Don Lemons, the Virginia Apartment Management Association requested the court issue an order prohibiting local judges from requiring property owners to swear they're abiding by federal protections before signing off on evictions, arguing the practice unfairly biases the trial process against them.

“'I understand it is difficult for judges to hear unlawful detainer cases during this pandemic, but it is not the place of our judiciary to become an advocate for one party over the other,” said the association's chief executive, Patrick McCloud. “Both parties deserve equal access to our court system so that cases before the judiciary can be adjudicated free of predetermined bias.”

Tenant advocates expressed disbelief upon learning of the letter. They warned that if the Supreme Court grants the request, it will lead to more evictions and erode existing protections, which they say are already limited, confusing and difficult for tenants to utilize.
“I’m very disappointed that during this pandemic, an association whose mission is to provide housing to people would go out of its way to ask the Supreme Court to make it easier for landlords to evict tenants,” said Christie Marra, the director of housing advocacy at the Virginia Poverty Law Center.

At issue is a practice in some courts in which judges ask landlords and the attorneys representing them to provide an affidavit stating that the property in question is not covered by protections under the CARES Act. Some courts have also begun asking landlords to swear that the tenant has not taken steps to exercise their rights under a limited federal moratorium put in place by the Centers for Disease Control.

The effect is to extend those federal protections to tenants even in cases where they don't appear in court, an extremely common occurrence that typically leads to a default judgement in favor of the landlord. Advocates who support the affidavit requirement said it’s especially important given how poorly understood the CARES Act and CDC order are among tenants, who may not realize they have a defense in their case or don't understand the intricacies of the federal laws and regulations in place.

It's unclear how many courts are requiring property managers to sign affidavits before granting eviction judgements, but the practice is widespread enough that landlords argue it's become an impediment to evictions and tenant advocates argue it’s indeed helping keep people in their homes. The apartment management association specifically cited courts in three jurisdictions they say are requiring the affidavits, Chesapeake, Waynesboro and Chesterfield. Legal aid groups say it's also common in the Richmond area and Northern Virginia.

To take advantage of the CDC’s eviction moratorium, tenants must provide their landlord a signed declaration swearing under penalty of perjury that they would become homeless if evicted, have experienced a substantial loss of income as a result of the pandemic and have “used best efforts to obtain all available government assistance for rent or housing.”

Lawyers who represent housing providers said tenants who are asserting a defense based on the CDC’s moratorium should be required to appear in court to mount it themselves. They say putting the onus on the landlord to affirm that they have or have not received a declaration from a tenant deprives them of the opportunity to challenge the tenant’s assertions in the declaration. In particular, they question whether all tenants submitting a declaration have truly sought rental assistance through a state program established by Gov. Ralph Northam which now pays 100 percent of back rent for low- and medium-income people who have fallen behind.

“It puts the burden on the owner to prove the negative,” said Elizabeth Godwin-Jones, who represents landlords in courts throughout the Richmond area. “Tenants
should be coming forward with their declaration. Where's the tenant's obligation to prove that they have?"

Their request to the Supreme Court was prompted by a recent CDC filing in a federal lawsuit challenging the moratorium. In the document, the agency offers a far narrower interpretation of its initial order, writing it does not prohibit landlords from initiating eviction lawsuits and "attempting to demonstrate that a tenant has wrongfully claimed its protections."

With no ruling on that lawsuit, Godwin-Jones acknowledges that the effect of the CDC's filing is limited. But she said the interpretation should at least open the door for landlords to request documentation and proof in court that a tenant meets the program's requirements — an opportunity she says landlords are being denied even in some cases where the tenant appears in court.

Lawyers who represent tenants called the stance troubling and dispute that the CDC's court filings change how the agency's moratorium should be interpreted. Marra, with the Virginia Poverty Law Center, said Virginia is far from the only state where judges are requiring affidavits from landlords. "This is not unique," she said. "Some of the highest courts, in states such as Texas, issued a statewide order to that effect. So nobody is going out on a limb here. Judges are just practicing good law."

Palmer Heenan, at attorney with the Central Virginia Legal Aid Society, argued there's nothing unusual about judges making sure a plaintiff is in compliance with the law before issuing a ruling in a case. "Judges are there not there just to sign papers, but to ensure that the law is being followed," he said. "And this is merely requiring that a landlord certify that they are following the law. ... I don't have any qualms about saying that evictions will increase if this were granted."

Throughout the pandemic, Gov. Ralph Northam has made several requests to the Supreme Court of Virginia to initiate and extend a judicial moratorium on evictions. The court rejected his last request for an extension in early September, writing that local judges have been alerted to the CDC's moratorium, which expires at the end of the year.

General Assembly lawmakers are still debating the terms of a state-level moratorium, but the House's proposal also relies on the CDC's moratorium to halt eviction, with state-level protections beginning only when the CDC order ends.

Ned Oliver
Ned, a Lexington native, has more than a decade's worth of experience in journalism, beginning at The News-Gazette in Lexington, and including stints at the Berkshire Eagle, in Berkshire County, Mass., and the Times-Dispatch and Style Weekly in Richmond. He is a graduate of Bard College at Simon's Rock, in Great Barrington, Mass. Contact him at noliver@virginiamercury.com