Order

Michigan Supreme Court
Lansing, Michigan

March 22, 2021

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(9) [Unchanged.]

(10) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:

a. An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;

b. The defendant is eligible to receive rental assistance for all rent owed; and

c. The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.

If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings.

(10)-(13) [Renumbered (11)-(14) but otherwise unchanged.]

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

ZAHRA, J. (*dissenting*). In response to the backlog of landlord-tenant cases likely to be caused by the federal Coronavirus Aid, Relief, and Economic Security Act, 15 USC 116 *et seq*.—which imposed a moratorium on evictions from March 27, 2020, when the act was enacted, through July 25, 2020 for certain rental properties whose dwellings are supported by federal programs—and several executive orders imposing a moratorium on evictions for all renters issued by Governor Whitmer (e.g., Executive Order No. 2020-118), this Court on June 9, 2020, issued this administrative order setting forth procedures for courts to follow in actions filed under the summary proceedings act, MCL 600.5701 *et seq*. Further, noting that the Legislature approved 2020 SB 690 (now 2020 PA 123), which earmarked $50 million for direct payments to landlords for rent arrearages and $10 million to support legal services and administration to reduce the number of evictions, this administrative order required a one-week adjournment to allow litigants the opportunity to access any resources that might help defray the rent due or to enter into agreements to resolve the dispute privately. This one-week adjournment was consistent with the one-week adjournment already provided for at the court's discretion under MCR 4.201(F)(4)(c), and arguably did not represent a new, unreasonable delay, even though it is a procedure that is not commonly exercised by the courts.

This administrative order has since been amended four times and extended three times. In amending this order today for a fifth time, this Court *requires* all actions for nonpayment of rent to be stayed for at least 30 days after a pretrial hearing is conducted if the tenant applies for COVID Emergency Rental Assistance (CERA) relief. The stay may be extended an additional 15 days if the tenant becomes eligible for such relief and is awaiting payment, and it may be extended further if any "delays attributable to the [landlord]" occur. I conclude it is an abuse of this Court's authority to exercise general superintending control over all state courts under Const 1963, art 6, § 4 to modify the statutory framework in which a landlord may obtain a judgment against a defaulting tenant. Preliminarily, it should not be lost on anyone that if landlords and tenants wish to delay summary proceedings in actions for nonpayment of rent pending CERA eligibility determinations and payment, they may do so on their own accord; there is no need for a Court mandate to accomplish this. Why must—and on what authority may—this Court strip litigants of their ability to resolve their disputes privately and force these delays in the process where none exist by statute? Indeed, there is no guarantee that every tenant who applies for CERA relief will obtain it. Yet by requiring the stay of all proceedings for at least 30 days, this Court shelters tenants, many of whom ultimately will not qualify for these funds, at the expense of *all* landlords, whose own financial struggles appear to be lost on this Court. Moreover, why does this Court only extend the stay for delays caused by the landlord? Is it not conceivable a tenant may cause delays in the process to extend the life of the stay? Do delays caused by the tenant not warrant an immediate lift of the stay and a continuation of the proceedings?

This raw exercise of judicial power violates a fundamental tenet of our democracy: the separation of powers.[1] The Legislature, not the judiciary, possesses the exclusive power to make laws. "Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law."[2] "In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power."[3] Because I would not abuse this Court's general superintending authority over all state courts to judicially modify the framework governing

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[1] Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

[2] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161 (2004).

[3] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98 (2008) (quotation marks, citation, and brackets omitted).

actions for nonpayment of rent, a framework enacted by this state's sole legislative body, I dissent from this Court's order.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to further administratively suspend the operation of certain laws governing summary landlord-tenant proceedings.[4] Today's amendments impose an automatic stay on all cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent if the tenant has applied for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The changes, although perhaps well-intentioned, upend the statutory scheme the Legislature created for landlord-tenant proceedings and deprive district court judges of discretion that they have been granted by the Legislature and this Court. I believe that changes to our state's laws should be made by the Legislature, not this Court, and that amendments to the court rules and administrative orders governing the procedural aspects of landlord-tenant proceedings should be made through our regular and public amendment process rather than by emergency orders.

As noted above, this amendment to Administrative Order No. 2020-17 provides for a stay in all cases in which a tenant has applied for the CERA program and notified the court of the application. The stay is supposedly subject to a number of conditions; it is "contingent upon": (1) an eligibility determination being made by the appropriate agency within 30 days of the pretrial hearing, (2) the tenant being eligible for rental assistance for all rent owed, and (3) the landlord receiving full payment within 45 days of the pretrial hearing. However, there is no mechanism for the district court to determine the tenant's eligibility; rather, the eligibility determination is made by the Housing Assessment and Resource Agency. Thus, although the maximum duration of the stay absent delays attributable to the landlord will be 45 days, it appears as a practical matter that today's amendment will result in an automatic 30-day stay since the stay must be entered even before these determinations by an outside agency are made, and the district court will have no power over how long they take to be made.

The Legislature established a scheme for summary proceedings to recover possession of premises. MCL 600.5701 *et seq*. When a tenant fails to pay rent, a landlord

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[4] To the extent that this administrative order continues to rely on the eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC), I continue to object for the reasons I have stated previously. Administrative Order No. 2020-17, 506 Mich ___ (October 22, 2020) (VIVIANO, J., dissenting) (questioning the constitutionality of the CDC's order and criticizing the Court's reliance on it as a basis to suspend the operation of certain laws governing summary landlord-tenant proceedings), citing CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020); Amendment of Administrative Order 2020-17, ___ Mich ___ (January 30, 2021) (VIVIANO, J., dissenting) (same), citing CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 8,020 (February 3, 2021).

may recover possession of the premises by summary proceedings if the tenant fails to move out or pay the rent due under the lease within seven days of being served with a written demand for possession for nonpayment of rent. MCL 600.5714(1)(a). This seven-day time frame between when notice is given and when summary proceedings can commence is shorter than other notice timeframes that govern landlord-tenant relationships, such as the 30-day notice to quit required when a landlord wishes to evict a holdover tenant. MCL 554.134(1). There are also shorter time frames, such as the 24-hour notice required for tenants involved in illegal drug activity. MCL 554.134(4). Thus, the Legislature established different notice periods in landlord-tenant proceedings depending on why the landlord is seeking to recover possession. The automatic-stay requirement imposed by this Court does not respect these legislative choices. Landlords who wish to exercise their statutory right to recover possession of their premises are now forced to wait until the stay is lifted if a tenant applies for the CERA program.[5]

Today's amendments to the administrative order further strip district court judges of their discretion to adjourn landlord-tenant proceedings, enter a default, or proceed immediately to trial. MCL 600.5732 states, in relevant part, "Pursuant to applicable court rules, a court having jurisdiction over summary proceedings *may* . . . order adjournments and continuances . . . ." (Emphasis added.) Under MCR 4.201, the district court "*may* adjourn" proceedings for up to seven days if a party fails to appear or up to 56 days if the tenant appears. MCR 4.201(F)(4)(c), (J)(1) (emphasis added). Use of the word "may" indicates that the district court has discretion to adjourn the proceedings. See *People v Grant*, 445 Mich 535, 542 (1994); *Mull v Equitable Life Assurance Society of the US*, 444 Mich 508, 519 (1994). The court also has discretion to enter a default if the tenant does not appear, MCR 4.201(F)(4)(a), or proceed to trial if the tenant appears, MCR 4.201(J)(1). The Court previously divested district court judges of their discretion to enter a default or proceed to trial at the initial court date, requiring that all landlord-tenant proceedings be adjourned for seven days, with a limited number of exceptions. Administrative Order No. 2020-17(8). Today's amendments go even further. Not only must district court judges

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[5] The Court's continued interference with the statutes and rules governing summary proceedings appears to be based on the assumption that landlords and tenants alike will enthusiastically embrace the CERA program because both parties will immediately benefit from the large influx of federal aid. However, as with most government programs, not every potential recipient is interested in accepting federal dollars with all the inevitable strings attached. See Parker, *Why Some Landlords Don't Want Any of the $50 Billion in Rent Assistance*, Wall Street Journal (March 19, 2021) <https://www.wsj.com/articles/why-some-landlords-dont-want-any-of-the-50-billion-in-rent-assistance-11616155203> [https://perma.cc/YA3X-DZZ9] (noting that Congress has appropriated $50 billion for rental assistance, "[b]ut thousands of building owners across the country are rejecting the government offer . . . [because] the aid often has too many strings attached").

adjourn all cases for seven days; they must also stay proceedings in all nonpayment of rent cases in which the tenant has applied for CERA.[6] I agree with Justice ZAHRA that this raises yet another significant question about today's order: where does this Court derive its authority to dictate in advance how a trial court must exercise its discretion in a particular case?[7]

We are now over a year into the COVID-19 pandemic, and the Court has made numerous changes to landlord-tenant proceedings without providing stakeholders any opportunity for public comment. We have the power to "establish, modify, amend and simplify the practice and procedure in all courts of this state" through our court rules. Const 1963, art 6, § 5. But we are not permitted to "establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 27 (1999). Additionally, to amend the Michigan Court Rules or other sets of rules, we have established procedures that generally require notice and administrative public hearings unless the Court "determines that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice." MCR 1.201(D). Rather than continue to adopt emergency orders, changes to our landlord-tenant laws should be made by the Legislature and changes to the related court procedures should be made utilizing our normal, transparent amendment processes.

To the extent the Court today is attempting to facilitate voluntary participation by landlords and tenants in the CERA program, our current statutes and court rules already allow them to do so. In cases in which an adjournment is necessary to provide additional time to pursue rental assistance, the parties can request an adjournment and the district court has discretion to grant such requests in appropriate cases. I do not believe that we should circumvent our laws and court rule amendment processes in order to coerce landlords to participate in the program. In my opinion, district court judges are in the best position to decide, on a case-by-case basis, when adjournments in landlord-tenant proceedings are necessary or appropriate.

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[6] Under MCR 4.201(H)(2) and (J)(1), the trial court may order the defendant to pay rent into escrow if the trial is adjourned more than seven days. Although not mentioned in the administrative order, the conditional-stay provision would presumably prevent such an escrow order from being enforced—effectively divesting district court judges of another act of discretion provided for in the court rules.

[7] The Court's order claims the power to require adjournments and stays as part of our "general superintending control over all courts" established in Const 1963, art 6, § 4. But if the Court has the power to broadly stay an entire class of cases for at least 30 days, what is the extent of this power? Does the Court have the power to indefinitely stay all landlord-tenant cases?

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In my view, we should return our trial courts to regular order and stop micromanaging them to coerce participation in governmental programs and directives that are of questionable constitutional validity.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 22, 2021

Clerk