Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

October 22, 2020

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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On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

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)-(10) [Unchanged.]

(11) A court shall discontinue ~~compliance with this order~~prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and ~~June 30~~July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, issued by the Centers for Disease Control and Prevention and published at 85 FR 55292, is in effect.

(12) In complying with the provisions of the CDC order referenced above and during the pendency of the order, trial courts must:

a. Require a plaintiff filing a LT case to also file a verification form indicating whether a declaration has been submitted by defendant or whether the case may proceed because it is not subject to the CDC order's moratorium. The verification shall be made on a SCAO-approved form, and a plaintiff shall have a continuing obligation to inform the court if a declaration has been submitted by defendant; in addition, a court may accept a declaration prepared pursuant to the CDC order from plaintiff or defendant.

b. Accept filings related to LT cases and proceed as follows:

(i) For cases that are not subject to the moratorium under the CDC order, the court shall proceed as provided in this order and MCR 4.201.

(ii) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or by December 31, 2020, whichever date is later. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence January 1, 2021 for those cases.

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). Today, the Court suspends the statutory rules entitling property owners to recover their premises from tenants through summary proceedings in court. See MCL 600.5701 *et seq*. Normally, the plaintiff-owner is entitled to a writ enabling him or her to obtain possession as soon as 10 days after judgment enters in the plaintiff's favor. MCL 600.5744(5). In this administrative order, however, Subsection (12)(B)(ii) allows the district court to process the case through entry of judgment but prohibits the plaintiff from obtaining possession until at least December 31, 2020.

The only basis for the extraordinary act of administratively suspending a statute is a recent order from the Centers for Disease Control and Prevention (CDC) purporting to prohibit landlords from evicting certain tenants covered by the order. CDC, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed Reg 55,292 (September 4, 2020). But that order has been challenged on a host of grounds and, I believe, rests on a shaky legal foundation. The CDC relied on a single statute and an accompanying regulation. The statute provides:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary. [42 USC 264(a).]

The related regulation states:

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest

> extermination, and destruction of animals or articles believed to be sources of infection. [42 CFR 70.2 (2019).[1]]

The CDC order relies on dubious legal authority. The statute and regulation give a broad power to do whatever the CDC Director "deems reasonably necessary" to prevent a disease's spread. But it seems a stretch to say that they authorize the CDC to tinker with state landlord-tenant laws, a topic that neither the statute nor regulation mention. The examples of permissible orders provided in the law and regulation reflect "terms or tools traditionally associated with public-health emergencies." *In re Certified Questions from the United States Dist Court*, ___ Mich ___, ___ (2020) (Docket No. 161492) (VIVIANO, J., concurring in part and dissenting in part); slip op at 21. The regulation was, in fact, promulgated as part of a broader transfer of "regulatory authority with respect to interstate quarantine over persons" from the Food and Drug Administration to the CDC. Food and Drug Administration, *Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations*, 65 Fed Reg 49,906, 49,907 (August 16, 2000). I am unaware of any historical uses of eviction moratoriums in response to public-health crises. Cf. Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* (New Haven: Yale Univ Press, 2020) (describing legal frameworks for addressing past epidemics but not mentioning suspension of evictions until the COVID-19 pandemic). It appears, then, arguable that the CDC order is outside the authority granted under the statute or even the regulation.

Assuming that the statute and regulation encompass the power to put a halt to evictions nationwide, these laws run headlong into serious constitutional questions. The most obvious is the separation-of-powers problem that arises with such sweeping grants of power to executive agencies. We recently addressed that very issue and noted the present approach in federal courts that delegations to agencies are permissible if they contain intelligible principles to guide the exercise of the delegated authority. See *In re Certified Questions*, ___ Mich at___; slip op at 24 (opinion of the Court).

The CDC order here represents a vast delegation of power that might raise significant constitutional doubts. Under it, the executive could "restrict almost any type of activity. Pretty much any economic transaction or movement of people and goods could potentially spread disease in some way." Somin, The Volokh Conspiracy, *Trump's Eviction Moratorium Could Set a Dangerous Precedent [Updated]* <https://reason.com/2020/09/02/trumps-eviction-moratorium-could-set-a-dangerous-precedent/> (posted September 2, 2020) (accessed October 21, 2020) [https://perma.cc/N2RQ-3EF4]. And it does not take a pandemic with a novel disease to invoke this authority: the regulation defines "communicable diseases" to include any

[1] Although the statute mentions the Surgeon General, a subsequent administrative reorganization vested the powers in a different department, and they now fall under the CDC's purview. See generally *Reorganization Plan No. 3 of 1966*, 31 Fed Reg 8,855 (June 25, 1966).

illnesses due to "infectious agents" that can be transmitted directly or indirectly. 42 CFR 70.1 (2019). The seasonal flu and common cold fit this definition. All the Director needs to show is that he or she "deem[ed]" the order "reasonably necessary." 42 CFR 70.2 (2019). Under that line, it is questionable whether the order even needs to be reasonably necessary as long as the Director asserted it was so. See Somin, *supra*.

All of this makes me question whether the CDC order is valid under the regulation, the statute, or the federal Constitution. And I am not alone in raising these questions. To date, at least two challenges to the CDC's order have been brought in federal court and are currently pending. See *Brown v Azar* (Case No. 1:20-cv-03702) (ND Ga); *Tiger Lily LLC v US Dep't of Housing & Urban Dev* (Case No. 2:20-cv-02692) (WD Tenn).

Even if the order is valid, to rely on it as the sole basis for our administrative order today, we must further assume that it preempts our state law governing landlord-tenant evictions, MCL 600.5701 *et seq*. and MCR 4.201. This question is open to debate and, it seems to me, better resolved in an actual case than an administrative order. The statute itself disclaims any intent to preempt state laws that do not conflict with the exercise of authority under the statute. 42 USC 264(e). As noted above, nothing in 42 USC 264(a) or the regulation appears to grant power to make or enforce an eviction moratorium.

Without a valid CDC order that preempts our law, I am unaware of any authority for this Court to suspend until December 31, 2020, a plaintiff's ability to obtain a writ of restitution under MCL 600.5744.[2] The statute, as noted above, provides a district court

[2] Our original eviction moratorium, in Administrative Order No. 2020-17, 505 Mich ___ (2020), was adopted under 1963 Const, art 6, § 4, which grants this Court with general superintending control over all courts. AO 2020-17 also relied on, among other things, Administrative Order No. 2020-6, 505 Mich ___ (2020) (Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely). That order, in turn, referenced Executive Order No. 2020-33, which was the Governor's emergency and disaster declaration, and Administrative Order No. 2020-8, 505 Mich ___ (2020), which was adopted to comply with the federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), PL 116-136; 134 Stat 281. This Court recently held that all of the Governor's executive orders issued under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., including EO 2020-33 "are of no continuing legal effect." *House of Representatives v Governor*, ___ Mich ___ (2020) (Docket No. 161917). Additionally, the eviction moratorium in the CARES Act lasted 120 days and ended months ago. 15 USC 9058(b). Thus, this Court's original action in adopting AO 2020-17 was based on the premise that the Governor's executive orders were valid and that there was a valid federally mandated eviction moratorium in place. One of these rationales turned out not to be true, and the other rationale is no longer valid. The lessons I take from this are that we should be much more circumspect before rushing to embrace an executive's sweeping assertion of legislative power, and that we are on much more solid ground when we tailor our rules to conform to laws duly enacted by the Legislature.

power to enter the writ of restitution 10 days after entry of judgment in favor of the plaintiff. MCL 600.5744(5). The Legislature has established that "[e]xcept as otherwise provided in [the Revised Judicature Act], the procedure in summary proceedings shall be regulated by rules adopted by the supreme court and by local court rules not inconsistent therewith." MCL 600.5708. But we do not have the power to change the substantive relief to which the prevailing party is entitled in a landlord-tenant proceeding.

I believe the CDC's order rests on questionable legal grounds and very well might be struck down. Consequently, I would not rely on it as the basis to suspend the normal workings of our statutes. And without the order, we lack any authority for our present action. For these reasons, I dissent.

SEAL OF THE MICHIGAN SUPREME COURT · LANSING ·

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.

October 22, 2020

Clerk