

# Mediation and Mitigation:

BY MICHAEL K. MORTON, ESQ.



The Legislative Building was closed to the public. Bill presentations and public testimony were taken by video conference and telephone hotlines. Socially distanced members of the Nevada Assembly signaled their intention to speak by sticking playing cards on their nameplates. Some members of both houses participated in floor sessions remotely. These unprecedented – and hopefully temporary – changes to the legislative process in Nevada did not stop the Nevada Legislature from making broad and sweeping changes to property law in Nevada in light of the devastating health and economic impacts that the COVID-19 pandemic has had on residents and businesses in Nevada. Two bills from the 32<sup>nd</sup> Special Session of the Nevada Legislature – Senate Bill Nos. 1 and 4 – addressed issues relating to eviction proceedings from a rental property and liability protections for businesses that comply with controlling health standards aimed at mitigating the spread of COVID-19.

## How the Nevada Legislature Changed Property Law during Special Session Addressing the COVID-19 Pandemic

### Senate Bill No. 1

Chapter 40 of the Nevada Revised Statutes (NRS) establishes various provisions relating to real property. More specifically, NRS 40.215 to 40.425, inclusive, establish various rights, obligations, limitations and protections regarding obtaining possession of real property, recreational vehicles and mobile homes – more colloquially known as landlord-tenant law. Pursuant to the Declaration of Emergency issued on March 12, 2020, Governor Steve Sisolak issued Declaration of Emergency Directive 008 (Directive 8) on March 29, 2020. Section 1 of Directive 8 placed a moratorium on all eviction and foreclosure proceedings that could otherwise be initiated pursuant to chapter 40 of NRS. At the press deadline for this issue, the eviction moratorium was extended to 11:59 p.m. on October 14, 2020.

Aware that the economic realities of the COVID-19 pandemic would endure for the foreseeable future, the Nevada Legislature passed Senate Bill No. 1 (SB1), which was signed by Sisolak on August 7, 2020. Section 1 of SB1, codified at NRS 40.2544, grants the Nevada Supreme Court the authority to stay an eviction proceeding commenced pursuant to chapter 40 of NRS for no more than 30 days if the Supreme Court has created an expedited program of alternative dispute resolution concerning the eviction of a tenant. The stay is intended to facilitate the use of such a program. Because Directive 8 placed a moratorium on evictions during the aforementioned period of time, but did not relieve a renter of the obligation to pay any past due rent, alternative dispute resolution could help renters with a history of regular on-time payments in their homes while providing property owners

CONTINUED ON PAGE 17

# Mediation and Mitigation

with some certainty regarding payment of past due amounts of rent.

In response to the passage of SB1, Chief Justice Kristina Pickering and Justice James Hardesty filed the petition for Administrative Docket 567 (ADKT 0567) with the Nevada Supreme Court on August 31, 2020. The petition notes that the “expiration of the stay against residential summary evictions ... will result in increased traffic in courthouses across the state, posing a threat to public health and safety, unless measures are taken to facilitate remote filing and virtual appearances in residential summary eviction cases.”<sup>1</sup>

The Nevada Access to Justice Commission formulated two alternative plans for an expedited program of alternative dispute resolution for summary eviction proceedings as part of ADKT 0567. In the first plan, marked in the petition as Exhibit A, a tenant or landlord who wishes to participate in the program must file an affidavit containing: (1) the preferred method of mediation (in person, by telephone or video conference); (2) the name of the tenant(s) participating in the mediation; and (3) accurate contact information. Under this first plan, once such an affidavit is filed by either a tenant or landlord, the court clerk would immediately assign the matter to a mediator at random, and no hearing on the summary eviction action could be held until either after: (1) 30 days after the filing of the action by the landlord; or (2) the court receives notice of the result of the mediation from the selected mediator, whichever occurs first.

Under the second proposed plan for the mediation program, marked as Exhibit B in the petition, the affidavit requirement for a request for mediation is the same as Exhibit A for landlords; however, the requirements for a request filed by a tenant are much more cumbersome. Including the requirements discussed above for Exhibit A, a tenant must include in his or her affidavit:

- A statement describing how the tenant is unable to pay rent due to the COVID-19 pandemic because of a significant loss of income, a significant increase in expenses, or the inability to work due to the pandemic;
- A statement that the tenant has attempted to negotiate in good faith with the landlord to resolve the issue of nonpayment;
- Whether the tenant has previously applied for rental assistance from the state of Nevada; Whether or not the

tenant has previously entered into mediation with the same landlord within the last 12 months; and

- Whether or not the tenant has already entered into a repayment plan with the landlord for past due rent.

The largest hurdle in the proposed mediation program in Exhibit B is that a tenant is not entitled to mediation of a summary eviction action if the tenant had: (1) already entered into a written payment arrangement with landlord; or (2) requested mediation with the same landlord in a similar action within the preceding 15 months. Additionally, the proposed program in Exhibit B provides the landlord an opportunity to contest a mediation order issued by the court.

After receiving nearly 80 comments from the public on the two proposed mediation programs, the Supreme Court entered its order, adopting Exhibit A as the Temporary Residential Summary Eviction Mediation Rules, on October 6, 2020. The court further ordered that the rules would become effective on October 15, 2020, and would remain in effect until: (1) the exhaustion of all federal and state funding for the program; or (2) May 31, 2021, whichever occurs earlier.<sup>2</sup>

## Senate Bill No. 4

Generally, chapter 41 of NRS establishes legal actions and provides procedures for such actions against individual persons and businesses. As the Nevada economy continues to slowly reopen and recover from the ongoing COVID-19, pandemic, as part of Senate Bill No. 4 (SB4), the Nevada Legislature amended chapter 41 of NRS to include certain liability protections for certain for-profit businesses, certain nonprofit organizations and certain governmental agencies from lawsuits resulting from exposure to COVID-19, if such entities substantially complied with what the legislation defined as “controlling health standards.” Section 29 of SB4 defined controlling health standards as “any of the following that are clearly and conspicuously related to COVID-19 and that prescribed the manner in which an entity must operate at the time of the alleged exposure:

1. A federal, state, or local law, regulation or ordinance; or
2. A written order or other document published by a federal, state or local government or regulatory body.”<sup>3</sup>

As set forth in section 29 of SB4, if such an entity did substantially comply with controlling health standards, as determined by the court as a matter of law, the entity is immune from liability in any civil action where a plaintiff alleges a personal injury or death from COVID-19 while on the premises of the entity. The only way for a plaintiff to overcome the immunity granted above is to plead with particularity that: (1) the entity violated controlling health standards with gross negligence; and (2) that such gross negligence caused the injury or death at issue. These liability protections remain effective until: (1) the date on which the governor terminates the Declaration of Emergency issued on March 12, 2020; or (2) July 1, 2023, whichever occurs later.

The Nevada Legislature had a herculean task during the 32<sup>nd</sup> Special Session of the Nevada Legislature – attempting to balance the needs of at-risk individuals and at-risk businesses during an ongoing pandemic that, at the time of publication, is unfortunately still coursing through Nevada. Undoubtedly, attorneys will be at the front lines of the policies established by SB1 and SB4 as these policies are implemented in the coming months and years.

## ENDNOTES:

1. Supreme Court of Nevada. *In re: Residential Summary Eviction Actions and Notices during COVID-19*. Petition. ADKT 0567. Aug. 31, 2020.
2. Supreme Court of Nevada. *In re: Residential Summary Eviction Actions and Notices during COVID-19*. Order Adopting the Temporary Residential Summary Eviction Mediation Rules. ADKT 0567. Oct. 6, 2020.
3. Senate Bill No. 4. 32<sup>nd</sup> Special Session of the Nevada Legislature (2020).

### MICHAEL KILPATRICK MORTON

is the senior research specialist for the Nevada Gaming Control Board, providing the board with legal and policy advice. Prior to his tenure in the executive branch, Morton served as senior deputy legislative counsel to the Nevada Legislature. He received his J.D. from Saint Louis University School of Law, where he served as a lead editor for the *Journal of Health Law and Policy*.

