Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

1st NYC Tenant Harassment, Then Commercial Rent Control?

Law360, New York (October 19, 2015, 11:06 AM ET) --

Bradley S. Silverbush

Advising clients who own or manage residential or commercial office space in New York City is becoming increasingly more difficult. Issues that continue to thwart landlords are everything from leases involving tenants who may have diplomatic immunity (see, e.g., 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 988 F2d 295 (2nd Circuit 1993) to the currently pending proposed legislation regarding harassment of nonresidential tenants. Specifically, I reference proposed Int. No. 851-A which will amend Section 1, Title 22 of the Administrative Code of the city of New York by adding a new Chapter 9 relating to "Nonresidential Tenant Harassment." The purpose of this article is to give a brief overview of this pending legislation.

The bill is sponsored by council members Robert Cornegy, Mark Levine, Margaret Chin, Costa Constantinides, Laurie Cumbo, Vanessa Gibson, Karen Koslowitz, Helen Rosenthal, Corey Johnson, Antonio Reynoso, Carlos Menchaca and Ruben Wills. The stated intent of the proposed local law amendment is to curtail "harassment of small businesses and other nonresidential tenants." Certain groups, such as the Real Estate Board of New York are taking positions in opposition and the New York State Real Property Law committee and the Co-op-Condo committee are preparing written opposition to the proposal. A review of the proposal indicates what potentially is the beginning of a game changer in terms of landlord/tenant relationships in commercial settings.

By definition, the proposed amendment (Administrative Code Section 22-901) will apply to "nonresidential real property that is occupied by a tenant pursuant to a current or expired lease agreement." The term "lease agreement," as defined, refers to both "written and unwritten agreements between a landlord and a tenant for the lease of covered property."

While "nonresidential tenant" is not specifically detailed, the definition "includes, but is not limited to, a tenant that is a small business." The term "tenant" is defined as a "person occupying covered property pursuant to a current or expired lease agreement."

Subchapter 2 includes three new provisions relating to what the code defines as "nonresidential tenant harassment" (§ 22-911-913); it also provides eleven categories of nonresidential tenant harassment, which is defined as engaging in any of the conduct specified in those eleven categories, "with intent to

cause a tenant (i) to vacate covered property or (ii) to surrender or waive any right of such tenant under a lease agreement." Those eleven categories include the following:

1. Using force against or making express or implied threats that force will be used against the tenant or a tenant's invitee.

2. Causing repeated interruptions or discontinuances of one or more essential services.

3. Causing an interruption or discontinuance of an essential service for an extended period of time.

4. Causing an interruption or discontinuance of an essential service where such interruption or discontinuance substantially interferes with the tenant's business.

5. Repeatedly commencing frivolous court proceedings against a tenant or a tenant's invitee.

6. Removing from covered property any personal property belonging to a tenant or a tenant's invitee.

7. Removing from covered property a door, window or lock or a mechanism connected to a door, window or lock.

8. Preventing a tenant or a tenant's invitee from entering covered property occupied by such tenant.

9. Commencing unnecessary construction or repairs on or near covered property, which construction or repairs substantially interferes with the tenant's business.

10. Refusing to negotiate with a tenant for renewal or extension of an existing lease agreement or requiring the payment of an unreasonable sum as a precondition to such negotiations.

11. Engaging in any other repeated or enduring acts or omissions that substantially interfere with comfort, repose, peace or quiet of a tenant or a tenant's invitee.

For the purposes of this code, "tenant's invitee" is defined as "a person whom a tenant has expressly or impliedly invited to enter covered property occupied by such tenant."

Regarding the foregoing section, the code also provides for certain defenses relating to the above subsections, as follows. It is an affirmative defense against an allegation under paragraph 7 that the removal was done "for the purpose of conducting a bona fide repair or replacement of such door, window, lock or mechanism." Similarly, it is an affirmative defense of an allegation of nonresidential tenant harassment under paragraph 8 that the conduct alleged was "due to a bona fide emergency, construction or repairs and excluding the tenant or tenant's invitee from the covered property was reasonably necessary to protect such tenant or tenant's invitee."

What remedies are provided for by the proposed legislation? Under proposed § 22-912, a tenant may bring an action in a court of competent jurisdiction to demonstrate that the landlord has committed nonresidential tenant harassment, and "that such harassment has harmed such tenant." In the event the tenant is able to establish the foregoing, "such tenant may recover" the following:

(1) possession of a covered property if the tenant has been dispossessed;
(2) damages from the landlord equal to the greatest of (i) the tenant's actual damages, (ii) one month's

rent or (iii) $1,000; and
(3) reasonable attorney's fees or court costs.

Notwithstanding the foregoing, the proposed legislation also provides that "instead of or in addition to any remedy provided for" by this new subsection, that the court "may order any equitable relief that the court deems necessary and appropriate." However, this section is limited to "a court of competent jurisdiction." It remains to be seen whether or not such a court would include the housing court, inasmuch as generally speaking, such court is a court of limited jurisdiction and does not have the power to grant equitable relief.

Subsection 3(c) specifies that "any monetary remedy" to which a tenant may be entitled to under the aforementioned section, "shall be reduced by any amount of delinquent rent or other sum for which a court of competent jurisdiction finds the tenant is liable to the landlord." Subsection (d) states that the provisions of this section "are an addition to any such common law and statutory remedies." However, note that subsection (e) states that a tenant's invitee does not have a cause of action under the proposed legislation and nothing contained in this new section shall be construed as granting any private right of action against the city.

As may be expected, the proposed legislation states that any provision of a lease agreement that conflicts with this chapter "is void as against public policy" and that the law takes effect 90 days after it is passed by the city council and becomes law.

Many landlords, tenants and those engaged in the practice of law, have considered if and when the legislature would impose any restrictions on an otherwise "free market" leasing of commercial space. It certainly seems, from the foregoing, that the legislature is ready to throw its weight behind the concept and take a foray into some legislation aimed at curtailing what they consider to be "harassment of nonresidential tenants." Whether the amendment has the desired effect may be questionable. However, this proposed legislation represents a direction that many commercial landlords have long feared and leaves this writer wondering whether or not commercial rent control can be far behind.

—By Bradley S. Silverbush, Rosenberg & Estis PC

Bradley Silverbush is a senior litigation member in Rosenberg & Estis' New York office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
