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The Extension of NY's Eviction Moratorium: An Analysis

On Sept. 2, 2021, Governor Kathy Hochul signed into law an extension of New York's commercial and residential eviction moratoriums through Jan. 15, 2022 (the "moratorium extension"). The moratorium extension features a new mechanism by which owners can challenge tenants' assertions of COVID-related financial hardship, which was added to comply with a recent U.S. Supreme Court ruling.

On paper, this procedure gives owners a new path forward in many eviction proceedings; however, it remains to be seen whether, as a result, an appreciable number of eviction proceedings actually move forward between now and early next year.

The moratorium extension essentially continues the statutory scheme

that was in place through Aug. 31 (see our April 7, 2021 column, "Eviction Moratoriums: A Legislative Update"). As before, the applicable hardship declaration form (whether commercial or residential) must be included with every written notice required to be served prior to the commencement of an eviction proceeding as well as with every initiating pleading served upon a tenant.

The moratorium extension adds another basis for an owner to commence an eviction proceeding where the tenant returns a hardship declaration: where the owner "believes in good faith that the hardship certified in the hardship declaration does not exist."

In order to commence an eviction proceeding, an owner must file an affidavit of service demonstrating that it served a hardship declaration and attesting that either (1) at the

time of the filing, the owner did not receive a completed hardship declaration from the tenant, or (2) the tenant returned the completed hardship declaration but is intentionally damaging the property or engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others, with a specific description of the behavior alleged.

Now, however, the moratorium extension adds another basis for an owner to commence an eviction proceeding where the tenant returns a hardship declaration: where the owner "believes in good faith that the hardship certified in the hardship declaration does not exist."

As a general matter, where a tenant returns a signed hardship declaration, the eviction proceeding will be stayed until Jan. 15, 2022, which stay will continue "unless the court finds the [tenant's] hardship claim

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invalid.” An owner can challenge a tenant’s hardship declaration by making a motion on notice “attesting a good faith belief that the [tenant] has not experienced a hardship,” whereupon “the court *shall grant a hearing* to determine whether to find the respondent’s or defendant’s hardship claim invalid” (emphasis supplied).

In other words, an owner making the required attestation is now entitled to a hearing to test the tenant’s hardship claims. This new right is a direct result of the recent ruling in *Chrysafts et al. v Marks*, 594 U.S. ____ (2021), in which the U.S. Supreme Court held that a tenant’s ability to stay eviction proceedings by unilaterally declaring a COVID hardship violated owners’ due process rights.

In the residential context, the moratorium extension defines “hardship” very broadly as either:

“(a) an inability to pay rent or other financial obligations due in full pursuant to a lease or rental agreement or obtain alternative suitable permanent housing due to one or more of the following reasons where public assistance, including unemployment insurance, pandemic unemployment assistance, disability insurance, or paid family leave, does not fully make up for the loss of household income or increase expenses:

(i) a significant loss of household income during the COVID-19 pandemic; or

(ii) increase in necessary out-of-pocket expenses related to performance of essential work or related to health impacts during the COVID-19 pandemic; or

(iii) childcare responsibilities or responsibilities to care for an elderly, disabled, or sick family member during the COVID-19 pandemic have negatively affected the ability of the tenant or a household member to obtain meaningful employment or earn income; or

(iv) increased necessary out-of-pocket expenses; or

(v) moving expenses and related difficulty in securing alternative housing make it a hardship to relocate to another residence during the COVID-19 pandemic; or

(vi) other circumstances related to the COVID-19 pandemic have significantly reduced household income or significantly increased expenses;”

—or—

“(b) an inability to vacate the premises and move into new permanent housing because doing so would pose a significant risk of severe illness or death from COVID-19 that a tenant or household member would face due to being over the age of sixty-five, having a disability or having an underlying medical condition, which may include but is not limited to being immunocompromised.”

A “hardship” alleged by a commercial tenant under the moratorium extension exists where:

“[it] is unable to pay the rent in

full or other financial obligations under the lease in full or obtain an alternative suitable commercial property because of one or more of the following reasons and any public assistance the business has received since the start of the COVID-19 pandemic has not fully made up for the business’s loss of revenue or increased expenses: Significant loss of revenue during the COVID-19 pandemic; or

1. Significant increase in necessary expenses related to providing personal protective equipment to employees or purchasing and installing other protective equipment to prevent the transmission of COVID-19 within the business; or

2. Moving expenses and difficulty in securing an alternative commercial property make it a hardship for the business to relocate to another location during the COVID-19 pandemic.”

If the court finds the tenant’s hardship claim valid after a hearing, the court shall grant or continue the stay through Jan. 15, 2022. In residential eviction proceedings, the court is also required to “direct, if the respondent appears to be eligible and has not yet applied, that the parties apply to the [Emergency Rental Assistance Program [ERAP]], so long as [ERAP is] accepting applications.”

If the court finds the tenant’s hardship claim invalid after the hearing, “the proceedings shall continue to a determination on the merits.”

The new law provides for similar procedures in residential and some

commercial mortgage foreclosure proceedings, as well as in tax lien foreclosure proceedings. Additionally, the law extends the covered hardship period for residential tenants under the Tenant Safe Harbor Act through Jan. 15, 2022. As a result, owners cannot obtain warrants of eviction for residential tenants' rent arrears accumulated due to financial hardship between March 13, 2020 and Jan. 15, 2022; they are entitled only to money judgments for such amounts.

The moratorium extension was almost immediately challenged in federal court as in violation of the U.S. Supreme Court's *Chrysafts* ruling. Assuming the moratorium extension survives, it remains to be seen how New York courts will administer the new hardship hearings. Some immediately apparent questions are:

• **What constitutes a “good faith belief” sufficient for an owner to challenge a hardship declaration?**

The quantum of information necessary to support an owner's “good faith belief” is not defined in the statute and is not otherwise addressed. In fact, it is doubtful in most instances that an owner would have access to a tenant's financial records or otherwise possess personal knowledge of a tenant's alleged “hardship” circumstances. Rather, the tenant's right to self-attestation in the Moratorium Extension remains unchanged from prior iterations of the law, and no obligation exists

to provide supporting documentation to the owner.

• **Will discovery be necessary or permitted?** Given that owners will usually not possess—and tenants claiming hardship are not required to provide—relevant documentation and information concerning the hardship standards outlined above, owners would presumably need discovery to support their claims. However, the Moratorium Extension is silent on this issue. Thus, unless the court orders expedited disclosure, owners seeking discovery would presum-

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ably need to navigate the disclosure mechanisms, timeframes and obligations set forth in Article 31 of the CPLR.

• **How quickly will courts hold hearings and issue decisions?**

Given the time necessary (1) to permit the discovery process to play out, (2) for the statutorily-mandated hearing to be held, and (3) for the court to issue a decision, the moratorium extension may well expire before a hardship declaration's validity

is finally determined—in which case the owner would have been better off not expending the time and resources challenging the hardship declaration in the first instance. Thus, hardship declaration challenges must be scheduled and adjudicated in an expeditious manner if the moratorium extension's new provisions are to have any meaning.

Notwithstanding the above, we surmise that the moratorium extension's provisions may deter tenants who are not truly suffering a COVID hardship and/or who do not wish to disclose personal documents and information from declaring a hardship in response to legal action by their landlords. In turn, this may tend to (1) permit owners to move forward against tenants who are able to comply with their leasehold obligations in spite of COVID, and (2) result in a greater proportion of tenants returning hardship declarations who are, in fact, suffering a COVID hardship. The next 60-90 days will be telling in this regard, and we will be watching closely as the courts implement the moratorium extension's new provisions.