

# REAL ESTATE WEEKLY

## The Tenant Safe Harbour Act Has Gone Too Far

BY MICHAEL A. PENSABENE, JULY 30, 2020



The recent passage of the Tenant Safe Harbor Act (“TSHA”) on June 30, 2020 in the wake of the pandemic has dealt yet another blow to landlords still reeling from the Housing Stability and Tenant Protection Act (HSTPA), which was enacted just a year earlier, on June 14, 2019.

In doing so, the Legislature overlooked the extensive protections that it had just implemented with HSTPA and failed to consider the devastating consequences that a blanket policy, such as TSHA, may have on the real estate industry, which the Legislature seems intent on pushing to the edge.

This article explains why TSHA was unnecessary in light of HSTPA. Understanding these points requires a cursory understanding of the “eviction” process and recent legislative history.

The stated purpose of HSPTA is to “extend tenant protections statewide,” justified on the Legislature’s desire “to allow more leniency throughout any eviction proceeding, including stays of eviction and executions of warrants; and to ensure that any eviction that is executed is done so in the interest of justice.”

In order to do this, HSTPA implemented sweeping revisions to several bodies of law, including the Real Property Actions and Proceedings Law (“RPAPL”), which governs “evictions” and summary proceedings for nonpayment of rent. HSPTA, among other things, lengthened the litigation period, broadened the court’s discretion to stay an

eviction, and extended a tenant’s right to ultimately cure a rent default in order to stave off an eviction.

Two statutes which HSTPA amended are particularly noteworthy. First, RPAPL §753 was amended to give courts the discretion to stay the issuance of a warrant of eviction for up to one year from the date that a final judgment is entered if, among other grounds, denying a stay would cause “extreme hardship” to the tenant or the tenant’s family.

The statute requires the court to consider certain factors regarding the tenant’s circumstances, such as illness, the exacerbation of an ongoing condition, and any other extenuating life circumstances, weighed against any substantial hardship that a stay may impose on the landlord.

Next, RPAPL §749 was amended to provide that the landlord-tenant relationship is not severed until the execution of the warrant of eviction, thus requiring landlords to accept rent payments through that date and allowing tenants the additional time to cure a rent default to prevent an eviction.

Since, warrants of eviction are only issued after the court determines the amount of rent that the tenant is responsible to pay, the HSPTA amendments provide tenants with ample opportunity to seek a rent abatement and, after the court determines the tenant’s rent liability, an opportunity to demonstrate a hardship that could stay the eviction for up to one year for the tenant to pay that amount to avoid an eviction. These protections that the Legislature granted tenants when it implemented HSPTA should have been all that was required during the pandemic.

Pursuant to Executive Orders 202.8, 202.28 and 202.48, the Governor stayed the initiation of nonpayment proceedings against tenants from March 20, 2020 through August 20, 2020.

Effectively, no summary nonpayment proceeding seeking rent due for March through August could

be started until August 20, 2020 – six months after the rent arrears began to accrue. In the unlikely event that courts resume trying new nonpayment proceedings in August and issue decisions immediately from the bench, a tenant impacted by the pandemic can still seek to stay the execution of a warrant of eviction through August 2021 and pay the rent owed, in an amount determined by the court, at any time before then to prevent an eviction.

The enactment of TSHA now prohibits courts from issuing a judgment of possession or warrant of eviction concerning rent which accrues during what the statute calls the “Covid-19 Covered Period” (the “Covid Period”).

To be clear, this is an indefinite period measured from March 7, 2020 until the date that the Governor’s Executive Orders (as they may be further amended and extended), no longer restrict businesses, places of public accommodation and non-essential gatherings.

Further, TSHA permits anyone to raise “financial hardship” during the Covid Period as a defense in any summary proceeding, which can be read to include holdover proceedings predicated on grounds other than a tenant’s failure to pay rent.

Now, the only remedy available to landlords in a nonpayment proceeding for unpaid rent during the Covid Period is a monetary judgment against a tenant, which does absolutely nothing for them.

Generally, landlords do not actually want to evict tenants who do not pay rent. Rather, they use the threat of an eviction as a tool to ensure that the rent is paid and, if the rent will not be paid, an eviction then allows the landlord to re-rent an apartment to a paying tenant so that they can mitigate their losses, which can be significant by the time the landlord can actually evict a tenant.

Landlords need to collect rent in order to provide services to tenants and to operate the building, which includes paying taxes, utilities and mortgage payments. Without the cashflow from rent, landlords are deprived of the resources to carry these charges. In practice, evictions have been much more important to landlords to maintain ongoing cashflow than any money judgment that may be entered for rent arrears, which would rarely

be chased. TSHA gives no consideration to these issues.

Further, TSHA’s blanket abolition of evictions effectively provides tenants with the right to a full rent waiver during an indefinite Covid Period.

Although TSHA allows landlords to seek money judgments against tenants, the only real threat to them is to their credit rating, which would mean nothing if, for example, they have no desire to own a home or buy a new car.

Moreover, HSTPA eliminated the landlords’ ability in summary proceedings to collect the attorneys’ fees they incur to obtain the monetary judgment and, once a judgment is finally obtained, the landlord then has to incur further expenses chasing after any assets that the tenant may have in order to receive payment on the judgment, so landlords must bear the costs of collections.

More often than not, landlords are reluctant to spend good money chasing after bad, especially when they might not have sufficient cash flow to carry other expenses for the building and the costs of collection outweigh the value of the judgment.

TSHA prohibiting the courts from balancing the parties’ respective circumstances, which should be inherent in any judicial process, demonstrates a disparate policy that is patently unfair to landlords.

The Legislature’s enactment of TSHA has stripped the courts of their discretion to make just determinations on a case-by-case basis in favor of a blanket policy to eliminate evictions altogether, while failing to recognize the landlords’ need for relief during the pandemic, such as tax forgiveness. Instead, the Legislature has allocated all these losses to landlords, without any consideration for their burdens. This has gone too far.