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Eviction Moratoriums: A Legislative Update


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New York State has recently enacted two laws aimed at preventing residential and commercial evictions during the COVID-19 pandemic. Specifically, Governor Andrew Cuomo signed into law (1) the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the "Residential Act") on Dec. 28, 2020, and (2) the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (the "Commercial Act;" collectively with the Residential Act, the "Acts") on March 9, 2021. (As the names suggest, the Acts also seek to temporarily prevent both residential and commercial foreclosures; these aspects of the Acts are beyond the scope of this column.) The Acts build upon prior eviction protections set forth in Cuomo's various executive orders and—with respect to residential tenancies—last summer's Tenant Safe Harbor Act.

This column will summarize the Acts' provisions, which, with exceptions discussed below, track each other closely. Generally, the Acts' provisions are effective through May 1, 2021—although, as with other tenant protection measures enacted in response to COVID-19, this date may very well be extended.

Stay of "Eviction Proceedings." The Acts both provide that any "eviction proceeding" that is pending or commenced within 30 days of each Acts' effective date shall be stayed for at least 60 days, or to such later date as determined by the chief administrative judge. Accordingly, residential eviction proceedings commenced on or before Jan. 27, 2021 were automatically stayed for at least 60 days, as are currently pending commercial eviction proceedings or those commenced on or before April 8, 2021. Thus, residential eviction proceedings commenced on and after Jan. 28, 2021 and commercial eviction proceedings filed on and after April 9 were and are not subject to a 60-day stay—although, in many instances, they are not moving forward in our currently overburdened judicial system.

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An "eviction proceeding" under the Acts includes summary proceedings under Article 7 of the RPAPL as well as "any other judicial or administrative proceeding to recover possession of real property"—which, presumably, was intended to include ejectment actions. Additionally, the definition of "eviction proceeding" does not include only proceedings for nonpayment of rent, as was the case under the governor's eviction moratorium, but appears to apply to all eviction proceedings, whatever their basis.

Hardship Declarations. The Office of Court Administration has created hardship declaration forms pursuant to the provisions of each Act. The applicable hardship declaration form (whether commercial or residential) must be included with every written notice to be provided prior to the commencement of an eviction proceeding, and with every notice of petition or summons and complaint served on a tenant.

In order to commence an eviction proceeding, the owner must file an affidavit of service demonstrating that

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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 "unreasonably engages in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others." The Acts do not explicitly define this standard, but language used elsewhere in the Acts implies that it is synonymous with "objectionable or nuisance behavior."

A question arises as to how an owner should proceed if no predicate notice is required prior to commencing the eviction proceeding—such as, for example, in a lease expiration holdover situation. It appears that, to be safe, owners should serve the hardship notice form alone upon the tenant prior to commencement so that they can truthfully make the required representations in the affidavit referenced above.

If there is no pending eviction proceeding and a tenant provides a hardship declaration to the owner, an eviction proceeding cannot be initiated against that tenant until at least May 1, 2021. If an eviction proceeding is already pending and the tenant provides the completed hardship declaration, the proceeding will be stayed until at least that date. And, in a pending eviction proceeding in which an eviction warrant or judgment of possession or ejectment has been issued but not yet executed, the judgment or warrant is not effective unless the tenant was properly served with the hardship declaration form and did not return it, or has engaged in the objectionable or nuisance behavior described above.

Nevertheless, under the Acts, the court must stay execution of the warrant or judgment at least until the court has held a status conference with the parties; where the tenant provides a completed hardship application, that stay must last until at least May 1, 2021.

Notably, a completed hardship declaration creates a rebuttable presumption "in any judicial or administrative proceeding" (not only in an eviction proceeding) that the tenant is experiencing financial hardship by reason of the COVID-19 pandemic. This could become relevant if, for example, an owner commences an action against a tenant seeking only a money judgment for unpaid rent and not eviction. Further, this rebuttable presumption is the only aspect of the Acts that survives their May 1, 2021 expiration date.

No Self-Help Against Commercial Tenants. The Commercial Act provides that commercial tenants may not be removed from possession prior to May 1, 2021 except by an eviction proceeding. This means that self-help, even where allowed by a commercial lease, is not permitted through such date. By contrast, owners have long been prohibited from exercising self-help against residential tenants.

Who Is a "Tenant" Entitled to the Acts' Protections? Under the Commercial Act, a tenant "includes a commercial tenant that is a resident of the state, independently owned and operated, not dominant in its field and employs 50 or fewer persons." This definition appears intended to exclude national chains; nevertheless, each situation must be evaluated on its own facts. For example: (1) Is the tenant entity a subsidiary entity of a larger chain that was formed under New York law? Or, perhaps, an independently-owned and operated franchisee of a national chain? (2) What if the national chain is reasonably considered "dominant" (*e.g.* McDonald's, Dunkin Donuts) but the tenant is a franchisee and, thus, effectively an independent business? To what extent must this franchisee entity "dominate" its local market to fall outside of the Commercial Act's protections? (3) How will an owner know its tenant's employee count? And for subsidiaries, affiliates and franchisees, does the owner count only the employees at that location, or nationally with the larger brand?

Under the Residential Act, a tenant "includes a residential tenant, lawful occupant of a dwelling unit, or any other person responsible for paying rent, use and occupancy, or any other financial obligation under a residential lease or tenancy agreement," and excludes those with seasonal use rentals.

Note that the definition of "tenant" is far broader in the Residential Act than in the Commercial Act. Especially when these definitions are considered together, the Commercial Act's definition could arguably be interpreted to exclude licensees and other non-tenants of commercial property.

With the pandemic ever-so-gradually receding and New York City and the country slowly beginning to open back up, we are hopeful that further measures such as the governor's eviction moratorium and the Acts will become unnecessary. However, until the real estate and legal industries return to something approaching pre-March 2020 normalcy, practitioners must familiarize themselves with the Acts and, in general, continue to monitor the ever-shifting legal landscape caused by COVID-19.