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NY Commercial Landlords Should Beware New Housing Law

By **Howard Kingsley** (July 3, 2019, 2:35 PM EDT)

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On June 14, 2019, in what has been called a "sweeping overhaul" of New York's housing regulatory scheme, Gov. Andrew Cuomo signed into law the immediately effective Housing Stability and Tenant Protection Act of 2019. In Part D of the act, the New York State Legislature declared "that in order to prevent uncertainty, potential hardship and dislocation of tenants living in housing accommodations subject to government regulations as to rentals and continued occupancy as well as those not subject to such regulation, the provisions of this act are necessary to protect the public health, safety and general welfare."

Based thereon, one would think that the act would protect only residential tenants in housing accommodations. Surprisingly, however, the act also protects commercial tenants who obviously do not need the same protections as residential tenants. Indeed, many commercial tenants are sophisticated business people and represented by counsel.

This article discusses some of the statutes amended by the act that affect commercial tenancies and how these changes may affect commercial summary proceedings in New York City's civil courts. While these changes may seem to be minor viewed independently of one another, when they are viewed as a whole, the act significantly delays a landlord's attempt to obtain possession and payment from their commercial tenants.

Month-to-Month Tenancies

Previously, New York's Real Property Law § 232-a required the landlord to serve a 30-day notice to terminate a month-to-month tenancy. The amended RPL § 232-a gives month-to-month tenants who have been in possession of the premises for more than one year more relatively significantly more time to vacate. Generally, where the tenant has been in possession for (1) more than one year but less than two years, the notice must give the tenant at least 60 days to vacate, and (2) more than two years, the notice must give the tenant at least 90 days to vacate.

To avoid this relatively long extension of time, if a tenant has expressed its intention to, or does not immediately, vacate upon expiration of the lease term, the landlord may consider not accepting "rent" for the month following the lease's expiration so as to avoid the creation of a month-to-month tenancy. By doing so, the landlord will avoid the requirement to wait at least 90 days to terminate any month-to-month tenancy.

Rent Receipts/Notices of Nonpayment

Although the newly amended RPL § 235-e(a) refers only to "residential premises," the amended subsection (b), and new subsections (c) and (d) do not expressly state that they apply only to residential tenancies. Accordingly, an argument can be made that these subsections apply to commercial premises. Generally, subsection (b) requires the landlord to provide the tenant with receipt of payment upon request, and subsection (c) sets forth the time frames to provide a receipt. Most notable is subsection (d) which requires a landlord to serve, by certified mail, a notice advising the tenant that the rent was not paid within five days of its due date, and if the landlord fails to provide such notice, such failure "may be used an affirmative defense … in an eviction proceeding based upon the non-payment of rent." Thus, a prudent landlord may consider serving the five-day notice to attempt to prevent delay in any litigation before serving a 14-day rent demand.

Summary Nonpayment Proceedings

Previously, New York's Real Property Actions and Proceedings Law § 711(2) required the landlord to serve a three-day rent demand as a predicate to commencing a summary nonpayment proceeding in civil court. Now, the landlord must serve a written 14-day rent demand. The act also doubled the amount of time the tenant had to serve its answer in a summary non-payment proceeding. Whereas the tenant had five days to respond to the petition, the tenant now has 10 days.

RPAPL § 749(3) now adds that "the court shall vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to [execution of the warrant], unless the [landlord] establishes that the tenant withheld the rent due in bad faith."

Summary Holdover Proceedings

RPAPL § 733 had required the petition in a summary holdover proceeding be returnable at least five, but not more than 12 days, after the tenant was served with the notice of petition and petition. The act changed the time frame from at least 10 to no more than 17 days.

Use and Occupancy in Summary Proceedings (Nonpayment and Holdover)

The act's change of RPAPL § 745 will likely create the most problems for landlords because a commercial tenant can now easily avoid paying rent/use and occupancy for many months during the summary proceeding without any suffering any consequences. The extreme "watering down" of the protections that this statute gave landlords should give them serious cause for concern.

The statute had previously provided that on the second request by tenant for an adjournment or more than 30 days after the first court date, the landlord could request the court, without making a motion, to direct the tenant to pay U&O for the total amount accrued through that date plus monthly U&O (usually in the amount of the last monthly rent) going forward. Moreover, and if the tenant failed to comply, landlord could obtain a judgment of possession and/or dismiss the tenant's defenses and/or counterclaims.

The act now changes such 30-day period to 60 days. In reality, however, the time frame is greater than 60 days before a tenant can be required to pay U&O. First, the 60-day period must be attributable only the tenant's requests for adjournments. Second, the 60-day period does not include the delay attendant

to the tenant's first request for an adjournment if the tenant seeks an adjournment to obtain counsel. Third, after that relatively lengthy period expires, the landlord must now make a formal motion, and then it can may be months until the Court makes a decision directing the tenant to pay U&O. It is, thus, not difficult to imagine that it could take six months from the first return date before the tenant is required to pay U&O.

Moreover, the tenant cannot be directed to pay the arrears, but can be directed to pay U&O only from the date of the court's order going forward. Making matters worse for landlords, if the tenant fails to pay U&O as directed, the act states that "[u]nder no circumstances shall the [tenant's] failure or inability to pay use and occupancy as ordered by the court constitute a basis to dismiss any of the [tenant's] defenses or counterclaims." Accordingly, if a tenant fails to pay, the landlord may be without a remedy.

Warrants in Summary Proceedings

After the warrant is issued, RPAPL § 749(a)(2) now requires that the city marshal deliver a 14-day notice, as opposed to the prior "72-hour notice."

The prior language in RPAPL § 749(d) that "[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant" has been deleted. The act gives the court the power, upon the tenant's showing of "good cause," to (1) stay or vacate the warrant, (2) enjoin the landlord from reletting or renovating the space, and (3) restore the tenant into possession after eviction. By giving the court much greater discretion and authority, landlords are being deprived of any comfort that the case is over even after eviction.[1]

Conclusion

Based upon the foregoing, the act apparently encourages a commercial tenant to engage in dilatory tactics and to not pay its rent, thereby undermining the expeditious nature and preferred forum of civil court summary proceedings. As a result, commercial landlords should discuss with their counsel how the act may affect them and ways to possibly avoid any adverse consequences. It will be very interesting to see how these changes play out in the courts.

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[1] It should also be noted that, if the commercial tenant ends up in bankruptcy, the commercial tenant may now have greater rights therein because the language that provided that the tenancy was terminated upon issuance of the warrant gave landlords certain rights in bankruptcy that it may not have otherwise had. Now, without such language, landlords may lose such rights.