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EXPERT ANALYSIS

Reopened NY Courts Change COVID-19 Eviction Landscape

As of May 26, New York state courts have reopened for new electronically filed applications. Now that tenants have a venue to challenge improper default notices, the question becomes whether, and to what extent, landlords can exercise conditional limitations and terminate leases for nonpayment of rent.

The governor's executive order, [which I previously discussed in a *Law360* guest column](#), had extended the commercial eviction moratorium through at least Aug. 20 and prohibits nonpayment proceedings from being filed until after June 20. However, nothing in this executive order prohibits landlords from terminating leases in the meantime and eventually commencing holdover petitions after June 20, assuming the housing courts are open.

DEFAULT NOTICES

This raises the question of whether landlords can start sending default notices that threaten lease termination. If so, must tenants then view these default notices with a greater degree of urgency than before the New York state courts reopened?

The answer to both of these questions is most likely yes.

Although no holdover proceedings can be brought until the housing courts reopen, there is nothing to stop landlords from sending a default notice for nonpayment of rent and, if uncured, terminating a lease on notice. Once the housing court reopens, landlords are free to commence a holdover proceeding, understanding that nothing is likely to happen substantively until after the eviction moratorium ends on Aug. 20.

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ENFORCEABILITY FOR LANDLORDS AND TENANTS

Procedurally, it is still uncertain as to whether default notices served before May 26 will be enforceable as a lease termination vehicle. Rather, these notices may have to be reserved on tenants now that the state court is opened. Most feel that it is unlikely for courts to allow cure periods contained in prior default notices to automatically start running as of May 26. Here are action steps that landlords and tenants can take:

- >> A landlord should reserve any notice that it wants to use in order to ultimately exercise a conditional limitation and terminate a lease on notice.
- >> A tenant that previously received a default notice threatening to terminate its lease (even if received before May 26) should consider whether it needs to file a Yellowstone injunction or obtain a side letter from the landlord to insure that the landlord does not terminate the lease on notice.

AMENDMENT TO THE CITY OF NY ADMINISTRATIVE CODE

Another piece of new legislation likely to cause further confusion during the eviction moratorium is amendment to Section 22-902 of the administrative code of the city of New York, which could subject landlords to as much as a \$50,000 fine for threatening a commercial business impacted by COVID-19.

Specifically, the new law would apply to those commercial tenants who are:

- >> Subject to seating, occupancy or on-premises service limitations due to an executive order issued by the governor or mayor during the COVID-19 period; or
- >> Able to demonstrate that its revenues during any three-month period within the duration of the COVID-19 pandemic (March 7 through the end of the month that commences after the end of the eviction moratorium, which is currently Sept. 30) was less than 50% of its revenues for the same three-month period in 2019 or less than 50% of its aggregate revenues for the months of December 2019, January 2020 and February 2020. This needs to indicate that such revenue loss was the direct result of the COVID-19 state disaster emergency.

It remains unclear whether this new amendment to the tenant anti-harassment statute and the definition of threaten will prohibit landlords from exercising a contractual right to terminate a lease for nonpayment of rent.



THE BOTTOM LINE

Now that the New York state courts are open for business, landlords have more flexibility in the type of default notices that they can send and they can start taking steps toward lease termination. Similarly, even during the eviction moratorium period, tenants must view any default notice attempting to terminate its lease with a higher degree of urgency and ensure that it avails itself of all rights and remedies to avoid having its lease terminate on notice.

