

EXPERT ANALYSIS

What NY's Eviction Moratorium Means for Landlords, Tenants

Gov. Andrew Cuomo has extended New York's moratorium on both commercial and residential evictions through at least August 20. In addition, New York's Civil Court (where landlord-tenant summary proceedings are typically brought and heard) remains closed to all new nonemergent proceedings and applications. The combination of the two has raised several questions among the landlord-tenant legal community. Among them are the following:

- >> Can a landlord send a default notice for nonpayment of rent to a tenant during the moratorium and before the courts open?
- >> If the tenant fails to cure its nonpayment default, can a landlord terminate a tenant's lease while the civil courts remain closed?
- >> Will cure periods, designed to serve as a precursor to terminate a tenant's lease, even start to run until the courts reopen?
- >> Once the courts reopen, will landlords have to reserve any notices of default previously served in order for the cure period to start?
- >> Can landlords expect cure periods to run immediately with respect to default notices that are not intended to serve as a precursor for a later lease termination?

For both landlords and tenants, many of these questions remain unanswered. While not specifically addressed by Cuomo, landlord-tenant practitioners are doing our best to provide prudent advice based on the information at our disposal.

ABOUT THE AUTHOR



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JUST THE FACTS

This is what we know for certain as of May 7:

- >> Commercial tenants cannot be evicted at least until after August 20.
- >> Tenants are still required to pay monthly rent in the absence of a favorable force majeure clause in its lease or other common law defense that might be available to it.
- >> No new summary proceeding filed after the courts reopen will be scheduled for hearing until after August 20.
- >> The Civil Court is still not accepting new nonemergent applications and it is unclear when it will do so.
- >> The U.S. District Court for the Southern District of New York is accepting new cases by landlords for breach of contract in connection with the failure to pay rent. The federal court, however, does not have jurisdiction to award legal possession of the leased premises to the landlord and can only offer money judgments.

HOW LANDLORDS SHOULD PROCEED

As long as landlord-tenant courts remain closed to new summary proceedings, landlords probably cannot and should not send default notices suggesting that they will exercise their right to terminate the lease if the nonpayment is not cured. Court closures mean that tenants have no ability to bring a Yellowstone application or otherwise challenge the validity of any default notice.

Therefore, any attempt by a landlord to terminate a lease while courts remain closed is likely to be found unenforceable. Moreover, aggressive tactics taken by landlords during these unprecedented times are likely to be greeted unfavorably by a judge once the courts do reopen.

In addition, landlords that serve default notices designed to terminate a lease while the courts are closed to new applications will likely have to reserve them again after the courts reopen. This is because the court is probably not going to put the onus on tenants to figure out when the courts reopened and when their individual cure periods began. Rather, the court is more likely to expect landlords to reserve default notices to eliminate all questions surrounding how many days a tenant had to cure a nonpayment default.

Very few landlord-tenant practitioners believe that landlords will be able to rely on prior notices served before the court's reopen and that the court's reopening will automatically trigger the start of whatever cure period was contained in that notice. A result like that would create havoc for both tenants and the judiciary and, therefore, is unlikely to be the outcome.

Neither the court's temporary closure, nor anything Cuomo has ordered should prevent landlords from issuing default notices for nonpayment of rent that preserve other leasehold rights unrelated to termination. For example, a landlord should feel comfortable serving a notice of default that limits the consequences to the landlord's ability to draw down on a cash security deposit or letter of credit. Any notice not designed to terminate a tenant's lease is likely still enforceable, regardless of court closures and the moratorium on eviction.

IMPORTANT INFORMATION FOR TENANTS

Notwithstanding the above, tenants should be mindful that if it receives a default notice, not to ignore it. The tenant should immediately contact its landlord to insure that such notice is not an attempt to terminate its lease.

Even if the parties cannot reach an agreement on rent abatement, deferment or some other lease modification, it is still vital to get clear understanding of the landlord's intentions. Once the courts reopen, if the tenant receives a default notice and there is any doubt as to whether the landlord's intent is to exercise its right to terminate the lease, tenants should either cure the default, or make an application to the court for injunctive relief before the cure period ends to avoid termination of its lease.

The August 20 date is not an extension of any cure period, nor is it a get-out-of-jail-free card. For the majority of tenants, rent must still be paid monthly. August 20 is nothing more than a date before which tenants cannot be evicted. However, tenants can still lose its lease and be subject to all damages associated with a lease termination.

THE BOTTOM LINE

Cuomo's extension to at least Aug. 20 on New York's moratorium for both commercial and residential evictions has raised questions for the landlord-tenant legal community in New York. While many questions remain, the analysis above hopefully gives some clarity regarding what landlords and tenants should be thinking about in the upcoming months when the courts reopen and the moratorium on evictions expires.

