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Guarantors of Commercial Leases, Court Directives, Ejectment Actions

alma · Friday, May 29th, 2020

In the past week, new legislation has been passed in New York City enacting additional limitations, and courts have provided some guidance, and further limits on the steps building owners can take to collect unpaid rent while Governor Cuomo's executive orders are in effect. Unfortunately, there are still many questions that have not been answered.

1. New NYC Law Affects Personal Guarantors of Commercial Leases. On May 26, 2020, Mayor Bill DeBlasio signed a bill into law which prevents commercial landlords from enforcing the personal liability provision of a commercial lease. The law specifies that if a tenant meets certain criteria, then building owners cannot seek the rent owed from "natural persons" serving as guarantors for the space (This law does not apply to corporate entities serving as guarantors). In order to qualify for protection under this law, the commercial tenant must be one of the following:

- (1) A business that was required to stop serving food or beverages on-premises (bars and restaurants);
- (2) A business that was required to cease operations all together (gyms, fitness centers, movie theaters);
- (3) A retail business that was required to close or subject to in-person restrictions; or
- (4) A business that was required to close to the public (barbershops, hair salons, tattoo shops, etc.).

Notably, the law does not specifically mention commercial office tenants although there is some catch-all language which could be construed to protect these tenants. Nonetheless, we do not believe the law as written covers office lease guarantors.

Additionally, the default which triggers the personal liability provision must have occurred, either wholly or partially, between March 7, 2020 and September 30, 2020. Based on this language, any attempt to collect arrears which occurred prior to these dates would not be subject to this law.

Further, if a landlord attempts to enforce a personal liability provision that they reasonably should know is unenforceable, it could be considered harassment which allows commercial tenants to file a civil lawsuit against the building owner where the court could impose a penalty of up to \$10,000.00. Critics of this law claim that the entire law is unconstitutional because it violates the Contracts Clause of the U.S. Constitution, which prevents state governments from making a law

which would relieve a person from their contractual obligations. Although this constitutional argument has merit, the moratorium on new non-payment proceedings and evictions will likely be lifted before any constitutional challenges can make their way through the courts.

2. New Court Directives For Nonpayment Proceedings and Evictions. On May 22, 2020, Judge Anthony Cannataro of the Civil Court of New York City issued three directives which clarified new procedures for nonpayment proceedings and the enforcement of eviction orders. The directives require an affidavit from a person with knowledge of the facts stating that the tenant is not eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic in the following situations: (1) when commencing a summary proceeding for nonpayment of rent; (2) when applying for a default judgment based upon tenant's failure to answer in a summary proceeding for nonpayment of rent; and (3) when seeking to enforce a warrant of eviction based upon the nonpayment of rent that was awarded before March 20, 2020. This affidavit requirement will begin on June 20, 2020. We have created a form questionnaire to send to tenants in order to try and ascertain whether they are facing financial hardship due to COVID-19.

3. Supreme Court Ejectment Actions? Given the limitations imposed upon building owners by recent executive orders and new legislation, there have been discussions in the legal community about whether ejectment actions in Supreme Court are a way to work around these limitations. Although this could be a backdoor way to commence nonpayment proceedings during this time, it could be a lengthy and costly endeavor without any guarantee of success. It may be more beneficial to wait and see if this approach is successful before making this type of pivot.

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