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Landlord Tenant Update (Involuntary Bankruptcy)

Stephen Lasser · Friday, May 21st, 2021

1. Commercial Landlord-Tenant Cases (a). Nonpayment Cases – The law passed on March 9, 2021 titled *COVID-19 Emergency Protect Our Small Business Act of 2021*, which codified and extended the commercial eviction moratorium on non-payment, holdover (with an exception for nuisances) and ejectment cases if the business has under 50 employees and demonstrates a financial hardship was extended from May 1 to August 31, 2021. In addition, the revised statute extends the hold on all existing cases until August 31, 2021, although the courts have continued conducting virtual court conferences when commercial tenants are represented by legal counsel.

The law's requirement that commercial landlords serve hardship declaration notices with all legal notices served on commercial tenants similarly to the protocol that was previously established for residential tenants remains in effect, and it should be noted that the official hardship declaration form has been modified and updated. Commercial landlords can continue to serve predicate default notices and commence new cases, but, if a tenant completes a hardship affidavit, the case will be on hold until August 31, 2021.

(b). Non-Monetary Holdover and Ejectment Cases (something to consider) – The tenant protections provided by the *COVID-19 Emergency Protect Our Small Business Act of 2021* also pertain to eviction proceedings based on non-monetary defaults except in situations where a tenant has violated its lease “by persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others.” This seems like a high threshold to satisfy, but a recent Supreme Court, Kings County decision dated April 20, 2021 demonstrates the potential benefit of serving notices now based on non-monetary defaults.

In this recent case, the court ruled that a tenant's failure to cure various non-monetary defaults, mostly related to building violations, within the prescribed lease cure period resulted in the tenant's lease being terminated without any means of the tenant to reinstate the lease due to its failure to obtain a Yellowstone Injunction. Although the landlord in this case should not be able to evict or eject the tenant until after August 31, 2021 due to the *COVID-19 Emergency Protect Our Small Business Act of 2021*, the landlord is going to be able to achieve results faster than other landlords, because it has already successfully litigated the issue of the tenant's non-monetary default. It is unclear from the decision whether the tenant submitted a COVID hardship affidavit, but the case nonetheless demonstrates that landlords should consider serving notices to cure any non-monetary defaults in order to potentially obtain a favorable court decision and lease termination prior to August 31, 2021, thereby paving the way for an expedited eviction or ejectment when the

moratorium expires on August 31, 2021. One simple potential default that has been upheld as the basis for the eviction of a commercial tenant, and is certainly worth investigating, is the failure to maintain proper insurance coverage required under a lease.

2. Money Judgment Actions Against Commercial Tenants and Guarantors – Landlords should consider pursuing money judgments against commercial tenants and guarantors who are not paying rent as an alternative to litigating in landlord-tenant court. These cases are not affected by the *COVID-19 Emergency Protect Our Small Business Act of 2021* and in addition to being a means of collecting rent, they can also be used to obtain a determination on the issue of a tenant's liability prior to August 31, 2021 thereby expediting an eviction or ejection once the August 31, 2021 moratorium expires. In addition, a money judgment can be used as a basis for filing an involuntary bankruptcy case against a tenant, as discussed further below.

3. Filing Involuntary Bankruptcy Case Against Commercial Tenant Entity (something else to consider) – The Bankruptcy Code allows creditors to file a bankruptcy petition to put a debtor into bankruptcy if the debtor fails to pay debts as they come due and the petitioner's claim is not contingent or subject to a bona fide dispute as to liability or amount. A commercial landlord filing an involuntary bankruptcy case against a commercial tenant entity or guarantor is a drastic measure, but one worth considering under the present circumstances. If it seems that a tenant is continuing to operate in a space with no intention of ever paying rent, then after obtaining a money judgment and unsuccessfully trying to collect on the judgment, then filing an involuntary bankruptcy case may be a means of collecting against the tenant's remaining assets as well as a way of forcing a sale or assignment of the tenant's lease.

Involuntary bankruptcy filings are rare because (1) usually there are effective state court remedies available to collect debts (and evict commercial tenants); (2) if it turns out that there is a bona fide dispute between the parties or other issues, the debtor may be entitled to recoup its reasonable attorney's fees from the creditor; and (3) if the court determines that the petitioning creditor filed the involuntary bankruptcy in bad faith, then the debtor may be entitled to recover punitive damages.

Nonetheless, due to the moratorium on commercial evictions until August 31, 2021 and the anticipated court backlog of cases, an involuntary bankruptcy filing may make sense for some commercial landlords to consider.

4. Residential Landlord-Tenant Cases – The May 1, 2021 expiration of the *COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020*, was extended until August 31, 2021. Cooperatives are subject to the requirements of this new law, and as a workaround we have been successful in serving maintenance default notices and UCC sale notices on lenders with apartment loans to procure payment of unpaid shareholder maintenance without filing court proceedings. There have been legislative discussions to prevent cooperatives from initiating UCC sales without court approval, but no laws prohibiting such practice to date.

5. Condominium and HOA Collections – Condominium and HOA lien foreclosure cases are proceeding. However, even though most of the COVID related laws do not technically apply to condominiums and HOAs, it does not seem that courts will be scheduling many condominium or HOA foreclosure sales until after August 31, 2021. On a positive note, the courts are reopening statewide and the backlog of cases are starting to be assigned in-person hearing dates.

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