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## **The Effect of Governor Cuomo's Executive Order 202.28 on the Landlord/Tenant Relationship**

- Robert A. Carruba

On May 7, 2020, the Governor of the State of New York issued Executive Order No. 202.28 (the “Order”) in order to address issues arising out of the COVID-19 pandemic state emergency, which included three significant additions and/or modifications to his prior orders affecting the landlord-tenant relationship. The applicable provisions include (i) a limited extension of the Governor’s prior order staying residential and commercial evictions; (ii) permits all tenants and licensees of residential properties facing financial hardship due to the COVID-19 pandemic to immediately apply any security deposit to rent arrears or future rent (with repayment over twelve (12) months); and (iii) prohibits all landlords from assessing any late fee or charge for unpaid rent due from March 20, 2020 through August 20, 2020.

In order to fully understand the effect of the Order on a landlord’s ability to pursue enforcement of lease defaults or holdover occupants, we must revisit the effect of Executive Order 202.8 issued on March 20, 2020 (“Prior Order”) and the recent court closures and filing restrictions. The Prior Order (which was the only previous executive order or directive addressing the landlord-tenant relationship) provided that: “[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of 90 days,” which 90 day period will end on June 19, 2020.

Additionally, on March 22, 2020, the Chief Administrative Judge of the Courts of the State of New York Courts issued Administrative Order AO/78/20 indefinitely precluding the commencement of any new matters including the filing of any new landlord/tenant summary proceeding. Additional administrative orders issued since that time virtually closed down the New York court system, except for the purpose of addressing “essential matters” (which excludes non-payment and holdover landlord/tenant summary proceedings).

As a result of the Prior Order and court closures (to either new or pending proceedings), a landlord was precluded from taking legal action to recover possession of property being held by a defaulting or holdover tenant. Notwithstanding the significant restriction on landlord's enforcement rights, there has not been any order or legislation abating or deferring a tenant's obligation to pay rent.

Critically, yesterday's Order does not rescind the Prior Order (which provides restrictions through June 19, 2020), but actually provides certain restrictions upon a landlord's right to pursue a tenant for the nonpayment of rent as of June 20, 2020 and through August 19, 2020. Unlike the Prior Order's broad prohibition on evictions, the Order appears to only apply to a proceeding or eviction based upon the nonpayment of rent where a tenant is experiencing financial hardship due to the COVID-19 pandemic. The Order states that:

[t]here shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent . . . rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

Therefore, once the broad restrictions of the Prior Order expire, the terms of this Order shall control and will significantly expand a landlord's ability to pursue its legal remedies for some defaults and all holdovers.

First, the Order only restricts landlord's actions toward a tenant for nonpayment of rent when that tenant is experiencing financial hardship due to the COVID-19 pandemic. This section of the Order only refers to "tenants" and not "licensees," when other sections of the Order specifically refer to both. Therefore, there is a strong argument that this restriction only applies to tenants and not licensees. Second, if the tenant is experiencing COVID-19 financial hardship, the Order not only prohibits an eviction until after August 19, 2020, (presumably in pending proceedings), but it prevents landlord from even commencing a new nonpayment summary proceeding to recover possession of the premises until August 20, 2020. Third, the Order does not distinguish rent that was due prior to the emergency from rent that accrued during the emergency. Accordingly, it could be argued to be a blanket prohibition against pursuing any proceeding or eviction against a tenant that is facing financial hardship and has not paid rent regardless of when that rent accrued.

Curiously absent from the Order is how a landlord is supposed to know that a nonpaying tenant is facing financial hardship due to the COVID-19 pandemic. Does a landlord have to send a letter before pursuing its remedies to inquire about this issue or must a tenant pro-actively advise landlord? Can a tenant merely respond to a predicate demand by advising that it is experiencing financial hardship due to the COVID-19 pandemic? Moreover, what, if any, type of proof must a tenant provide landlord to establish its claim. Since these questions are not addressed by the Order, an educated decision that best protects your interests will have to be made.

What is clear from the Order is that once the restrictions provided by the Prior Order end on June 19, 2020, and assuming that by that date the courts are permitting the commencement of new cases and hearing pending cases, a landlord will be able to pursue an eviction of a tenant for all defaults under a lease (other than monetary COVID-19 based financial hardship defaults) and tenant's failure to timely vacate the leased premises upon expiration, or termination, of a lease/tenancy.

Although the Order will expand landlord's rights that were broadly restricted by the Prior Order, there are still many questions that will need to be answered concerning the full extent of the Order's restriction upon landlord's right to pursue a tenant for the non-payment of rent prior to August 20, 2020. Notwithstanding, based upon the expected avalanche of filings on or after August 20, 2020, it is imperative that a landlord have all predicate notices served and expired prior to that date so that it can immediately commence the necessary summary proceeding.

In addition to the foregoing, the Order also impacts (i) security deposits for residential tenants and (ii) the assessment of late fees in the residential and commercial forum. A residential tenant facing financial hardship due to the COVID-19 pandemic may now apply all or a portion of its security deposit toward current rent arrears and/or future rent. However, the security deposit must be replenished by the tenant beginning not less than ninety (90) days from the date the security deposit is applied and shall be paid over twelve (12) months in equal installments. Finally, a landlord is prohibited from assessing a tenant any fee or charge for a late rent payment occurring during the period of March 20, 2020 through August 20, 2020.