

## The HSTPA and Commercial Tenants

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When the New York State Legislature implemented the HSTPA in June 2019, it predictably enacted dramatic and sweeping changes to not only the Rent Stabilization Law, but to both the Real Property Law and the Real Property Actions and Proceedings Law as well. Those amendments were widely predicted to impact owners' rights and obligations in connection with litigation against residential tenants, and they were aligned with the political philosophy of the Legislature to expand protections for residential tenants at the expense of owners.

What was not expected was the extent to which many of those same protections would apply to commercial tenancies, with even more draconian consequences. Four months later, owners across the State are feeling the impact of the HSTPA. This article will discuss the changes related to commercial tenancies.

### Non-payment Proceedings

Perhaps most significantly, the recovery of rent in a non-payment proceeding is significantly delayed by the changes in the law. Owners are now required to serve a five-day reminder notice by certified mail specifying the tenant's default, on any tenant that fails to timely tender rent, as a predicate to even serving a rent demand.

Similarly, the statutory rent demand has been expanded from a three-day notice to a 14-day notice. Thus, where a commercial owner could previously commence a non-payment proceeding in approximately one week, it is now over three weeks before a proceeding may be commenced. The statute is not explicit as to whether the five-day notice and the rent demand may run concurrently. Therefore, in order to shorten the time to commence a proceeding, some owners are serving rent demands immediately after service of the five-day notice, without waiting for it to expire.

Until this question is litigated, there is some risk that the courts will find that this practice is improper and dismiss petitions, thus delaying the ultimate recovery of rent. The decision of whether or not to take this risk is a business judgment, and smaller owners for whom cash flow is more of a factor may be better off taking a conservative approach to avoid dismissal. Absent legal guidance,

however, the failure to serve a five-day notice is an affirmative defense which must be raised by the tenant and does not appear to be jurisdictional.

### Timing of Proceedings and Adjournments

Once an owner finally commences a proceeding, the changes in the law also prolong the timeline for summary proceedings. In the first instance, the tenant's time to answer a non-payment petition has been expanded from five to 10 days, and holdover petitions **must** be served no less than 10 days prior to the first return date (also increased from five days).

The prior limitations on adjournments have been eliminated and the pendulum has swung completely in the opposite direction. On the first request for an adjournment by either party, the court must adjourn every case for no less than 14 days, with no upper limit on the length of the adjournment. Subsequent adjournments are in the discretion of the Court, which is free to adjourn a proceeding as long and as many times as it deems appropriate, all while the owner is likely not collecting rent.

### Use and Occupancy Applications

Use and occupancy may be ordered upon either (i) the second of two adjournments granted solely at the request of the tenant or (ii) the (60<sup>th</sup> day (increased from 30 days) after the first appearance of the parties in court, counting only days attributable to adjournments made solely at the request of the respondent and, in either event, not counting an initial adjournment requested by respondent for the purpose of securing counsel.

Such applications can no longer be made orally and now must be made by motion on notice with the delay attendant to motion practice. The Court may only order prospective rent deposits, and no deposit will be ordered if the tenant can establish actual or constructive eviction or lack of personal jurisdiction. The sole remedy for a tenant's failure to comply with a rent deposit order is an immediate trial such that no further adjournments of the proceeding will be granted at respondent's sole request, but the Court may extend any time period for payment or deposit for good cause shown. The Court may no longer strike the tenant's answer, defenses and/or counterclaims as a consequence of a breach of a rent deposit order.

## Evictions

The new law requires the court to specify the earliest date on which an eviction can proceed. In non-payment proceedings with payment schedules, most Judges are using the date of the last payment as the earliest eviction date (EED) and requiring owners to move to accelerate execution of the warrant upon a default. However, many of the Civil Court Judges will permit the parties to stipulate to the EED. As such, owners should consider structuring the stay of eviction such that the EED is the first payment deadline, subject to extension upon compliance.

While this may not be accepted by every Judge, it is one means of mitigating the impact of the new law. In addition, the marshal's notice of eviction has been increased to a 14-day notice. The Court must vacate the warrant if a tenant satisfies the judgment in a non-payment proceeding, either by depositing the full amount into court or by paying the owner at any time prior to the execution of the warrant, unless the owner can establish that rent was withheld in bad faith.

## Rent Receipts

On the management side, owners are now burdened with providing rent receipts to commercial tenants, although it is unclear whether

this provision was intended to apply to commercial tenancies. RPL 235-e requires, in subsection (a), that owners provide rent receipts to residential tenants who pay by cash or any means other than personal check. Notwithstanding the limitation to residential tenants in subsection (a), the succeeding subsections contain no such limitation and therefore arguably apply to all tenancies.

As such, owners of commercial properties are, on the face of the law, required to provide written rent receipts on demand and maintain copies of all such receipts for three years. Receipts must be issued immediately if payment is made in hand and within 15 days if made "indirectly." While there are owners and attorneys who have taken the position that this provision is limited to residential tenants, until the courts rule on such an argument or the Legislature addresses the issue, the more conservative approach is to issue receipts.

In sum, the Legislature has imposed additional requirements on owners of commercial properties that will unquestionably delay any litigation – both non-payment and holdover proceedings. Given the foregoing, owners are advised to be more vigilant in tracking tenant defaults and proceeding expeditiously to enforce their rights. ■

## HSTPA Fallout Continues

### *Stabilization Fee Increase from \$10 to \$20 Per Apartment Takes Effect*

The impact of the Housing Stability and Tenant Protection Act of 2019 continues to worsen for apartment building owners. One of the numerous changes to the rent laws made by the HSTPA was the increase in the so-called "rent stabilization fee" from \$10 to \$20 paid by property owners to the City's Department of Finance (DOF) based upon the number of stabilized units registered with DHCR.

Owners who filed DHCR rent registrations for the 2019 cycle prior to the issuance of the July tax bills were billed \$10 per apartment, which was the amount required by law at that time. The HSTPA, which took effect on June 14<sup>th</sup>, then increased the fee to \$20 per apartment. As a result, the January 2020 tax bills include an additional \$10 rent stabilization fee for each

apartment registered for the 2019 cycle. The tax bills contain the following explanation:

*"The rent stabilization fee increased to \$20 per unit as of July 1, 2019. This fee was calculated at the old rate on your previous property tax bill. You will see two charges on this bill. One is the current charge at the new rate, and the second is the difference between what you were previously billed at the new legal rate."*

The HSTPA provides that the fee is calculated at the end of the fiscal year and the City is charging the additional \$10 per unit because the fiscal year ended after June 14<sup>th</sup>, the effective date of the new law. ■