HARRIS BEACH PLLC
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Reforms to Residential Landlord Tenant Relations

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Background

On June 14, 2019, Governor Andrew Cuomo enacted The Housing Stability and Tenant Protection Act of 2019 establishing sweeping legislation that expands certain rent provisions statewide and alters the relationship between landlords and tenants in residential real estate, effective June 14, 2019 unless otherwise noted (the "Act"). The Act also strengthened the substantive rights of residential tenants against landlords while bolstering tenants' procedural rights in the face of an eviction proceeding.

The Act amended provisions of the New York Real Property Law (the "RPL"), the New York Real Property Actions and Proceedings Law (the "RPAPL"), and the New York General Obligations Law (the "GOL"), often introducing entirely new sections to these laws. This memorandum will provide a summary of some of the changes and additions to the law affecting landlord-tenant relations in the context of residential real estate. This memorandum has two sections, the first dealing with the strengthened and new substantive rights for tenants and the second dealing with expanded procedural rights of tenants during eviction proceedings.

New Tenant Protections

1. Landlords Must Mitigate Damages

Under prior New York law, a residential landlord was under no duty to mitigate damages unless the terms of the lease indicated otherwise.[1] Under this rule, a landlord could allow abandoned property to sit vacant and idle and still hold the tenant liable for all of the rent due under the lease for the entire term as and when it became due. Essentially, the landlord was under no obligation or duty to the tenant to relet, or attempt to relet, the abandoned premises in order to minimize its damages.[2]

The Act abolished this common law rule and now requires the landlord to take reasonable and customary actions in good faith to rent the premises at fair market value, or the rental rate agreed-to in the lease, if a tenant vacates the premises in violation of the lease.[3] If a landlord fails to mitigate damages by attempting to re-lease the premises in good faith, the landlord's potential damages against the tenant will be limited.

2. Security Deposits Limited to 1 Month

It is common practice for landlords to hold a security deposit, usually in an amount equal to at least one month's rent, in addition to requesting advance payment of the first and last months' rent. The amount of the deposit or the advance payment the landlord collected was not previously regulated. However, the Act introduced limitations applicable

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[1] *Rios v. Carrillo*, 53 A.D.3d 111, 114 (2d Dept 2008).
[2] *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 133 (1995).
[3] *See* RPL § 227-e.

to all dwelling units in residential premises except for those units subject to the New York City Rent Stabilization Law of 1969 as amended,[4] the Emergency Tenant Protection Act of 1974 as amended,[5] and to certain other types of dwelling units, like continuing care retirement communities, adult care facilities, and similar kinds of housing.[6]

Under the Act, a residential landlord cannot demand a "deposit or advance" in excess of one month's rent.[7] The language of the statute is quite broad and conceivably it could be interpreted to mean that the total, cumulative amount of all deposits, such as unit and/or pet deposits, and advance payments, such as first and/or last months' rent, are regulated by the Act. The total amount cannot exceed one month's rent. Erring on the side of caution until more time passes to see how this new section is applied, the total amount of the deposit and advance, together, should be limited to one month's rent. As noted below, failure to follow this new limitation, depending on how it is interpreted and applied, could subject the landlord to damages in an amount up to twice the deposit or advance.

Also, there is uncertainty over whether the Act's security deposit and advance limitation will apply to non-traditional leases, like short-term vacation rentals or similar arrangements where there is a rental term in excess of one month and a single payment is made. As is often the case, the lessor in these arrangements will demand a single payment for the entire term. For instance, a family looking to rent a vacation house for two months will make one payment for the entire two month term, as opposed to two separate monthly payments. Some commentators are characterizing the single payment for the entirety of the term as prepaid rent and an "advance" regulated under the Act. According to these commentators, the landlord would be required to bill the tenants on a monthly basis because the single payment cannot exceed "one month's rent."

Alternatively, the Act could be interpreted to apply only to traditional leases where the lease requires payment of rent on a monthly basis. The Act itself states that "[n]o deposit or advance shall exceed the amount of one month's rent under such contract,".[8] If the tenancy does not provide for monthly rental payments because there is only one payment for the entire tenancy, then "under such contract" there is no "one month's rent," which should render the security and advance limitation inapplicable.

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[4]Contained in the New York City Administrative Code § 26-501 et seq.
[5]Also on June 14, 2019, the Governor expanded the Emergency Tenant Protection Act of 1974 ("*ETPA*") as part of this sweeping legislation to all municipalities throughout the State. The ETPA established the system of rent stabilization and regulated rent seen in New York City. Rent regulation can be expanded to any village, town, or city if the local legislative body passes a resolution, upon adequate public notice, declaring an "emergency" after finding that vacancy rates for any or all classes of housing are 5% or less.
[6]Previously, GOL § 7-108 was limited to dwelling units in residential premises "containing six or more dwelling units," i.e. this section of the GOL was limited to multi-family buildings and did not previously apply to single family homes. However, the Act removed this limitation and applies GOL § 7-108 (imposing the new deposit and advance limitations, amongst other existing requirements) to "all dwelling units in residential premises" except for rent regulated units and certain other kinds of dwelling units.
[7]*See* GOL § 7-108(1-a)(a).
[8]GOL § 7-108(1-a)(a).

Also, instead of characterizing a single payment for the entire term of a vacation rental or similar arrangement as an "advance," it should be viewed simply as a rental payment entitling the tenant to possess the premises for the stated duration, even if that duration happens to be for more than one month. Additional time is needed to determine which of these opposing interpretations, if any, will be applied.

The Act also requires the entire amount of the deposit or advance be refunded to tenant upon tenant's vacating of the premises except for an amount retained for reasonable and itemized costs because of non-payment of rent or utilities, damage to the unit, or costs associated with removing, moving, and storing a tenant's belongings.[9]

Additionally, a landlord is now obligated to offer a tenant the opportunity to inspect the premises with the landlord after initial lease signing but prior to taking possession.[10] During the inspection, the tenant shall have the opportunity to assess the condition of the premises and both parties are required to execute a written agreement describing its condition, noting any existing defects or damages. The agreement is intended to serve as evidence of the conditions at the premises in the event a dispute later emerges. Also, after notification by either party of its intent to terminate the tenancy, landlord is obligated to notify the tenant in writing of its right to request an inspection before vacating the premises along with the tenant's right to be present during the inspection.[11] The tenant has the right to receive an itemized statement of the required repairs or cleaning and has the ability to fix any such issues.

Finally, within 14 days after the tenant has vacated the premises, the landlord must provide an itemized statement to tenant indicating the basis for retaining a portion of the deposit, if any.[12] Failure to comply with these requirements can subject landlord to liability for actual damages and potentially punitive damages that could equal an amount up to two times the deposit or advance.[13]

3. Application Fees are Prohibited

In New York State, as well as in many other states, it is common practice for a landlord to charge a non-refundable rental application fee prior to the tenancy's commencement, often ranging from $30 to upwards of $200 per applicant.[14] Under the Act, landlords are prohibited from demanding any payment, fee, or charge for the processing, review, or acceptance of any rental application, and, except as noted below, are also prohibited from demanding any other payment, fee, or charge prior to or at the beginning of the tenancy. [15]

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[9] *See* GOL § 7-108(1-a)(b).
[10] *See* GOL § 7-108(1-a)(c).
[11] *See* GOL § 7-108(1-a)(d).
[12] *See* GOL § 7-108(1-a)(e).
[13] *See* GOL § 7-108(1-a)(g).
[14] *See* https://www.rentprep.com/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/ (Accessed July 9, 2019).
[15] *See* RPL § 238-a(1)(a).

The limitation on application fees could also extend to cooperative housing arrangements. Generally, a housing cooperative refers to a cooperative corporation, which is formed to own a multi-unit residential building. The cooperative corporation is owned by shareholder-tenants who are allocated a particular unit in that building tied to their ownership interest in the cooperative corporation. The shareholder-tenant then enters into a lease agreement with the cooperative corporation to possess and reside in its particular unit.[16]

One of the distinguishing factors from a traditional lease is that the shareholder-tenant holds an ownership interest in the cooperative-landlord. Quite often, the cooperative-landlord will require payment of an "application fee" or similar charge when entering into the lease. It is possible courts could treat cooperative apartment leases like traditional leases and apply the new application fee prohibitions to cooperative housing arrangements.[17]

4. Background Fees are Capped

Although the Act outlaws collection of rental application fees or any other kind of fee prior to the tenancy's commencement, a landlord can still collect fees for running background checks, albeit in limited amounts. The Act permits a landlord to charge a fee to reimburse the landlord for the costs associated with conducting a background check so long as the total fee is no greater than the lesser of (i) the actual cost of the background check or (ii) $20; additionally, the landlord is required to waive the fee or fees entirely if the potential tenant provides a copy of a background or credit check that occurred within the last thirty days.[18]

5. Late Payment Fees are Also Capped

A landlord can no longer demand any payment, fee, or charge for the late payment of rent unless the payment is more than five (5) days late. Furthermore, the amount of the late fee cannot exceed the lesser of (i) $50 or (ii) 5% of the monthly rent.[19] As of the date of this memorandum, there is no guidance as to whether each monthly rental payment will be treated separately, or whether capped late fees can be reassessed month-over-month.

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[16] *See Frisch v. Bellmarc Mgmt., Inc.,* 190 A.D.2d 383, 387 (1st Dept 1993) ("A person having a cooperative interest in real estate [e.g., a tenant-shareholder in a cooperative apartment] typically owns stock in a cooperative corporation and has a 'proprietary' leasehold granted by the corporation. The cooperative corporation is the sole owner of the land, structures and facilities, while the individual shareholder through the proprietary lease receives the right to occupy the space in the premises to which his or her shares are allocated.").

[17] In some cases, courts have applied certain sections of the RPL to cooperative housing arrangements, *see Suarez v. Rivercross Tenants' Corp.,* 107 Misc. 2d 135, 139 (1st Dept 1981) (applying RPL § 235-b to cooperative apartments), in addition to the RPAPL, *see Earl W. Jimerson Hous. Co. v. Butler,* 102 Misc. 2d 423, 424 (App. Term 1979) ("[T]he relationship between the petitioner, a co-operative, and respondent, its stockholder, is that of landlord and tenant to the extent that petitioner may maintain a summary proceeding against respondent.").

[18] RPL § 238-a(1)(b).

[19] *See* RPL § 238-a(2).

6. Self-Help is Criminalized

The already risky common-law remedy of self-help—where a landlord re-enters the premises upon a default in payment of rent—is now criminal.[20] Under the Act, it is unlawful for a landlord to evict or attempt to evict a residential tenant who has occupied a dwelling unit for 30 or more consecutive days through (i) using or threatening to use force, (ii) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the "comfort, repose, peace or quiet of such occupant," or (iii) engaging or threatening to engage in any other conduct which prevents or is intended to prevent the occupant from lawfully occupying the dwelling unit, such as removing the occupant's possessions, removing the door at the entrance of the unit, or changing the locks.[21]

Any person who intentionally violates this provision shall be guilty of a class A misdemeanor and may also be subject to a civil penalty ranging from $1,000 to $10,000 for each violation.[22] In effect, this Act limits the self-help remedies that a residential landlord may attempt to use against a tenant who defaults on the payment of rent, and should incentivize landlords to obtain a warrant of eviction prior to removing a tenant from possession.

7. Strengthened Protections against Retaliatory Evictions

Historically, residential tenants had statutory protections against retaliatory evictions in certain instances. Under prior law, a landlord was prohibited from commencing an eviction proceeding in retaliation for a tenant's good faith complaint to a governmental authority based on an alleged violation of applicable health or safety laws or regulations. In short, the landlord could not go after the tenant for the tenant's good faith complaint to government for alleged violations of safety ordinances or other law.

The Act expands the scope of protections available to tenants and also the scope of instances that are deemed "retaliatory." Now, a landlord is prohibited from serving a notice to quit or commencing an eviction proceeding in retaliation for a good faith complaint by the tenant to the landlord or landlord's agent, in addition to a governmental authority. Additionally, the kinds of complaints protected under the statute are also expanded to include not just the landlord's alleged violation of applicable health or safety laws or regulations, but also complaints concerning the warranty of habitability and the landlord's duty to repair under other sections of the RPL.[23]

A landlord is prohibited from serving a notice to quit or commencing an eviction proceeding in retaliation for a good faith complaint by the tenant to the landlord or landlord's agent

[20]Under current law, a landlord can be liable to a tenant for removing that tenant from his tenancy in a "forcible or unlawful manner," or, if after removing that individual, the landlord keeps the tenant out of the premises through the use of force or other "unlawful means." The landlord could be liable to tenant for up to 3-times the amount of damages the tenant experiences. *See* RPAPL § 853.
[21]*See* RPAPL § 768(1)(a).
[22]*See* RPAPL § 768(2).
[23]*See* RPL § 223-b.

8. Notice

Under the Act, residential tenants now have additional statutory notice protections. Prior to the landlord increasing rent by 5% or more above the current rental rate, or deciding not to renew a tenancy, the landlord is obligated to provide written notice of such change to the tenant.[24] Failure to provide written notice in a timely fashion will result in a continuation of the occupant's tenancy under the existing terms in the lease. The tenancy will continue from the date on which landlord gave actual written notice as required under the Act and until the notice period provided for under the law actually expires. Notice must be provided according to the following table:

Length of Tenant's Occupancy & Lease Term	Required Notice
Less than 1 year	30 Days
Between 1 and 2 years	60 Days
More than 2 years	90 Days

Evictions

1. Damages in Eviction Proceedings are Limited

Previously, a residential landlord was permitted to collect additional rent as damages when prosecuting an eviction proceeding.[25] However, the Act now limits the definition of "rent" in the residential context to exclude these additional kinds of damages that were previously recoverable. Now, the term "rent" only means "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent may be sought in a[n] [eviction proceeding] . . . pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement."[26] As a result, a landlord can no longer collect additional rent as damages in an eviction proceeding.

2. Grounds for Eviction can be Rendered Moot if Tenant Makes Full Payment Prior to Hearing

In the event a residential tenant fails to pay rent and the landlord commences an eviction proceeding, the action can be dismissed if, at any time prior to the hearing on the petition, the tenant pays the full amount of rent due.[27] The landlord is obligated to accept the payment of the rent. Furthermore, because of the change in the definition of "rent" discussed in the immediately preceding section, a landlord can no longer require payment of additional rent or other amounts owing under the lease as a condition to reinstatement of the tenancy.

A landlord can no longer collect additional rent as damages in an eviction proceeding

[24] *See* RPL § 226-c.
[25] "Additional rent" is a broad term with meaning that differs from lease-to-lease, but it usually refers to the costs, charges, and expenses incurred in operating the property, such as property taxes, insurance premiums, common area maintenance expenses, repair costs, and utility charges.
[26] *See* RPAPL § 702.
[27] *See* RPAPL § 731.

3. Stays for Warrants

The Act also expanded the protections of stays for warrants of eviction. As amended, a court may stay the issuance of a warrant of eviction and any execution to collect costs of the proceeding for a period of up to 1 year—increased from 6 months—upon application of the occupant and if the following conditions are met: (i) the premises were used for dwelling purposes, (ii) the application was made in good faith, and (iii) the applicant cannot secure suitable premises in its neighborhood similar to those occupied by the applicant after making reasonable efforts to secure other premises, or it would cause "extreme hardship" to the applicant's family if the stay were not granted.[28]

Notably, the amended statute now defines what scenarios would cause "extreme hardship." Specifically, the court is advised to consider serious ill health, significant exacerbation of an ongoing condition, a child's enrollment in a local school, and any other "extenuating life circumstances affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life."[29]

4. Timing of Eviction Proceedings

Tenants received additional procedural protections under the Act applicable to eviction proceedings. For example, a landlord must make written demand for rent with at least 14 days' notice, as opposed to 3 days' notice, when seeking payment of the rent owing under the lease or possession of the premises.[30] Time periods for service of process were also increased to require service of the notice of petition and petition at least 10 days and no more than 17 days before the date the petition is noticed to be heard, an increase from the previous 5 and 12 days, respectively.[31]

The Act also significantly expands adjournments of eviction proceedings. Previously, the court had the discretion to adjourn or temporarily suspend a trial for up to 10 days upon the request of either party and upon proof that the adjournment was necessary to enable the applicant to procure its evidence to be used in that trial, such as securing necessary witnesses. Now, the court shall adjourn an eviction proceeding at the request of either party for 14 days without any showing that the adjournment is necessary to procure witnesses or other evidence.[32] As amended, a tenant has the statutory right to adjourn a trial for 14 days.

Under the prior law, once a warrant of eviction was issued, the officer to whom the warrant was directed and also responsible for removing the tenants from possession was typically required to deliver at least 72 hours' notice in writing to the persons to be evicted or dispossessed. However, the Act significantly expands this notice requirement, now requiring the officer to deliver at least 14 days' notice in writing.[33]

As amended, a tenant has the statutory right to adjourn a trial for 14 days

[28] *See* RPAPL § 753(1).
[29] *Id.*
[30] *See* RPAPL § 711(2).
[31] *See* RPAPL § 733(1).
[32] *See* RPAPL § 745(1).
[33] *See* RPAPL § 749(2).

5. New Defense to Eviction Proceedings

Tenants now have a new affirmative defense that can be raised in an eviction proceeding. The amended law requires landlord or its agent to deliver written notice, via certified mail, of any failure to pay rent within 5 days of the due date specified in the lease.[34] The failure to provide a tenant with a written notice of the non-payment of rent may be used as an affirmative defense in an eventual eviction proceeding.

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[34] *See* RPL § 235-e(d).

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Contacts

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