

### **Presents**

### The State of the Moratoria – Updates in Landlord Tenant Practice

October 6, 2021 12:00 pm - 1:30 pm

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### NYS Eviction Moratorium

CEEFPA

COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA)

Amended and extended by Senate Bill 50001, Part C

Effective 12/28/2020 until 01/15/2022

Stated legislative intent: "to avoid as many evictions and foreclosures as possible for people experiencing a financial hardship during the COVID-19 pandemic or who cannot move due to an increased risk of severe illness or death from COVID-19."

### CEEFPA

# Stay of Pending Evictions

If the tenant submits a **Hardship Declaration**, the case is stayed through 01/15/2022

If a warrant has already been granted, execution of the warrant is stayed

Applies to **both nonpayment and holdover** evictions

### CEEFPA

# Notices and New Evictions

Landlord's Hardship Notice Obligations

- Must serve with demand for rent and any other pre-eviction notices
- Must serve with Notice of Petition

If a LL receives a Hardship Declaration, may not commence an eviction proceeding prior to January 15, 2022

The **LL must give the court an attesting affidavit** regarding notice compliance

Court obligation to ensure compliance

## CEEFPA -Eligibility

### Hardship categories:

- The household suffered a loss of income or had increased costs during the COVID-19 pandemic; or
- Moving would pose a significant health risk for the tenant or a household member

### **CEEFPA**

Financial Hardship The household has an inability to pay rent or some other lease obligation in full, or is unable to obtain alternative suitable permanent housing due to:

- significant loss of household income
- increase in work or health related expenses
- childcare responsibilities (also caring for an elderly, disabled or sick family member)
- moving expenses/difficulty relocating
- other COVID-related circumstances affecting income or expenses

### **CEEFPA**

### Significant Health Risk

Vacating the premises and moving into new permanent housing would pose a significant health risk because a household member has an increased risk for severe illness or death from COVID-19 due to:

- being over the age of sixty-five
- having a disability, or
- having an underlying medical condition

# CEEFPA Exception

The moratorium does not apply if the tenant is being evicted for (1) intentionally damaging the property or (2) 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

If the petition does not allege such behavior, Petitioner must serve and file a new petition alleging such

### **CEEFPA**

Hardship Challenges Petitioners can now challenge the validity of a hardship declaration at a hearing, upon motion of the Petitioner

At the hearing, the burden should be on the Petitioner

If the hardship claim is found to be <u>valid</u>, the court shall grant or continue the stay – provided the court directs the parties to apply for ERAP (if still available)

If the hardship claim is found to be <u>invalid</u>, the proceedings shall continue to a determination on the merits

# CEEFPA - Additional Info

It is against the law for a tenant to make a statement on the Hardship Declaration that the tenant knows is false

Tenants are still responsible for rent and other lawful charges and landlords may still seek a money judgment

### Federal Moratorium -CDC Order

On August 3, 2021, the Centers for Disease Control (CDC) issued a new order temporarily halting residential nonpayment evictions until October, 2021, in counties with "substantial" or "high" levels of COVID transmission

The Supreme Court invalidated this moratorium on August 26, 2021

# Tenant Safe Harbor Act (TSHA)

Chapter 127 of the Laws of 2020, S. 8192B

Enacted June 30, 2020; Amended September 2, 2021

Legislative purpose: to help keep residential tenants in their homes following the COVID-19 pandemic by allowing only money judgments, and not evictions, for unpaid rent that comes during the covered period

# TSHA Statutory Language

"No court shall issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period for the non-payment of rent that accrues or becomes due during the COVID-19 covered period."

# TSHA Who is Covered?

Residential tenants

Lawful occupants

• Generally, anyone who was given permission to enter the dwelling unit by the landlord, owner or other authorized person (i.e., managing agent, tenant)

Does not apply to "unlawful" occupants (i.e., trespassers and squatters)

### **TSHA**

# What is Financial Hardship?

Not specifically defined

Hardship Declaration = rebuttable presumption

Court must consider relevant factors, including:

- Income prior to COVID
- Income during COVID
- Any liquid assets
- Eligibility for and receipt of Cash Assistance, SNAP, SSI, NYS Disability, HEAP, and UIB, and ERAP

## TSHA -COVID-19 Covered Period

Began on March 7, 2020

Expires on January 15, 2022

## TSHA -Effect

The tenant/occupant may raise financial hardship as a defense in an eviction proceeding

- In nonpayment proceedings
- Possibly in holdover proceedings

Court may award the landlord a money judgment for rent that accrued during the covered period

# Utility Shutoff Moratorium

No utility, water works, telephone company or municipality can discontinue service due to nonpayment a residential customer during the COVID-19 state of emergency

For customers who experienced a change in financial circumstances due to COVID-19, the moratorium lasts **180 days** from the expiration of the state of emergency

The state of emergency expired June 25, 2021. The moratorium ends on December 22, 2021

### Emergency Rental Assistance Program (ERAP)

NYS passed legislation creating the ERAP program as part of the NYS budget. See NY Senate Bill 2506—C, Part BB, Amended by NY senate bill 50002

The program provides rental assistance to eligible tenants for up to 12 months of rental or utility arrears and 3 months of future payments for rent burdened households.

A total of \$2.8 billion available for all NY counties and areas, except Monroe County, the City of Yonkers, Onondaga County and the towns of Hempstead, Islip and Oyster Bay.

# ERAP Application

ERAP is being administered by the Office of Temporary and Disability Assistance (OTDA)

OTDA began accepting applications June 1, 2021, and is currently accepting applications

Applications can only be made online at <a href="https://otda.ny.gov/programs/emergency-rental-assistance/">https://otda.ny.gov/programs/emergency-rental-assistance/</a>

Updated guidance from the Treasury has relaxed the requirements for required documentation to allow for self-attestations

## ERAP -Eligibility

Applicant must have had a household who, on or after March 13, 2021, (1) qualified for unemployment, or (2) experienced a financial hardship during the COVID-19 pandemic

Application must be at risk of homeless or housing instability

Applicant's household income must be at or below 80% of AMI, adjusted for household size

A lawful immigration status is NOT required

### **ERAP**

Eligibility, expanded

On September 1, 2021, \$250 million in additional funding was provided to expand eligibility for the program

\$125 million was made available to individuals who are otherwise eligible, but earn more than 80%, but not more than 120% of AMI

\$125 million was made available to landlords if a tenant refuses to participate, including where the tenant has vacated the property

### ERAP -Payments

Payments are made directly to landlords and utility providers

If an application is approved, OTDA will contact the landlord to attempt to make the payment

If the landlord refuses, the funds will be set aside for 180 days, after which they may be re-allocated

### ERAP -Protections

Eviction proceedings may not be filed while an application is pending

Pending proceedings are stayed until the application has been denied; landlords must inform the court regarding a pending application

If a landlord accepts the funds, they must waive all late fees and accept the funds as payment-in-full for the period covered by the payment; upon payment, a landlord may not raise the rent or evict a tenant as a holdover for 12 months

If a landlord declines the payment, their refusal is a defense against eviction or judgment; if a landlord refuses to accept payment for longer than 12 months, they are deemed to have waived the rent for the period covered by the payment

### ERAP -Nuisance

Eviction protections do not apply if Petitioner establishes that a tenant intentionally caused significant damage the property or is persistently and unreasonably engaging in nuisance behavior, as described by the statute

If a judgment has already been granted on the basis of nuisance or objectionable tenancy, the court shall hold a hearing to determine if such conduct is continuous and persistent

An allegation of such behavior by the petitioner or an agent is not sufficient evidence

### **ERAP**

Is it income?

Funds provided by the program are <u>not</u> considered income for purposes of public benefit eligibility.

Funds <u>are</u> considered a "source of income" for protection from income discrimination under § 296 of the Human Rights Law.

### <u>Landlord/Tenant Update:</u> The Moratoria, Tenant Safe Harbor Act, and ERAP

#### I. State of the "Moratoria"

- a. NY COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA)
  - i. Effective 12/28/2020; extended 05/04/2021; enjoined by Supreme Court 08/12/2021; amended and extended 09/02/2021
    - 1. Amended by <u>Senate Bill 50001</u>, <u>Part C</u>, to address the due process concerns expressed by the Supreme Court in *Chrysafis v. Marks*, 594 U.S. \_\_\_\_\_ (2021)
  - ii. Legislative intent: to avoid as many evictions and foreclosures as possible for people experiencing financial hardship during COVID-19
  - iii. Stay of Pending Evictions
    - a. Applies to nonpayment *and* holdover evictions
    - b. If a tenant submits a Hardship Declaration, the case is stayed until at least 01/15/2022, unless, after a hearing on petitioner's motion, the court finds a respondent's hardship claim invalid
    - 2. Notice Requirements and New Evictions
      - a. If a landlord receives a Hardship Declaration, they may not commence an eviction proceeding before 01/15/2022
      - b. Landlord must attest that a Hardship Declaration was served but not returned; the court is obliged to ensure compliance.
    - 3. Hardship Declaration Form available at <a href="www.nycourts.gov/eefpa">www.nycourts.gov/eefpa</a>
      - a. Hardship categories: Financial and Significant Health Risk
      - b. Financial Hardship:
        - i. Inability to pay rent/lease obligation *or* unable to obtain alternative suitable permanent housing due to loss of income, increased costs, childcare, moving costs, or other COVID-related circumstances.
      - c. Significant Health Risk
        - Moving into new permanent housing would pose significant health concerns because a household member is at increased risk for COVID-19 due to age (65 and up), disability, or underlying medical condition
    - 4. Hardship Challenge (§ 10)
      - a. A stay shall be granted or continued unless a court finds the hardship claim invalid.
      - b. Upon motion by the petitioner, a court shall hold a hearing to determine whether a hardship claim is invalid.
        - 1. Petitioner must attest to a good-faith belief that the respondent is not experiencing hardship
        - i. If a hardship claim is found to be valid, the court shall grant or continue a stay
          - 1. Provided that the court direct the parties to apply for ERAP or other similar locally available programs, if they have not yet.
        - ii. If a hardship claim is found to be invalid, the proceedings shall continue to a hearing on the merits
    - 5. Exception
      - a. Moratorium does not apply if tenant is being evicted for persistently and unreasonably engaging in behavior that:

- i. Substantially infringes on use and enjoyment of other tenants
- ii. Causes substantial safety hazard

b.

- 6. Additional Notes
  - a. Tenant cannot knowingly make false statement on Hardship Declaration
  - b. Landlords may seek money judgment
- b. Most Recent Federal (CDC) Moratorium
  - i. Replaced old CDC Order, which expired July 31, 2021.
  - ii. Was effective from 08/03/2021 until 08/26/2021
    - 1. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U. S. (2021)
      - a. Court found the CDC moratorium not authorized by purported authority; 42 U.S.C.A. § 264 and 42 C.F.R. § 70.2 (delegating authority to the CDC).

### II. Tenant Safe Harbor Act

- a. Chapter 127 of the Laws of 2020, S. 8192B, enacted 06/30/2020; amended 09/02/21 (Senate Bill 50001, Part D)
  - i. Purpose: to help keep tenants in their homes during COVID-19 by allowing money judgments, not evictions, for unpaid rent until 01/15/2022
- b. Who is covered:
  - i. Residential tenants
  - ii. Lawful occupants: anyone given permission to enter the unit by landlord, owner, or other authorized person (managing agent, tenant)
  - iii. Does not apply to unlawful occupants (trespassers and squatters)
- c. "Financial Hardship"
  - i. Not defined
  - ii. Hardship Declaration is a rebuttable presumption
  - iii. Relevant factors: Income prior to COVID-19, income during COVID-19, liquid assets, eligibility for/receipt of cash assistance, SNAP, SSI, NYS Disability, HEAP, UIB, or ERAP.
- d. Coverage Period
  - i. Began on 3/07/2020; continues until 01/15/2022
- e. Effect
  - i. Tenant can raise financial hardship as a defense in eviction proceeding (nonpayment and possibly holdover)
  - ii. Court may award landlord money judgment for accrued rent

#### **III.** Moratorium on Utility Terminations

- a. NY State Senate Bill S8113A
- b. No utility, water works, telephone company or municipality can discontinue service due to nonpayment by a residential customer during COVID-19
- c. NY Senate Bill S1453A, signed by the Governor on 5/11/21, updated the sunset date to December 22, 180 days after the expiration of COVID-19 state of emergency on June 25, 2021.

#### IV. New York State Emergency Rental Assistance Program (ERAP)

- a. Amended 09/02/2021
- b. Chapter 56 of the Laws of 2021, NY Senate Bill S2506—C, Part BB
  - i. As amended by NY Senate Bill 50001, Part A

- c. Provides assistance for up to 12 months of rental and utility arrears due on or after March 13, 2020, and up to three months of prospective rent payments for "rent burdened" households.
  - i. Originally funded by the Consolidated Appropriations Act of 2021, the American Rescue Plan of 2021, with some additional funding from NYS.
  - ii. Additional state and federal funding was added on 09/2/2022.
    - 1. Over of \$2.8 billion has been made available through the program.
    - 2. If 65% of the funds are not utilized before September 30, 2021, then the federal government may reclaim and reallocate the remaining funding.
- d. <u>Applications</u> accepted starting 06/01/2021 and are currently being accepted.
  - i. Program is administered by the Office of Temporary and Disability Assistance (OTDA).
  - Available in all NY geographic areas, except the City of Rochester and Monroe County, the City of Yonkers, Onondaga County, and the towns of Hempstead, Islip and Oyster Bay.
- e. Eligibility Requirements:
  - i. Is obligated to pay rent in their primary residence in New York State;
  - ii. On or after March 13, 2020, a HH member qualified for unemployment, had a reduction in HH income, had significant costs, or experienced other financial hardship due directly or indirectly to the COVID-19 pandemic;
  - iii. Is at risk of homelessness or housing instability; and
  - iv. The HH's current or 2020 gross income is at or below 80% of the Area Median Income, adjusted for HH size. (copy included).
  - v. Does NOT require lawful immigration status for eligibility.
- f. Expanded Eligibility and Free Representation:
  - i. <u>Senate Bill 50002</u>, passed September 1, 2021, amends Section 1 of chapter 53 of the laws of 2021 to provide additional funding, expand eligibility, and provide for free representative for tenants.
    - 1. \$125 million is available for household who otherwise qualify, but earn more than 80% but not more than 125% AMI
      - a. For the first 45 days applications are accepted, applications will only be accepted for households who earn not more than 100% AMI
    - 2. \$125 million is available for landlords with tenants who have (1) refused to participate in ERAP, including tenants who have vacated
      - a. Only available for units where the landlord does not charge more than 150% of the fair market value by unit size
      - b. For the first 45 days applications are accepted, applications will only be accepted if submitted by "small landlords" owning 20 or fewer units.
    - 3. \$25 million is available to provide legal services or attorney's fees to tenants related to eviction proceedings or maintaining housing stability in areas where free access to such services is not already provided.
- g. Funds will be paid directly to landlords.
- h. Courts are required to promptly provide tenants with information on how to apply for the program in any pending or newly-filed eviction proceedings.
- i. Eviction protections under the program:
  - i. A landlord may not start an eviction proceeding against a tenant after they submit an application.
  - ii. If there is a pending eviction proceeding, the proceeding is stayed pending an eligibility determination.

- iii. If the landlord accepts the funds, they must agree to waive any late fees associated with the period covered by the program and must accept the funds as payment in full for the period covered by the payment.
- iv. If the landlord accepts the funds, they may not bring a holdover eviction proceeding against the tenant or raise the tenant's rent for 12 months after the first payment is received.
- v. If a tenant is deemed eligible, and the LL refuses payment, the money will be put aside for 180 days. If the LL continues to refuse to accept payments after 180 days, then the tenant may raise such as an affirmative defense to a nonpayment proceeding for the period covered by the provisional payment, and after 12 months, the LL is deemed to have waived the amount of rent covered by the provisional payment.
- j. Nuisance Cases (§ 9-a, as amended 09/02/2021)
  - i. Creates a narrow nuisance exception to the eviction protections if a landlord establishes by sufficient evidence that a tenant intentionally causes significant damage to the property or "persistently and unreasonably engages in behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard to others," provided:
    - 1. The petitioner, prior to filing, files an attestation that a tenant is engaged in such nuisance behavior, as defined by the section
    - 2. The petitioner, in a pending proceeding where a nuisance has not been previously alleged, serves and files a new petition alleging such behavior
  - ii. If a warrant has been executed on the basis of nuisance or objectionable behavior, a hearing shall be held to determine whether the tenant is continuing to persist in such behavior.
  - iii. An allegation by petitioner or their agent that a tenant is continuing to persistently engage in such behavior will not be sufficient evidence of such behavior.
- k. Administrative Order (AO) 244/21 (copy included), effective August 13, 2021, directs petitioners with pending eviction proceedings to notify the court, by prescribed form, if they (1) have been notified that the respondent-tenant has submitted an ERAP application, (2) have applied for ERAP on behalf of the respondent-tenant, or (3) have received payment from ERAP on behalf of the respondent-tenant.
- 1. Funds provided by the program are not considered "income" for purposes of public benefit eligibility, but are considered a "source of income" for purposes of protections against housing discrimination provided under section 296 of the human rights law. NY Senate Bill S2506—C, Part BB § 10.

### SUPREME COURT OF THE UNITED STATES

No. 21A8

### PANTELIS CHRYSAFIS, ET AL. v. LAWRENCE K. MARKS

ON APPLICATION FOR INJUNCTIVE RELIEF

[August 12, 2021]

The application for injunctive relief presented to JUSTICE SOTOMAYOR and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

This order enjoins the enforcement of only Part A of the COVID Emergency Eviction and Foreclosure Prevention Act (CEEFPA). 2020 N. Y. Laws ch. 381. That is the only relief applicants seek. See Case No. 2:21-cv-02516, ECF No. 1 at 9; Emergency Application for Writ of Injunction 7, 40. If a tenant self-certifies financial hardship, Part A of CEEFPA generally precludes a landlord from contesting that certification and denies the landlord a hearing. This scheme violates the Court's longstanding teaching that ordinarily "no man can be a judge in his own case" consistent with the Due Process Clause. *In re Murchison*, 349 U. S. 133, 136 (1955); see *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 53 (1993) (due process generally requires a hearing).

This order does not enjoin the enforcement of the Tenant Safe Harbor Act (TSHA), which applicants do not challenge.

2020 N. Y. Laws ch. 127, §§1, 2(2)(a). Among other things, TSHA instructs New York courts to entertain a COVID-related hardship defense in eviction proceedings, assessing a tenant's income prior to COVID, income during COVID, liquid assets, and ability to obtain government assistance. §2(2)(b). If the court finds the tenant "has suffered a financial hardship" during a statutorily-prescribed period, then it "shall [not] issue a warrant of eviction or judgment of possession." §2(1).

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting from grant of application for injunctive relief.

The New York Legislature has passed two laws regulating evictions during the COVID-19 pandemic. The first is the Tenant Safe Harbor Act, which provides tenants who have "suffered a financial hardship during the COVID-19 covered period" with a defense in eviction proceedings. 2020 N. Y. Laws ch. 127, §2.2.(a) (McKinney). The second is the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA). CEEFPA simplifies the process for tenants to invoke financial hardship during the pandemic as a defense to eviction. Tenants who wish to assert the defense must provide a sworn attestation stating that they are experiencing financial hardship or health impacts as a result of the pandemic. 2020 N. Y. Laws ch. 381, pt. A, §4. The attestation pauses eviction proceedings until the time that CEEFPA expires, namely the end of August 2021. §§2, 4, 6, 8; 2021 N. Y. Laws ch. 104 (establishing CEEFPA's August 31, 2021, expiration date). Pending eviction proceedings are stayed, new eviction proceedings cannot be filed, and outstanding eviction warrants cannot be executed until that date. 2020 N. Y. Laws ch. 381, pt. A, §§2, 4, 6, 8. Eviction proceedings may resume after August 31, 2021.

Only CEEFPA is before us. Applicants, five New York

quires only the dissemination of "purely factual and uncontroversial information" in the context of commercial speech and is therefore authorized by our precedents. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985). Given the arguments on the other side, I again cannot say that the legal rights in issue are indisputably clear.

Second, applicants have not shown that critical or exigent circumstances justify our intervention. As I have said, CEEFPA's pause on eviction proceedings will expire in less than three weeks, alleviating the hardship to New York landlords. Any hardship is further alleviated by provisions of CEEFPA that provide relief from foreclosure for property owners who own 10 or fewer dwelling units. See 2020 N. Y. Laws ch. 381, pt. B, subpts. A–B. Further, landlords' hardship is alleviated because CEEFPA does not preclude them from seeking unpaid rent and other damages in a common-law action. Finally, respondent states that New York is currently distributing more than \$2 billion in aid that can be used in part to pay back rent, thereby helping to alleviate the need for evictions. See 2021 N. Y. Laws ch. 53, p. 635.

While applicants correctly point out that there are landlords who suffer hardship, we must balance against the landlords' hardship the hardship to New York tenants who have relied on CEEFPA's protections and will now be forced to face eviction proceedings earlier than expected. This is troubling because, as noted, New York is in the process of distributing over \$2 billion in federal assistance that will help tenants affected by the pandemic avoid eviction. See *ibid.*; Consolidated Appropriations Act, 2021, H. R. 133, 116th Cong., 2d Sess., 686–692 (2020). Ending CEEFPA's protections early may lead to unnecessary evictions. It is impossible—especially on the abbreviated schedule of an application for an emergency injunction—to know whether more hardship will result from leaving CEEFPA in place or

from barring its enforcement.

Third, the public interest weighs in favor of respecting New York's "especially broad" latitude "to act in areas fraught with medical and scientific uncertainties." Marshall v. United States, 414 U.S. 417, 427 (1974). The New York Legislature is responsible for responding to a grave and unpredictable public health crisis. It must combat the spread of a virulent disease, mitigate the financial suffering caused by business closures, and minimize the number of unnecessary evictions. The legislature does not enjoy unlimited discretion in formulating that response, but in this case I would not second-guess politically accountable officials' determination of how best to "guard and protect" the people of New York. South Bay United Pentecostal Church, 590 U. S., at \_\_\_ (ROBERTS, C. J., concurring) (slip op., at 2) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).

For these reasons, I would not grant relief now, and therefore respectfully dissent. Of course, if New York extends CEEFPA's provisions in their current form, applicants can renew their request for an injunction.

### Income Limits for Low-Income Families, Earning at 80% of the Area Median Income, By Number of Persons and Counties of New York State

Effective April 1, 2021

County	Persons in Family											
	1	2	3	4	5	6	7	8	9	10	11	12
Albany	\$53,550	\$61,200	\$68,850	\$76,500	\$82,650	\$88,750	\$94,900	\$101,000	\$107,100	\$113,200	\$119,350	\$125,450
Allegany	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Bronx	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Broome	\$40,500	\$46,300	\$52,100	\$57,850	\$62,500	\$67,150	\$71,750	\$76,400	\$81,000	\$85,600	\$90,250	\$94,850
Cattaraugus	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Cayuga	\$41,800	\$47,800	\$53,750	\$59,700	\$64,500	\$69,300	\$74,050	\$78,850	\$83,600	\$88,350	\$93,150	\$97,900
Chautauqua	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Chemung	\$39,200	\$44,800	\$50,400	\$56,000	\$60,500	\$65,000	\$69,450	\$73,950	\$78,400	\$82,900	\$87,350	\$91,850
Chenango	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Clinton	\$40,250	\$46,000	\$51,750	\$57,450	\$62,050	\$66,650	\$71,250	\$75,850	\$80,450	\$85,050	\$89,600	\$94,200
Columbia	\$44,600	\$51,000	\$57,350	\$63,700	\$68,800	\$73,900	\$79,000	\$84,100	\$89,200	\$94,300	\$99,350	\$104,450
Cortland	\$40,450	\$46,200	\$52,000	\$57,750	\$62,400	\$67,000	\$71,650	\$76,250	\$80,850	\$85,450	\$90,100	\$94,700
Delaware	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Dutchess	\$55,950	\$63,950	\$71,950	\$79,900	\$86,300	\$92,700	\$99,100	\$105,500	\$111,850	\$118,250	\$124,650	\$131,050
Erie	\$44,200	\$50,500	\$56,800	\$63,100	\$68,150	\$73,200	\$78,250	\$83,300	\$88,350	\$93,400	\$98,450	\$103,500
Essex	\$40,550	\$46,350	\$52,150	\$57,900	\$62,550	\$67,200	\$71,800	\$76,450	\$81,050	\$85,700	\$90,300	\$94,950
Franklin	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Fulton	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Genesee	\$43,300	\$49,500	\$55,700	\$61,850	\$66,800	\$71,750	\$76,700	\$81,650	\$86,600	\$91,550	\$96,500	\$101,450
Greene	\$41,000	\$46,850	\$52,700	\$58,550	\$63,250	\$67,950	\$72,650	\$77,300	\$81,950	\$86,650	\$91,350	\$96,000
Hamilton	\$39,950	\$45,650	\$51,350	\$57,050	\$61,650	\$66,200	\$70,750	\$75,350	\$79,850	\$84,450	\$89,000	\$93,550
Herkimer	\$40,550	\$46,350	\$52,150	\$57,900	\$62,550	\$67,200	\$71,800	\$76,450	\$81,050	\$85,700	\$90,300	\$94,950
Jefferson	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Kings	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Lewis	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Livingston	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Madison	\$44,550	\$50,900	\$57,250	\$63,600	\$68,700	\$73,800	\$78,900	\$84,000	\$89,050	\$94,150	\$99,200	\$104,300
Monroe	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200

# Income Limits for Low-Income Families, Earning at 80% of the Area Median Income, By Number of Persons and Counties of New York State

Effective April 1, 2021

Country	Persons in Family											
County	1	2	3	4	5	6	7	8	9	10	11	12
Montgomery	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Nassau	\$66,450	\$75,950	\$85,450	\$94,900	\$102,500	\$110,100	\$117,700	\$125,300	\$132,850	\$140,450	\$148,050	\$155,650
New York	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Niagara	\$44,200	\$50,500	\$56,800	\$63,100	\$68,150	\$73,200	\$78,250	\$83,300	\$88,350	\$93,400	\$98,450	\$103,500
Oneida	\$40,550	\$46,350	\$52,150	\$57,900	\$62,550	\$67,200	\$71,800	\$76,450	\$81,050	\$85,700	\$90,300	\$94,950
Onondaga	\$44,550	\$50,900	\$57,250	\$63,600	\$68,700	\$73,800	\$78,900	\$84,000	\$89,050	\$94,150	\$99,200	\$104,300
Ontario	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Orange	\$55,950	\$63,950	\$71,950	\$79,900	\$86,300	\$92,700	\$99,100	\$105,500	\$111,850	\$118,250	\$124,650	\$131,050
Orleans	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Oswego	\$44,550	\$50,900	\$57,250	\$63,600	\$68,700	\$73,800	\$78,900	\$84,000	\$89,050	\$94,150	\$99,200	\$104,300
Otsego	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Putnam	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Queens	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Rensselaer	\$53,550	\$61,200	\$68,850	\$76,500	\$82,650	\$88,750	\$94,900	\$101,000	\$107,100	\$113,200	\$119,350	\$125,450
Richmond	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
Rockland	\$66,850	\$76,400	\$85,950	\$95,450	\$103,100	\$110,750	\$118,400	\$126,000	\$133,650	\$141,250	\$148,900	\$156,550
St. Lawrence	\$66,450	\$75,950	\$85,450	\$94,900	\$102,500	\$110,100	\$117,700	\$125,300	\$132,850	\$140,450	\$148,050	\$155,650
Saratoga	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Schenectady	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Schoharie	\$44,550	\$50,900	\$57,250	\$63,600	\$68,700	\$73,800	\$78,900	\$84,000	\$89,050	\$94,150	\$99,200	\$104,300
Schuyler	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Seneca	\$38,850	\$44,400	\$49,950	\$55,500	\$59,950	\$64,400	\$68,850	\$73,300	\$77,700	\$82,150	\$86,600	\$91,000
Steuben	\$39,500	\$45,150	\$50,800	\$56,400	\$60,950	\$65,450	\$69,950	\$74,450	\$78,950	\$83,450	\$88,000	\$92,500
Suffolk	\$66,450	\$75,950	\$85,450	\$94,900	\$102,500	\$110,100	\$117,700	\$125,300	\$132,850	\$140,450	\$148,050	\$155,650
Sullivan	\$40,250	\$46,000	\$51,750	\$57,450	\$62,050	\$66,650	\$71,250	\$75,850	\$80,450	\$85,050	\$89,600	\$94,200
Tioga	\$40,500	\$46,300	\$52,100	\$57,850	\$62,500	\$67,150	\$71,750	\$76,400	\$81,000	\$85,600	\$90,250	\$94,850
Tompkins	\$50,200	\$57,400	\$64,550	\$71,700	\$77,450	\$83,200	\$88,950	\$94,650	\$100,400	\$106,100	\$111,850	\$117,600
Ulster	\$49,200	\$56,200	\$63,250	\$70,250	\$75,900	\$81,500	\$87,150	\$92,750	\$98,350	\$103,950	\$109,600	\$115,200
Warren	\$44,200	\$50,500	\$56,800	\$63,100	\$68,150	\$73,200	\$78,250	\$83,300	\$88,350	\$93,400	\$98,450	\$103,500

# Income Limits for Low-Income Families, Earning at 80% of the Area Median Income, By Number of Persons and Counties of New York State

Effective April 1, 2021

County	Persons in Family											
	1	2	3	4	5	6	7	8	9	10	11	12
Washington	\$44,200	\$50,500	\$56,800	\$63,100	\$68,150	\$73,200	\$78,250	\$83,300	\$88,350	\$93,400	\$98,450	\$103,500
Wayne	\$44,950	\$51,350	\$57,750	\$64,150	\$69,300	\$74,450	\$79,550	\$84,700	\$89,800	\$94,950	\$100,050	\$105,200
Westchester	\$63,400	\$72,450	\$81,500	\$90,550	\$97,800	\$105,050	\$112,300	\$119,550	\$126,750	\$134,000	\$141,250	\$148,500
Wyoming	\$40,950	\$46,800	\$52,650	\$58,500	\$63,200	\$67,900	\$72,550	\$77,250	\$81,900	\$86,600	\$91,250	\$95,950
Yates	\$41,350	\$47,250	\$53,150	\$59,050	\$63,800	\$68,500	\$73,250	\$77,950	\$82,650	\$87,400	\$92,100	\$96,850

Source: U.S Department of Housing and Urban Development.

https://www.huduser.gov/portal/datasets/il.html

ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, with regard to implementation of the statewide

Emergency Rental Assistance Program in response to the COVID-19 public health emergency, I

hereby direct that, effective immediately, petitioners with pending eviction proceedings who

have either (1) been notified of a pending application for emergency rental assistance by

respondent-tenant, (2) applied for emergency rental assistance on behalf of respondent-tenant

and the application is pending, or (3) received emergency rental assistance on behalf of

respondent-tenant, shall submit notice, in the form attached as Exhibit 1, to the court where such

eviction proceeding is pending.

This order shall take effect immediately and shall remain in effect for such time as

federal and state emergency rental assistance programs in response to the COVID-19 pandemic

remain in effect.

Chief Administrative Judge of the Courts

Dated: August 13, 2021

AO/244/21

# Exhibit 1



# PETITIONER NOTICE OF PENDING OR COMPLETED RENTAL ASSISTANCE APPLICATION

COUR	T: Ca	Case Caption:Index No:						
		RAP Application No.						
		requiring submission to the court of notice of application ance on behalf of respondent-tenant, notice is hereby plies below):						
	Received notification of a pendi respondent-tenant.	ng application for emergency rental assistance by						
	Applied for emergency rental as application is pending.	ssistance on behalf of respondent-tenant and the						
	amount of	stance on behalf of respondent-tenant issued in the for unpaid rent during the period of time between						
	Signature Petitioner or Petitioner's Attorne	Date						
	Print Name							

# <u>The Process Due When Rent is Due: Residential Nonpayment Evictions in New York After COVID-19</u>

## William J. Niebel<sup>1</sup>

As a result of moratoria at the state and federal levels, most evictions for unpaid rent in New York have been on hold since the beginning of the COVID-19 pandemic in March 2020.<sup>2</sup> While some financial assistance is available for rental arrears, this will only help a fraction of the tenants who need it. Therefore, as the bans on eviction begin to expire, a wave—or tsunami—of nonpayment cases is expected. At this critical juncture, to prevent homelessness and the unnecessary displacement of families, it is imperative to review New York nonpayment eviction law, with a focus on the procedural protections available to tenants.

Additionally, New York's Housing Stability and Tenant Protection Act (HSTPA) of 2019 dramatically changed the eviction process only months before the pandemic hit.<sup>3</sup> And laws enacted during COVID-19, such as the Tenant Safe Harbor Act,<sup>4</sup> will continue to affect housing practice going forward. Thus, for the benefit of

<sup>&</sup>lt;sup>1</sup> Adjunct Professor of Law at Cornell Law School, directing its Tenants Advocacy Practicum. Professor Niebel is also a Staff Attorney at Legal Services of Central New York, Inc., primarily handling landlord-tenant cases. The author wishes to thank Jaclyn Kelley-Widmer, Associate Clinical Professor of Law at Cornell Law School, and Hon. Gerald Lebovits, acting Supreme Court justice in New York County, for their review of this article.

<sup>&</sup>lt;sup>2</sup> The current New York moratorium (the COVID-19 Emergency Eviction and Foreclosure Prevention Act) is in effect until January 15, 2022. The most recent federal eviction ban, issued by the Centers for Disease Control and Prevention (CDC), was nullified by the United States Supreme Court on August 26, 2021. Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al., 594 U.S. (2021).

<sup>&</sup>lt;sup>3</sup> See generally Gerald Lebovits et al., New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know, 24 J. Affordable Housing & Community Dev. L. 75 (2020).

<sup>&</sup>lt;sup>4</sup> See L. 2020, ch. 127, eff. June 30, 2020, amended by L. 2021, ch. 417, September 2, 2021.

judges and advocates alike, it is important to highlight the unsettled issues that must still be litigated.

This article will consider the New York nonpayment eviction process chronologically. It will first address the pre-commencement<sup>5</sup> notices to which tenants are entitled. Then it will discuss the court eviction proceeding and warrant<sup>6</sup> process, with an emphasis on tenant protections that are built into the law. Again, because some of these provisions are so new, this article will flesh out some arguments that are untested in the courts.

#### I. Pre-Commencement

Summary eviction proceedings in New York are governed by Article 7 of the Real Property Actions and Proceedings Law (RPAPL). Section 711 of the RPAPL provides: "No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." This means that self-help evictions of a tenant is illegal in New York. In fact, it is a crime under RPAPL § 768. The only lawful way to evict a tenant for nonpayment of rent is through a summary proceeding based on RPAPL § 711(2), which contains the appropriate cause of action.

<sup>&</sup>lt;sup>5</sup> That is, before the eviction case is commenced in court.

<sup>&</sup>lt;sup>6</sup> The warrant of eviction is the court order authorizing a law enforcement officer to actually remove the tenant from his or her home

<sup>&</sup>lt;sup>7</sup> N.Y. Real Prop. Act. & Pro. Law § 711.

<sup>&</sup>lt;sup>8</sup> That is, the landlord evicting the tenant without using the court process, such as by changing the locks.

<sup>&</sup>lt;sup>9</sup> Enacted by the HSTPA, pt. M, sec. 24. Self-help eviction is also a crime in New York City, under N.Y.C. Admin. Code § 26-521.

<sup>&</sup>lt;sup>10</sup> N.Y. Real Prop. Act. & Pro. Law § 711(2).

### a. The 14-Day Notice

Before commencing a nonpayment eviction case in court, a landlord must serve a written 14-day rent demand. Since the HSTPA went into effect, landlords can no longer use a three-day notice of unpaid rent or an oral rent demand. One might ask: What is the earliest date on which the 14-day notice can be served? Under the statutory language, a tenant must be in default when the notice is served. If rent is due on the first of the month, the notice may not be served on the first—because the tenant is not in default until after the first. But is the tenant in default on the second day of the month? Multiple lines of reasoning suggest that the answer is no, and that the tenant is not in default until the seventh day of the month (six days after the rental due date). To understand why, it is necessary to first analyze a new provision created by the HSTPA—Real Property Law (RPL) § 235-e(d).

b. The RPL § 235-e(d) Notice and the New Five-Day Grace Period

A landlord/lessor has a duty, under RPL § 235-e, to provide a written receipt for the payment of rent. <sup>15</sup> In addition, the new subsection (d) requires a landlord to provide a written notice, by certified mail, if rent is *not* received "within five days" of

<sup>&</sup>lt;sup>11</sup> *Id*.

<sup>&</sup>lt;sup>12</sup> Section 711(2) previously required that "a demand of the rent ha[d] been made, or at least three days' notice in writing" had been given, before a summary eviction proceeding could be commenced.

<sup>&</sup>lt;sup>13</sup> N.Y. Real Prop. Act. & Pro. Law § 711(2).

<sup>&</sup>lt;sup>14</sup> Enacted by the HSTPA, pt. M, sec. 9.

<sup>&</sup>lt;sup>15</sup> Subsection (a) specifies the required contents of the receipt and subsections (b) and (c) address particular payment scenarios.

its due date.<sup>16</sup> This provision was enacted to improve and formalize rent record-keeping.<sup>17</sup> The legislature included an enforcement mechanism by providing that failure to give such a notice "may be used as an affirmative defense by such lessee [i.e., tenant] in an eviction proceeding based on the non-payment of rent."<sup>18</sup> If this defense is established by the tenant, the court should dismiss the case.<sup>19</sup> Courts should not allow landlords to evict for nonpayment if they fail to follow these enhanced record-keeping requirements, assuming the deficiency is raised as an affirmative defense. Ultimately, while this new notice (commonly called a "five-day notice"<sup>20</sup>) is not a predicate notice in the technical sense,<sup>21</sup> landlords should have properly served one (or more, for multiple months of unpaid rent) prior to commencing an eviction.

Significantly, this new statutory provision appears to recognize a *five-day* grace period to pay rent. If rent is due on the first of the month, the five-day notice cannot be given until the seventh, because all the days up to and including the sixth

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<sup>&</sup>lt;sup>16</sup> Though the statute refers to a "lease agreement" being in effect, it does not say *written* lease agreement. Lease agreements can be either oral or written. Andrew Scherer, Residential Landlord-Tenant Law in New York § 2:1 (2020).

<sup>&</sup>lt;sup>17</sup> The Summary of Provisions on the New York Senate website states that RPL § 235-e(d) "provides more robust record-keeping" than was previously required.

<sup>&</sup>lt;sup>18</sup> N.Y. Real Prop. Law § 235-e(d).

<sup>&</sup>lt;sup>19</sup> One city court suggested that the defense can be raised "only where there is a genuine issue of a fact in a non-payment proceeding," which would "permit the court to preclude the collection of rent as a consequence for non-compliance." *Lawler v. Canfield*, 114 N.Y.S.3d 621 (Watertown City Ct., 2019). However, the statutory language places no such limitation on the defense.

<sup>&</sup>lt;sup>20</sup> This is misleading, in the sense that the notice does not provide the tenant with five days to do anything. By comparison, a 14-day notice gives the tenant 14 days to pay or vacate. Nevertheless, this article will use the phrase "five-day notice" for readability and because it is familiar to practitioners.

<sup>&</sup>lt;sup>21</sup> That is, failure to serve this notice does not deprive the court of jurisdiction or authority to entertain the summary eviction proceeding; it must be raised as an affirmative defense.

are "within five days" of the rental due date.<sup>22</sup> One might ask: Can the 14-day notice simply be served six days after the rental due date, and thus double as the five-day "written notice stating the failure to receive such rent payment" under RPL § 235-e(d)?<sup>23</sup> No, for at least four reasons.

First, basic rules of statutory construction indicate that this new provision in the Real Property Law creates a new and additional notice.<sup>24</sup> The new provision must be read and understood in a way that gives it meaning, not one that renders it superfluous. Second, the notices serve different purposes. The five-day notice requirement applies to tenancies at all times, regardless of whether a nonpayment eviction is contemplated, and it functions to formalize rent record-keeping—to keep the landlord and tenant "on the same page." The 14-day notice sets the stage for a summary eviction proceeding. Third, the statutes require these notices to be served in different manners.<sup>25</sup> Fourth, if it could double as a five-day notice, this would essentially write the affirmative defense out of the statute—there would be virtually no scenario in which to raise it. This is because, in every viable nonpayment case, a 14-day notice will have been served. For all these reasons, the 14-day notice and five-day notice are separate and distinct, and both should be properly served prior to the commencement of a nonpayment eviction proceeding.

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<sup>&</sup>lt;sup>22</sup> N.Y. Real Prop. Law § 235-e(d).

 $<sup>^{23}</sup>$  *Id*.

<sup>&</sup>lt;sup>24</sup> See, e.g., Bolden v. Blum, 418 N.Y.S.2d 229, 230-31 (3rd Dep't 1979) ("The rule is well established that in statutes, words of ordinary import are to be given their usual and commonly understood meaning . . . and every word is to be given effect.") (citations omitted).

<sup>&</sup>lt;sup>25</sup> The 14-day notice must be served as prescribed in RPAPL § 735. The § 235-e(d) notice is served by certified mail.

Next, let us consider additional statutory support for the new five-day rent grace period. The HSTPA also created RPL § 238-a, which limits certain fees that can be charged in the landlord-tenant context. Subsection 2 specifically provides that no late fee can be charged "unless the payment of rent has not been made within five days of the date it was due, and such payment, fee, or charge shall not exceed fifty dollars or five percent of the monthly rent, whichever is less." Again, a five-day grace period is built into the law. This specific section indicates that rent is not "late" (in default) unless it is paid more than five days after the due date. Reading all these statutes together, and harmonizing them, it is logical to conclude that the 14-day notice should not be served until at least six days after the rental due date, just like the five-day notice. If rent is due on the first day of the month, the earliest time at which these notices can be properly served is the seventh day. And if either notice is served prematurely, a subsequent nonpayment proceeding should be subject to dismissal. Served

# II. The Summary Proceeding

A summary eviction proceeding is commenced using a notice of petition and petition.<sup>29</sup> In city courts, the proceeding is commenced upon filing, with service to

<sup>&</sup>lt;sup>26</sup> N.Y. Real Prop. Law § 238-a(2) (emphasis added).

<sup>&</sup>lt;sup>27</sup> *Id*.

<sup>&</sup>lt;sup>28</sup> See supra note 16, at § 9:17.

<sup>&</sup>lt;sup>29</sup> N.Y. Real Prop. Act. & Pro. Law § 731(1).

follow.<sup>30</sup> In justice (town and village) courts, the order is reversed; the case is commenced upon service, with filing to follow.<sup>31</sup>

#### a. What is Rent?

The HSTPA made clear, by enacting RPAPL § 702, that "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding." Thus, only unpaid *rent* can be used as a basis for a nonpayment proceeding, and rent is defined as "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement." In the recently decided case of *Beco v. Ritter*, the Appellate Division, Third Department, confirmed that late fees and other charges cannot be disguised as rent and used as a basis for a nonpayment proceeding. 4

In *Beco*, the landlord, specifically in response to the enactment of the HSTPA, attempted to raise his tenants' rent by \$375 but stated that they would receive a "discount" of the same amount if they paid their rent by the 17th of the month.<sup>35</sup>

The Court found this an attempt to circumvent the late fee limitation in RPL \$238-a(2), and to build other administrative fees into the "rent" in an effort to

<sup>&</sup>lt;sup>30</sup> N.Y. Uniform City Ct. Act § 400(1).

<sup>&</sup>lt;sup>31</sup> N.Y. Uniform Justice Ct. Act § 400.

<sup>&</sup>lt;sup>32</sup> NY Real Prop. Act. & Pro. Law § 702.

<sup>33</sup> T.J

<sup>34 140</sup> N.Y.S.3d 294 (3rd Dep't 2021).

 $<sup>^{35}</sup>$  *Id*.

recover these in a summary eviction proceeding. The Court unanimously held this discount scheme illegal and unenforceable.<sup>36</sup>

### b. Attorneys' Fees

When it comes to seeking attorneys' fees in particular, one could assume that this is not permissible, based on the plain language of RPAPL § 702,37 and this may well be the case. However, RPL § 234 predates the HSTPA and continues to provide for a reciprocal right to recover attorney's fees in summary eviction proceedings. It states:

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant . . . ."<sup>38</sup>

Significantly, the HSTPA added the following clause to the statute: "A landlord may not recover attorneys' fees upon a default judgment."<sup>39</sup> This all seems to indicate that a landlord *can* recover attorneys' fees in certain cases.<sup>40</sup> Still, RPAPL § 702 was enacted to end the practice of labeling items as "additional rent" in a lease, and this appears to invalidate one of the underpinnings of the reciprocal attorneys' fees

 $<sup>^{36}</sup>$  Id.

<sup>&</sup>lt;sup>37</sup> Stating that "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding."

<sup>&</sup>lt;sup>38</sup> N.Y. Real Prop. Law § 234.

<sup>&</sup>lt;sup>39</sup> *Id*.

<sup>&</sup>lt;sup>40</sup> Such as where attorneys' fees are provided for in the lease and *not* requested upon a default judgment.

law.<sup>41</sup> Ultimately, it seems clear that a court may not grant a nonpayment judgment and issue a warrant of eviction based on unpaid attorneys' fees. And a tenant may not be required to pay them to prevent eviction. However, a landlord (or tenant) may be able to obtain a money judgment for attorneys' fees, either as an ancillary judgment in a nonpayment proceeding or in a separate plenary action.

#### c. The Petition, Answer, and Motions

The petition must contain the elements found in RPAPL § 741, and shall be verified as required by that section, as well as the New York Civil Practice Law and Rules (CPLR) 3020-3022. Pursuant to the HSTPA, the notice of petition and petition must be served 10 to 17 days (instead of the previous 5- to 12-day range) before the time at which the petition is noticed to be heard.<sup>42</sup> The tenant can answer at the time of the hearing, or before, but may not be required to answer prior to the hearing.<sup>43</sup> The tenant may also make motions (for dismissal, summary judgment, etc.) at the time of the hearing or before.<sup>44</sup> If a written motion is filed before the hearing, the motion must be set for hearing at the same time as the petition.<sup>45</sup>

<sup>&</sup>lt;sup>41</sup> Prior to the HSTPA, other fees could be designated as "additional rent" in the lease and sought in a nonpayment eviction.

<sup>&</sup>lt;sup>42</sup> N.Y. Real Prop. Act. & Pro. Law § 733.

<sup>&</sup>lt;sup>43</sup> N.Y. Real Prop. Act. & Pro. Law § 743.

<sup>&</sup>lt;sup>44</sup> Supra note 16, at §§ 13:1-13:2.

<sup>&</sup>lt;sup>45</sup> N.Y. CPLR Rule 406.

### d. The Right to an Adjournment

The right to one mandatory (i.e., non-discretionary) adjournment, for a minimum of 14 days, was created by the HSTPA<sup>46</sup> and was a game changer, primarily for tenants. Since tenants usually do not have counsel at the initial appearance, this gives them an opportunity to seek representation and more adequately prepare to raise defenses or counterclaims.<sup>47</sup> It also builds time into this summary process, for the tenant to come current with the rent or arrange to move out. Subsequent adjournment requests can also be made, and granted in the court's discretion.<sup>48</sup>

The prefatory clause in RPAPL § 745 could be read to require that "triable issues of fact [be] raised" for the first adjournment to be granted. That said, since the statute also states that subsequent adjournment requests are discretionary, the implication is that the court does not have discretion to deny a first adjournment request. Further, in practice, some issue of fact almost always exists, unless the tenant appears and states: "I fully agree I should be evicted." And even in that unusual scenario, if the tenant requests an adjournment, it should be granted, so that the tenant can consult with an attorney to better understand whether there are relevant issues of fact, or other defenses, to raise. Considering the legislative intent to protect tenants, it would seem odd that those (especially unrepresented tenants) who do not artfully raise issues of fact would lose the right to an

<sup>&</sup>lt;sup>46</sup> NY Real Pro. Act. & Pro. Law § 745(1).

 $<sup>^{47}</sup>$  Courts should advise unrepresented tenants of their rights to an adjournment and to seek counsel.  $^{48}$  Id.

adjournment. For all these reasons, courts have not been requiring a detailed statement/showing of alleged issues of fact to support a request for a first adjournment.<sup>49</sup>

#### e. The Right to a Jury Trial

A related question arises with respect to the trial. A tenant generally has the right to a jury trial where there are issues of fact,<sup>50</sup> unless the right has been knowingly and voluntarily waived in the lease between the parties.<sup>51</sup> One must be requested "at the time the petition is noticed to be heard." Before the HSTPA, the deadline for requesting a jury trial was understood to be the initial appearance in a nonpayment case, when issue was joined and the case could potentially proceed straight to trial.<sup>53</sup> But, considering the new right to a mandatory adjournment, does a jury trial still need to be requested at the initial appearance in a nonpayment proceeding, lest it be waived? Or can it be requested at a subsequent appearance? Again, it is useful to consider this question from the perspective of an unrepresented tenant, who may not even know about the right to a jury trial. Should the tenant really be required to request a jury trial at the first appearance so as not to waive the right? If the tenant is represented by counsel at the initial appearance, it may make sense for the attorney to go ahead and assist the tenant in electing between a bench or jury trial, for the sake of judicial economy. However,

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 $<sup>^{49}</sup>$  In the experience of the author and his colleagues.

<sup>&</sup>lt;sup>50</sup> N.Y. Real Prop. Act. & Pro. Law § 745(1).

<sup>&</sup>lt;sup>51</sup> Supra note 16, at § 10:23.

<sup>&</sup>lt;sup>52</sup> NY Real Prop. Act. & Pro. Law § 745(1).

<sup>&</sup>lt;sup>53</sup> Supra note 16, at §§ 10:15-10:16 (2020).

the tenant should no longer be *required* to make this election at the first appearance if the case is adjourned pro forma. The adjournment effectively changes the time at which the petition is noticed to be heard (the deadline to request a jury trial). Thus, the tenant should be able to request a jury trial at a subsequent appearance, before the case proceeds to trial.

#### f. The Right to Pay and Stay

Pursuant to the HSTPA, if the tenant pays the full amount of rent due to the landlord at any time before the trial, it "shall be accepted by the landlord" and this payment "renders moot the grounds on which the special [nonpayment] proceeding was commenced."<sup>54</sup> Further, it is well established that full payment *at the time of trial* is a complete defense, resulting in dismissal.<sup>55</sup> But if the case is not resolved by payment, settled, or dismissed on other grounds, it comes on for trial. The court determines how much rent, if any, is owed to the landlord, and must consider defenses and potential offsets in making its decision.

#### g. The Tenant Safe Harbor Act of 2020

Generally, if some amount of rent is adjudged to be owed to the landlord and not paid at the time of judgment, a warrant of eviction may issue.<sup>56</sup> However, one defense that will be particularly relevant in many soon-to-be-heard nonpayment cases is found in the Tenant Safe Harbor Act (TSHA), which was enacted during the

<sup>&</sup>lt;sup>54</sup> N.Y. Real Prop. Act. & Pro. Law § 731(4).

<sup>&</sup>lt;sup>55</sup> Albany v. White, 261 N.Y.S.2d 361 (Civ. Ct., N.Y. Cty. 1965).

<sup>&</sup>lt;sup>56</sup> Supra note 16, at §§ 15:1-15:2, 15:28.

COVID crisis.<sup>57</sup> Under this law, tenants who "suffered a financial hardship during the COVID-19 covered period" shall not be evicted for "non-payment of rent that accrues or becomes due during" that period.<sup>58</sup> The covered period spans the time from March 7, 2020, to January 15, 2022.<sup>59</sup> So no tenant who suffered a financial hardship during that time period should face the issuance of a warrant of eviction for unpaid rent that accrued during the period.

The TSHA states that financial hardship can be raised "as a defense in a summary proceeding under article 7 of the real property actions and proceedings law." Further, in determining whether the tenant suffered a financial hardship, the court is required to consider the following, as well as "other relevant factors": (i) the tenant's income before the covered period; (ii) the tenant's income during the covered period; (iii) the tenant's liquid assets; and (iv) the tenant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, the New York State disability program, the home energy assistance program (HEAP), unemployment insurance or benefits under state or federal law, or the emergency rental assistance program (ERAP). 61

<sup>&</sup>lt;sup>57</sup> See L. 2020, ch. 127, eff. June 30, 2020, amended by L. 2021, ch. 417, September 2, 2021.

 $<sup>^{58}</sup>$  Id

<sup>&</sup>lt;sup>59</sup> The COVID-19 covered period was originally defined as "March 7, 2020 until the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation, or required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason in [the relevant Executive Orders] . . . continue to apply in the county of the tenant's or lawful occupant's residence." The applicable Executive Orders were rescinded by the Governor, effective June 25, 2021. However, on September 2, 2021, the statute was amended to state that the COVID-19 covered period "means March 7, 2020 until January 15, 2022." See L. 2021, ch. 417.

<sup>&</sup>lt;sup>60</sup> See L. 2020, ch. 127, amended by L. 2021, ch. 417, September 2, 2021.

 $<sup>^{61}</sup>$  *Id*.

The TSHA specifically provides that the landlord may obtain a money judgment for unpaid rent that accrued during the covered period. 62 However, many nonpayment evictions will be prevented by application of this law. Additionally, it is possible that some holdover evictions should also be stopped by the TSHA. Why? First, some holdover evictions will be clearly motivated by nonpayment of rent during the covered period, even though the landlord does not explicitly state this. In other words, some landlords will attempt to get around the TSHA ban on evictions for covered period nonpayment by bringing holdover evictions. The courts should not permit this. Second, as noted above, the affirmative defense language is very broad. The TSHA financial hardship defense can be raised in "a summary proceeding under article 7 of the real property actions and proceedings law." By its own terms, this provision is not limited to nonpayment proceedings. Third, courts have already held that the TSHA, as implemented by Executive Order 202.66, applies to holdover proceedings.

h. The COVID-19 Emergency Rental Assistance Program of 2021

As part of the State Fiscal Year 2021-2022 budget, New York enacted the COVID-19 Emergency Rental Assistance Program (ERAP).<sup>67</sup> ERAP uses federal

 $<sup>^{62}</sup>$  Id

<sup>&</sup>lt;sup>63</sup> That is, evictions based on a claim that the lease has expired or the tenancy has been terminated, usually without any stated reason. These kinds of evictions do not generally allege nonpayment of rent.

 $<sup>^{64}</sup>$  Id.

 $<sup>^{65}</sup>$  A holdover eviction proceeding is also a summary proceeding under article 7 of the real property actions and proceedings law.

<sup>&</sup>lt;sup>66</sup> SRI Eleven 1407 Broadway Operator LLC v. Mega Wear Inc., 144 N.Y.S.3d 289 (Civ. Ct., N.Y. City 2021); Matter of Cabrera, 140 N.Y.S.3d 609 (3rd Dep't 2021).

<sup>&</sup>lt;sup>67</sup> See L. 2021, ch. 56, eff. April 16, 2021, amended by L. 2021, ch. 417, September 2, 2021.

funding from the Consolidated Appropriations Act of 2021 and the American Rescue Plan of 2021 to provide monetary assistance for up to 12 months of rental and utility arrears for eligible tenants, with the money being paid directly to *cooperating* landlords. Importantly, the legislation implementing ERAP includes a number of protections against eviction. First, neither a nonpayment nor a holdover eviction can be commenced against a tenant who has applied for ERAP, unless and until the tenant is found to be ineligible. Relatedly, if an eviction proceeding has already been commenced, and the tenant applies for ERAP, the case must be stayed pending an eligibility determination.

Tenants are also provided with protection against eviction in the event that the landlord does not cooperate and agree to accept ERAP benefits. The state agency administering the program, the Office of Temporary and Disability Assistance (OTDA), or its designee must make "reasonable efforts" to obtain the landlord's cooperation.<sup>71</sup> If the landlord will not cooperate but the tenant is otherwise eligible for ERAP assistance, the money to which the tenant is entitled is to be set aside for 180 days,<sup>72</sup> allowing the landlord time to change course and agree

 $<sup>^{68}</sup>$  *Id*.

<sup>&</sup>lt;sup>69</sup> *Id.* at sec. 8.

 $<sup>^{70}</sup>$  Id.

<sup>&</sup>lt;sup>71</sup> *Id.* at sec. 9(2)(b). Such outreach efforts can be "considered complete if: (i) a request for participation has been sent in writing, by mail, to the landlord or utility provider and the addressee has not responded to the request within 14 calendar days after mailing; or (ii) at least 3 attempts by phone, text, or e-mail have been made over a 10 calendar day period to request the landlord's or utility provider's participation; or (iii) a landlord or utility provider confirms in writing that the landlord or utility provider does not wish to participate. The outreach attempts or notices to the landlord or utility provider shall be documented and shall be made available to the tenant." <sup>72</sup> The 180 days can be extended by OTDA or its designee upon a showing of "good cause." *Id.* 

to accept the funds. 73 It appears that the eviction stay continues in effect during this time period, which should persuade the landlord to cooperate. Additionally, the statute gives the tenant "an affirmative defense in any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment."74 This defense should further incentivize landlords to cooperate, especially since it exists for "twelve months from the determination of provisional eligibility." But, ultimately, "[i]f the landlord has not accepted such provisional payment within twelve months of the determination the landlord shall be deemed to have waived the amount of rent covered by such provisional payment," and the landlord is precluded from seeking eviction or a money judgment based on "the amount of rent covered by such provisional payment."75 The statute is silent regarding whether a landlord can refuse to accept ERAP funds for an eligible tenant and then move forward with a holdover eviction. 76 However, allowing this would obviously run contrary to the purpose of the ERAP program—keeping as many tenants in their homes while making their landlords whole.

Moreover, there are substantial protections in the statute for tenants whose landlords cooperate and receive ERAP benefits. By accepting the funds, the landlord agrees that the arrears covered by the ERAP payment are satisfied "and will not be

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<sup>&</sup>lt;sup>73</sup> *Id.* at sec. 9(2)(c).

 $<sup>^{74}</sup>$  *Id*.

 $<sup>^{75}</sup>$  Id.

<sup>&</sup>lt;sup>76</sup> As noted above, holdover evictions are only explicitly barred or stayed during the application/review period, that is, until an eligibility determination is made.

used as the basis for a non-payment eviction," and also "to waive any late fees due on any rental arrears paid" by ERAP.<sup>77</sup> Further, the landlord cannot raise the rent for at least "one year after the first rental assistance payment is received."<sup>78</sup> Neither can the landlord pursue a holdover eviction for one year after the first payment is received, with one small exception.<sup>79</sup> And the landlord must notify the tenant of all these protections.<sup>80</sup> Of note, the ERAP law was amended on September 2, 2021, to provide that, despite the eviction protections outlined above, tenants can still be evicted if they intentionally cause "significant damage to the property" or "persistently and unreasonably" engage in behavior that "substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others."<sup>81</sup>

#### III. The Warrant

If the court finds that some amount of rent is owed to the landlord, it is not paid at the time of judgment, and neither the TSHA or ERAP defenses prevent issuance of a warrant of eviction, then the warrant may issue. Pursuant to the HSTPA, the warrant must be served with 14 days' notice.<sup>82</sup> Notably, neither

<sup>&</sup>lt;sup>77</sup> *Id.* at sec. 9(2)(d).

 $<sup>^{78}</sup>$  *Id* .

<sup>&</sup>lt;sup>79</sup> *Id.* An exception is provided for situations where "the dwelling unit . . . is located in a building that contains 4 or fewer units, in which case the landlord may decline to extend the lease or tenancy if the landlord intends to immediately occupy the unit for the landlord's personal use as a primary residence or the use of an immediate family member as a primary residence."

<sup>81</sup> Id. at sec. 9-a (added to the law by L. 2021, ch. 417, eff. September 2, 2021).

<sup>82</sup> N.Y. Real Prop. Act. & Pro. Law § 749(2)(a).

issuance of the warrant nor its service terminates the tenancy. The tenant still has the right to pay and stay.83

## a. The Extended Right to Pay and Stay

Pursuant to RPAPL § 749(3), if the tenant tenders "the full rent due" to the landlord, or deposits it with the court, "the court shall vacate the warrant of eviction," unless the petitioner proves "that the tenant withheld the rent due in bad faith," which will be a rare case. Thus, the tenant has an extended right to pay and stay, even after service of the warrant, "at any time prior to execution"—final lockout by the sheriff or constable. 85

Of course, this begs the question: What is "the full rent due?" <sup>86</sup> Is it the amount demanded in the petition, the amount due at the time of the hearing, the monetary judgment entered by the court, or something else? Does it include any money that comes due after the hearing? This is an especially important question when a new month (or other rental period) begins after the hearing but before the scheduled execution of the warrant. From a practitioner's perspective, it seems that this issue can be addressed by the court being abundantly clear in its decision, or in approving the terms of a settlement that involves the issuance of a warrant. Since a money judgment is not always issued at the same time as the warrant, and may not

<sup>&</sup>lt;sup>83</sup> RPAPL § 749(3) previously provided that "[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant." The HSTPA removed this language.

<sup>84</sup> N.Y. Real Prop. Act. & Pro. Law § 749(3).

 $<sup>^{85}</sup>$  *Id*.

 $<sup>^{86}</sup>$  *Id*.

even be requested by the petitioner, the exact amount due that must be paid to vacate the warrant should ideally be included in the warrant itself.

But consider the scenario where the judge simply rules from the bench that some amount of rent—say \$1,000—is owed and, thus, a warrant issues. Suppose rent is \$500/month, the tenancy runs from the first day of the month to the last, the warrant is issued on the 25th of the month, and it does not specify how much rent must be paid, to vacate the warrant. If the tenant wants to pay and stay a week later—a couple days into the new month—what is "the full rent due" that must be paid? Is it \$1,000 or \$1,500 (including rent for the subsequent month), or some amount in between (including, for example, a per diem amount after issuance of the warrant)? There is a strong statutory basis for concluding that the answer is \$1,000 and no more. In RPAPL § 749(3), immediately after the provision that allows for paying the full rent due at any time prior to execution of the warrant, the very next sentence indicates that the petitioner is entitled to recover only the sum of money owed for two discrete time periods: Money owed "at the time when the special proceeding was commenced" and for the time between commencement and when the warrant is issued.87 Thus, "the full rent due" should be the amount of rent owed at the time the court issues the warrant. It should not include any amount that accrues after that. Indeed, at least one court has already come to this conclusion.88

<sup>87</sup> *Id*.

<sup>88 636</sup> Apt. Assoc., JV v. Mayo, 130 N.Y.S.3d 649 (City Ct., New York 2020).

### b. The Hardship Stay

One procedural protection for tenants that was greatly expanded by the HSTPA is the so-called hardship stay. Under the previous version of RPAPL § 753(1), courts in New York City only could discretionarily stay issuance of the warrant of eviction for up to six months in holdover cases.89 However, as modified by the HSTPA, this subsection now makes this discretionary stay available in nonpayment cases as well, throughout New York State, and for up to one year. 90 In exercising its discretion to stay an eviction, the court must consider a number of factors, including ill health, exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating circumstance affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. In deciding whether to grant the stay or in setting the length or other terms of the stay, the court is also required to consider any "substantial hardship" the stay might impose on the landlord. 92 The stay must be conditioned on payment of the amount due for occupation of the premises during the stay, but the court may permit installment payments.93 Before the HSTPA, the payment of all unpaid rent was required before a stay could be granted.<sup>94</sup> However, this is no longer mandatory; it is within the court's discretion.95

<sup>89</sup> HSTPA, pt. M, sec. 21.

 $<sup>^{90}</sup>$  *Id*.

<sup>&</sup>lt;sup>91</sup> Not just any hardship.

<sup>92</sup> N.Y. Real Prop. Act. & Pro. Law § 753(1).

<sup>93</sup> N.Y. Real Prop. Act. & Pro. Law § 753(2).

<sup>&</sup>lt;sup>94</sup> HSTPA, pt. M, sec. 21.

<sup>95</sup> N.Y. Real Prop. Act. & Pro. Law § 753(2); HSTPA, pt. M, sec. 21.

#### **IV. Conclusion**

As applicable moratoria expire, a wave of evictions will begin in New York. Tenants will have to avail themselves of procedural protections in the law, some of which are currently unsettled because they went into effect only a short while before the COVID-19 pandemic hit. Yet, this presents an opportunity for these issues to be litigated, and the protections to be firmly established. Foremost among these are the rights to a five-day rent grace period, to raise the connected affirmative defense for failure to provide the five-day notice, and to request a jury trial—even after the first appearance. Additionally, many tenants will seek to use the TSHA or ERAP defenses to prevent eviction in nonpayment cases, and these may also provide protection in holdover proceedings. In those cases where a warrant of eviction will issue, it will be critical to confirm the exact amount of rent that must be paid to prevent execution of the warrant, and to ensure that it does not include any post-judgment amounts. Finally, the hardship stay available under RPAPL § 753(1) can be applied as a "safety net" to prevent eviction in many other cases. All these tenant protections, when properly utilized and applied by the courts, will delay and, in many cases, prevent homelessness and the unnecessary displacement of families.