

Client Alert

April 2020

NY Executive Order 202.8 Should Not Stop Commercial Lease Enforcement

Governor Cuomo's Executive Order 202.8 freezes evictions of any residential or commercial tenant through June 18, 2020, but does not expressly restrict taking enforcement actions against tenants short of an actual eviction.

While the vast majority of landlords will resolve rent defaults with commercial tenants in these times for many good business reasons, once a landlord determines that it will not offer a rent waiver or forbearance to a defaulting tenant, and assuming there is no contrary lease provision, our view is that the landlord is entitled to send demand notices, notices to cure and termination notices to a tenant that has not paid rent. There are two paths available: (i) a rent demand followed by the institution of a non-payment proceeding in landlord-tenant court; or (ii) a notice to cure, followed by a notice of termination of the lease by reason of the default, and then the institution of a holdover proceeding in landlord-tenant court. The main difference between the two is that tenants have a right to cure a non-payment after it loses the non-payment proceeding. A proper termination of the lease after expiration of any cure and notice periods, however, is typically not curable.

Normally, a tenant could challenge a notice to cure by starting an action and asking for an injunction to toll the cure period until after the dispute is finally determined. These injunctions are called "Yellowstone injunctions" named after the case that created the need for the injunction. However, a complicating factor under our current climate is that in addition to the moratorium on eviction proceedings noted above (both non-payment and holdover proceedings are eviction proceedings), the New York State court system is currently closed to new actions that are not "essential" under court rules. It is our view that the courts will not deem Yellowstone injunctions essential, thereby depriving the tenant of a legal path to toll the cure period. As of the writing of this Alert, the New York State courts have taken preliminary steps to keep pending actions moving, but the prohibition on commencing new actions is still in effect.

While the precise scope of the tolling in the Executive Order will only be determined once courts have been afforded the opportunity to rule on individual cases, our view is that landlords' actions to enforce commercial

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leases short of eviction will be upheld. Tenants will no doubt claim rights to Yellowstone injunction relief notwithstanding the passing of contractual cure and notice deadlines, relying on a variety of theories including equitable tolling, impossibility and the Executive Order itself. For this reason, many landlords may wish to enter into out-of-court resolutions after sending a rent demand, notice to cure and/or termination notice. We also suggest that a tolling agreement between the parties that recites the default and in which the tenant acknowledges receipt and proper service of the rent demand, notice to cure and/or termination notice may be appropriate in the circumstances.

At this time, there is one pending statute that would give small businesses a rent break for 90 days and require building mortgagees to share the pain of that rent break under NY Senate Bill S8125, but the likelihood of passage is unclear.

Olshan lawyers from multiple practice groups are working together with clients to address COVID-19-related matters, including the CARES Act stimulus programs (i.e., the PPP and EIDL) and other corporate matters, including contractual analysis and financing, tax, restructuring, employee benefits and employment practices, insurance coverage and litigation. Click [here](#) to access additional materials addressing issues raised by COVID-19.

Please contact the Olshan attorney with whom you regularly work or one of attorneys listed below if you would like to discuss this client alert or have questions about its content.

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