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Client Alert

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New York's Executive Orders 202.8 and 202.28 Should Not Stop Commercial Lease Enforcement, Though New York City Legislation Will Prevent Landlords From Seeking Recovery From Personal Guarantors for Tenant Defaults

Governor Cuomo's Executive Order 202.8, dated March 20, 2020, froze evictions of any residential or commercial tenant through June 18, 2020, but did not expressly restrict taking enforcement actions against tenants short of an actual eviction. On May 7, 2020, Governor Cuomo issued Executive Order 202.28, which extended that moratorium until August 20, assuming the owner or tenant "is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic." Neither of these Executive Orders expressly restricts landlords from taking enforcement actions against tenants short of an actual eviction, including terminating leases based on tenant defaults. They also do not obviate a commercial tenant's obligation to continue paying rent under the lease.

While the vast majority of landlords will resolve rent defaults with commercial tenants in this environment 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. Normally, 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.

Although landlords are currently prohibited from seeking relief in landlord-tenant court (both non-payment and holdover proceedings are considered eviction proceedings), on May 25, 2020 the New York Supreme Court re-opened for filings in new "non-essential" litigations. Landlords are thus

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presented with a choice: commence actions in Supreme Court to seek damages for the tenant's default, or wait until landlord-tenant court opens for a swifter proceeding there. We will continue to monitor this.

Tenants can 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. A complicating factor under our current climate is that in addition to the moratorium on eviction proceedings noted above, the New York State court system was closed to new actions that were not "essential" under court rules until May 25, 2020. During that period, the courts were not deeming Yellowstone injunctions essential, thereby depriving the tenant of a legal path to toll the cure period. Now that New York Supreme Court has re-opened for filings in "non-essential" cases, tenants can (and have) commenced actions seeking Yellowstone relief. Given the devastating financial impact that the pandemic has caused to retailers and other businesses, we anticipate that a recurring issue in such cases will be whether tenants can show that they are "prepared and maintain the ability to cure the alleged default," one of the necessary factors for securing a Yellowstone injunction.

While the precise scope of the tolling in the Executive Orders 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 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 Orders themselves. 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.

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While several proposed bills offering relief to commercial tenants have been introduced in both the state legislature and city council, the only one to pass is the city law discussed below. Commentators have opined that any such legislation, including the city law, will be subject to constitutional challenge.

The only legislation passed to date is an amendment to the New York City Administrative Code, effective May 26, 2020, prohibiting the enforcement of personal guaranties in connection with commercial tenancies. The law applies only to defaults that occur between March 7, 2020 and September 30, 2020, and for personal guaranties by "natural persons who are not the tenant under" the "commercial lease or other rental agreement involving real property." In addition, for the law to apply, the tenant must satisfy one of the following three conditions: (a) it was required under the Governor's March 16 Executive Order to cease serving patrons food or beverages for on-premises consumption, or to cease operation (this includes, for example, restaurants,

bars, gyms, fitness centers and classes, and movie theaters); (b) it was a non-essential retail establishment subject to in-person limitations under state-issued guidance; or (c) it was required to close to members of the public (including barbershops, salons, tattoo or piercing parlors, and similar personal care services).

The Administrative Code also sets forth a list of prohibited actions that amount to "commercial tenant harassment" by landlords, which "would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property." The list includes (among other actions) "using force against or making express or implied threats that force will be used against a commercial tenant or such tenant's invitee," and "threatening a commercial tenant based on such person's" age, race, creed, and a variety of other designations. The new amendment adds a fourteenth item to the "commercial tenant harassment" list: "attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to [the amendment]."

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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