

### HOSPITALITY LITIGATION

# The Pandemic's Impact On Eviction Proceedings



By  
**Todd E.  
Soloway**



And  
**Rachel E.  
Shaw**

Over the course of the last 16 months, both landlords and tenants have seen a dramatic shift to the rules and regulations governing, among other things, the commencement of eviction proceedings throughout New York State. Less than a year after extraordinary modifications to the statutes governing landlord-tenant relations, the COVID-19 pandemic has caused the government to impose additional limitations on the commencement and prosecution of eviction proceedings.

While there have been innumerable articles and alerts issued across the industry, by this article we attempt to organize the most recent pandemic-related governmental and administrative orders issued limiting eviction proceedings and their impact on both commercial and residential proceedings in New York City, including limitations placed on personal guarantors.

TODD SOLOWAY is a partner at Pryor Cashman.  
RACHEL E. SHAW is counsel at the firm.

### Orders Summarized

To date, the COVID-19 pandemic has resulted in the deaths of 224,000 Americans, including more than 23,000 residents of the New York City Metro Area. In an effort to decelerate the spread of the virus, beginning in March 2020, New York Governor Andrew Cuomo and New York City

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Mayor Bill DeBlasio issued emergency orders placing strict limitations on non-essential businesses and gatherings. In turn, recognizing that the government-ordered shutdown would lead to significant economic distress for many citizens and businesses, the Chief Administrative Judge of the Courts issued various

Administrative Orders establishing procedures and protocols designed to temporarily stay residential and commercial eviction matters before New York State Courts.

**Residential Evictions:** Raising fears that thousands of New York residents may be displaced in the worst economic downturn in over a decade, effective Oct. 12, 2020, residential landlords were permitted to proceed with the commencement of residential nonpayment and holdover eviction proceedings. See Administrative Order 231.20. However, residential tenants should take comfort in the fact that even if a landlord prevails in a summary proceeding, a moratorium is in place prohibiting the execution or enforcement of a judgment or warrant issued against a residential tenant—even those rendered prior to March 7, 2020—through Jan. 1, 2021. See Executive Order 202.66.

And practitioners should also be mindful of AO 231.20's requirement for both residential and commercial proceedings commenced pursuant to Article 7 of the NYS Real Property Actions and Proceedings Law

(RPAPL) that all petitions include a notice to respondent providing resources related to eviction proceedings. See Administrative Order 231.20.

**Commercial Evictions:** Unlike residential eviction proceedings, the ability to commence a commercial eviction proceeding remains suspended. Specifically, Executive Order 202.69 suspends the initiation of a summary proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent through Nov. 13, 2020. Further underscoring the current protections in place for commercial tenants, Executive Order 202.70 bars the eviction of any commercial tenant for nonpayment through January 1, 2021.

Commercial nonpayment proceedings commenced prior to March 17, 2020, may proceed in the normal course subject to limitations concerning the enforcement of eviction orders. See Administrative Order No. 160A.20.

In addition, pursuant to the Directives and Procedures of the Civil Court of the City of New York, landlords who wish to enforce a warrant of eviction awarded prior to March 20, 2020, based upon nonpayment of rent must first make an application to the court. Such an application must include an affidavit affirming the landlord has made a good faith effort to ascertain whether the tenant qualifies for certain benefits or is otherwise facing financial hardship due to the pandemic. See DRP 211B.

**Individual Guarantors of Commercial Leases.** In furtherance of the city's response to the pandemic and

its impact on local commerce, the New York City Council passed Local Law 53-2020 to insulate individual guarantors of commercial leases from personal liability where the commercial tenant has been impacted by the pandemic (the "Guaranty Protection"). The City Council also passed Local Law 53-2020 to protect commercial tenants from harassment by their landlords brought on by the pandemic (the "Commercial Harassment Law" and collectively with the Guaranty Protection, the "Guaranty Laws"). As of the date of this article, the Guaranty Protection has been extended through March 31, 2021. See Local Law 98.

In order to qualify for such protection, the monetary default must have occurred between March 7, 2020 and September 30, 2020, and the tenant must satisfy one of the following conditions: (i) the tenant was required, per Executive Order No. 202.3, to cease operation, and if the commercial tenant is a restaurant or bar, to cease serving food or beverage for consumption on-site; (ii) the tenant is a non-essential retail establishment subject to in-person limitations pursuant to Executive Order No. 202.6 (applicable to shopping malls and boutiques), or (iii) tenant was required to cease operations pursuant to Executive Order No. 202.7 (applicable to personal care services such as barbershops or tattoo parlors).

The constitutionality of the Guaranty Laws is currently being challenged before the Southern District, where the plaintiffs allege that it "substantially alters lease arrangements

between commercial landlords and their tenants by stripping them of critical personal guaranties, thereby violating the Contracts Clause of the US Constitution." See *Melendez v. The City of New York, et al.*, No. 1:20-cv-05301 (SDNY) The city has moved to dismiss the complaint arguing, among other things, that the Guaranty Laws do not substantially impair plaintiffs' contractual relationships and any impairment caused is limited in scope.

### What Happens Now?

Faced with a situation where the directives governing residential and commercial eviction proceedings differ, and landlords are barred from pursuing remedies against individual guarantors, practitioners ask themselves: what can we do?

Preliminarily, the courts will certainly be looking to the bar to actively engage in settlement discussions in nearly every landlord-tenant dispute arising out of the pandemic, both as an effort to ease the burden on the courts and most importantly, to address the practical realities that landlords and tenants alike are facing. And this too has been codified: in an effort to stave off the mass displacement of residential tenants and recognizing that more than one million New Yorkers have lost their jobs due to the pandemic, AO 231.20 encourages parties to utilize alternative dispute resolution methods. As a result, heavy-handed litigation tactics will likely be disfavored by the courts. *Id.*

On the litigation front: for now, rather than risk becoming tangled

in continued and fluctuating limitations on eviction proceedings or the enforcement of warrants of eviction in Civil Court, many landlords are commencing plenary actions in State court alleging breach of contract for unpaid rent.

Such actions do not threaten lease termination and, as such, are likely to provide for a more streamlined adjudication of pandemic-related rent disputes. In defense of such actions, and in the absence of relevant force majeure clauses, practitioners should expect tenants to rely upon the common law doctrines of frustration of purpose or impossibility as a basis to excuse performance of lease obligations. Under the doctrine of impossibility, performance may be excused if a party can establish an unexpected intervening event occurred, the parties' agreement assumed such an event would not occur, and the unexpected event made performance of contractual obligations impossible. *See Kolodin v. Valenti*, 115 A.D.3d 197 (1st Dept. 2014).

Similarly, in order to invoke the doctrine of frustration of purpose, a party must establish that an unforeseen event substantially frustrated the principal purpose of entering into the contract, the nonoccurrence of the event was an assumption of the contract, and the event was not the fault of the party seeking to assert the defense. *See PPF Safeguard v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506 (1st Dept. 2011). In New York, no pandemic-specific precedent has been established concerning either doctrine, but parties should expect

courts to focus on whether a global pandemic constitutes a foreseeable event.

In addition to the aforementioned equitable defenses, tenants may also be able to rely upon contractual force majeure clauses as a basis to excuse performance. While little pandemic-specific precedent has been established on this point so far, New York Courts have historically applied a narrow interpretation of force majeure clauses, such that nonperformance will only be

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excused if the force majeure clause specifically includes the event that prevents a party's performance. *See Kel Kim Corp. v. Cent. Mkts. Inc.*, 70 N.Y.2d 900 (1987).

As a result, lease agreements with force majeure clauses that do not specifically include the words "pandemic" or "epidemic" will likely be insufficient to support a force majeure defense. In addition, tenants should be mindful of the general rule that difficulty of performance occasioned only by financial hardship, even to the extent of insolvency or bankruptcy, will not excuse

performance under a contract (*see 401 East 61st Garage Inc. v. Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275 (1968); *Urban Archaeology Ltd. v. 207 East 57th Street LLC*, 60, A.D.3d 562 (1st Dept. 2009) and a force majeure clause that specifically includes the applicable supervening event may negate a party's ability to rely upon the equitable doctrines of impossibility or frustration of purpose.

How courts will interpret pandemic-related equitable defenses remains to be seen. Historically, New York courts have narrowly interpreted defenses to contractual performance. However, given the unprecedented crisis caused by the pandemic, courts may be sympathetic to residential and commercial tenants alike and encourage parties to come to the table with an open mind and a willingness to settle matters out of court. For many reasons, it is a whole new world.