



Lawrence K. Marks
Chief Administrative Judge

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MEMORANDUM

March 15, 2021

To: Hon. George J. Silver
Hon. Vito C. Caruso

From: Lawrence K. Marks *LM*

Subject: COVID-19 Emergency Protect Our Small Businesses Act of 2021
(L. 2021, c. 73) – Commercial Eviction Proceedings

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Governor Cuomo has signed into law chapter 73 of the Laws of 2021 (the COVID-19 Emergency Protect Our Small Businesses Act of 2021 [“Act” (effective March 9, 2021); Exh. A]), which, inter alia, provides COVID-related protections for respondents in commercial eviction matters. Modeled upon the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (“EEFPA”) enacted last December, the Act **imposes a 60-day stay upon (1) pending commercial eviction proceedings and (2) proceedings commenced within 30 days of the Act’s effective date (i.e., on or before April 8, 2021).**

The Act also sets forth a number of additional procedural requirements commercial eviction proceedings similar to those imposed upon residential evictions under the EEFPA – the translation and posting of Hardship Declarations by the Court System; the delivery of Hardship Declarations to tens of thousands of tenants in pending matters; the holding of additional conferences in matters where a warrant or judgment of possession or ejection has been issued but not yet executed. All these requirements expire on May 1, 2021 (Act, Part A, §13). Highlights of the Act are as follows:

1. Stay of Pending Commercial Eviction Matters; Exception: The Act immediately stays pending commercial eviction matters, including matters commenced prior to March 7, 2020, for 60 days (i.e., through May 8, 2021), and stays matters commenced between March 9, 2021 and April 8, 2021, for 60 days from filing (Act, Part A, §3). An administrative order effectuating this stay is attached as Exh. B.

Nuisance Exception: A pending or newly-filed commercial eviction proceeding alleging that a tenant has persistently and unreasonably engaged in behavior that substantially infringes upon the use and

enjoyment of other tenants or occupants, or causes a substantial safety hazard to others, may continue to be heard, with certain qualifications discussed in section 6 below (Act, Part A, §§9, 9[5])) (“Nuisance Exception”).

Post-Judgment Nuisance Exception: If a court has awarded judgment against a respondent prior to March 9, 2021 on the basis of objectionable or nuisance behavior, that eviction may proceed only after the court has held an additional hearing to determine whether the tenant is persisting in such conduct (“unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes substantial safety hazard to others”) (Act, Part A, §9[2]). *This hearing requirement expires on May 1, 2021.*

2. Stay of Execution of Warrants in Commercial Eviction Proceedings: The Act provides that, in any commercial eviction proceeding in which a warrant or judgment of possession or ejection has been issued but has not yet been executed, execution of the warrant shall be stayed until the court has held a status conference with the parties (Act, Part A, §8[a][i]). *This conference requirement expires on May 1, 2021 (Act, Part A, §13).*

3. Eviction Proceeding Required. No commercial tenant shall be removed from possession of the property prior to May 1, 2021, except by an eviction proceeding pursuant to RPAPL Article 7 (Act, Part A, §2).

4. Hardship Declarations – Publication, Translation and Effect: The Act contains a Notice to Tenant and a tenant’s Hardship Declaration (collectively, “Hardship Declaration”; Exh. C), setting forth various grounds by which tenants might be adversely affected by the COVID-19 pandemic (Act, Part A, §1[4]). It further directs the Office of Court Administration to make available on its website translations of the Hardship Declaration into Spanish and, to the extent practicable, the six other most common (non-English) languages in New York City, and to make other translations thereafter as practicable as well (Act, Part A, §10). *These requirements expire on May 1, 2021 (Act, Part A, §13).*

- a. Court System Obligation to Provide Hardship Declaration in Pending Matters: In a manner similar to the EEFPA, the Act requires the Court System to deliver copies of the Hardship Declaration to respondents in all pending commercial eviction matters (Act, Part A, §3). Our Division of Technology is undertaking this task.
- b. Eligibility to Submit a Hardship Declaration: The Act defines a tenant eligible for submission of the Hardship Declaration as a commercial tenant that is a resident of New York State, independently owned and operated, not “dominant” in its “field” and employing 50 or fewer persons (Act, Part A, §1[3]). The Act provides no further definitions of such criteria.
- c. Recipients of Hardship Declarations: The Act provides that eligible tenants who are parties in pending matters may submit Hardship Declarations to either their landlord,

their landlord's agent, or the courts (Act, Part A, §7). Prior to the commencement of a matter, an eligible tenant may submit a Hardship Declaration to the landlord or landlord's agent only. (Act, Part A, §5). *These provisions expire on May 1, 2021 (Act, Part A, §13).*

d. Consequence of Submission of a Hardship Declaration:

(1) In a Pending Matter: The submission of a Hardship Declaration by an eligible commercial tenant in a pending matter requires that the matter be stayed until at least May 1, 2021 (unless the Nuisance Exception applies) (Act, Part A, §7).¹

(2) In a Matter Not Yet Commenced: The submission of a Declaration to a landlord prior to commencement of a matter will (i) preclude the landlord from commencing an eviction proceeding against the tenant until May 1, 2021; and (ii) toll the limitations period for the commencement of that eviction proceeding until May 1, 2021 (Act, Part A, §5).

(3) As Prima Facie Evidence of Hardship: The Act provides that the Hardship Declaration shall serve as prima facie evidence establishing a rebuttable presumption that a commercial tenant is experiencing financial hardship in a proceeding as a defense under any federal or state executive order, local or state law, or other regulation limiting the eviction of a tenant suffering financial hardship due to COVID-19. However, the absence of a Hardship Declaration does not create a presumption that no hardship is present. (Act, Part A, §11). *This "prima facie" evidentiary effect is the single consequence of the Act's Hardship Declaration provisions that extends beyond May 1, 2021 (Act, Part A, §13).*

5. Court Practice Upon Commencement of a New Proceeding: The Act provides that a court cannot accept a new commercial eviction proceeding filing unless it is accompanied by both (a) an affidavit of service of the Hardship Declaration,² and (b) an affidavit from the landlord stating that no Hardship Declaration has been received from the tenant or that the Nuisance Exception applies (see paragraph 7) (Act, Part A, §6). In review of proposed petitions, the court must determine that the petition contains a blank copy of the hardship declaration in English and, where practicable, the tenant's primary language. Personal service of the notice of petition and Hardship Declaration is required, unless such service cannot be made with due diligence, in which case alternative service may be pursued. *These provisions expire on May 1, 2021 (Act, Part A, §13).*

The court must expeditiously seek confirmation by the tenant, on the record or in writing, that the tenant has received the blank Declaration and has not submitted a completed Declaration to petitioner-landlord, an agent of the petitioner-landlord or the court. If the court determines a

¹ Where a Hardship Declaration is delivered in a pending or new proceeding where a 60-day stay is already in force, this second stay has no practical impact. However, it may be consequential, for a short period, in matters filed between April 9 and April 30, 2021

² Until May 1, 2021, petitioners are required to serve a blank copy of the Hardship Declaration with all future pre-eviction notices (Act, Part A, §§3, 13).

respondent-tenant has not yet received a Declaration, it must stay further proceedings for no less than 10 business days and provide the tenant-respondent with a copy of a blank Declaration in both English and the tenant's primary language (Act, Part A, §6[2]). In any case where a Hardship Declaration is submitted to a landlord, a landlord's agent, or the court, by an eligible commercial tenant, the matter must be stayed until at least May 1, 2021 (unless the nuisance exception applies). Where these procedures have been followed and no Hardship Declaration is submitted, the matter may proceed in the normal course. *These provisions expire on May 1, 2021 (Act, Part A, §13).*

6. Nuisance Exception: Where a pending or new petition alleges "unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes substantial safety hazard to others," the stay provisions of the Act do not apply: the matter may be reviewed in the normal course and a warrant of eviction may issue; new matters alleging nuisance may also be commenced immediately (Act, Part A, §9). However, in any pending proceeding where a nuisance holdover has not been previously pleaded, the landlord must submit a new petition containing those allegations, and comply with other commencement requirements under the Act (Act, Part A, §9[1]). If nuisance is not proven, and the tenant has submitted a Hardship Declaration, the court must stay the eviction until at least May 1, 2021 (Act, Part A, §9[4]). *This provision expires on May 1, 2021 (Act, Part A, §13).*

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Please distribute this memorandum and attachments to judges and non-judicial staff as you deem appropriate. Questions on the subject may be addressed to Jessica Cherry of Counsel's Office (jcherry@nycourts.gov).

c: Hon. Anthony Cannataro