

Clients & Friends Memo

COVID-19 Update: Governor Cuomo Extends Eviction Protections for Small Businesses That Demonstrate a Financial Hardship

March 15, 2021

In December, New York Governor Andrew Cuomo signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, which provided a moratorium on residential eviction and foreclosure proceedings until May 1, 2021. This act, however, did not provide any extensions of the moratorium on commercial evictions and foreclosures originally provided by Executive Order 202. The latest extension of the commercial ban (pursuant to Executive Order 202.91) expired on February 22, 2021. On February 22, 2021, Governor Cuomo issued Executive Order 202.95, which generally continued “the suspensions and modifications of law and any directives, unless superseded, modified or otherwise expired, made by Executive Order 202” for thirty days until March 24, 2021. Other than this blanket extension, commercial eviction and foreclosing protections had not been addressed.

On March 9, 2021, Governor Cuomo signed the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (the “**Act**”), which provides eviction and foreclosure protections for small businesses. The Act applies to commercial tenants that are resident in New York, independently owned and operated, not dominant in their field and have fifty or fewer employees (individually, a “**Small Business**,” or collectively, “**Small Businesses**”). The Act provides that no Small Business may be removed by any means prior to May 1, 2021, except pursuant to a formal eviction proceeding (*i.e.*, “self-help” evictions are prohibited). Any eviction proceedings pending on March 9, 2021, or commenced within thirty days thereof, will be stayed for at least sixty days.

Landlords are required to include a “Hardship Declaration” with every written notice required to be provided before the commencement of an eviction proceeding or with every notice of petition or summons and complaint served on a Small Business. The Hardship Declaration provides notice to the Small Business that if it has lost significant revenue or had significantly increased necessary costs during the pandemic, then it cannot be evicted until at least May 1, 2021, for nonpayment of rent or holding over. The landlord must also provide the Small Business a mailing address and e-mail address to which the Small Business can return the Hardship Declaration. If the Small Business confirms its financial hardship by signing and delivering the Hardship Declaration to the landlord, such Small Business cannot be evicted until May 1, 2021. However, the Small Business

may still be evicted for violating its lease persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard to others (collectively, “**Unreasonable Behavior**”). Pursuant to the Act, courts are prohibited from accepting any petition to commence an eviction proceeding unless the landlord files an affidavit of service, demonstrating the manner in which the landlord served a copy of the Hardship Declaration on the Small Business and an affidavit attesting either that (i) at the time of filing the landlord had not received a signed Hardship Declaration or (ii) although the Small Business returned a signed Hardship Declaration, the Small Business is engaging in Unreasonable Behavior.

Additionally, the Act provides protections against foreclosure for Small Businesses that own ten or fewer commercial units, whether directly or indirectly. The ten or fewer commercial units may be in more than one property or building as long as the total aggregate number of ten units are currently occupied by a tenant or are available for rent.

The Act does not apply to any mortgage loans made, insured, purchased or securitized by a governmental agency. Similar to the moratorium on eviction proceedings, any foreclosure actions against a Small Business pending on March 9, 2021, or commenced within thirty days thereof, will be stayed at least sixty days. The mortgagee is required to include a Hardship Declaration with every notice required to be provided to the Small Business prior to filing an action for foreclosure, and if the Small Business returns the Hardship Declaration to the mortgagee, the mortgagee cannot initiate a foreclosure action until May 1, 2021. The Act further provides a moratorium on actions to foreclose on delinquent taxes or to sell a tax lien relating to commercial real property until May 1, 2021, if the Small Business submits a Hardship Declaration. It also prohibits discrimination in the determination of whether credit should be extended to any Small Business that owns commercial real property or reported negatively to a credit reporting agency because such Small Business has been granted a stay of mortgage foreclosure proceedings, tax foreclosure proceedings or tax lien sales.

We will continue to keep you apprised of any further developments.

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If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

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