

## Outside Counsel

## Expert Analysis

# New York City Commercial Tenant Harassment Law Takes Effect

Mayor Bill de Blasio recently signed legislation prohibiting New York City landlords from engaging in “commercial tenant harassment.” The new law, titled “Non-Residential Tenant Harassment” and codified as Chapter 9 to Title 22 of the New York City Administrative Code, became effective on Sept. 26, 2016. Until the new law is interpreted by the courts, key issues such as appropriate forum, limitations on remedies and potential waiver of statutory protections remain unclear.

The law was primarily intended to protect small business owners from harassment by their landlords. For example, the initial draft of the statute defined “non-residential tenant” as “includ[ing], but not limited to, a tenant that is a small business.”<sup>1</sup> Furthermore, hearings before the City Council’s Committee on Small Business and press conferences held by City Council members touted the law as protecting small business owners.<sup>2</sup> The law as enacted, however, adopted

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a broader definition of “commercial tenant” to include all tenants—not just small businesses.

### Elements and Definitions

Tenants seeking to establish a commercial tenant harassment claim must prove two elements. First, the tenant must demonstrate that the landlord’s offensive act or omission was intended to cause the tenant’s vacatur of the

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covered property or to surrender or waive any rights under a lease, other rental agreement or applicable law. N.Y.C. Admin. Code §22-902(a).

Covered property is defined as “any building or portion of a building (i) that is lawfully used for buying, selling or otherwise providing goods or services, or for other lawful business, commercial,

professional services or manufacturing activities, and (ii) for which a certificate of occupancy authorizing residential use of such building or such portion of a building has not been issued.” N.Y.C. Admin. Code §22-901.

Second, the landlord’s conduct must consist of one or more of the wrongful acts enumerated in the statute, including improper use of force, repeated service interruptions, commencement of frivolous court proceedings and access obstructions. *Id.*

Specifically excluded from the definition of commercial tenant harassment, however, are “[a] landlord’s lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession” of the covered property. N.Y.C. Admin. Code §22-902(b). Thus, the statute expressly acknowledges that a landlord’s lawful exercise of its right to recover leased space is not harassment.

Additionally, even if commercial tenant harassment is otherwise found to have occurred, provided the harassment does not include threatening to use or using force or repeatedly commencing frivolous court proceedings, the landlord may raise as an affirmative defense that “(i) such condition or service interruption was not intended to

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cause any commercial tenant to vacate a covered property or waive or surrender any rights in relation to such covered property, and (ii) the landlord acted in good faith in a reasonable manner to promptly correct such condition or service interruption, including providing notice to all affected lawful tenants in a covered property of such efforts, where appropriate." N.Y.C. Admin. Code §22-904.

The law affords tenants a wide array of remedies and imposes a mandatory civil penalty of between \$1,000 and \$10,000. N.Y.C. Admin. Code §22-903(a). In addition, courts may "issue an order restraining the landlord from engaging in commercial tenant harassment and directing the landlord to ensure that no further violation occurs" and/or "award such other and further relief as the court deems appropriate, including but not limited to injunctive relief, equitable relief, compensatory damages, punitive damages and reasonable attorneys' fees and court costs." *Id.* It is unclear how the courts will interpret and apply these remedies.

### Other Unresolved Questions

The statute raises other unresolved questions. For example, "commercial tenant" is defined as "a person or entity lawfully occupying a covered property pursuant to a lease or other rental agreement." N.Y.C. Admin. Code §22-901. It could be argued that this defined term does not include licensees and others. It is also unclear whether courts will strictly interpret the definition of "owner" and limit applicability to the fee owner of covered property. *Id.*

Tenants may be precluded from raising harassment claims in New York City Civil Court summary proceedings because the law refers to commencement of "an action" in a "court of competent

jurisdiction" against landlord. N.Y.C. Admin. Code §22-903(a). Summary proceedings pursuant to CPLR Article 4 and RPAPL Article 7, however, are special proceedings and not "actions." Additionally, specifically enumerated remedies such as injunctive and equitable relief are generally unavailable in Civil Court.<sup>3</sup> The statute also states that tenants "shall not be relieved of the obligation to pay any rent for which [they are] otherwise liable" (N.Y.C. Admin. Code §22-903(b)), suggesting that harassment may not be a valid defense to nonpayment of rent.

Furthermore, if tenants are permitted to raise commercial tenant harassment in Civil Court summary proceedings, the "summary" nature of these matters might be jeopardized. Discovery is generally disfavored in summary proceedings absent a showing of "ample need."<sup>4</sup> As noted above, a tenant alleging harassment must demonstrate that the landlord's wrongful act or omission was intended to cause the tenant's vacatur or a waiver or surrender of rights. Since questions of intent often cannot be determined without discovery,<sup>5</sup> tenants may be more likely to claim "ample need" and delay adjudication.

The new law contains "offset" language stating that any damages awarded to the tenant under the statute "shall be reduced by delinquent rent or other sum for which a court finds such commercial tenant is liable to the landlord." N.Y.C. Admin. Code §22-903(b). Tenants may argue that this offset language justifies consolidation of summary proceedings with Supreme Court harassment actions because there are inherent common issues of law and fact with respect to damages and rent owed.<sup>6</sup> It is unclear whether such arguments will succeed.

It also remains to be determined whether the commercial tenant

harassment law can be waived in lease agreements.<sup>7</sup> Such waivers are often enforceable, for example, with respect to the protections of RPL 227.<sup>8</sup> Unlike the commercial tenant harassment statute, however, RPL 227 expressly provides that its provisions may be waived. Accordingly, the efficacy of such waivers and other measures designed to eliminate or limit landlord liability will remain unresolved until rights and remedies under the new statute are clarified by the courts.



1. See New York City Council, Proposed Legislation Int. No. 851.

2. See, e.g., Sept. 25, 2015 Transcript of the Minutes of the Committee on Small Business, City Council, City of New York.

3. See *Broome Realty Assocs. v. Sek Wing Eng.*, 182 Misc.2d 917, 703 N.Y.S.2d 360 (App. Term 1st Dept. 1999).

4. See *Plaza Operating Partners Ltd. v. IRM (U.S.A.)*, 143 Misc.2d 22, 539 N.Y.2d 671 (Civ. Ct. N.Y. Co. 1989).

5. See, e.g., *Justinian Capital SPC v. WestLB AG*, 37 Misc.3d 518, 952 N.Y.S.2d 725 (Sup. Ct. N.Y. Co. 2012).

6. See *Mattia v. Food Emporium*, 259 A.D.2d 527, 686 N.Y.S.2d 473 (2d Dept. 1999) (consolidation appropriate where, among other things, there are common questions of law or fact).

7. See *Fisk Building Associates v. Shimazaki II*, 76 A.D.3d 468, 907 N.Y.S.2d 2 (1st Dept. 2010) ("[u]nless public policy is implicated, parties to an agreement, such as a commercial lease, may waive the benefit of statute and assume obligations beyond the statutory provisions which would otherwise control"). The initial draft of the law included language voiding as against public policy any lease provisions conflicting with the law, but that language was removed from the enacted version. See New York City Council, Proposed Legislation Int. No. 851.

8. Among other things, RPL 227 provides tenants with the ability to surrender a premises destroyed or otherwise rendered untenable without further liability for rent accruing subsequent to the surrender.