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N.Y. Real Property Law Journal

A publication of the Real Property Law Section of the New York State Bar Association

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In Memoriam: Joel Sachs

In Memoriam

Joel Sachs

All who knew former Real Property Section Chair Joel H. Sachs were saddened to learn of his passing in January.

Joel's professional activities were many. To choose only some highlights from a long career: Joel was Chair of the Real Property Section from 2009-2010, was a Chair of the Section's Environmental and Energy Section, was President of the White Plains Bar Association, and was a longtime adjunct professor at Pace Law School. Even after his terms in these positions, Joel remained a key senior observer, consulted by the Bar in both formal and informal roles.

Good natured, garrulous and welcoming, Joel was always a likely person (together with his wife Roz in social settings) to talk to lawyers and their families new to an organization, and to introduce them around so they could make new friends and feel a part of the proceedings.

Joel's practice included important roles for developers and municipalities in many formative real estate, land use and environmental matters that helped establish the face of modern Westchester County. In practice, Joel is remembered for his nearly three decades at his White Plains law firm, Keane & Beane, P.C.; as the first Deputy Chief when the New York Attorney General's Office established its Environmental Protection Bureau; and early on as Town Attorney for the Town of Greenburgh.

Thoughts and love to Roslyn (herself, a major asset of the Section) and daughters, Beth and Lori, who are both also attorneys.

In honor of Joel's memory, donations may be made to the Lustgarten Foundation for Pancreatic Cancer Research in honor of his late brother Mel A. Sachs who bravely fought this disease.

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Submission Guidelines

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.
For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors. Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

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Message from the Chair

Residential closings have posed a safety dilemma for real property attorneys and their clients as they are sometimes required to personally attend face-to-face closings conducted in violation of COVID-19 orders of the Governor and the New York State Department of Health.

Ira S. Goldenberg

To assist practitioners, the Real Property Law Section, with the help of its Title and Transfer Committee, adopted guidelines for closings, copies of which were distributed to Section members and a copy of which is published in this issue of the *New York Real Property Law Journal* starting at page 32. The Section encourages attorneys to follow the recommendations and asks that those who have not complied do so immediately because we as real estate lawyers should not only obey the law, but also take measures to protect our clients and prevent the spread of this deadly disease.

The Section's guidelines have three components: First, there is a summary of the directives imposed by Executive Order 202.6 (as subsequently extended and amended) to minimize personal interactions and conduct transactions "as remotely as possible"—for example, through escrow arrangements. Second, 15 specific practices are recommended for when a remote closing is not possible, such as limiting the number of people in a room, mask wearing, social distancing, proper ventilation, and patience in dealing with others. Finally, there is the admonition that we as attorneys are charged with "the professional obligation of protecting our clients . . . and the civil responsibility of ensuring the safety and well-being of each other."

The Section's closing guidelines were prompted by complaints from members that some attorneys have insisted on personal attendance at indoor closings at which steps were not taken to protect the health of attendees. For example, we received complaints that closings were held in poorly ventilated rooms, with too many people sitting too close together for too long. Other complaints were that mask-wearing was not encouraged, and that steps that could be taken to facilitate non-contact closings—such as execution of documents prior to and outside of the closing location, the use of remote notarization, or the assistance of an escrow or settlement agent—were not permitted.

The problems created by those attorneys who refused to comply with New York's guidelines forced other attorneys to choose between safety and completion of a transaction. In essence, the non-compliant attorneys placed the need to close over the health of others, despite the fact that measures could be taken to achieve both goals.

Indeed, the Section has received panicked communications for help from attorneys who found they had no leverage to force counter-parties to use safe alternatives to a face-to-face closing. Anecdotally, some of the non-compliant attorneys represented lenders who took the almost unconscionable position that a purchaser/borrower was required to physically attend a closing. They did this despite the fact that the same lending officers who issued the rules were safely ensconced at home, proclaiming that it was too dangerous for them to personally attend closings. The problem was even worse for some residential cooperatives, when both a pay-off bank and a new lender insisted on personal attendance while refusing to explore safe alternatives.

Compounding the problem was that, in some parts of the state, closings became "super-spreader" events to which participants subsequently learned that their contraction of COVID-19 might be traced. While we have no data to support that view, the seriousness of the problem is highlighted by statements by lawyers that it was not until the pandemic that they realized how dangerous a closing could be or claiming attendance at closings was like participating in a suicide mission.

The officers of the Section recognized that these dangerous closing conditions required action to protect attorneys and the public from those who would expose others to COVID-19. The Title and Transfer Committee of the Section, co-chaired by Toni Ann Barone and John Jones, has led the Section's response to the problem. With the help of committee members, they researched the requirements imposed by Executive Orders of the governor as well as guidelines issued by the New York State DOH. They spoke with practitioners to determine their experiences, concerns and practical steps that could be undertaken for a safe closing. They also reviewed the Section's bylaws and the rules and practices of the New York State Bar Association.

The guidance formulated by the Committee eventually became the Section's resolution as adopted by the Section's Executive Committee on January 13, 2021.

Unfortunately, the Section does not have the power to make the guidelines obligatory, despite our earnest desire to do so, as the Section's authority is limited by its bylaws to calling attention to problems and recommending improvements in practice and procedure. However, to the extent we can offer the Section's weight and collective experience to assist attorneys and their clients to safely navigate the pandemic and remind others of their obligations to do so, then perhaps the Section through its recommendations and guidelines has made the practice of real property law a bit safer for all.

Please be safe and well,

Ira S. Goldenberg

Commercial Lease Amendments in the Age of COVID-19: Making Them Work in Eight Steps

By Joshua Stein

Property owners, tenants, and their attorneys and other advisers have spent a lot of time since March 2020 negotiating lease amendments and waivers to give tenants breathing room in the face of COVID-19-driven shutdowns of many businesses. These negotiations have dealt with the same economic issues again and again. In most cases, the tenant asks for a partial or complete abatement of rent to help compensate for the tenant's loss of business. Sometimes the owner agrees.

In many cases, the parties agree to defer rent rather than abate it. This does not help the tenant much beyond temporary cash flow relief, unless repayment of the deferred rent begins far in the future, when the tenant expects to be back in business, and then continues in small installments long after that. From the owner's perspective, though, a deferral will amount to an abatement if the tenant is gone and beyond the owner's reach by the time the deferred rent comes due. The burden of having to repay the deferred rent might itself drive an earlier departure. It also requires the tenant to increase its commitment to a location that may now feel very wrong or at least oversized and overpriced. That increases the tenant's problems rather than solves them.

Commentators sometimes suggest that during the pandemic property owners should collect only enough rent to cover their debt service, taxes, and operating expenses. Those commentators argue that the owner should suck it up and forgo profit during the pandemic. That's a nice heartwarming suggestion with no connection to business reality. In the real world, especially in large cities like New York, an owner needs nearly all its revenue just to stay above water. Owners do not just own real estate and get free money. They have expenses—lots of expenses—a fact often overlooked by the "cancel rent" crowd and the legislators who listen to them. Many real estate owners are not institutional REITs that make the headlines, but instead small inves-

Joshua Stein, a former Section chair, handles a wide range of commercial real estate transactions and regularly serves as an expert witness. He is a member of the American College of Real Estate Lawyers, the American College of Mortgage Attorneys, and the Association for Real Property and Infrastructure. He has written five books and 300+ articles on commercial real estate. Many appear on his website, www.joshuastein.com. He received his law degree from Columbia Law School, where he was a Harlan Fiske Stone Scholar and a managing editor of the *Columbia Law Review*.

Earlier versions of this article appeared in *The Practical Real Estate Lawyer* and on www.forbes.com. Andrew L. Herz, of Patterson Belknap Webb & Tyler LLP; Bradley A. Kaufman, of Pryor Cashman LLP; and Nina L. Kampler, of Kampler Advisory Group, LLC, all reviewed this article in draft and significantly improved it. Both the author and the reviewers reserve the right to assert positions inconsistent with this article, which is offered for discussion only.

tors that may own a property or two and cannot pay their property taxes without the inflow of monthly rent, let alone manage their personal lives when that inflow has been massively disrupted. These property owners depend on their rental income just to pay their own obligations.

Owners sometimes simply go along with whatever the tenant proposes and sign formal abatement or deferral agreements as they really believe they have no other options. They see a dim future. They would rather have tenants in occupancy than vacant space, perhaps for a very long time, in a market where rents drop daily. The fact that real estate is a marketplace, in which prices can go down dramatically and quickly due to even small shifts in supply, is another important element of reality that activists and legislators forget or maybe never recognized in the first place.

In response to requests from tenants, some owners jump through hoops to accommodate because it is a round world and they fear inviting bad karma. Others fear that if they fail to cooperate, they will end up with even less. As a result, countless tenants and owners have been signing rent abatement or deferral agreements since March 2020.

In this process, the parties—especially owners—should look beyond the simple issues of abatement and deferral. They should consider some other elements of lease amendment negotiations that should be part of the package and that, if not handled correctly, could produce unpleasant surprises later.

This article seeks to help counsel avoid pitfalls in today's lease renegotiations against the backdrop of unforeseeable events arising from the COVID-19 pandemic. Much of this advice also applies to any distress-driven lease renegotiations even outside a pandemic.

I. Formalize Amendment Negotiations

It starts with the negotiation process. An owner will sometimes not want to deal with the problem, because it is unpleasant. Instead, unpaid rent will just pile up. While the owner kicks the can down the road, the owner and tenant may send emails back and forth about possible rent waivers or deferrals. If the owner is not careful, though, a court might decide after the fact that the owner agreed to something—potentially much to the owner's chagrin.

Most leases contain protective language that tries to prevent unintended lease amendments or waivers. Courts in a tenant-friendly mood—i.e., many and perhaps most courts—sometimes ignore or actively sidestep such boilerplate language.[1] So an owner should not rely on it.

A careful owner will state in every communication on any possible change in the lease that the communication is not legally binding. It is only a conversation about a possible future lease amendment. An even more careful owner might insist on more formal written communications, with appropriate caveats every time, much like dealing with pre-workout discussions for a mortgage loan. In a pandemic, however, that level of formality might not always be feasible.

If an owner simply waits and fails to act, a court might decide, at a certain point, that the owner has waived some of its rights. The owner should not ignore the problem in the hope that it will go away. It will not. Unlike fine wine, tenants' problems in paying rent do not improve with age. And the owner should not expect the tenant to push discussions along. It is often up to the owner.

Before going too far down the lease amendment road, an owner may want to ask some financial questions and obtain some financial information on the tenant and its guarantors. Here are some examples, the appropriateness of which will vary between, for example, retail and office leases:

- Exactly how is the pandemic causing financial hardship for your business?
- How and why are you expecting that hardship to resolve or to continue?
- Please provide current financial reports (and historical comparisons) demonstrating that financial hardship.
- What government assistance have you obtained or are you seeking?
- Have you filed claims on your business interruption insurance?
- How many employees have you kept, laid off, or furloughed?
- Given the nature of your business, to what degree can your staff continue to work offsite and generate revenue so you can pay your contract rent?
- What is your exposure on other leases? What arrangements have you made there?
- Please provide current and complete financials for the tenant and its principals, including any guarantors.
- Although this location is now shut, how has it performed for you over the years? Please provide sales reports or location-specific profit and loss statements.
- Provide the dates and amounts of the distributions and compensation your business paid to its owners over the last year or two.

By asking questions like these and clearly indicating that the answers are the price of admission, an owner can sometimes stop the lease amendment process in its tracks. Of course, these questions and their answers may also give the tenant a roadmap for the case it might later try to make in court, but the tenant probably could make that case all on its own with no need for these hints.

II. Other Deal Terms

An owner might reasonably ask the tenant to make concessions in exchange for the accommodations being sought. The tenant might prepay at least some of any reduced rent. If the tenant pays real estate taxes, the owner might insist on an early deposit of funds. Perhaps the lease should be extended for the duration of any rent holiday, or the owner should obtain a termination right.

Before an owner waives or defers rent, the parties might explore other ways to cover the tenant's rent in the shutdown period. For example, if the owner still owes the tenant anything on account of a tenant improvement allowance, the parties might repurpose those funds and use them to pay rent. If the lease gives the tenant a future free rent period, perhaps the parties will agree to accelerate it.

Sometimes the parties will agree to release funds from the tenant's security deposit to pay some or all of the current unpaid rent. In that case, the lease will ordinarily require the tenant to immediately replenish the security deposit, subject of course to the effect of occasional pandemic-driven legislation to the contrary.[2] The owner should waive that replenishment requirement completely or allow the tenant to replenish on a very slow schedule. Without a very gradual schedule for replenishment, the tenant has not accomplished much.

If the lease already allows the tenant to reduce the security deposit over time, how does that work with the proposed lease amendment and possible accelerated release of funds from the security deposit? Will the tenant still have the right to a future reduction?

In mixed retail/residential buildings, owners who are otherwise resigned to a rent reduction have sometimes come up with a creative substitute to help their retail tenants while scoring points with their apartment tenants. The retail tenants have paid some of their rent by giving the owner gift cards, which the owner then distributes to the apartment tenants. Although this provides a form of marketing for both the owner and its retail tenant, it hardly offers a long-term solution to the retail tenant's problems and it won't always make sense.

In renegotiating any lease, a tenant may want to add new language that goes beyond rent abatements and deferrals in response to today's pandemic. Specifically, tenants—especially retail tenants—are starting to request built-in rent abatements or deferrals that would activate automatically if some future action by any governmental authority requires the tenant to shut down its business without fault by the tenant.

For example, a prominent coffee chain based in Seattle with a round green and white logo reportedly now tries to include in its new leases a 50% fixed rent abatement if a future mandatory shutdown reduces its sales by more than 25%, with a complete abatement of fixed rent if the business must shut down completely. It remains to be seen how much success tenants will achieve with such proposals. Lenders and owners do not want leases to allow any interruption of rental income. In the upcoming tenant-friendly leasing market, however, lenders and owners may have to relent if they want to sign leases. It may all depend on what the owner of the building next door or down the street is willing to do to fill its own vacant space.

Similarly, tenants amending existing leases or signing new ones, especially retail tenants, may want to lower their fixed rent and pay percentage rent if the tenant's business later becomes very successful. Historically, property owners have hesitated to agree to percentage rent with small, informal, or cash-based businesses out of fear that their financial reporting will be completely unreliable. Owners may need to live with that fear going forward if they want to sign leases or keep their existing tenants. They may also take comfort from the increasing use of credit cards and electronic payments, which may make cheating harder. They can also limit the percentage rent to a certain period or require that the breakpoint increase over time.

Traditionally, at least outside of malls (i.e., in so-called "street deals"), a retail tenant's sales and profitability were none of the owner's business. Now that owners have unexpectedly and involuntarily become participants in the downside of their tenants' businesses, perhaps it is reasonable for them to know how their tenants are doing going forward, even if the owners cannot totally rely on the sales figures and, perhaps, are not even collecting percentage rent. At a minimum, transparency on a tenant's sales and profitability might help the owner and its lender assess the likelihood of future defaults or future requests for extensions or renewals. The tenant, of course, should worry that the owner will use this information to try to leverage the tenant to pay above-market rent in the next round of lease negotiations.

As part of today's lease amendment discussions, a tenant may also want to realign its rent structure with current market rents, which are dropping and will probably continue to drop. A tenant that remains optimistic about the particular location may agree to extend its lease at lower rents, with an immediate rent adjustment to reflect today's market. Depending on the tenant's overall cash position and financial position, the tenant

might agree to pay the contract rent for a while, with a future rent reduction, thereby temporarily easing the owner's pain. Today, however, many tenants are focused on their short-term survival and conserving cash.

III. Lease Amendment Process

Once a tenant and an owner agree on a lease amendment, the tenant will typically try to keep the formalities to a minimum, helpfully providing a very minimalistic and perhaps not very careful amendment that accomplishes only what the tenant wants to accomplish. The tenant may do this partly in the hope that the owner will not think too much about the lease amendment, and will choose not to involve counsel. Lawyers only make things complicated, after all.

In most cases, an owner should not just sign whatever lease amendment the tenant proffers. At the very least, the owner should insist on having the tenant confirm the status of the lease. For example, does the tenant have any claims against the owner? Did the owner deliver the space as required? Does the tenant think it is entitled to any refunds? Does the tenant think the owner waived any lease obligations? Standard lease amendment boilerplate can help protect the owner.

A lease amendment gives the owner a great opportunity to pin down issues with the lease and try to eliminate them. Ideally, the owner should require the tenant to waive and release any issues. Otherwise, the parties should negotiate a resolution in their lease amendment. The owner does not want to learn about the tenant's issues 20 minutes after accommodating the tenant's request for rent relief.

An owner might reasonably ask the tenant to pay the owner's legal fees in negotiating any lease amendment. As a practical matter, tenants generally refuse because the whole exercise is driven by the tenant's statement that it is short of funds.

IV. Don't Forget About the Rest of the Lease

If an owner and tenant agree on some rent relief, how does that interact with other provisions of the lease? For example, perhaps the owner now agrees to abate rent by 50% for four months because of the pandemic. But maybe the tenant was already entitled to a free month of rent during that abatement period. Does the tenant still get the free month of rent? Can the tenant apply that free rent to some other month?

Similar issues arise if the lease expresses future rent adjustments as a percentage of the previous rent. What happens if that "previous rent" got chopped in half? How then do you calculate the future adjustments?

These are great questions. The parties should answer them in the lease amendment, not leave them for future debate or litigation.

V. Two-Way Street

Any lease amendment process can be a two-way street, giving an owner an opening to try to change the lease to its benefit as well. Here are some questions to ask:

- Has anything else in the lease, beyond the tenant's current and hopefully temporary inability to pay rent, been a problem?
- Does anything in the leased space need repairs? Does the space need alterations to conform to changes in how business is done?
- If the lease has burdensome or dangerous pro-tenant clauses, such as purchase options, other options, rights of first refusal, or restrictions on other leasing, should the owner try to get rid of them?
- Might it make sense to update any percentage rent language to improve the treatment of online sales?
- Did the owner make final concessions in the original lease negotiations that the owner might now have a chance to undo or limit so they benefit only the original tenant?
- If the lease allowed relatively free assignment, would the owner like to trim that back now?
- Would the owner like to obtain a lease extension or a right to terminate the lease early?
- If the tenant did not previously deliver a guaranty of the lease, should the owner now demand one, or at least a good-guy guaranty?
- If the owner agrees to defer rent, that's really a loan. Should it bear interest? And if the tenant misses any rent payments, deferred otherwise, should the owner have the right to accelerate the implied loan without having to declare the entire lease in default?

Whether or not the owner already has in mind making any changes to the existing lease, the owner may want its counsel to read through the lease, to look for problems or trouble. The problem, of course, is that the owner's counsel can almost always find something that could stand improvement. The cost and timing of the search for inferior lease language may make no sense. The tenant will likely try to reject anything the owner proposes anyway. By suggesting other improvements in the lease, the owner may inspire the tenant to do the same, thus opening a Pandora's box and turning a simple lease amendment into a complex transaction.

So, although a full review of the lease may sound like a great idea, it is not something for which the owner should tolerate much delay or extra expense. Perhaps counsel should just check for some crucial provisions. For example, this might be a good time to add a late charge and default interest, or "magic language" necessary to exercise rights and remedies under state law, if absent from the current lease.

VI. Rethink Notices in the WFH Era

As part of any pandemic-based lease amendment, the parties should think about how working from home might affect the practicalities of lease administration. Specifically, they might want to update the notice procedures in the lease to require formal lease notices to be given by email rather than by physical delivery. If no one is working at the office, no one will be able to receive and act upon any physical notices.

Email notices do raise legal and practical issues and uncertainties beyond the scope of this article. However, as an example of how email notices can work, the parties to one recent lease renegotiation agreed that anyone giving an email notice had to give it to a total of four email addresses, with such notice not taking effect unless at least two recipients acknowledged receipt.

VII. Deal with Third Parties if Necessary

Whenever the owner agrees to any lease amendment, the owner also must consider any third parties.

The owner might still owe installments of brokerage commission to the broker who arranged the lease. The owner may want to try to renegotiate or eliminate those payments, given that the lease is not as valuable as was anticipated. The owner's leverage will partly depend on what the brokerage agreement says about conditions to payment of any future installments and whether the tenant is actually in default under the lease.

If a guaranty backs the lease, then the owner should insist that the guarantor consent to the amendment and acknowledge the guaranty will still apply to the lease as amended. Without that, the guarantor might claim the guaranty went away as soon as the lease was amended.[3]

As a second and more subtle guaranty-related issue, often a guaranty will terminate if at any time the tenant peacefully moves out without having to be evicted (a "good-guy guaranty"). In that case, as a condition to terminating the guaranty, the owner might want to require the guarantor to repay some or all of the deferred or abated rent. As an alternative, the parties might modify the guaranty to say the exit right will arise only after a certain date.

The owner should consider recent legislation and case law on the enforceability of guaranties. If changes in the guaranty structure or documentation will avoid those limits on enforceability, the owner should insist on implementing them. For example, the New York City Council decided to invalidate certain personal guaranties but, in its wisdom, did nothing about leases made directly in the name of the person who owns the business.[4] Thus, it may make sense to tear up the guaranty and the lease, and instead have the guarantor sign a new lease directly as tenant, jointly and severally liable with the original tenant.

If the lease is a long-term financeable ground lease, any lease modification will require consent by the tenant's lender. If the owner and the tenant agree to defer rather than merely abate rent, that probably constitutes a modification requiring lender consent. The tenant's lender will probably regard the deferral as just a form of borrowing by the tenant—and a future monetary burden likely to cause a future default—and hence very undesirable. In one matter the author handled, a tenant tried without success to get around that problem and some others by documenting the deferred rent as an unsecured loan from the owner, not as actual rent. The property owner decided that was not a very good idea.

VIII. Avoid These Borrower-Lender Traps

If an owner (referred to as the "borrower" in this section) accommodates even a handful of requests for relief from tenants, the borrower may soon have trouble paying its mortgage. The idea of repurposing or contributing funds from other sources to pay the mortgage is against the religion of most real estate investors. If rental income stops or slows down, then the money simply isn't there to pay the mortgage. Before long, the borrower may decide to approach its lender for accommodations like those the borrower gave its tenants. If a borrower takes a wrong step in the process, though, it may find itself in default under its mortgage loan and at risk of losing its property through foreclosure, or worse.

Loan documents often require the borrower to obtain the lender's approval before waiving or deferring any rent payment or modifying any lease in any way. Those restrictions vary among loans and with the size, duration, importance, and type of leases. When such restrictions do apply, if a borrower accommodates its tenant without the lender's approval, the lender might very well have the right to call a default and ultimately foreclose.

A court might side with the borrower, but there's no guarantee. So, if the loan documents require it, the borrower needs to have a conversation with its lender, and get approval for any rent abatement or deferral.

The tenant may have a similar concern. It may well have signed a nondisturbance agreement with the lender, saying that if the lender ever forecloses, then the new owner of the property will not be bound by any lease amendment or waiver made without the lender's consent. Today's financial conditions certainly make such agreements much less theoretical than they once may have been. Thus, a tenant should also want to know that the owner's lender consented to any lease amendment or waiver.

If a lender refuses to go along with a proposal to defer or abate rent, the borrower and the tenant might creatively restructure the accommodation in a way that sidesteps the lender approval requirement. This could create its own set of issues. It also will not help the tenant much if the lender forecloses.

Any rent waiver made without lender approval may produce horrible consequences for the borrower that go far beyond just allowing the lender to call a default.

In most commercial mortgage loans, the borrower's principals sign a nonrecourse carveout guaranty, in which they agree to repay the loan from their personal assets if the borrower violates certain provisions of the loan documents, such as by making a prohibited transfer of the property, filing a voluntary bankruptcy, or misapplying funds. As long as the borrower refrains from doing those things, the lender might foreclose, but it will not have any recourse against the principals or their personal assets if the collateral is insufficient to repay the loan.

The list of violations triggering a nonrecourse carveout guaranty sometimes includes amending a lease or waiving a tenant's obligations without the lender's consent. So an ordinary accommodation to a tenant in trouble, if done without the lender's consent, might in the worst case make the borrower's principals personally responsible for payment of the entire loan, an exposure they otherwise would have avoided. They would properly regard that result as a disaster.

A borrower should consider another similar trap before approaching its lender for any relief. Almost all loan documents state that it is a default, so the lender can at least in theory foreclose, if the borrower admits in writing its inability to pay its debts. This default usually appears in a long, dense, unreadable paragraph on bankruptcy and insolvency-related defaults. It exists because, if a borrower admits it cannot pay its debts, this might help support an involuntary bankruptcy filing against the borrower. The lender does not want such a filing to happen or to prevail—not that the borrower's written admission will affect the ultimate outcome all that much if the borrower in fact cannot pay its debts. But the "admission of inability to pay debts" language usually appears in every bucket of insolvency-related defaults in a set of loan documents.

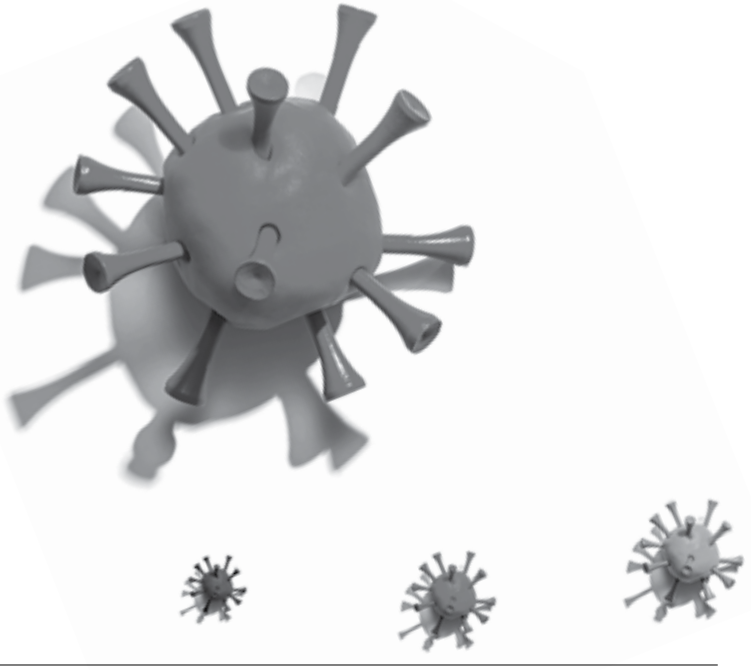
A borrower's admission of inability to pay debts may even allow the lender to claim that the borrower's principals are now liable for the entire loan under a nonrecourse carveout guaranty. This is, of course, an absurd result, but no more absurd than other recent results in litigation over similar guaranties. Therefore the borrower should not say or write anything about its general inability to pay its debts, even if entirely accurate.

IX. Conclusion

Any real estate owner must proceed with extreme care both in accommodating its tenants and in seeking accommodations from its lender. Read the loan documents first. Do nothing to give the lender a hook on which to hang a default—or, worse, a claim under a nonrecourse carveout guaranty. When negotiating with tenants, remember that lease renegotiations can work both ways. Conversely, if a tenant starts the conversation, the tenant should realize it might go in directions other than what the tenant intended.

Endnotes

1. *Latham Four P'ship v. SSI Med. Servs., Inc.*, 182 A.D.2d 880, 581 N.Y.S.2d 891, 892 (3d Dep't 1992).
2. *See, e.g.*, 2020 N.Y.C. Local Law No. 55, N.Y.C. Admin. Code § 22-1005.
3. *See Atlantic Props. LLC v. DiFiore*, 40 Misc. 3d 913, 919, 968 N.Y.S.2d 847 (Rochester Cty. Ct. 2013); *cf. White Rose Food v. Saleh*, 99 N.Y.2d 589, 592, 758 N.Y.S.2d 253 (2003).
4. *See* note 2, *supra*. Most real estate legislation seems to have been written with similar awareness of how actual real estate transactions might work.



Dignity and Autonomy Above All: Subjecting Tenants with Mental Illness to Involuntary Hospitalizations and Guardianships as an Alternative to Eviction Is Both Discriminatory and Dangerous

By Emily DiBiase and Elizabeth Woods

The following article offers a different viewpoint on the issues discussed in "Alternatives to Eviction: Legal Remedies When Faced With a Mentally Ill Tenant" by Carolyn Reinach Wolf and Jamie Rosen, which appeared in the fall 2020 issue of this Journal. —Ed.

"[I]f the law recognizes the right of an individual to make decisions about . . . life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is mentally or physically ill."[1]

A recent article for the *N.Y. Real Property Law Journal* recommends petitioning the courts for Article 81 Guardianships, Mental Hygiene Warrants and Assisted Outpatient Treatment as alternatives to summary eviction proceedings for the resolution of landlord-tenant disputes involving those referred to as "mentally ill" tenants.[2] Disability Rights New York (DRNY), the Protection and Advocacy System for the State of New York, emphatically opposes use of the remedies suggested in the article. Those suggested dispute resolution tactics are inappropriate substitutes for summary eviction proceedings and would constitute draconian and discriminatory misuses of the Mental Hygiene Law.

A person's home is their sanctuary. The law affords expansive rights, supports, and protections to safeguard an individual's housing status. The creation of a summary Housing Court process to handle landlord-tenant matters, while by its nature expedited, nonetheless recognizes and understands the competing interests at stake, including the very real risks of homelessness. This reality is especially true for individuals with mental illness who may have difficulty navigating the housing system.

Mental Hygiene Law mechanisms (Article 81 Guardianship, Mental Hygiene Warrants, Assisted Outpatient Treatment or AOT) are drastic, invasive, and potentially dangerous measures that implicate the constitutional rights and freedoms of people with disabilities. They are inappropriate for the overwhelming majority of people with mental illness, who possess the legal capacity for decision making and who do not pose a serious risk of harm to themselves or others. These measures should be an absolute last resort, used only in the most exigent circumstances after all less invasive options are exhausted.

Individuals with disabilities, particularly those with invisible disabilities, should not face increased interference with their right to quiet enjoyment by a landlord who undisputedly has a financial interest in the tenant's apartment. People with disabilities have equal rights to make legal and medical decisions in their community setting. Only in extreme and rare circumstances are Mental Hygiene procedures appropriate. If, after due diligence, it appears that an individual with a disability does not have adequate supports in the community, Adult Protective Services (APS) may investigate and evaluate the need for assistance, operating with a mandate to use the least restrictive means consistent with individual liberties.[3] This necessarily includes investigation and evaluation of tenants with invisible disabilities, including mental illness.

DRNY opposes use of the Mental Hygiene Law to circumvent the myriad tenant protections available in summary eviction proceedings. Landlords should not be entitled to "speed up" Housing Court cases at the expense of due process rights for individuals with disabilities. The Mental Hygiene Law's purpose is not to protect the pecuniary interests of landlords, homeowner's as-

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sociations, and co-op boards. Nor is the Mental Hygiene Law a work-around for the life-saving eviction moratoriums put in place to prevent a surge of homelessness and COVID-19 spread. To utilize it as an alternative to existing avenues for landlord-tenant dispute resolution would be a misuse of the limited resources of the courts and the mental health system.

I. Overview of Anti-Discrimination and Anti-Harassment Laws Protecting People with Disabilities

With very limited exceptions, private and public housing is covered by the Fair Housing Act and Fair Housing Amendments Act 42 U.S.C. § 3604 (FHAA or "Fair Housing Act").[4] Under the FHAA it is unlawful for a housing provider to discriminate against individuals with disabilities in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the dwelling.[5] An individual with a disability is defined as having a known or perceived disability.[6] It is also unlawful discrimination to deny reasonable accommodations in rules, policies, practices, or services, when accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.[7] The Act recognizes the potential for illegal harassment of tenants with disabilities, the existence of which is to be determined by the totality of the circumstances.[8] Even a single incident of harassment may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment, or evidences a quid pro quo.[9] DRNY suggests that the suggested misapplication of the Mental Hygiene Laws could clearly constitute such a hostile environment.

Tenants' protections in public housing and other government housing are additionally afforded by Title II of the Americans with Disabilities Act (ADA) [10] and Section 504 of the Rehabilitation Act of 1973 (Section 504).[11] Private housing that receives federal funding is also covered by Section 504. Under the ADA, a public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.[12] Courts have held that the ADA and Section 504 also prohibit placing people with mental illness "at serious risk of institutionalization or segregation," even if they reside in the community.[13]

The New York Human Rights Law, N.Y. Executive Law § 296 (NYHRL), also prohibits discrimination in housing based on disability.[14] It is an unlawful practice to discriminate against any person because of disability in the terms, conditions or privileges of the sale, rental or lease of a housing accommodation or in the furnishing of facilities or services in connection with the housing.[15] The New York City Administrative Code § 8-107(5) has similar provisions.

A. Specific Tenant Protections Afforded to New York City Residents

In New York City, where large numbers of residents are expected to face housing insecurity as a result of the pandemic,[16] a number of protections exist that affirm and expand these tenets. Even prior to the pandemic, the City Council determined that landlord harassment was a growing problem among its residents.[17]

> "Before someone is deprived of his or her autonomy through an Article 81 Guardianship, all less restrictive measures must be exhausted. Individuals with mental illness deserve to live with freedom and dignity like everyone else."

New York City residents are afforded protection from discrimination and harassment via the New York City Human Rights Law,[18] Local Law No. 7,[19] and the Housing Stability and Tenant Protection Act.[20] These collectively create a strong framework for New York City tenants to combat harassment by their landlords. Harassment is defined as any act or failure to act by a landlord or a landlord's agents that causes or is intended to cause any person legally entitled to live in a room or apartment to give up their room or apartment, or any rights related to their tenancy.[21]

In New York City, tenant harassment is not only a civil and criminal matter, but also a housing code violation.[22] This means tenants have the power to sue their landlord in housing court if they are being harassed. Each borough has a designated housing court part where tenants can bring affirmative litigation, referred to as an "HP Action."[23] It is a measure designed to empower tenants to take action against reckless acts by landlords and was created to help the most vulnerable New Yorker combat the growing problem of landlords engaging in disruptive and potentially dangerous methods to remove tenants from their homes.[24] The law also prevents similar actions by third parties working on the landlord's behalf.[25] Civil penalties for judicial findings of harassment range from $1,000 to $5,000.[26] The enactment of the Local Law balanced protections for tenants with safeguards for landlords.

Under the Human Rights Law, reasonable accommodations are used to afford people with disabilities equal access to use and enjoyment of housing. A personalized interactive process is required, and the accommodation must be provided unless it either imposes an undue financial or administrative burden or fundamentally alters the nature of the housing provider's program.[27] There is an exception if a tenancy would constitute a "direct threat" to the health or safety of other individuals or if the tenancy would result in substantial physical damage to the property of others.[28] However, the Fair Housing Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general.[29] A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence.[30] Reasonable accommodations can be an essential and critical part of a person's right to live in the community free from restriction. Additionally, reasonable accommodations can be, and should be, used as needed during court proceedings to ensure tenants' due process and equal protection rights.

II. Article 81 Guardianship Petitions, Mental Hygiene Warrants, and Referrals for Assisted Outpatient Treatment

"[T]he appointment of a guardian is a drastic remedy which involves an invasion of the respondent's freedom and a judicial deprivation of his constitutional rights."[31]

Article 81 of the Mental Hygiene Law establishes guardianship over adults in New York State.[32] These are powerful tools which can fundamentally alter the lives of individuals subject to them. Guardianships allow for another person, the guardian, to control almost all aspects of an individual's life—health, home, finances, and other decisions.[33] When properly used and in very limited circumstances, guardianships can potentially allow a person who no longer has the capacity to maintain a full and connected life in the community.[34] However, there are inherent risks when assigning such complete control of another's life to a guardian. During the creation of a guardianship, all participants involved must continually assess the individual's health and safety, best interest overall, capacity, and potential for abuse to ensure the individual has the least restrictive support possible. Under the FHA, NYHRL, NYCHRL, ADA and Section 504, purposefully targeting disabled tenants for invasive Mental Hygiene Law court processes as a work-around to summary eviction proceedings can be discriminatory.[35] To evict a non-disabled tenant, a landlord must follow all procedures in Real Property Actions and Proceedings Law Article 7, as well as those in the lease or other contractual agreement.[36] There are additional protections and procedures for rent-controlled or rent-stabilized tenants under the Emergency Tenant Protection Act (ETPA).[37] Currently, many tenants are protected in non-payment proceedings by the Tenant Safe Harbor Act,[38] the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020,[39] and the moratorium on non-payment evictions from the Centers for Disease Control and Prevention (recently extended through June 30, 2021).[40]

Disabled tenants are entitled to the same terms, conditions, privileges, and protections as tenants without disabilities.[41] Few terms and conditions are more fundamental to a tenancy than the laws, contractual obligations, and procedures governing resolution of landlord-tenant disputes. No one with a disability should be denied these same protections *because* of their disability. The Mental Hygiene Law is not a "loophole" in the Real Property Actions and Proceedings Law to make tenants with disabilities more vulnerable in the landlord-tenant context than other tenants.

Mental illness is not uncommon. It is not synonymous with incapacity. Capacity is based on functional limitations and the ability to understand these limitations, not on a diagnosis.[42] Article 81 Guardianship is inapplicable and inappropriate in almost all situations involving individuals with mental illness. According to the National Institute of Mental Health, in 2019, there were an estimated 51.5 million adults aged 18 or older in the United States with a mental illness. This number represented 20.6% of all U.S. adults. In 2019, there were an estimated 13.1 million adults aged 18 or older in the United States with Serious Mental Illness (such as schizophrenia, PTSD, and bipolar), or 5.2% of all U.S. adults.[43]

Before someone is deprived of his or her autonomy through an Article 81 Guardianship, all less restrictive measures must be exhausted. Individuals with mental illness deserve to live with freedom and dignity like everyone else. Capacity and tenancy issues are a false dichotomy. A tenant with capacity is not necessarily a perfect tenant. For example, someone having trouble with housekeeping may only need a Medicaid care manager to help secure appropriate services. This is routinely done through social services or with help from programs like the Independent Consumer Advocacy Network. There are also independent living organizations, peer advocates, and other community-based providers throughout the state who can help people get the services they need without stripping their independence.

Communication barriers and conflicts are natural in an adversarial process. Effective communication is a two-way street; individuals with disabilities cannot be the only participants. Landlords cannot avoid speaking to tenants based on mere stereotypes and fear. In fact, people with serious mental illnesses are far more likely to be the victims of violent crime than perpetrators.[44] Referring tenants to civil legal services and trusted community organizations that can explain their rights and

obligations, discuss solutions, and provide assistance can be empowering to the tenant. Self-advocacy and self-determination are tools that lay the foundation for long-term success and stability. Advocates can facilitate but not replace effective communication. Dealing with pro se litigants can be challenging generally, regardless of disability.[45] Alternative dispute resolution is a tried and true method to avoid housing court.[46] If a landlord truly wants to resolve disputes in an inclusive non-discriminatory way, community mediation services are effective alternatives to court proceeding.[47] It must be paramount to make decisions that embrace the individual's rights and autonomy, instead of ones that disempower them, a central guiding principle.

Another less invasive alternative to guardianship involves "natural supports." A tenant may have "natural supports" (family, friends, case managers, social workers, counselors, peer advocates) who they routinely ask for help. Absent truly exigent circumstances, other people, including family, should only be involved with the consent of the tenant. Adults with mental illness are not children. Sometimes well-meaning family members can confuse disagreeing with a person's decisions with the inability to make those decisions. Individuals with disabilities must be allowed to try to resolve their issues independently, to respect their autonomy as tenants and members of the community.

"DRNY is profoundly troubled by the suggestion that Mental Hygiene Warrants are a viable alternative to summary eviction proceedings. Being involuntarily removed from one's home by the sheriff is humiliating, dehumanizing, and dangerous."

A call to Adult Protective Services should only be placed in rare instances when all less restrictive solutions have failed. APS may help open access to services without having to petition for a guardianship. For instance, APS can potentially pay for deep cleaning and help arrange maintenance cleanings of an apartment or they can provide assistance with financial management.[48] Furthermore, if APS determines additional assistance is necessary, APS has a wide variety of tools at their disposal. If, after an investigation, APS does not think guardianship is necessary, chances are the person is not actually incapacitated and the landlord should not bring a guardianship petition independently. Additionally, Housing Court itself has tools at its disposal. This includes the appointment of a Guardian Ad Litem.[49] A Guardian Ad Litem is appointed by the court on behalf of the person with the disability when the court has questions regarding capacity. It is limited. It ceases upon completion of the Housing Court case. It is a temporary restriction.

Most importantly, landlords and their attorneys should be mindful of the duty to provide reasonable accommodations so that individuals with disabilities can have full use and enjoyment of the premises. Almost all accommodations can be provided without the need for guardianship. Reasonable accommodations are by law an individualized assessment based on the needs of the individual and the remedies that will assist them directly. Inappropriate use of Article 81 petitions can be discriminatory, especially if less restrictive measures and reasonable accommodations were not attempted first. If an Article 81 petition is misused to pressure a tenant to vacate, that may constitute unwelcome conduct that is sufficiently severe or pervasive that it rises to the level of illegal harassment.[50]

DRNY is profoundly troubled by the suggestion that Mental Hygiene Warrants are a viable alternative to summary eviction proceedings. Being involuntarily removed from one's home by the sheriff is humiliating, dehumanizing, and dangerous. It can result in a person being held for evaluation for up to 15 days, losing their job, and experiencing disruption of care routines, family crisis, and trauma.[51]

Mental Hygiene Warrants are emergency provisions that should never be used to remedy conduct that is merely offensive, unpleasant, annoying, or a technical violation of a lease. Under MHL § 9.01 there must be likelihood or substantial risk of serious harm such as threats of or attempts to commit suicide, serious bodily harm, homicide, or other violent behavior.[52] It is an abuse of the Mental Hygiene Law to file a petition for a Mental Hygiene Warrant when someone is merely disturbing the "quiet enjoyment" or "damaging the floorboards."[53]

It is particularly critical that such tactics not be suggested by purported experts in our current climate, when landlords are understandably frustrated by COVID-related eviction moratoriums and court delays and seeking all viable means to stay solvent. Potential abuses are especially concerning in the context of rent-controlled and rent-stabilized housing, where there is great financial incentive to make tenants vacate and circumvent the robust protections in place to help them stay.[54]

Having a disability does not mean you surrender your right to privacy. Seeking treatment is a private and deeply personal decision. It is a decision that should be made by the individual with the disability. Indeed, the

law guarantees a right to counsel in treatment and medication matters in order to defend against abuses.

An Assisted Outpatient Treatment order is a last resort, to be used only when all else has failed, and one that carries with it significant privacy concerns.[55] Federal guidance clearly articulates the impropriety of asking a tenant to turn over detailed medical information and protected medical records, even in the context of reasonable accommodation requests.[56] Information provided for accommodations or resolution of disputes should be minimal and on a need-to-know basis only. If a referral is made for AOT as a tactic to gain unfair advantage in a landlord-tenant dispute and a tenant is pressured to turn over protected medical records to support the motion for an AOT order, this can easily rise to the level of illegal harassment and discrimination. AOT has very stringent criteria which is inapplicable to most tenants and most situations.[57]

III. Race, Mental Health, and the Heightened Risks of Law Enforcement Involvement

In recent months there has been an increased awareness of the risks associated with uses of force and policing to Black, Indigenous, and other people of color ("BIPOC communities"). Systems have begun evaluating the institutional strains and biases that result in more force-filled interactions with BIPOC communities.[58] A similar, and sometimes overlapping, risk is present for individuals with mental illness. Individuals with mental illness, especially those in BIPOC communities, are victims of racism and implicit bias.[59] They are cast as "threatening" and "dangerous." These categorizations often put them at a significantly heightened risk of physical injury and death during tense law enforcement interactions.[60]

In recent years, individuals profoundly in need of mental health treatment have been subject to police intervention that ultimately ended in their deaths—India Cummings (2016)[61] and Daniel Prude (2020)[62] to name two examples. Misuse or overuse of these Mental Hygiene Law mechanisms, especially by a landlord with alternate civil remedies, would stress already overworked and underfunded systems. Being forcibly removed from one's home by the sheriff on a Mental Hygiene Warrant can be exceedingly dangerous or potentially deadly for the tenant with mental illness. This risk of injury or death is unnecessary and should be considered unconscionable when other legal remedies and procedures are available.

Racism and implicit bias can influence whether a tenant is perceived as "dangerous," leading to disproportionate use and what amounts to weaponization of Mental Hygiene Warrants against BIPOC communities.

IV. Conclusion

Using the Mental Hygiene Law to resolve landlord tenant disputes carries great potential for abuse and exploitation of individuals with mental illness. Misuse

of the Mental Hygiene Law carries great risks of financial, psychological, and physical harm to people with mental illness, especially those in BIPOC communities. Individuals with mental illness deserve and are legally entitled to have their legal issues heard in a safe environment, free from illegal discrimination and harassment. With these principles in mind, DRNY asserts that the suggested use of Article 81 Guardianships, Mental Hygiene Warrants, and Assisted Outpatient Treatment by landlords with a financial interest in the outcome of the proceedings is unconscionable. The substituted judgment of a self-interested party should never be proposed as a substitute for due process and equal protection.

Endnotes

1. *Rivers v. Katz*, 67 N.Y.2d 485, 493, 504 N.Y.S.2d 74, 78 (1986) (internal citations omitted).
2. We use the term "mentally ill" in this one instance because it is the term adopted by the authors of the prior article referenced. We encourage readers to inquire about and honor personal preferences in terms of using person first/identity first or other preferred language when referring to members of the disability community. For more information, we encourage readers to visit the American Psychological Association Style and Grammar Guide on Bias Free Language available at:

   https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/disability
3. N.Y. State Office of Children & Family Services, *Important Principles of Adult Protective Services,* https://ocfs.ny.gov/main/psa/principles.asp.
4. *See* 24 C.F.R. § 100.
5. 42 U.S.C. § 3604(f)(2)(B).
6. 42 U.S.C. § 12102(1).
7. 42 U.S.C. § 3604(f)(3).
8. *See* 24 C.F.R. § 100.600(a)(2)(i).
9. 24 C.F.R. § 110.600.
10. 42 U.S.C. § 12131; 28 C.F.R. § 35.130.
11. 29 U.S.C. § 794; 24 C.F.R. § 8.
12. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

13. *See Davis v. Shah*, 821 F.3d 231, 262 (2d Cir. 2016); *see also United States v. Mississippi*, 400 F. Supp. 3d 546, 553 (S.D. Miss. 2019).
14. N.Y. Executive Law § 296.
15. *See id.*
16. *See* The COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, 2020 N.Y. Laws ch. 381.
17. *See Melendez v. City of New York*, No. 20-CV-5301 (RA) (S.D.N.Y. Nov. 25, 2020); *see also Prometheus Realty Corp. v. City of New York*, 80 A.D.3d 206, 208, 911 N.Y.S.2d 299, 300 (1st Dep't 2010).
18. *See* N.Y.C. Administrative Code tit. 8, ch. 2. et seq. (N.Y.C. Human Rights Law).
19. 2008 N.Y.C. Local Law No. 8.
20. *See* Housing Stability and Tenant Protection Act of 2019, 2019 N.Y. Laws ch. 36.
21. *See Prometheus Realty Corp.*, 80 A.D.3d at 211.
22. *See Building & Realty Inst. of Westchester & Putnam Ctys., Inc. v. State of New York*, No. 19-CV-11285 (KMK) (S.D.N.Y. Sept. 23, 2020); *see also* 2019 N.Y. Laws ch. 36.
23. N.Y.C. Housing Court, *Starting a HP Proceeding to Obtain Repairs*, http://www.courts.state.ny.us/courts/nyc/housing/startinghp.shtml.
24. *See D'Agostino v. Forty-Three E. Equities Corp.*, 16 Misc. 3d 59, 60-61, 842 N.Y.S.2d 122 (1st Dep't 2007).
25. *See* N.Y.C. Admin. Code § 27-2093.
26. *See* 2008 N.Y.C. Local Law No. 8; Press Release, New York City Council, Groundbreaking Tenant Protection Act Becomes Law (Mar. 13, 2008), https://council.nyc.gov/press/2008/03/13/1323/.
27. *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodation, The U.S. Department of Justice, Office of Fair Housing and Equal Opportunity (May 14, 2004), https://www.justice.gov/crt/us-department-housing-and-urban-development.
28. *See* 42 U.S.C. § 3604(f)(9).
29. *See* Joint Statement, *supra* note 27.
30. *See id.*
31. *In re Doe*, 181 Misc. 2d 787, 793, 696 N.Y.S.2d 384 387 (Sup. Ct., Nassau Co. 1999).
32. N.Y. Mental Hygiene Law § 81.01 *et seq.* (MHL).
33. *Id.*
34. *Id.*
35. 42 U.S.C. § 1981; N.Y. Exec. Law § 296; N.Y.C. Admin. Code § 8-101; 42 U.S.C. § 12101 *et seq.*; 29 U.S.C. § 701 *et seq.*
36. N.Y. Real Property Actions and Proceedings Law § 713 (RPAPL).
37. 1974 N.Y. Laws ch. 576, §.4, as amended.
38. 2020 N.Y. Laws ch. 127, as modified by Exec. Order 202.66.
39. Signed by Governor Cuomo on December 28, 2020, the COVID-19 Emergency Eviction and Foreclosure Prevention Act placed a moratorium on many residential evictions until August 31, 2021 if the tenant submits a written declaration of COVID-19 related financial hardship. *See* 2020 N.Y. Laws ch. 381.
40. *See* Center for Disease Control and Prevention, *Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19* (Mar. 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html.
41. 42 U.S.C. § 3601.
42. Charlie Sabatino & Erica Wood, *The Ten Commandments of Mental "Capacity" and the Law*, Bifocal, Vol. 40, Issue 1 (Sept.-Oct. 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-1-september-october-2018/10-commandments/.
43. National Institute of Mental Health, *Mental Illness* (Jan. 2021), https://www.nimh.nih.gov/health/statistics/mental-illness.shtml.
44. Sarah L. Desmarias Ph.D. *et al*., *Community Violence Perpetration and Victimization Among Adults with Mental Illness,* Am. J. Public Health (Nov. 12, 2014).
45. *See* www.lawhelp.org/NY for a list of free legal service providers in NYS.
46. American Bar Association, Section of Dispute Resolution, *Dispute Resolution Process,* https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/.
47. Gerald Lebovits & Lucero Ramirez Hidalgo, *Alternative Dispute Resolution in Real Estate Matters: The New York Experience*, 11 Cardozo J. Conflict Resol. 437, 450 (2010).
48. N.Y. State Office of Children and Family Services, *Adult Protective Services*, https://ocfs.ny.gov/main/psa/services.asp.
49. Kelly Crowe, *Statutory Provisions For Guardians ad Litem,* Bifocal, Vol. 39, Issue 6 (July-Aug. 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-6--july-august-2018-/statutory-provisions-for-guardians-ad-litem/.
50. Finally, landlords attorneys should remember that in an Article 81 proceeding the allegedly incapacitated person has the right to counsel and a jury trial, it is the highest burden of proof in a civil case (clear and convincing evidence), and the landlord will almost certainly not be appointed as the guardian due to a conflict of interest. If the petition is dismissed, the landlord can be liable to pay the attorney's fees of the respondent. *See* MHL §§ 81.19(d)(8), 81.10, 81.11, 81.12.
51. MHL § 9.39.
52. MHL § 9.01.
53. Government housing providers should be mindful of *Olmstead* and the ADA's integration mandate, as petitioning for a Mental Hygiene Warrant almost certainly increases a tenant's risk of institutionalization. *See Olmstead v. LC*, 527 U.S. 581 (1999).
54. Shannon Price, *Stay at Home: Rethinking Rental Housing Law in an Era of Pandemic*, 28 Geo. J. on Poverty L. & Pol'y 1, 29 (2020).
55. *See* MHL § 9.60(j)(2).
56. *See* U.S. Department of Housing and Urban Development, *Reasonable Accommodations and Modifications*, https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications.
57. *See* MHL § 9.60.
58. *See* N.Y. Comp. Codes. R. & Regs. tit. 9, § 8.203.
59. *See* Stephanie Hepburn, *Implicit Bias and Mental Health*, Nat'l Ass'n of St. Mental Health Program Directors (Dec. 2016), https://www.nasmhpd.org/sites/default/files/Implicit-Bias-and-Mental-Health.pdf.
60. *See* Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams are Failing*, NPR (Sept. 18, 2020), https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing.
61. *See* Erin Donaghue, *Lawsuit Claims Deputies "Literally Watched" New York Inmate Die*, CBS News (Feb. 8, 2019), https://www.cbsnews.com/news/india-cummings-case-lawsuit-claims-deputies-literally-watched-inmate-die-in-new-york-jail/.
62. *See* Edgar Sandoval, *Daniel Prude Was in 'Mental Distress.' Police Treated Him Like a Suspect*, N.Y. Times (Oct. 9, 2020, updated Feb. 23, 2021), https://www.nytimes.com/2020/10/09/nyregion/daniel-prude-rochester-police-mental-health.html.

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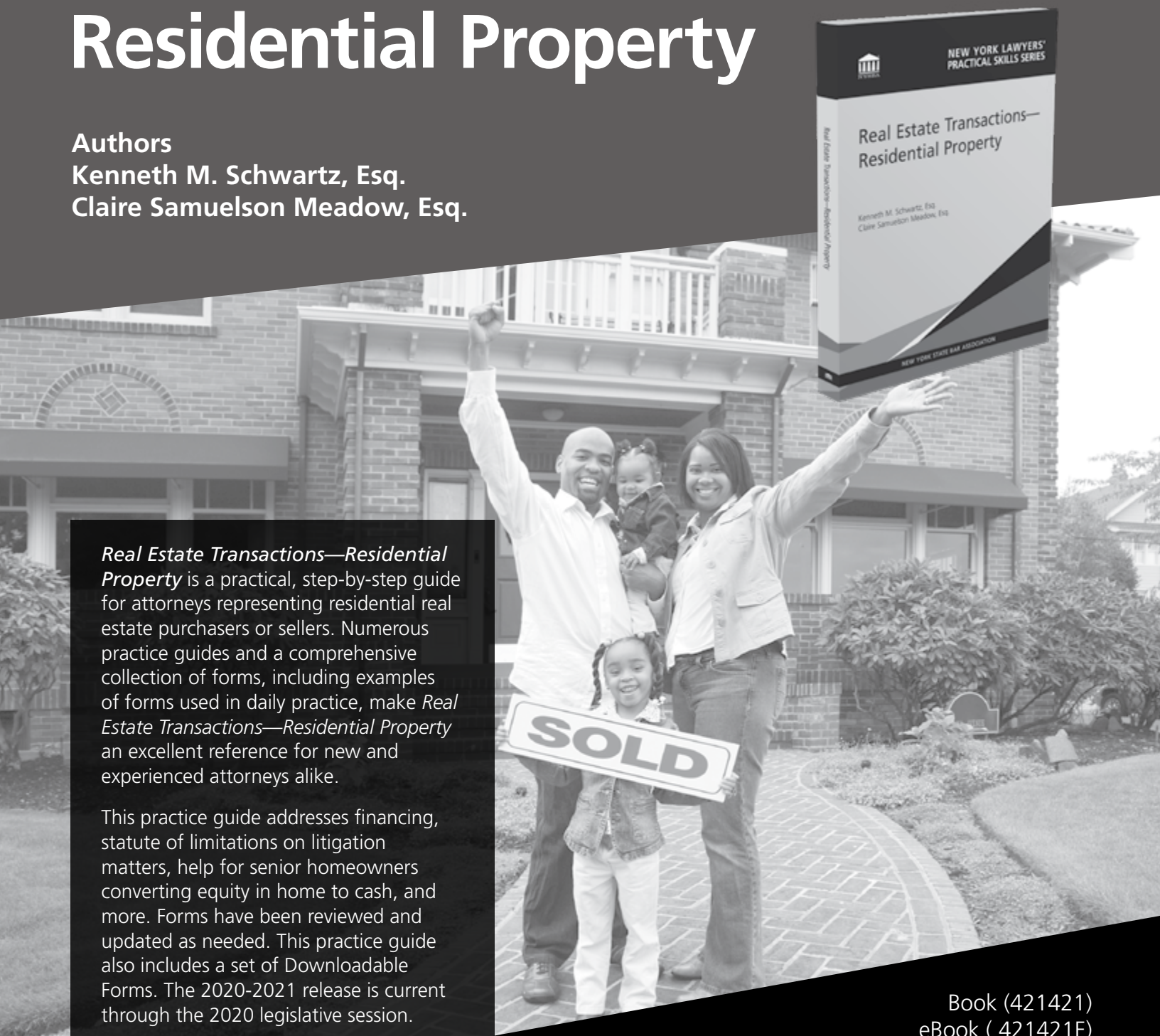

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The First Quarter of 2021 Is Over: Where Are We?

By S.H. Spencer Compton and Robert J. Sein

Like every other aspect of life in New York, over the past year, real property leasing, lending and sales have been turned upside down by the COVID-19 pandemic. Countless tenants and property owners have failed to pay full rent or mortgage payments, but have been protected from immediate dispossession through at least August 31, 2021 by a combination of executive orders and legislation.[1] While trials have resumed in New York City, a growing backload of foreclosures and evictions continues to be held in abeyance.[2] Many offices and commercial establishments have emptied out as a result of closure orders, job losses, work-from-home arrangements and rising vacancy rates, raising questions as to lasting changes to New York's office stock and streetscapes.[3] Commercial real estate lawyers are anxiously wondering what the coming months will hold in store. This article will briefly examine some recent developments on the legislative and litigation fronts that may be consequential for the commercial real estate law bar.

On the legislative front, the Governor has signed a $212 billion budget bill for the 2022 fiscal year (the "2022 budget").[4] This budget, criticized by some as a "tax-and-spend boondoggle,"[5] nevertheless failed to implement several measures that had been dreaded in many real estate circles:

- First, the 2022 budget does not include the so-called "mezzanine recording tax." This tax, the latest incarnation of which was introduced in the legislature earlier this year, [6] would create a new § 291-k of the Real Property Law that would require the recording of a mezzanine loan or preferred equity investment (in the latter case, if there is a special, preferred or accelerated rate of return) concurrently with the recording of a mortgage on the subject real property located in New York. This legislation would also require the payment of a mortgage recording tax (on the amount of the loan or investment) at the same rate as applicable to the recording of a mortgage on the property (under a new proposed § 253(4) of the Tax Law). Failure to record and pay the tax might mean that the lender would not have a perfected security interest and would not have the right to enforce its lien on the collateral (under UCC § 9-601(h)). The "mezzanine recording tax," in its current and former iterations, has been widely criticized as unworkable by the real estate law bar, and fiercely opposed by industry groups.[7]
- The 2022 budget also left out an extension and increase to the state capital base tax which had been inadvertently included in the Senate and Assembly budget proposals.[8]
- Also omitted was the "pied-à-terre" tax, which had been included in the original Senate and Assembly budget proposals. Such a tax, under consideration for at least seven years, had been advancing in Albany earlier this year.[9]
- Notably, the 2022 budget also failed to pick up a new "short-term rental sales tax" requirement that was included in Governor Cuomo's executive budget proposal.[10] The proposal was opposed by Mayor de Blasio and others on the basis that it would legitimize activity which is currently illegal under the Multiple Dwelling Law.[11]

Nonetheless, the 2022 budget increases income tax rates, even in the face of better than expected revenues from tax collections and federal aid.[12] Given the state legislature's current inclination to increase tax revenues, the real estate industry's collective sigh of relief as to the absence of the above-described taxes from the budget could very well prove fleeting.

In Albany, other legislation is in the works to address rising commercial vacancy rates. The Housing Our Neighbors With Dignity Act, in committee in both the

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Senate and Assembly, would permit building owners to sell their properties to the state with the purchase price being funded with federal monies, and the state would then operate them as affordable housing managed by housing nonprofits and similar organizations.[13] The 2022 budget did not include anything close to what is proposed in this bill, but did include $100 million in funding for an "Adaptive Reuse Affordable Housing Program," the monies for which will not be used until a program for buying and converting distressed commercial properties in New York City is established.[14] How the program will ultimately be structured (if at all) remains to be seen.

Other recent proposed legislation has been aimed at helping small businesses impacted by the pandemic. The Save our Storefronts Act, introduced in the summer of 2020, would reduce the rent of qualifying small business tenants to the lesser of 20% of actual income or 1/3 of the contractual rent.[15] Other legislation would be aimed at limiting defaulting commercial tenants' liability by requiring landlords to mitigate damages.[16] In New York City, in coming months, we may very well see increasing calls[17] to enact the Small Business Jobs Survival Act[18] and/or the so-called Commercial Rent Stabilization Act,[19] which have been referred to, individually and collectively, as "commercial rent control" (approvingly or derisively, depending on the speaker).[20]

On the practical side, a bill pending in Albany would authorize the use of video and audio conference technology to identify individuals for electronic notarization.[21] This would make permanent some temporary measures implemented during the pandemic. This bill is still in committee in the Assembly, but it has passed in the Senate. Federal legislation making remote and electronic notarization (the Securing and Enabling Commerce Using Remote and Electronic [SECURE] Notarization Act of 2020) is also pending in Washington, D.C..[22] S.B. 3533, 116th Cong. (2020); H.R. 6364, 116th Cong. (2020). All such legislation is being closely monitored by title insurance companies and other interested constituents.

Shifting now to litigation, the "elephant in the room" is, of course, the deluge of eviction and foreclosure actions that is expected after the expiration of the moratoria.[23] It remains to be seen to what extent the substantial federal and state aid expected to be made available to affected tenants and owners will ultimately protect these individuals and entities from dispossession, money judgments and lasting negative credit consequences.

Over the past year, tenants, licensees, purchasers and other parties adversely affected by the pandemic have sought relief from their performance obligations through the doctrines of force majeure, impossibility of performance, frustration of purpose, failure of consideration, constructive eviction, and even on the basis that the pandemic constitutes a casualty event or regulatory taking. To date, these efforts have met with limited success in the federal and state courts.[24] However, there is presently scant guidance from the courts as to the impact of these doctrines on loan enforcement proceedings, and little to no guidance at the appellate level as to their applicability in any context. As time goes on, the Appellate Division and other appellate courts may have the opportunity to adjudicate these issues, and clearer parameters for the applicability of these doctrines may emerge.

In recent months, we have also seen the resolution of legal challenges to legislation enacted by the New York City Council in 2020 to ameliorate the effect of the pandemic on commercial and residential tenants and lease guarantors.[25] In November 2020, in *Melendez v. City of New York*, [26] the Southern District of New York rejected the constitutional challenges to Local Laws No. 56-2020, No. 53-2020, and No. 55-2020, a suite of legislation passed by the City Council in May 2020 prohibiting landlords from harassing "person[s] impacted by COVID-19" out of their lawfully occupied space, and permanently limiting the ability of commercial landlords to enforce "personal guaranties" by natural persons of payments accrued between March 7, 2020 and June 30, 2021 contained in leases with certain tenants (the "guaranty law").[27] An appeal is pending in the Second Circuit. Still unresolved is the question of whether the courts will interpret the guaranty law to limit the enforcement of standalone guaranties which are not, strictly speaking, in "a commercial lease or other rental agreement."[28] In January 2021, the Supreme Court of New York County permitted Saks, Inc.'s landlord to enforce a lease guaranty, confirming that the 2020 Local Law does not limit a landlord's remedies against non-natural person guarantors.[29]

Any discussion of COVID-19-related real estate litigation would be incomplete without saying a word about the wealth of disputes between property owners, lessors, and their insurers about whether or not commercial property policies (including business interruption and civil authority coverages contained therein) cover pandemic-related losses. The defenses to such coverage raised by insurers have included the requirement of direct physical loss and, if applicable, virus exclusions.[30] Insurers' incentives to settle pandemic-related claims may grow in view of legislation pending in the at the state[31] and federal[32] level which, if passed, would require certain pandemic-related perils to be covered under business interruption policies or would reimburse insurers for voluntary payments of pandemic-related losses. These pandemic-related insurance suits may be consolidated or continue to be litigated separately.[33] Also under consideration is the Pandemic Risk Insurance Act of 2020,[34] which, using an approach analogous to the

Terrorism Risk Insurance Act of 2002,[35] would create a federal Pandemic Risk Insurance Program providing coverage to insurers that incur losses as a result of coverage related to pandemics and the outbreaks of disease on or after January 1, 2021.

In light of the moratoria on the commencement of commercial mortgage foreclosure actions, lenders are exploring other potential remedies. One that has been utilized is an action (and application therein, albeit on notice) for the appointment of a receiver for the mortgaged property pursuant to Article 64 of the Civil Practice Law and Rules.[36] There are many implications (including the impact of New York's election of remedies) that must be considered before a lender might invoke this remedy. In a recent federal case, the court appointed a receiver for the income-producing mortgaged property, in the absence of a mortgage foreclosure action, concluding "the elimination of rental income is a direct impairment of the lender's collateral."[37] In addition, mezzanine lenders may proceed with UCC foreclosures notwithstanding the moratoria;[38] however, establishing the commercial reasonableness of such sales during a pandemic may be complicated.[39]

Lastly, and perhaps overshadowed by the COVID-19 emergency, is 2019's Climate Mobilization Act,[40] which deals with greenhouse gas emissions mitigation, adaptation, and finance. Notably, the 2022 budget failed to include a so-called "climate law workaround" for which many in the real estate industry had lobbied and which had been included in Governor Cuomo's executive budget.[41] While the January 1, 2024 compliance date is still more than two years away, building owners claiming "adjustments" to the emissions limitations must do so by July 1, 2021.[42] Affected real estate owners and their advisors should promptly access the Act and navigate its compliance requirements as best they can. While comprehensive rules are not yet in place, there is a wealth of law firm client advisories, webinars and continuing legal education programs that may help provide guidance. Owners, users, and their respective legal counsel will need to negotiate compliance cost allocations. Environmental experts, construction companies and related consultants will need to be enlisted to help guide compliance. Brokers and bankers will need to evaluate how the Act will affect both the future value of real estate and its cash flows. Regulators will need to fill in any remaining gaps in the Act.

COVID-19 has changed our world, including real estate in New York. The extent to which its effects will continue to be felt in years to come remains to be seen. Much will depend on epidemiology (including the emergence of variants and long-term efficacy of vaccines), economics (overall economic growth and the effect of stimulus monies), changes in work habits (less reliance on use of physical office space) and politics (in particular, the outcome of the gubernatorial election on November 8, 2022 and, in New York City, the mayoral election on November 2, 2021).

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Endnotes

1. *See* N.Y. Exec. Order No. 202 (Mar. 7, 2020) (the "Executive Order"; together with its successors, collectively, the "Executive Orders").

   The moratoria on commercial evictions, foreclosures and tax sales previously mandated by the Executive Orders were codified in a modified form on March 9, 2021 in the COVID-19 Emergency Protect Our Small Businesses Act of 2021, Assemb. B. 3207, 2021-2022 Leg. Sess. (N.Y. 2021), as extended by Assemb. B A7175-A, 2021-22 Leg. Sess. (N.Y. 2021); S.B. S6362-A, 2021-22 Leg. Sess. (N.Y. 2021). It establishes hardship declarations for owners of commercial real property and a temporary stay. Currently, small businesses with 50 employees or less are eligible for the eviction moratorium, and properties of 10 units or less are eligible for the foreclosure moratorium. It seems possible that these protections will be expanded to include additional business owners and landlords suffering financial hardship in the coming months. *See* Press Release, Andrew Cuomo, Governor, New York State, *Governor Signs the COVID-19 Emergency Protect Our Small Businesses Act of 2021 Establishing Eviction and Foreclosure Protections for Small Business* (Mar. 9, 2021), https://www.governor.ny.gov/news/governor-cuomo-signs-covid-19-emergency-protect-our-small-businesses-act-2021-establishing#:~:text=The%20COVID%2D19%20Emergency%20Protect%20Our%20Small%20Businesses%20Act%2C%20which,without%20the%20looming%20threat%20of.

   Since the pandemic began, residential tenants and mortgagors have been protected from dispossession by operation of the Executive Orders and, since December 28, 2020, the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, Assemb. B. 11181, 2019-2020 Leg. Sess. (N.Y. 2020); S.B. 9114, 2019-2020 Leg. Sess. (N.Y. 2020). This enactment stays all evictions for residential tenants experiencing a financial hardship due to COVID-19 until August 31, 2021. *See also* Coronavirus Aid, Relief, and Economic Security Act of 2020. Pub. L. No. 116-136, 134; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020), as extended by Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 502, as further extended by Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021).

2. *See* Coronavirus and the New York State Courts, https://www.nycourts.gov/covid-archive.shtml (last visited Mar. 10, 2021); Eviction Moratoria and Courthouse Operations, N.Y.C. Mayor's Office to Protect Tenants, https://www1.nyc.gov/content/tenantresourceportal/pages/eviction-moratorium-and-courthouse-closures (last visited Mar. 18, 2021); Will Parker, New York Renters Owe More Than $1 Billion in Unpaid Rent, Survey Finds, Wall St. J. (Jan. 14, 2021), https://www.wsj.com/articles/new-york-city-renters-owe-more-than-1-billion-in-unpaid-rent-survey-finds-11610622000.

3. *See, e.g.*, Matthew Haag, *Remote Work Is Here To Stay. Manhattan May Never Be the Same*, N.Y. Times (March 29, 2021), https://www.nytimes.com/2021/03/29/nyregion/remote-work-coronavirus-pandemic.html?referringSource=articleShare.

4. The 2022 budget is embodied in more than 10 bills passed in each legislative chamber, all of which are available at https://www.budget.ny.gov/pubs/archive/fy22/#en.

5. *See* Press Release, New York Republican State Committee, *Statement from NYGOP Chairman Nick Langworthy on the 2022 State Budget* (April 7, 2021), https://nygop.org/statement-from-nygop-chairman-nick-langworthy-on-the-2022-state-budget/.

6. Assemb. B. A3139, 2020-2021 Leg. Sess. (N.Y. 2021); S.B. S3074, 2020-2021 Leg. Sess. (N.Y. 2021). This legislation is a new version of legislation introduced in 2020. *See* Assemb. B. 9041-A, 2019-2020 Leg. Sess. (N.Y. 2020); S.B. 7231-A, 2019-2020 Leg. Sess. (N.Y. 2020).

7. *See, e.g.*, Meghan O'Reilly and Rachel M. Orbach, *Potential Implications of Proposed Mezzanine Tax: Consequences for Lenders and Developers* (January 2020), https://www.herrick.com/publications/potential-implications-of-proposed-mezzanine-tax-consequences-for-lenders-and-developers/.

8. See Erin Hudson, *Legislators Accidentally Propose Huge Tax Hike for Co-ops*, The Real Deal (Mar. 26. 2021), https://therealdeal.com/2021/03/26/legislators-accidentally-propose-huge-tax-hike-for-co-ops/.

9. Assemb. B. 9041-A, 2021-2022 Leg. Sess. (N.Y. 2021); S.B. 4199, 2021-2022 Leg. Sess. (N.Y. 2021).

10. *See* Jimmy Vielkind, *Cuomo Proposes Airbnb Collect Sales Tax on New York Stays*, Wall St. J. (Jan. 25, 2021), https://www.wsj.com/articles/cuomo-proposes-airbnb-collect-sales-tax-on-new-york-stays-11611579661?st=fm2bzd4qd3rnnz7&reflink=article_email_share.

11. *See* MDL § 4(8)(a). *See also* Ryan Deffenbaugh, *Lawmakers Fear Trojan Horse in Cuomo's Airbnb Tax Proposal*, Crain's N.Y. Bus. (Mar. 18, 2021), https://www.crainsnewyork.com/hospitality-tourism/lawmakers-fear-trojan-horse-cuomos-airbnb-tax-proposal?utm_source=morning-10-friday&utm_medium=email&utm_campaign=20210318&utm_content=article4-headline.

12. *See* Carl Campanile, *COVID Stimulus Eliminates Need for NY Tax Hikes, Experts Say*, N.Y. Post (Mar. 10, 2021), https://nypost.com/2021/03/10/covid-19-stimulus-eliminates-need-for-ny-tax-hikes-expert-says/.

13. Assemb. B. 6593, 2021-2022 Leg. Sess. (N.Y. 2021); S.B. 5257, 2021-2022 Leg. Sess. (N.Y. 2021); *See* Katie Honan, *New York Could Turn Hotels, Office Buildings Into Affordable Housing Under State Senate Bill*, Wall St. J. (Mar. 2, 2021), https://www.wsj.com/articles/new-york-could-turn-hotels-office-buildings-into-affordable-housing-under-state-senate-bill-11614723512.

14. *See supra* note 4.

15. Assemb. B. A-10901, 2019-2020 Leg. Sess. (N.Y. 2020); S.B. 8865, 2019-2020 Leg. Sess. (N.Y. 2020). This legislation would, inter alia, cancel the contractual rent of qualifying small business tenants during the state of emergency to the extent it exceeds the lesser of 20% of actual income or 1/3 of the contractual rent, landlords would waive 20% of the contractual rent, and an interim commercial rent relief program of up to $500 million of federal monies will be set up to help compensate landlords for the differential. This legislation is a commercial adaptation of the Rent and Mortgage Cancellation Act, proposed earlier in 2020. Assemb. B. A-10826, 2019-2020 Leg. Sess. (N.Y. 2020); S.B. 8802, 2019-2020 Leg. Sess. (N.Y. 2020).

16. Assemb. B. A8482, 2019-2020 Leg. Sess. (N.Y. 2019); S.B. S1129, 2021-2022 Leg. Sess. (N.Y. 2021) (passed by the Assembly and introduced in the Senate in January 2021).

17. In fact, some small business advocates have already renewed their calls for this legislation; *see* Bridget Bartolini, *City's Small Businesses Need Rent Stabilization To Survive COVID-19, Advocates Say*, City Limits (Apr. 6, 2020), https://citylimits.org/2020/04/06/citys-small-businesses-need-rent-stabilization-to-survive-covid-19-advocates-say/.

18. N.Y. City Council Int. No. 737A (2018) (would establish conditions and requirements for commercial lease renewals).

19. N.Y. City Council Int. No. 1796 (2019) (would establish conditions and requirements for commercial lease renewals). (would cap annual rent increases for certain commercial tenants at amounts determined by a City Council-appointed board).

20. These bills seek to regulate the commercial landlord-tenant relationship in a manner not seen in over half a century. *See* N.Y. Unconsol. Laws §§ 8521-38 (Consol. 1945) (expired 1963); *see also* N.Y. Unconsol. Laws §§ 8521-67 (Consol. 1945) (expired 1963). We expect that all such legislation will continue to be vociferously opposed, on constitutional and other grounds, by the Real Estate Board of New York and other industry groups.

21. Assemb. B. 4076-B, 2019-2020 Leg. Sess. (N.Y. 2020); S.B. S4352B, 2019-2020 Leg. Sess. (N.Y. 2020).

22. S.B. 3533, 116th Cong. (2020); H.R. 6364, 116th Cong. (2020) (currently before the Senate Judiciary Committee); H.R. 6364, 116th Cong. (2020) (currently before the House Energy and Commerce and House Judiciary Committees).

23. *See supra* note 1.

24. Some courts have been persuaded to apply these doctrines excusing performance. *See, e.g.*, *In re* Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill. 2020); *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, No. 652732/2020 (Sup. Ct., N.Y. Co. Oct. 30, 2020), *rev'd* on other grounds; *Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, No. 2020-03361 (1st Dep't Feb. 16, 2021*); UMNV 205-207 Newbury, LLC v. Caffé* Nero Americas Inc., No. 2084CV01493-BLS2 (Mass. Super. Ct. Feb. 8, 2021) (partial summary judgment order); *188 Ave A Take Out Food Corp. v. Lucky Jab Realty Corp*., No. 653967/2020 (Sup. Ct., N.Y. Co. Dec. 21, 2020) (Yellowstone injunction motion). However, courts seem to reject the applicability of these doctrines in most reported decisions. *See, e.g., Martorella v. Rapp*, 20 Misc. 000153 (MDV) (Mass. Land Ct. June 1, 2020); *FTC v. A.S. Research, LLC*, No. 19-CV-03423-PAB-KMT (D. Colo. July 21, 2020*); Future St. Ltd. v. Big Belly Solar, LLC*, No. 20-cv-11020-DJC (D. Mass. July 31, 2020); *Victoria's Secret Stores, LLC v. Herald Sq. Owner LLC*, 70 Misc. 3d 1206(A), 136 N.Y.S.3d 697 (Sup. Ct., N.Y. Co. 2020); *Lantino v. Clay LLC*, No. 1:18-cv-12247 (SDA) (S.D.N.Y. May 8, 2020); *Backal Hosp. Grp. LLC v. 627 W. 42nd Retail LLC*, No. 154141/2020 (Sup. Ct., N.Y. Co. Aug. 3, 2020); *BKNY 1, Inc. v. 132 Capulet Holdings, LLC*, No. 508647/16, 2020 N.Y. (Sup. Ct., Kings Co. Sept. 23, 2020); *Dr. Smood N.Y. LLC v. Orchard Houston, LLC*, No. 652812/2020 (Sup. Ct., N.Y. Co. Sept. 29, 2020); E. *16th St. Owner LLC v. Union 16 Parking LLC*, No. 653839/2020 (Sup. Ct., N.Y. Co. Jan. 15, 2021); *Atlantic Garage Mgmt. LLC v. Boerum Commercial LLC*, No. 512250/2020 (Sup. Ct., Kings Co. Dec. 2, 2020); *35 East 75th Street Corporation v. Christian Louboutin L.L.C.*, No.154883, slip op. (Sup. Ct., N.Y. Co. Dec. 9, 2020).

25. N.Y. City Local Laws Nos. 56-2020, 53-2020, and 55-2020; *see also* Press Release, *N.Y.C. Council, Council Votes To Provide Relief to Small Businesses and Restaurants Impacted by COVID-19 Pandemic* (Aug. 27, 2020), https://council.nyc.gov/press/2020/08/27/2012/.

26. *Melendez v. City of New York*, No. 20-CV-5301 (RA) (S.D.N.Y. Nov. 25, 2020), appeal docketed, No. 20-4238 (2d Cir. Dec. 22, 2020).

27. N.Y. City Local Law No. 55-2020. The prohibition on enforcement originally expired on March 31, 2021, but on March 25, 2021, the date was extended to June 30, 2021. *See* Natalie Sachmechi, *City Council Extends Protections for Small Businesses*, Crain's N.Y. Business (March 25, 2021), https://www.crainsnewyork.com/commercial-real-estate/city-council-extends-protections-small-businesses?utm_source=morning-10-friday&utm_medium=email&utm_campaign=20210325&utm_content=article5-readmore.

28. *See* Mark S. Edelstein, Jeffrey J. Temple and Bozena Sarsynska, *Morrison Foerster Client Alert: NYC Enacts Law Prohibiting Enforcement of Personal Liability Provisions for COVID-19-Impacted Commercial Tenants* (May 29, 2020), https://www.mofo.com/resources/insights/ 200529-nyc-law-personal-liability-covid-commercial-tenants.html.

29. *135 East 57th Street, LLC v. Saks Inc*., No. 155234/2020 (Sup. Ct., N.Y. Co. Jan. 29, 2021).

30. *See, e.g., Soundview Cinemas Inc. v. Great Am. Ins. Grp*., No. 605985-20 (Sup. Ct., N.Y. Co. Feb. 8, 2021); *Social Life Magazine, Inc. v. Sentinel Insurance Co., Ltd*., No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020).

31. Assemb. B. A-10226B, 2019-2020 Leg. Sess. (N.Y. 2020).

32. Business Interruption Relief Act of 2020, H.R. 7412, 116th Cong. (introduced on June 29, 2020) (establishes a Business Interruption Relief Program to provide benefits to insurers that choose to join the program and voluntarily pay benefits for COVID-19 related losses).

33. *See* Storm Wilkins, *Commercial Property and Business Interruption Insurance Coverage Issues: The Next COVID-19 Hotspot?*, 49 Real Est. Rev. J., no. 1, 2020, at 7.

34. H.R. 7011, 116th Cong. (2020).

35. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (codified as amended at 15 U.S.C. § 6701 (2002)).

36. CPLR 6401.

37. *Wilmington Tr., Nat'l Ass'n v. Winta Asset Mgmt. LLC*, No. 20-CV-5309 (JGK) (S.D.N.Y. Sept. 28, 2020).

38. *See, e.g., 1248 Associates Mezz II LLC v. 12E48 Mezz II LLC*, Index No. 651812/2020 (Sup. Ct., N.Y. Co. May 18, 2020) (order vacating TRO); *893 4th Ave. Lofts LLC v. 5AIF Nutmeg, LLC*, 2020-08886, 511942/2020 (2d Dep't Jan. 20, 2021).

39. UCC § 9-610(b) requires that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable". Pandemic-related disruptions have affected courts' assessment of the commercial reasonableness of UCC sales. *See D2 Mark LLC v. OREI VI Invests., LLC*, Index No. 652259/2020 (Sup. Ct., N.Y. Co. June 23, 2020) ("what is reasonable during normal business times, may not be reasonable during a pandemic").

40. N.Y. City Local Law Nos. 92 and 94–97.

41. The proposed executive budget would have allowed building owners to meet emissions targets by buying credits for renewable energy produced in New York. N.Y. State Div. of the Budget, FY 2022 New York State Executive Budget (2021), https://www.budget.ny.gov/pubs/archive/fy22/ex/artvii/ted-bill.pdf.

42. *See* Raymond "Rusty" Pomeroy II, Brian Diamond, Karen Scanna, Ross F. Moskowitz and Joseph B. Giminaro, *The NYC Climate Mobilization Act: How to Prepare and What You Need to Know*, Stroock Special Bulletin (Jan. 16, 2020), https://www.stroock.com/news-and-insights/new-york-city-climate-mobilization-act.

Duration and Renewal of Money Judgments: What Lenders and Judgment Creditors Need To Know

For a foreclosing lender, naming and serving all junior interests is a goal; that is, naming necessary parties and extinguishing their interests, thus making the foreclosure title more valuable. (Foreclosure searches should not recite stale judgments—but lenders still want to appreciate the subject.) Mindful that a money judgment (unlike a judgment of foreclosure and sale) has *some* life, the judgment creditor needs to assure its viability and maintain it if necessary. A recent case conveniently explores all the principles and reminds us to review those here.[1]

First, the duration of a money judgment is 20 years, but that is only as to personal property.[2] Its effectiveness as a lien on real property is 10 years. Therefore, from the viewpoint of a foreclosing lender, if a judgment is more than 10 years old, it has expired as a lien on real property and that judgment creditor need not be named as a party defendant in a mortgage foreclosure action; the judgment creditor has nothing—at least as against the property.

From the vantage point of a judgment creditor, when a judgment has a life of 10 years, the creditor may wish to avail itself of a renewal procedure and have that judgment extended for another 10-year period. (Here is where it gets a bit more interesting.)

Statute provides for renewal of a money judgment (CPLR 5014) which allows for an action for renewal to be commenced during the year prior to the expiration of 10 years from the first docketing of the judgment. The judgment that issues from such an action is designated a renewal judgment and it is to be docketed by the court clerk, to take effect upon the expiration of 10 years from the first docking of the original judgment.

So, as long as the renewal judgment is obtained within that original 10-year lien period, then the new lien takes effect not immediately, but only upon expiration of the first 10-year lien period. This structure critically avoids a lien gap and at the same time affords the judgment creditor a full 10 years for the new lien.

The glitch in the case referred to was that the judgment creditor commenced its renewal action more than 10 years after the judgment was originally docketed. While the action was nevertheless timely, the judgment creditor was unable to avoid a lien gap. What the judgment creditor wanted was that the renewal judgment would begin at the very moment the earlier judgment ended. However, having not begun the renewal action within the 10-year period, the court was unable to relate the renewal lien back to the end of the original 10-year period.

The question then was, when does the lien of a renewal judgment where the action was begun after the conclusion of the 10 years become effective? The answer is that the renewal lien becomes effective when granted by the Supreme Court, but it is deemed granted on the date the decision and order is entered and docketed by

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the county clerk, and there is a difference between those two events. Although the 10-year realty lien is realized when the judgment is docketed, it is measured not from the time of docketing, but from the filing of the judgment roll, which is the moment the judgment is entered. In turn, a Supreme Court judgment is entered after it has been signed by the clerk and it is filed by the clerk. (Arcane stuff, to be sure.)

All these obscure niceties are meaningful because when a foreclosing plaintiff obtains a foreclosure search, if a money judgment has expired, the holder of that expired judgment need not be named as a party defendant. That it may have begun an action to renew the lien is not something the foreclosing plaintiff needs to search for. That the renewal judgment will later be granted, means only that the judgment comes on anew when it is docketed and entered. If this occurs after the foreclosing plaintiff has begun its foreclosure action, the judgment creditor is simply bound by the lis pendens filed in the foreclosure action and the foreclosing plaintiff still does not have to worry about serving the judgment creditor.

The lesson in the end? Yes there are some complexities here, but the lender's title search should resolve them and properly advise as to when junior parties are or are not to be named in a foreclosure action. As to judgment creditors, it is an instruction that renewal of a judgment needs to be pursued before expiration of the judgment, lest there be a deleterious gap period emerging.

Endnotes

1. *Wilmington Savings Fund Society, FSB v. John*, 67 Misc.3d 319, 132 N.Y.S.3d 862 (Sup. Ct. 2020).
2. For a more extensive review of this entire subject, *see* Bruce J. Bergman, 2 Bergman on New York Mortgage Foreclosures § 12.06 (LexisNexis, Matthew Bender Elite Products, 2020).

Reviewing New York's Commercial Lease Defenses to Paying Rent

By Adam Leitman Bailey and Dov Treiman

Few landlords and commercial tenants have been completely immune from the governmentally imposed economic shutdown and COVID-19's wrath. Adam Leitman Baily and Dov Treiman discuss the three traditional theories under which commercial tenants can seek forgiveness of their rent. – Ed.

New York is in one of its worst depressions since the American Revolution. Few landlords and commercial tenants have been completely immune from the governmentally imposed economic shutdown and COVID-19's wrath. Not including what may have been negotiated in a commercial lease, there are three traditional theories under which commercial tenants could seek to assert entitlement to forgiveness of their rent: frustration of purpose, impossibility of performance, and force majeure.

One of our partners recently participated in a lecture with two other judges where one of the judges announced that the courts would be kept very busy while these tenant disputes were litigated. That may be true but the reality—from the past precedents since its first use in New York during World War II and recently, from the decisions coming down from the state supreme courts—is that their ability to terminate a lease or vitiate the payment of rent will occur in very, very, few cases.

I. Frustration of Purpose

Formally defined, the doctrine of frustration of purpose applies when a change in circumstances makes one party's performance virtually worthless to the other, thereby frustrating the purpose in making the contract.[1] What this means in real world terms is that, regardless of fault, if circumstances arise in which there is (for at least one side) no purpose to the contract, that side's performance is excused.

The elements of frustration of purpose require consideration of (1) whether the frustrated purpose is the basis of the contract, (2) whether the frustrating event

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was foreseeable, and (3) whether the frustration of purpose is substantial.[2]

Frustration of purpose is "limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."[3] It is not enough that the transaction has become less profitable for the affected party or even that the affected party will sustain loss.[4]

In *Crown*, the court said that the doctrine is a narrow one and that "in order to invoke this defense the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[5]

In *Jack Kelly Partners LLC v. Zegelstein*, an owner and a tenant entered into a commercial lease agreement to use the rental space for general offices of an executive recruiting firm so as not to violate the certificate of occupancy. However, the certificate of occupancy was for exclusive residential use. When the landlord refused to amend the certificate of occupancy the court, finding frustration of purpose, allowed the tenant to terminate the lease.[6]

In *Mr. Ham, Inc. v. Perlbinder Holdings, LLC*, the lease provided that the premises were to be used for the preparation and retail sale of various food items and that the tenant would do the build out. The court found that the owner's unanticipated renovation of the premises, preventing the build out, deprived plaintiff of its consideration and frustrated the purpose of the contract, allowing rescission.[7]

In *Benderson Dev. Co. v. Commenco Corp.*, a tenant leased premises to run a restaurant and could not do so until a sewer was constructed years later. The court allowed the tenant to rescind the contract based on frustration of purpose.[8]

In none of these cases did the court address a situation where the duration of the frustrating event is expected to be considerably shorter than the expected duration of the lease. None of them consider the idea of forgiving some months of rent in the middle of the lease term when things are expected eventually to go back to normal. The "cataclysmic" standard of *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, could therefore find that the temporary interruptions of the pandemic do not qualify for rent forgiveness.

Recently, numerous cases have been filed in New York courts trying to terminate commercial leases or stop the payment of rent under this theory and one of the questions the courts will have to decide—for the first time since these cases were first filed in New York during World War II—is whether the leases can stand when the business is closed for a few months during a 10- or 20-year lease. I have named this theory temporary frustration of purpose. No court to date has allowed a tenant to stop paying rent based on these set of facts, but the courts being closed for several months (except for emergencies) and the inability once the courts have been open to expedite or move a case through the system has limited the ability of practitioners to receive decisions.

II. Foreseeability

Neither frustration of purpose nor impossibility of performance apply if the circumstances preventing the performance were foreseeable.[9] One author, Dov Treiman, notes that it can be argued that COVID-19 was foreseeable, since Ebola gave a comparatively mild rehearsal, showing what could happen.[10] Yet, others would argue that the ferocity of this pandemic sees its only parallels in the Spanish flu of a century ago and, prior to that, the bubonic plague from centuries earlier and, therefore, no commercial lease could have been written in our lifetimes predicting this event.

In addition, COVID-19 and the governmental responses to it are distinct issues. Whether or not the virus itself was foreseeable, there can be frustration of purpose or impossibility of performance if the government's response defied prediction.[11] In *Kel Kim Corp. v. Central Mkts.*, the parties were expected to see and predict the instability of the insurance industry and to make provision in their contract for the tenant's inability to procure the required insurance.[12]

III. Impossibility of Performance

The elements of impossibility of performance require a showing that (1) the event rendering the performance impossible was unforeseeable, (2) that said event destroyed the subject matter of the contract or the means of performance, and (3) it was the event that made performance objectively impossible.[13]

The standard for unforeseeability is no different for impossibility of performance than for frustration of purpose.

Key to impossibility of performance is that a party should be excused from the performance required of it on a contract when it is objectively impossible to do the act that the contract requires of the performer.[14] Extreme difficulty of performance does not satisfy that condition, such as the nonpayment of money when one has no income. Even in an economy where no one is lending money, the cases conclusively presume that someone who needs money can always come up with it.[15] However, the doctrine has no place when the other party has not actually required the performance.[16]

IV. Prohibited Performance

Where the law prohibits the performance, it is excused.[17] However, while the government has prohibited certain facilities from being open (thus excusing the

landlord), it has not prohibited the tenants from continuing to pay their rent (thus not excusing the tenants).[18] What the case law has not provided definitive guidance on is whether a business is truly shut down by governmental operation if the only part that is shut down is the face-to-face aspect of the business while the on-line presence thrives.[19]

V. Causation

In the element of impossibility of performance as above stated, "it was the event that made performance objectively impossible," *Kolodin,* is contained the idea that the catastrophe was the cause of the inability to perform.[20] Indeed, with many retail businesses, it will be a difficult matter of proof that their collapse was COVID-19 caused and not merely part of the ongoing shift to consumer preferred on-line shopping.

A decade after the 1918 flu, courts engaged the problem of causation, in *Palsgraf v. Long Island Railroad Co.*, where an exploding package on a railroad platform caused scales to fall on the plaintiff at some distance. The court found the cause and effect too attenuated to cast blame on the defendant.[21]

While there is a direct cause and effect for a tattoo parlor ordered closed in response to the COVID-19 crisis, consider a negligence litigation law firm that occupies rented space, finding its income shut down by the closure, not of their office space, but of the court system. This does not square with *Palsgraf's* ideas of causation.

There is a line of authority that just because the disaster made the supplied party lacking a need for the product it undertook to buy, it was not excused from paying the full amount.[22] Thus, the law firm that did not need to use its office would not be excused from paying the rent.

Tenants seeking rent relief because of impossibility of performance will thus encounter barriers in causation, and objective impossibility.

VI. Impossibility for Landlords and Tenants

The question of impossibility in light of COVID-19 reaches both ways in the landlord-tenant relationship, both as to the landlord's inability to provide the space and the tenant's inability to serve customers. *Baron Leasing Corp. v. Raphael*, a case with a leased taxi medallion owned by a decedent, holds that governmental regulations prohibiting the use of the medallion excuse the owner from damages for requiring its nonuse.[23] Thus, the owner is excused from damages arising from obedience to the law.

VII. Force Majeure

The other doctrines with which we have been dealing are common law in nature.[24] Force majeure, however, is entirely contractual in nature. To establish an effective force majeure defense, these elements must be present: (1) the specific language used is a force majeure clause, (2) the event sought to excuse performance must fall within the scope of the clause, and (3) it is the event that renders performance actually impossible, rather than merely financially imprudent.[25]

A contract may have a clause excusing performance of one of more of the contracting parties upon the occurrence of certain listed events. In the absence of such a clause, those events—typically storms, insurrections, earthquakes, and the like—do not excuse either party's performance under the lease, unless they fall within the other doctrines discussed herein.[26]

What all these events have in common is that they are usually disastrous in nature, but since parties are free to contract as they will, [27] they could be something relatively benign in nature, such as a building becoming X% vacant or a party is unable to acquire the materials it needs.[28]

However, force majeure clauses, as they actually appear in nearly all leases, where present, specify that a force majeure event does not excuse the payment of rent. Courts will not rewrite what the parties themselves have contracted and give the tenant an excuse from paying rent when the lease specifies that these catastrophes are not an excuse from paying rent.[29]

Often these clauses include language on the order of "or other similar."[30] In order for an event to be "similar" to one listed, it has to be more particularly similar than also being a disaster.[31] While a volcano would likely be deemed similar to an earthquake, a pandemic is not similar to a labor strike.[32]

As *Team Marketing* explained, "the precept of ejusdem generis as a construction guide is appropriate—that is, words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned."[33] In *Team Marketing* the court declined to give the phrase "for any reason, including, without limitation" a reading that "any" meant "all" regardless of the types of disastrous events specifically listed.[34]

It is not enough for the event to occur for it to excuse the performance. There must be a nexus between the event and the inability to perform,[35] and the event in question must be beyond the control of the party seeking to have performance excused.[36] This gives rise to the same questions about causation we discussed earlier.

VIII. Act of God

If the force majeure clause contains "act of God" language, the party may run into the issue of whether COVID-19 is an act of God. "Acts of God" are generally understood to include accidents caused by forces of nature. According to Black's Law Dictionary, an "act of God" is "an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood or tornado."[37] The courts have also said that for a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree.[38] Since the loss of business upon which tenants seek to rely for rent relief is not based on the disease itself, but the governmental order to shut down, this could prove to be a problem for them.

IX. Conclusion

While there have been some rulings in the Midwest where commercial tenants have had a measure of success in seeking relief from their rent obligations utilizing these three doctrines, and a lot of talk and threats and misunderstandings of the power of these three tools in the legal arsenal, application of them in accordance with New York's understandings will make relief for tenants extremely difficult.[39]

Endnotes

1. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508, 924 N.Y.S.2d 391 (1st Dep't 2011).
2. *Rockland Dev. Assocs. v. Richlou Auto Body, Inc.*, 173 A.D.2d 690, 691, 570 N.Y.S.2d 343 (2d Dep't 1991); *Crown IT Services, Inc. v. Koval-Olsen,* 11 A.D.3d 263, 265, 782 N.Y.S.2d 708 (1st Dep't 2004).
3. *U.S. v. Gen. Douglas MacArthur Senior Vill. Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).
4. *See Rockland Dev.,* 173 A.D.2d at 691.
5. *See PPF Safeguard*, 85 A.D.3d at 508 (citing *Crown IT Servs., Inc., v. Koval-Olsen*, 11 A.D.3d 263, 265, 782 N.Y.S.2d 708 (1st Dep't 2004).
6. *See Jack Kelly Partners* LLC, *v. Zegelstein* ,140 A.D.3d 79, 85, 33 N.Y.S.3d 7 (1st Dep't 2016).
7. *See Mr. Ham, Inc. v. Perlbinder Holdings, LLC* , 116 A.D.3d 577, 578, 983 N.Y.S.2d 729 (1st Dep't 2014).
8. *See Benderson Dev. Co. v. Commenco Corp.*, 44 A.D.2d 889, 355 N.Y.S.2d 859 (4th Dep't 1974).
9. *See Warner v. Kaplan*, 71 A.D.3d 1, 6, 892 N.Y.S.2d 311 (1st Dep't 2009); *see also Kel Kim Corp*, 70 N.Y.2d at 902.
10. Julia Ries, *Here's How COVID-19 Compares to Past Outbreaks*, Healthline (Mar. 12, 2020, https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks.
11. *See J.H. Labaree Co. v. Crossman*, 100 A.D. 499, 505, 92 N.Y.S. 565 (1st Dep't 1905).
12. *See Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900, 902, 524 N.Y.S.2d 384 (1987).
13. *See Kolodin v. Valenti,* 115 A.D.3d 197, 200, 979 N.Y.S.2d 587 (1st Dep't 2014*); see also Kel Kim Corp,* 70 N.Y.2d at 902.
14. *See Reed Foundation, Inc. v. Franklyn D. Roosevelt Four Freedoms Park, LLC,* 108 A.D.3d 1, 7, 964 N.Y.S.2d 152 (1st Dep't 2013).
15. *See 407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281-282, 296 N.Y.S.2d 338 (1968).
16. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 685, 948 N.Y.S.2d 580 (1st Dep't 2012).
17. *See Labaree*, 100 A.D. at 566.
18. *See Crown Embroidery Works v. Gordon,* 190 A.D. 472, 477, 180 N.Y.S. 158 (1st Dep't 1920).
19. *See Crown Embroidery,* 190 A.D. at 476-77.
20. *See Kolodin*, 115 A.D.3d at 202; *see also Kel Kim Corp.*, 70 N.Y.2d at 902.
21. *See Palsgraf v. Long Island. R.R. Co.,* 248 N.Y. 339, 343-47 (1928).
22. *See Constellation Energy Servs of N. Y., Inc. v. New Water St Corp.*, 146 A.D.3d 557, 559, 46 N.Y.S.3d 25 (1st Dep't 2017).
23. *See Baron Leasing Corp. v. Raphael,* 103 A.D.3d 763, 764, 962 N.Y.S.2d 172 (2d Dep't 2013).
24. *See Gen. Douglas MacArthur Senior Vill. Inc.*, 508 F.2d at 382.
25. *See Kel Kim Corp.,* 70 N.Y.2d at 902-03*; see also Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1225-26, 931 N.Y.S.2d 436, 438 (3d Dep't 2011); *see also Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227, 728 N.Y.S.2d 14, 15 (1st Dep't 2001).
26. *See Gen. Elec. Co. v. Metals Resources Grp. Ltd.*, 293 A.D.2d 417, 418, 741 N.Y.S.2d 218, 220 (1st Dep't 2002).
27. *Constellation Energy Services of New York, Inc. v. New Water Street Corp.*, 146 A.D.3d 557 (1st Dept. 2017).
28. *See Route 6 Outparcels, LLC*, 931 N.Y.S.2d at 437-438.
29. *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 767-68 (2004).
30. *See Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942-43, 839 N.Y.S.2d 242, 245-46 (3d Dep't 2007).
31. *See Duane Reade v. Stoneybrook Realty, LLC,* 63 A.D.3d 433, 434, 882 N.Y.S.2d 8 (1st Dep't 2009).
32. *See Kel Kim Corp.,* 70 N.Y.2d at 903.
33. *Team Mktg. USA Corp.*, 41 A.D.3d at 942.
34. *Id.*
35. *See Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.,* 782 F.2d 314, 319 (2d Cir. 1985).
36. *See Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993); *see also United Equities Co. v. First Nat'l City Bank,* 52 A.D. 2d 154, 154, 383 N.Y.S.2d 6 (1st Dep't 1976).
37. *See Hernandez-Ortiz v. 2 Gold, LLC*, 170 A.D.3d 465, 466, 96 N.Y.S.3d 18 (1st Dep't 2019); *see also Chittur v. Briarcliff Woods Condominium Ass'n, Inc.*, 15 A.D. 3d 329, 329, 790 N.Y.S.2d 151 (2d Dep't 2005); *see also Merritt v. Earle*, 29 N.Y. 115, 115 (1864).
38. *See Moore v. Gottlieb,* 46 A.D.3d 775, 775, 848 N.Y.S.2d 328 (2d Dep't 2007); *see also Woodruff v. Oleite Corp.,* 199 A.D. 772, 772, 192 N.Y.S. 189 (1st Dep't 1922).

Third-Party Tenant Harassment Poses Dilemma for Landlords

By Adam Leitman Bailey and John Desiderio

New York common law has long shielded landlords from tort liability for intentional injury suffered by one tenant at the hands of another tenant, unless the landlord "has the authority, ability, and opportunity to control the actions of the assailant."[1]

I. The 'Francis' Decisions

However, this shield was recently pierced by the U.S. Court of Appeals for the Second Circuit in *Francis v. Kings Park Manor*, 944 F.3d 370 (2d Cir. 2019) ("Francis III"), in which the court held that a landlord may be liable under Title VIII of the Civil Rights Act of 1968 and the Fair Housing Act (FHA), 42 U.S.C. § 3604(b), "for intentionally discriminating against a tenant based on the tenant's race, where the landlord allegedly refused to take any action to address what it knew to be a racially hostile housing environment created by one tenant targeting another, even though the landlord had acted against other tenants to redress prior, non-race related issues."[2]

In addition, the court also held that such "post-acquisition conduct," occurring after the initial rental transaction and during the period the plaintiff actually resided in the rental property, separately violated FHA § 3617 which makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604."[3]

In doing so, the Second Circuit majority opinion relied upon the Supreme Court's "directive" that the FHA's language has a "broad and inclusive compass,"[4] and thus the court's majority read the FHA's text "broadly" to include the liability standard applied in employment discrimination cases adjudicated under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from creating or tolerating a hostile or abusive working environment, arising from discriminatory motives or actions, based on race, color, religion, sex, or national origin—whether or not the employer has himself engaged in the alleged harassment.[5]

In Francis III, the panel majority reaffirmed the holding of landlord liability that the court had previously declared in its March 4, 2019, decision in *Francis v. Kings Park Manor*, 917 F.3d 109 (2d Cir. 2019) ("Francis I"), which, presumably in response to Judge Debra Ann Livingston's eviscerating dissent of the majority opinion in that decision, was precipitously withdrawn by the order of the court just four weeks later, on April 5, 2019.[6]

II. Court Divided Over "Evidence" Necessary

Francis III creates a serious dilemma for housing landlords. As noted by Judge Livingston in her dissent to the majority's opinion, "any faithful application of the pleading standard employed today would appear to expose all landlords to suit for purposeful discrimination based on the wrongful conduct of one tenant vis-à-vis another so long as such landlords have ever responded to a lease violation."[7]

Thus, when a landlord demands overdue rent payments, thus "interven[ing] against…tenants…regarding non-race-related violations of their leases," she assumes an ill-defined responsibility to intervene (and immediately commence an eviction proceeding?) whenever a tenant complains about the allegedly racially-motivated behavior of another tenant.[8] Landlords in this circuit may therefore face a choice between two lawsuits: one for violating the FHA, the other for wrongful eviction, with unforeseen consequences for those improperly accused of discrimination, not to mention those attempting to obtain housing on reasonable economic terms.

The plaintiff in Francis was an African American who, in 2010, entered into a lease agreement with defendant Kings Park Manor (KPM) for an apartment unit in a complex owned by KPM. On several occasions between February and September 2012, Francis's next-door neighbor, Endres, engaged in highly offensive, racially based, harassing rants directed at Francis, including, on one occasion, "I ought to kill you, you f***ing n****r."[9] Francis filed police reports complaining of Endres's abusive conduct in March and May 2012. By letter, dated May 23, 2012, Francis notified KPM directly about Endres's racist conduct between March and May 2012. On Aug. 10, the Suffolk County Police Department arrested Endres for aggravated harassment in violation of New York Penal Law § 240.30, and Francis sent a second letter to KPM advising of Endres's continued racial slurs and of Endres's arrest for harassment. He sent a

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third letter to KPM on September 2 again complaining of Endres's continued racial harassment.[10]

KPM advised its property manager to "not get involved." However, it is not alleged that Francis did actually, at any time, request KPM to take any action against Endres. Endres's lease expired at the end of 2012, at which time KPM declined to renew the lease, and Endres vacated his unit at the end of January 2013. He later pleaded guilty to harassment in violation of New York Penal Law § 240.26(1) and was also subjected to an order of protection prohibiting him from contacting Francis.[11]

Livingston's dissent noted that Francis's brief on appeal did not contend that the complaint even plausibly alleged intentional discrimination by KPM, "but instead primarily urged this court to impose liability under the FHA for the 'negligent failure to remedy a discriminatory [housing] environment.'" Accordingly, KPM argued that, "even if a hostile housing environment claim were cognizable under the FHA," Francis had failed to allege that KPM intentionally discriminated against Francis.[12]

Moreover, the District Court had concluded that, "assuming without deciding that a 'hostile housing environment' claim is actionable against a landlord or property owner under FHA, a question unresolved at this time by the Second Circuit [before Francis III], such a claim would require allegations of intentional discriminatory conduct, or failure to intervene, by the landlord or property owner based on a protected category."[13] The District Court held, therefore, that "naked assertions by plaintiffs that race was a motivating factor without a fact-specific allegation of a causal link between defendant's conduct and the plaintiff's race are too conclusory," and the District Court thereupon found "on the facts in this case, that the plaintiff alleges no basis for imputing the allegedly harassment conduct to the KPM defendants as opposed to Endres, or that the KPM defendants failed to intervene on account of their own racial animus toward the plaintiff."[14]

Nevertheless, the Francis III majority of the Second Circuit panel proceeded to consider "whether a landlord may be liable under the FHA for intentionally discriminating against a tenant by, as is alleged to have occurred here, choosing not to take any reasonable steps within its control to address tenant-on-tenant harassment of which it has actual notice that is specifically based on race, even though it chooses to take steps to address other forms of tenant misconduct unrelated to race."[15]

In response to the argument that Francis had failed to allege intentional discrimination, the majority said:"[W]e assume, without deciding that intentional discrimination is an element of an FHA violation and conclude that Francis's complaint, viewed in the light most favorable to Francis plausibly and adequately alleges that the KPM Defendants engaged in intentional racial discrimination."[16]

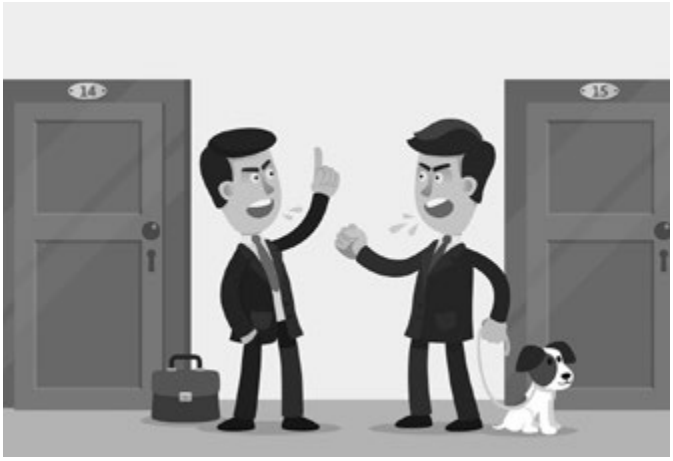
In reply, the dissent argued that the majority had "conjur[ed] a plausible basis for inferring intentional discrimination" by "latch[ing] onto Francis's conclusory statement in the complaint that the KPM Defendants 'have intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law.'"[17] The dissent further expounded that:

> This amounts to the claim that because the KPM Defendants did something with regard to some incident involving some tenant at some past point, the alleged failure to intervene here must have been based on racial animus. But the majority cannot say (because the complaint does not allege) whether these other vaguely referenced interventions involved members of a protected class, intratenant relations, the heating system, or a shower curtain.[18]

The dissent further argued that "this 'bland abstraction[ ]—untethered from allegations' regarding any actual interventions in either tenant-on-tenant disputes specifically or even lease violations generally—is thus a very far cry from what [the Second Circuit has previously] required in the employment context to assert a plausible claim of purposeful discrimination."[19] Continuing, the dissent concluded, "[s]imply put, the 'naked assertion' on which the majority relies to once again revive this complaint (after over three years of review) does not plausibly support an inference of discriminatory intent, dooming [Francis's claims]."[20] In addition, citing the Supreme Court's decision in *Ashcroft v. Iqbal*, the dissent noted that "a complaint fails to state a claim 'if it tenders naked assertions[s] devoid of further factual enhancement,' and that pleading 'purposeful discrimination requires more than . . . intent as awareness of consequences.'"[21]

III. The New York Landlords' Dilemma

Francis III not only held that the allegations against the landlord satisfied the racially based motivation



requirements of the FHA, but the court also held, citing *Stalker v. Stewart Tenants Corp.*, that the allegations of Francis's complaint sufficiently alleged a violation of the New York State Human Rights Law, which "is substantially similar" and which "like the FHA, prohibits housing discrimination" and makes it "an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent . . . [t]o discriminate against any person because of race . . . in the terms, conditions or privileges or the sale, rental or lease of any such housing accommodation or in the furnishing or facilities or services in connection therewith."[22]

Francis III not only creates a dilemma for landlords from tenant-on-tenant racial discrimination, but may now also provide a basis for claims being made, under Executive Law § 296(h), against landlords for tenant-on-tenant sexual harassment, even if the landlord has instituted the sexual harassment prevention policy for its employees now required under § 201-g of the New York Labor Law.[23]

The decision of the Second Circuit in Francis III, which may have been issued with good intentions, is nevertheless judicial legislation that, if not modified in the very rare en banc review ordered in the case on Feb. 3, 2020 (which was scheduled for hearing on September 24, 2020, but following which there has been no en banc decision to date), will be precedent for many unintended consequences in New York's housing industry. As a consequence of the majority ruling, Francis III potentially may have greater impact on New York housing than any other housing decision in recent memory. As the FHA makes no distinctions based on ownership, all forms of housing owners will need to update their leases and/or corporate documents. Leases will need to be amended to include default provisions that permit landlords to commence eviction proceedings for the uttering of discriminatory words or the commission of any conduct that violates the FHA. Cooperatives will need to amend their corporate documents and by-laws to include Pullman-like provisions that allow boards to evict and to cancel the shares of shareholder-tenants who make discriminatory comments or commit discriminatory conduct in violation of the FHA.[24] Condominiums will need to make similar changes in their by-laws, and, in the first instance, they may elect to impose severe fines on tenant-on-tenant harassment, in obedience to the mandate of Francis III, before expending substantial amounts of capital funds on lawsuits in Supreme Court.[25] Many rental properties may not impose fines upon their rent regulated tenants; as a consequence, landlords of those properties will be forced to sue to evict.

IV. Conclusion

The Francis III decision requires that property owners protect themselves by implementing policies to ensure (a) that they can be made aware of the violation of the Fair Housing Act by one tenant against another, and (b) that they will have the opportunity to take appropriate action to stop the unlawful discriminatory harassment. Nevertheless, the ruling in Frances III may not be the final word. The case is scheduled to be reheard, in a very rare en banc proceeding, before all of the judges of the Second Circuit. And if those judges do not understand the impact that Francis III can have on the workings of the complex housing laws in New York, landlords will no doubt turn their eyes to the U.S. Supreme Court for relief. But, in the interim, if property owners in New York do not follow the decisions of the appellate courts, disobedience will be painfully expensive.

Endnotes

1. *Britt v. N.Y.C. Hous. Auth.*, 3 A.D.3d 514, 514, 770 N.Y.S.2d 744, 745 (2d Dep't 2004).
2. *Francis v. Kings Park Manor, Inc.*, 944 F.3d 370, 373 (2d Cir. 2019) (Francis III).
3. 42 U.S.C. § 3617 (2020).
4. *See City of Edmonds v. Oxford House, Inc.*, 115 S.Ct. 1776, 1780 (1995).
5. *See Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 348 (6th Cir. 1988).
6. *See Francis v. Kings Park Manor, Inc*, 920 F.3d 168 (2d Cir. 2019).
7. *See* Francis, 944 F.3d at 385.
8. *Id*. at 385.
9. *Id*. at 374.
10. *Id.* at 374.
11. *Id.* at 375.
12. *Id*. at 379.
13. *Francis v. Kings Park Manor, Inc.*, 91 F.Supp.3d 420, 433 (E.D.N.Y. 2015) (emphasis added).
14. *Id.* at 433.
15. *See Francis*, 944 F.3d at 378.
16. *Id*. at 379.
17. *Id.* at 384.
18. *Id.* at 380-84.
19. *Id*. at 38 (citing *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 257 (2d Cir. 2014).
20. *Id*. at 384.
21. *Id.* at 384 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676-78 (2009)).
22. *See id*. at 380 (citing *Stalker v. Stewart Tenants Corp.*, 93 A.D.3d 550, 940 N.Y.S.2d 600, 602-03 (1st Dep't 2012)); *see also* N.Y. Exec. Law § 296(5)(a)(2); N.Y. Exec. Law § 296(6)(prohibiting aiding and abetting "any of the acts forbidden under this article").
23. *See Francis*, 944 F.3d at 381; N.Y. Exec. Law § 296(h); N.Y. Lab. Law § 201-g.
24. *See Francis*, 944 F.3d at 381; *see 40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 152 (2003); 42 U.S.C. § 3604; 42 U.S.C. § 3617.
25. *See Francis*, 944 F.3d at 378.

Recommendations for the Conduct of Closings During the COVID-19 Pandemic

The Real Property Law Section

At its meeting on January 13, 2021, the Real Property Law Section adopted the following recommendations for the conduct of closings during the COVID-19 pandemic (A copy of the full Resolution follows):

A. New York State has designated real estate as an essential business and Executive Order 202.6 (14) directs that all real estate transactions should be conducted "as remotely as possible" and any in person interaction "should be limited to the extent necessary."

B. In an effort to comply with the Executive Order, the Real Property Law Section of the New York State Bar Association recommends that while continuing our practices and representing our clients, when possible, attorneys conduct a real property closing by mail and/or in escrow.

C. However, if closing in escrow is not possible, the following closing practices are recommended:

1.) Limit the number of people in attendance. Among other things, real estate brokers should not attend.

2.) Be organized and prepared in advance of closing.

3.) To the extent possible, minimize time spent in the closing and the number of persons attending the closing by having seller documents signed and acknowledged prior to the closing, along with any other documents that can be signed (and acknowledged) in advance. However, bear in mind that not all title companies will accept (a) remote notarizations or (b) pre-signed documents delivered by an attorney if the attorney is not given a power of attorney or is not holding the documents in escrow. Accordingly, confirm the title company's requirements prior to closing.

4.) All parties should be screened prior to entering the closing room, including temperature checks and completion of a COVID-19 questionnaire.

5.) The office where the closing is being held should keep a record of all who attend the closing for contact tracing purposes, including contact information for each person attending the closing.

6.) Limit the number of people in any room. Separate those in attendance to the extent possible, including separating the purchasers and their attorney from the bank's attorney and title closer, if possible.

7.) All parties must bring their own pens. For those who forget, make pens available for their use and then give the pens to the users or dispose of them.

8.) All parties must adhere to appropriate social distancing and wear a properly-fitted mask at all times.

9.) Ventilate the room(s) in use as best as possible, including by opening windows if possible.

10.) Handshaking and other personal contact should be avoided. In this the attorney should set the example by welcoming people without handshaking or other personal contact.

11.) Consider having bottled water available for attendees. Do not permit attendees to use the kitchen, use coffee makers or other shared appliances, or obtain food from shared containers.

12.) Have hand sanitizers readily available.

13.) Do not use rooms for back-to-back closings and thoroughly ventilate room if possible (including by opening windows).

14.) Be respectful and courteous to the individual personal and/or medical needs and comfort levels of each party.

15.) Remember that patience is a virtue. All parties should be aware that title companies and county clerk's offices are subject to COVID-19 guidelines and COVID-19-related closures; therefore, obtaining documents and title reports will most likely take longer than anticipated.

16.) In general, during this difficult time, as attorneys we are tasked with not only the professional obligation of protecting our clients' interests, but also with the civil responsibility of ensuring the safety and well-being of each other. Please be sure to employ common sense to meet all of the necessary health, safety and legal requirements that are presented in each transaction.

Resolution of the Executive Committee of the Real Property Law Section of the New York State Bar Association Concerning Real Estate Closings During COVID-19

At a meeting of the Executive Committee of the Real Property Law Section of the New York State Bar Association, held on January 13, 2021, upon due notice at which a quorum was present and acted throughout, the following Resolution was adopted:

WHEREAS, the Section recognizes that the conduct of real property closings during the COVID-19 emergency has created misunderstanding, confusion, and conditions that are potentially dangerous to clients, practitioners and others;

WHEREAS, the Section is authorized by Article I, Section 2 of its By-Laws to draw attention to problems, abuses and issues in real property law and recommend improvements in procedures and practices;

WHEREAS, the Title and Transfer Committee of the Section proposes that the Section adopt and recommend the following suggested closing practices during the COVID-19 emergency;

WHEREAS, the Officers of the Section reviewed the suggested closing practices; and recommend that the Executive Committee adopt the practices on behalf of the Section;

WHEREAS, the Section directs its Officers and administrator to notify its members, and other interested parties, of the following recommended practices;

NOW THEREFORE, the Section RESOLVES that during the COVID- 19 emergency that real property closings should be conducted in accordance with the following:

A. New York State has designated Real Estate as an essential business and **Executive Order 202.6 (14)** directs that all real estate transactions should be conducted "as remotely as possible" and any in person interaction "should be limited to the extent necessary."

B. In an effort to comply with the Executive Order, the Real Property Law Section of the New York State Bar Association recommends that while continuing our practices and representing our clients, when possible, attorneys conduct a real property closing by mail and/ or in escrow.

C. However, if closing in escrow is not possible, the following closing practices are recommended:

1.) Limit the number of people in attendance. Among other things, real estate brokers should not attend.

2). Be organized and prepared in advance of closing.

3.) To the extent possible, minimize time spent in the closing and the number of persons attending the closing by having seller documents signed and acknowledged prior to the closing, along with any other documents that can be signed (and acknowledged) in advance. However, bear in mind that not all title companies will accept (a) remote notarizations or (b) pre-signed documents delivered by an attorney if the attorney is not given a power of attorney or is not holding the documents in escrow. Accordingly, confirm the title company's requirements prior to closing.

4.) All parties should be screened prior to entering the closing room, including temperature checks and completion of a COVID questionnaire.

5.) The office where the closing is being held should keep a record of all who attend the closing for contact tracing purposes, including contact information for each person attending the closing.

6.) Limit the number of people in any room. Separate those in attendance to the extent possible, including separating the purchasers and their attorney from the bank's attorney and title closer, if possible.

7.) All parties must bring their own pens. For those who forget, make pens available for their use and then give the pens to the users or dispose of them.

8.) All parties must adhere to appropriate social distancing and wear a properly fitted mask at all times.

9.) Ventilate the room(s) in use as best as possible, including by opening windows if possible.

10.) Handshaking and other personal contact should be avoided. In this the attorney should set the example by welcoming people without handshaking or other personal contact.

11.) Consider having bottled water available for attendees. Do not permit attendees to use the kitchen, use coffee makers or other shared appliances, or obtain food from shared containers.

12.) Have hand sanitizers readily available.

13.) Do not use rooms for back-to-back closings and thoroughly ventilate room if possible (including by opening windows).

14.) Be respectful and courteous to the individual personal and/or medical needs and comfort levels of each party.

15). Remember that patience is a virtue. All parties should be aware that title companies and county clerk's offices are subject to COVID guidelines and COVID related closures; therefore, obtaining documents and title reports will most likely take longer than anticipated.

D. In general, during this difficult time, as attorneys we are tasked with not only the professional obligation of protecting our clients' interests, but also with the civil responsibility of ensuring the safety and well-being of each other. Please be sure to employ common sense to meet all of the necessary health, safety and legal requirements that are presented in each transaction.

RESOLUTION SO ADOPTED:

As certified by:

Gilbert M. Hoffman

Gilbert Hoffman, Secretary
Real Property Law Section

The Real Property Law Section Welcomes New Members

The following members joined the Section between Nov. 2, 2020 – April 30, 2021.

Allen Abraham
Peter A. Ackerman
Jon H. Adams
Trevor Todd Adler
Robert Jacob Adler
John E. Ahearn
William Alesi
Miles Franklin Altarac
Meghan Cartier Altidor
Melody Emelina Alvarado Latino
Jensen Ambachen
Courtney Anauo
David Aronstam
Michelle Artiles
Bruce H. Ashbahian
Bruce H. Ashbahian
Elizabeth Anne Athenas
Jonathan R. Aubin
Francisco Augspach
Samantha Reed Axberg
Ruth Bain
Lynn D. Barsamian
Michael Helmut Bauscher
Randall S. Beach
Jack Stuart Beige
Bryan R Beirola
Ricki H. Berger
Marc A. Berk
Andrew R. Berman
Marie Caroline Bertrand
Keith R. Betensky
Joan H. Bischoff Van Heemskerck
Robert J. Bishop
Charles T. Bistany
John C. Black
Lester M. Bliwise
Susan K. Bloom
Jennifer M. Boll
Mayan Bouskila
Damian J. Brady
Aisling Brady
Shira Elizabeth Bressler
Roland T. Brewster
Charles Edward Brodsky
Heddyeh Broumand
Carly DiRisio Brown
Betsy Davis Brugg
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Stephen Buckley
Paul F. Bugoni
Teresa Butler
Leslie R. Byrd
Donald R. Campbell
Paulette Cooke Campbell
John Canino
Salvador Joseph Capecelatro
Anthony Michael Carello
Thomas Eliot Carroll
Deirdre A. Carson
Michelle C. Charbonneau
Stefanie Talena Charles
Nicholas Chivily
Joyce Serbalik Choi
Neha Kiran Chopra
Steven L. Chudnow
William J. Ciaravino
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Joshua N. Cohen
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Peggy Collen
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Sharon Michelle Connelly
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Sean P. Constable
William M. Cornachio
Heather M. Cornell
Joanne Darcy Crum
Deanna Cucharale
Anthony Christopher Curcio
Patricia Dalto-Schettino
John M. Daly
Jason Evan Danforth
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Jami Durante Rogowski
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Daniel Jason Evans
Laura E. Ewall
Manuel Fabian
John Robert Fairbairn
Michael James Falco
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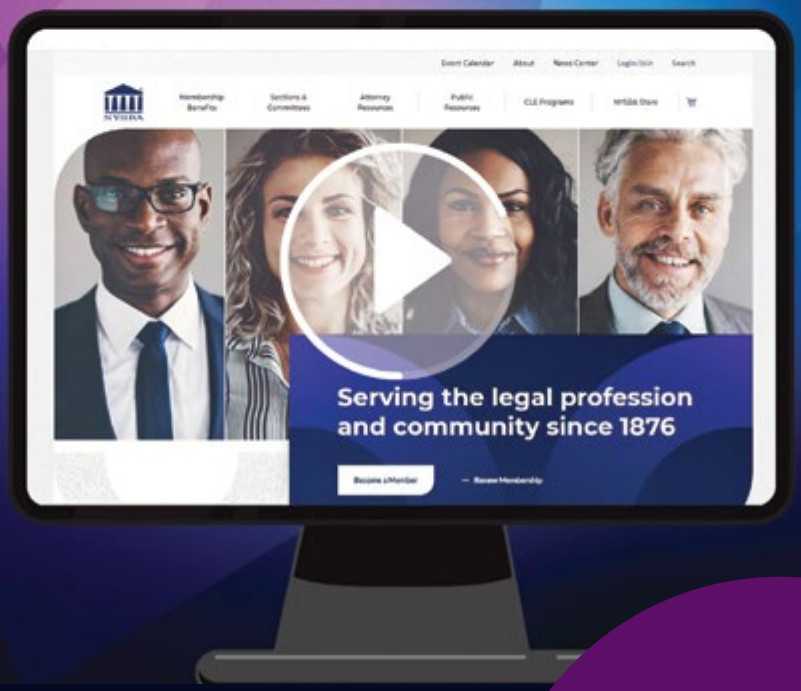

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