

NEW YORK FOLLOWS OTHER STATES IN ALLOWING SECURITY DEPOSITS TO BE APPLIED TOWARD RENT

Hodgson Russ Real Estate Alert
May 11, 2020

After weeks of speculation and much public interest, New York State finally joined several other states in providing relief for renters. On May 7, New York Governor Andrew Cuomo issued Executive Order 202.28 (the “Order”), which allows landlords and tenants to apply tenant security deposits toward rent payments, bans late fees for the late payment of rent, and extends the moratorium on evictions and foreclosures until August 20, 2020.

The Governor focused on the status of tenants early on in the COVID-19 crisis by issuing Executive Order 202.8 on March 20, 2020. That order imposed a moratorium on all evictions and enforcement actions for 90 days. The new Order comes as legislators and advocates from around the state have pleaded with the Governor to further protect tenants as they face the harsh financial impacts of the COVID-19 pandemic. The new Order is seen by some as helping landlords, too, by placing money in their pockets, although many wonder if it does enough and whether landlords need more assistance.

Under the Order, residential landlords and tenants, upon the tenant’s consent, may enter into a written agreement by which the tenant’s security deposit (and any interest accrued) can be applied toward rent that is past due or will become due. Landlords are required to provide such relief if requested by a tenant who is eligible for unemployment insurance or benefits under state or federal law or is otherwise facing financial hardship as a result of the COVID-19 crisis. The Order ultimately provides latitude to landlords and tenants to come to an agreement about the specifics of the application of the security deposit, subject to some limitations discussed below.

Any security deposit applied toward rental payments must be replenished by the tenant by paying 1/12 of the amount of the security deposit as additional rent each month. The tenant must begin to make payments to replenish the security deposit within 90 days from the date that the security deposit was applied to rent. The Order also allows a tenant to retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment, which the landlord must accept as replenishment.

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Additionally, residential landlords may not charge any fees for the late payment of rent occurring from March 20, 2020 through August 20, 2020. However, the Order does not preclude a landlord from presently pursuing collection of a late fee that accrued prior to March 20, 2020.

As we discussed in a prior client alert, New Jersey and Connecticut have already issued orders allowing landlords and tenants to use security deposits for rent payments. Unlike New York's order, New Jersey and Connecticut's orders do not allow a landlord to require replenishment of the security deposit during the remainder of the current term of the lease. Another stark difference in the orders are the months of rent that qualify for the security deposit to be applied. New York's order did not specify, while New Jersey limited the application toward rent payments that are due or will become due for a period of up to 60 days after the public health emergency ends, and Connecticut indicated that the security deposit can only be applied toward rent due in April, May or June 2020.

The Governor's original 90-day moratorium on evictions and foreclosures was set to expire on June 20. The Order has extended the moratorium to August 20, 2020, meaning no eviction actions may be instituted against any residential or commercial tenants for the nonpayment of rent and no foreclosure actions may be brought against any holders of residential or commercial mortgages for nonpayment of such mortgages during this time.

Although these measures will provide much relief to renters and businesses who lease space, many wonder if enough is being done to provide relief to landlords, who are still obligated to pay various operating expenses with little income coming in from tenants. Governor Cuomo said his focus is protecting families from being evicted, but that his team is also working on relief for landlords, as well as relief for mortgage lender banks.

The Hodgson Russ team continues to closely monitor these developments and how they impact our landlord and tenant clients. If you have any questions, please contact Sujata Yalamanchili (716.848.1657), Amy Fitch (716.848.1384) or Elizabeth Holden (716.848.1692).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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