

Outside Counsel

Expert Analysis

Non-Residential Tenant Harassment Law Makes ‘Self-Help’ Eviction Even Riskier

While recognized under New York’s common law and found in most, if not all, commercial leases, the peaceable “self-help” eviction remedy allowing landlords to re-enter the premises upon either (1) a default in payment of rent or (2) abandonment of the premises is seldom utilized. This stems from the court’s long-standing reluctance to allow a landlord to evict a tenant before adjudication of a tenant’s rights. Moreover, landlords that wrongfully eject commercial tenants “by force” are subject to statutes that provide for treble damages. See §853 of the New York State Real Property Actions and Proceedings Law (the RPAPL). As a result, attorneys are reluctant to advise their commer-

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cial landlord clients to exercise self-help eviction remedies even when available by contract. This is typically sound advice unless it is absolutely clear that a tenant has abandoned its space with no intent on ever returning.

Harassment Statute

If attorneys were already hesitant to advise commercial landlord clients to exercise peaceable self-help, legislation enacted Sept. 26, 2016 by New York City Mayor Bill de Blasio may have just ended any lasting uncertainty. A new statute, entitled the “Non-Residential Tenant Harassment” Law (codified as Chapter 9 to Title 22 of

the New York City Administrative Code) now prohibits commercial landlords from engaging in what is referred to as “commercial tenant harassment.” What does that mean, you ask? Good question. Courts do not know yet either and are still struggling with how and when to enforce the new statute.

Commercial tenant harassment is defined as any act or omission that: (1) is intended to cause a commercial tenant to vacate property, or to waive any rights under a lease, *and* (2) includes one or more of the following:

- Using force against or making express or implied threats that force will be used against a tenant;
- Causing repeated interruptions of an essential service;
- Repeatedly commencing frivolous court proceedings against a tenant;
- Removing personal property belonging to a tenant;

- Preventing a tenant from entering the property or changing the locks;
- Substantially interfering with a tenant's business with unnecessary construction; or
- Engaging in any other repeated acts or omissions that substantially interfere with a commercial tenant's business.

Considering the statute's broad definition of "harassment" and the fact that the purpose of peaceable self-help eviction remedies are always "intended to cause a commercial tenant to vacate property," the enactment of this statute is most likely certain to render toothless whatever remaining impact the self-help eviction remedy contained in most commercial leases previously had left.

Conflict With Recent Case Law

Ironically, the New York Supreme Court, Appellate Term, recently reaffirmed that a landlord, under certain circumstances, may evict a tenant utilizing classic "self-help" and without court action. For example, the most common way landlords exercise "peaceable self-help" is to change the locks. In *Sol de Ibiza v. Panjo Realty*, as a result of tenant's failure to pay its rent, landlord padlocked the door at a time when it was certain tenant

would not be present. The court granted tenant's petition for restoration of possession and directed an assessment of damages pursuant to RPAPL §853, which provides for treble damages in instances where tenant is forcibly or unlawfully ejected from its premises. However, the Appellate Term, First Department, reversed, affirming a New York landlord's right to exercise self-help if: (1) the lease specifically provides for the right to re-enter upon non-payment; (2) landlord previously served a valid rent demand; and (3) re-entry was performed "peaceably." In addition to the First Department ruling, the new statute specifically excludes from the definition of commercial tenant harassment "a landlord's lawful re-entry and repossession" of covered property.

The Bottom Line

The Appellate Term, First Department's decision notwithstanding, there remains real risk associated with a landlord electing to pursue an aggressive self-help eviction course. Until the rights and remedies available under the new statute are clarified, a landlord should continue to be aware of the risks posed by the new statute. Arguments with tenants on just about anything could lead to future harassment

claims. Even landlord's performing routine repairs in or around the premises could give rise to claims of harassment. The consequences of being found in violation of the statute are significant, as the new law affords tenants a wide array of remedies. In addition to monetary penalties of between \$1,000 and \$10,000, courts may award injunctive relief, punitive damages and attorney fees. N.Y.C. Admin. Code 22-903(a). Even if the landlord proceeds correctly, there will still be issues of proof and related costs associated with litigation. Thus, better to be safe than sorry when it comes to eviction and get judicial approval.