

## How To Evict Commercial Tenants in New York When You Can't Commence Proceedings

There are ways around the EPSBA which will still enable landlords to litigate their claims against tenants who fail to pay rent.

By **Michael A. Pensabene** | March 22, 2021 at 07:39 AM

On March 9, 2021, Governor Cuomo signed the COVID-19 Emergency Protect Our Small Businesses Act of 2021 ("the EPSBA") into law. In addition to making it unlawful for a landlord to exercise "self-help" evictions, the EPSBA immediately stayed all lawsuits seeking a commercial eviction that are currently pending and which may be filed before April 8, 2021 for *at least* 60 days. Although the stated purpose of the EPSBA is to protect small businesses, it is very poorly drafted with potentially broad implications. Similar to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, which applies to residential cases, the EPSBA permits qualifying commercial tenants to submit a "hardship declaration" form to their landlord if, as a result of the pandemic, they have lost significant revenue, incurred significant increase in necessary expenses, or have difficulty securing an alternate location. Once such a commercial tenant submits a hardship declaration to their landlord, the tenant is protected from an eviction through May 1, 2021, subject, of course, to further extensions that may be implemented. The EPSBA may have muddled the commercial eviction laws, but it has made the public policy clear: eviction proceedings are not proceeding quickly, if at all.

There are, however, ways around the EPSBA which will still enable landlords to litigate their claims against tenants who fail to pay rent — which can be the basis for an eviction. In an eviction proceeding, a landlord must first litigate the underlying claims upon which an eviction is sought before the landlord is permitted to evict that tenant (e.g., the nonpayment of rent). The EPSBA has stayed such litigation, but only if the lawsuit specifically seeks an eviction. A savvy attorney can find other ways to assert the same claims, which fall outside the scope of the EPSBA and executive orders, so that they can be litigated immediately. Then, when evictions are permitted, the underlying claims to support an eviction will have already been decided and they cannot be relitigated again under the legal principle of collateral estoppel.

For example, commercial leases commonly have "holdover rent" provisions which hold a tenant liable for liquidated damages, if the tenant fails to vacate the premises when the lease term expires. If the lease also contains a conditional limitation for the nonpayment of rent, and the landlord terminates the lease early based on the tenant's failure to pay rent, the landlord may assert a claim for "holdover rent." After the landlord terminates the lease, it would then commence a lawsuit against the tenant seeking the rent arrears and the holdover rent as liquidated damages resulting from the early lease termination. Since these are strictly monetary claims, the EPSBA and executive orders do not apply, so there are no restrictions on this litigation proceeding. In determining whether or not to award the landlord holdover rent, the court must first determine whether or not the lease was, in fact, properly terminated. Once the court makes that determination, it cannot be relitigated again, and if the court determines that the lease had been properly terminated, there is nothing left to litigate when commercial evictions are permitted again.

### Recommended For You

Collateral estoppel prevents an issue of fact that a court decides by a final judgment issued at the conclusion of litigation from being litigated again in a subsequent lawsuit between the

same parties. Accordingly, in my example, once the court finds that the landlord is entitled to holdover rent because the lease was terminated, the tenant cannot later dispute that the lease was, in fact, terminated, when the landlord uses that lease termination as a basis for an eviction, when evictions are permitted again. In this way, the landlord is effectively litigating an eviction proceeding immediately, notwithstanding the EPSBA and executive orders, and it will be in the best position to evict a tenant as soon as possible. Moreover, this strategy requires a tenant to respond to the landlord's claims immediately, rather than waiting for a stay to expire at some point in the future, which would, at the very least, expedite the entry of a monetary judgment against the tenant that the landlord may enforce without restriction. Landlords are encouraged to seek skilled counsel with an expertise in landlord/tenant litigation to help navigate them through the constantly evolving law concerning commercial evictions.

**Michael A. Pensabene is a member of Rosenberg & Estis' litigation department.**

---

**NOT FOR REPRINT**

© Touchpoint Markets, All Rights Reserved. Request academic re-use from [www.copyright.com](http://www.copyright.com). All other uses, submit a request to [asset-and-logo-licensing@alm.com](mailto:asset-and-logo-licensing@alm.com). For more information visit [Asset & Logo Licensing](#).