

## REAL ESTATE

## Evictions Errrrr

By Andrew Lieb

Welcome to your new landlord/tenant practice. On June 11, 2019, we received the Housing Stability and Tenant Protection Act of 2019 and practitioners have been scrambling ever since to make sense of the new law. Below, *The Suffolk Lawyer* lists the major changes applicable to a general landlord/tenant practice from the 74-page Act, in summary, for reference. Practitioners are advised to cross-reference this summary with the entire Act, which is available at: <https://legislation.nysenate.gov/pdf/bills/2019/S6458>.

**RPL §223-b** was amended to prohibit both an eviction or the offering of a new lease with an unreasonable rent increase in retaliation to a tenant's good faith compliant to a landlord, or its agent, concerning the warranty of habitability, in general, or the the duties to repair, to provide heat or to maintain a clean premises under the MDL or the duty to maintain a clean premises under the MRL. Upon a tenant enforcing its rights hereunder through a private right of action, the amendment also provides the tenant with a right to seek attorney's fees and costs. Notate that the failure to assert retaliation as an affirmative defense is fatal for the tenant, but that the presumption of retaliation was expanded from six months to one year after the complaint was made under the amendment.

**RPL §226-c** was added to require written notice for non-renewal or rent increases of 5 percent or more. Such notice varies based on the duration of the tenant's occupancy and the term of such tenant's lease. For occupancy and lease terms of less than one year, 30 days' notice is required; for occupancy and lease terms of more than one year, but less

than two years, 60 days' notice is required; for occupancy and lease terms of more than two years 90 days' notice. Failure to so notice voids the non-renewal or rent increase.

**RPL §227-e** was added to require, without possible waiver, a landlord to mitigate damages if a tenant vacates the premises in violation of the lease terms. Such landlord must undertake reasonable customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower. The statute places the burden of proof on the landlord to establish such actions were undertaken.

**RPL §232-b** was amended to provide that only a tenant, and not a landlord, can terminate a monthly tenancy on one month's notice outside of the City of New York. Presumptively, a landlord can terminate by way of RPL §226-c, but the same is not expressly set forth in the statute.

**RPL §234** was amended to add a provision that "[a] landlord may not recover attorneys' fees upon a default judgment" with respect to actions or summary proceedings concerning a residential lease. However, RPL §702 more broadly limits a landlord from recovering any "fees" besides "rent" in a summary proceeding. As a result, the purpose of §234 is ambiguous and will likely result in litigation as to whether the court will carve out attorneys' fees from §702's limitation where issue was joined because §234 would otherwise constitute superfluous language.

**RPL §235-e** was amended to require that "[t]he lessor shall maintain a record of all cash receipts for rent for at least three years."



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Additionally, a new notice requirement was added as a condition precedent to a non-payment proceeding, which notice requirement has a built-in five day grace period from the date of missed rent prior to the notice being available to be sent. Should the landlord fail to make such notice, the tenant now has an affirmative defense to a non-payment proceeding. Further, this statute should be read in conjunction with amended RPAPL §711(2), which now requires at least 14 days' written notice. Cumulatively, a tenant now, arguably, has 19 days from when the rent was due prior to the commencement of an eviction proceeding.

**RPL §238-a(2)** was added to cap rent payment late charges at the lessor of \$50 or 5 percent of monthly rent. Additionally, the statute provides a five day grace period similar to RPL §235-e.

**RPL §702** was added to prohibit the collection of any money besides "rent" in a summary proceeding. Additionally, the term "rent" was defined to mean "monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement." As such, no more additional / added rent clauses shall be effective in a lease without resort to a plenary action.

**RPAPL §713(4)** was amended to require a landlord to accept the full payment of rent at any time before the hearing on a non-payment proceeding thereby rendering the proceeding moot.

**RPAPL §732(1)** was amended to expand the amount of time that a petition is returnable from within five to 10 days after service

for non-payment proceedings.

**RPAPL §733(1)** was amended to expand the amount of time that a petition shall be served to at least 10 and not more than 17 days before the time it is to be heard.

**RPAPL §743** was amended to remove a possibility of requiring an answer prior to the date that the petition was noticed to be heard.

**RPAPL §745** was amended to enlarge first adjournments from not more than 10 days to not less than 14 days while removing any burden from the tenant in obtaining such adjournment.

**RPAPL §749** was amended with respect to warrants to require the court to include "the earliest date upon which execution may occur pursuant to the order of the court" and to permit the court to issue "a stay of re-letting or renovation of the premises for a reasonable period of time." Further, the sheriff now has to give 14 days' notice, rather than 72 hours, to the persons to be evicted. Lastly, the amended statute provides that "the court shall vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to its execution."

**RPAPL §753** was amended to expand the availability of a stay for the tenant's failure to "secure suitable premises similar" from NYC to the remainder of the state while enlarging the stay from six months to one year.

Happy litigating to all.

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## EMPLOYMENT

## New York State Overhauls Discrimination/Harassment Laws Opening the Floodgates to Future Claims

By Mordy Yankovich

On August 12, 2019, Governor Andrew Cuomo signed legislation implementing extensive reforms to the New York State Human Rights Law, which dramatically increases protections for victims of discrimination and harassment in the workplace and makes it exceedingly more difficult for employers to defend against such claims. The following is an analysis of the major changes to the NYSHRL.

**"Severe and Pervasive" standard no longer applicable**

Prior to the enactment of the new law, in order to establish a claim of harassment based on a protected class pursuant to the NYSHRL, the alleged conduct had to be "severe and pervasive." The new law expressly eliminates the "severe and pervasive" requirement. Rather, the conduct must only "subject an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of [the] protected categories." In

addition, an employer may raise as an affirmative defense that the conduct does not "rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." While the minimum conduct necessary to establish a claim of harassment under the new law will be subject to judicial interpretation, it is likely that isolated incidents of unequal treatment based on a protected class can now constitute unlawful harassment.

**Faragher Ellerth affirmative defense is diminished**

Under the new law, whether an employee complained about the harassment to his or her employer is not "determinative" as to employer liability. As a result, the effect of the *Faragher Ellerth* affirmative defense to liability will undoubtedly be weakened. The *Faragher Ellerth* defense is an affirmative defense to liability where the em-



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ployer can show that: 1) the employer exercised reasonable care to prevent and correct promptly any discriminatory or harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. See *Faragher v. City of Boca Raton*, 524 U.S.

775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Adams v. City of New York*, 837 F.Supp.2d 108 (E.D.N.Y. 2011); *Zakrzewska v. The New School*, 14 N.Y.3d 469 (2010) (This affirmative defense is not available under New York City law). While this defense is technically still available, the effect, if any, of such a defense moving forward is unknown since the second prong of the defense is contradicted by the new law.

**An employer is liable for claims of discrimination/harassment by non-employees**

An employer may now be liable for discrimination or harassment claims by

non-employees based on any protected class (previously limited to claims of sexual harassment). An independent contractor, sub-contractor, vendor or consultant now have standing to file a discrimination/harassment claim against a company based on any protected class.

**Employees may recover punitive damages and attorneys' fees**

Attorneys often strategically avoid filing discrimination claims, on behalf of their clients, in New York State Court (unless the claim arose in New York City) because of the inability to obtain punitive damages and reasonable attorneys' fees for claims brought under the NYSHRL (attorneys' fees and punitive damages are available under NYCHRL and attorneys' fees and capped punitive damages are available under Title VII). Now that attorneys' fees and unlimited punitive damages are available under the NYSHRL, more cases arising outside of New York City will undoubtedly be filed in New York State Court.

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