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# NY's Housing Stability & Tenant Protect. Act–Part III

Gerald Lebovits

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# New York's Housing Stability and Tenant Protection Act of 2019:

## WHAT LAWYERS MUST KNOW–PART III

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In Parts I and II of our series, we discussed how the Housing Stability and Tenant Protection Act of 2019 (HSTPA[1]) has dramatically altered New York's residential-rental landscape. Part I (91 N.Y. St. B.J. 35 (Sept./Oct. 2019)) outlined the law before and after HSTPA. Part II (91 N.Y. St. B.J. 26 (Nov. 2019)) focused on rent regulation. This concluding part of our three-part series covers the rest of HSTPA.

Historically, changes in New York landlord-tenant law focused on the rent-regulation scheme. Only here and there did the Legislature amend laws pertaining to unregulated units or how courts must adjudicate eviction actions and proceedings. HSTPA has changed that history. To the tenants' benefit and the landlords' burden, the Legislature has amended many parts of the Real Property


Law (RPL), the Real Property Actions and Proceedings Law (RPAPL), and the General Obligations Law (GOL), starting with how tenancies are created and ending with how tenants may be restored to possession after eviction.

## SECURITY DEPOSITS AND PRE-PAID RENT ARE LIMITED TO ONE MONTH'S RENT

Although security deposits have long been limited to one month's rent for rent-stabilized tenants, HSTPA amended the GOL effective June 14, 2019, to extend this limit to unregulated tenants statewide. The practice of requiring pre-paid rent, typically as the "first and last months' rent," is now prohibited. The broad language of the new limitation includes "advances" as well as deposits. Some landlords argue, however, that with the word "or" in GOL § 7-108 referring to "deposit or advance," first and last months' rent are still allowed, because it is payment for current use and occupancy

The amended GOL now also provides for a mandatory inspection procedure. Landlords must give tenants an opportunity to inspect the premises before they take occupancy. The parties "shall" then execute a written agreement noting any conditions. The law limits the admissibility of this agreement to a tenant's action to recover a security deposit and only as evidence of conditions at the start of the tenancy. Tenants may not use the agreement to establish the existence of violations in an HP (repair) proceeding or to assert a warranty-of-habitability breach in a nonpayment proceeding. Similarly, a landlord may not use the agreement to impeach a tenant's testimony at an abatement hearing asserting a habitability breach.

A landlord must again notify the tenant of the right to inspect the premises with the landlord 1–2 weeks before the tenant vacates. For a landlord to retain any portion of the security deposit, the landlord must, after the vacatur inspection, give the tenant an itemized statement specifying any repairs or cleaning needed to give the tenant an opportunity to cure the conditions.

Under the former law, landlords had to return a security deposit within a "reasonable time," meaning a month or two. The law now provides that if any portion of the security deposit is retained, the landlord must provide (i) an itemized statement of the claimed conditions within 14 days after the tenant vacates and (ii) any remaining portion of the deposit. A landlord that fails to comply forfeits any claim to the deposit.[2] The new law also narrows what may be withheld from the deposit to include "reasonable" costs due to nonpayment of rent or utility charges, damage beyond ordinary wear and tear, and moving and storage of the tenant's belongings. Notably excluded are additional rents such as late and legal fees. Landlords have the burden of proof to justify their retention of a security deposit, and the GOL now provides for punitive damages of up to twice the amount of the deposit for any willful violation of its provisions.

These changes are welcomed by tenants, who have long flooded the halls of small-claims courts with complaints that their landlords wrongly withheld their security deposits or inflated and fabricated repair costs to retain their deposits. But prospective tenants with no or poor credit history, newcomers to New York, and students enrolled in New York's many universities might be collateral damage of the new laws. Landlords might be unwilling to rent to them without the additional protection of an increased deposit or pre-paid rent. Business reasons often deter landlords from accepting a guarantor rather than security deposits and pre-paid rent. Landlords are already testing alternative security measures, such as requiring that tenants provide a bond to ensure payment of rent and a guarantor to pay an additional security deposit. The Division of Housing and Com-


munity Renewal (DHCR) has issued guidance since HSTPA's passage prohibiting landlords from demanding that a guarantor "or any third party" pay more than one month's security,[3] but this guidance applies only to rent-stabilized tenants. Time will tell whether courts follow the DHCR's lead in determining that the amended GOL prohibits using these security measures with unregulated tenants.

Landlords maintain that 14 days is too short to inspect the premises, prepare an itemized statement, and return any uncontested portion of a deposit. Landlords also argue that the inspection procedure is unworkable, because HSTPA requires that the landlord and tenant reach an agreement specifying conditions in the premises but provides no guidance about the form or content of the agreement or how the parties can proceed if they cannot agree. The statute requires that the initial inspection occur after the lease is signed, thus binding the parties to a contentious landlord-relationship from its inception. Some landlords will try to avoid this dilemma by holding the inspection before the lease is executed, but that might cause tenants to avoid raising conditions rather than risk having the landlord decide not to rent to them. Some landlords and tenants, we hear, are already contracting around GOL § 7-108(c) with language in which the tenant waives this inspection.

Landlords also object that the penalties for violating the new law are not limited to failing to return a security deposit but also seem to apply to any lesser violation, such as scheduling the final inspection outside the statute's one-week window. because no distinction is made between security deposits and pre-paid rent in imposing punitive damages, moreover, the potential liability could be high. In the case of a foreign resident, for example, in which a landlord requires a year's pre-paid rent, this practice could result in liability equal to two years' rent.

Under RPL § 235-e, once a tenancy is in effect, a tenant who demands rent receipts must get them. The receipt must include the date, amount paid, identity of the premises, and period covered. If the payment is made personally, the receipt must be given immediately. If the rent is paid in another manner, the receipt must be provided within 15 days. Once a receipt is demanded, the obligation to provide receipts continues for the life of the tenancy. Landlords must maintain records of cash payments for three years.

## THE RETALIATORY EVICTION PRESUMPTION HAS BEEN EXPANDED

RPL § 223-b protects tenants exercising their right to complain to governmental agencies, enforce their lease rights, and join a tenants' organization. Before HSTPA, landlords who commenced a holdover proceeding against a tenant within six months of exercising these rights created a rebuttable presumption that the proceeding was commenced in retaliation for the tenant's action.

HSTPA expands the scope and enforcement of RPL § 223-b, enlarging the time period during which the presumption applies from six months to a year and extending the presumption from holdover proceedings to nonpayment proceedings and also to "unreasonable" rent increases. Previously, the law covered only complaints of housing-code violations to enforcement agencies. HSTPA now covers habitability complaints, too. And tenant complaints are now protected if they are made to the landlord or its agent. Once a tenant raises a retaliatory-eviction claim, the landlord bears the burden of establishing a non-retaliatory motive for an eviction proceeding or raising rent. The prior law required simply that the landlord provide a "credible explanation." A landlord that fails to rebut the presumption of retaliation can be required to offer a new lease or lease renewal of

up to a year with only a "reasonable" rent increase. Additionally, a landlord could be liable for attorney fees if the tenant seeks damages in a civil action.

Tenants applaud the extension of RPL § 223-b. They argue that the former statute assumed, incorrectly, that tenants, including those who do not speak English, were informed of their rights and somehow knew about governmental agencies tasked with enforcing their rights. The reality is that many tenants without heat or hot water know no option but complaining to a landlord. HSTPA now bars unscrupulous landlords from retaliating against these tenants. Similarly, tenants argue that by including complaints of the breach of the warranty of habitability, HSTPA recognized that although the Housing Maintenance Code establishes *minimum* housing standards, New York law affords tenants the broader assurance that the premises be "fit and habitable."

Opponents of the new statute decry it as a capricious extension of RPL § 223-b that prevents one wrong by perpetrating another. Landlords argue that protections against unethical landlords are warranted but that HSTPA punishes landlords for exercising legitimate rights. By requiring a landlord to prove a non-retaliatory motive for a nonpayment proceeding, HSTPA rejects the notion that not paying rent is inherently a sufficiently non-retaliatory motive to commence a nonpayment proceeding. Landlords also believe that HSTPA will incentivize tenants to make frivolous habitability claims. Under the new law, a tenant might complain about a noisy refrigerator to immunize them against an eviction proceeding for a year. Because a landlord is not always notified of a tenant complaint to a governmental agency, particularly if the complaint does not result in a violation, landlords might also be saddled with a presumption of retaliation if it commences an unrelated eviction proceeding, even if the landlord had no knowledge of the complaint. Landlords argue against what they say is the inequity of a statute that permits a finding of retaliation without knowledge of the conduct against which the landlord is presumed to have retaliated. This inequity flows from an alleged double standard in the new law, which requires only a "good faith" complaint by a tenant, without mandating an equivalent inquiry into the landlord's "good faith" intent in bringing the eviction proceeding *before* the presumption of retaliation attaches.

Ambiguities abound in the amended RPL § 223-b. The statute provides no guidance about how landlords may rebut the presumption or whether, in addition to the underlying basis for the eviction proceeding, a second non-retaliatory motive is required. It is also unclear what role the timing of the complaint plays in triggering the presumption of retaliation. Will the presumption apply if the tenant fails to pay rent or is guilty of objectionable conduct, but makes a habitability claim before the landlord can commence an eviction proceeding? By requiring only a "good-faith" complaint, the statute focuses on the tenant's subjective intent in complaining without addressing whether the complaint is objectively valid. Tenants might believe, incorrectly but in good faith, that they are entitled to choose the paint color when the landlord repaints the apartment. Does the tenant nonetheless get the benefit of the presumption of retaliation if the landlord commences a nonpayment proceeding after the tenant withholds rent in objection to the paint color? Finally, offering a new lease with an "unreasonable" rent increase is now a prohibited retaliation, but HSTPA does not specify a standard or whether the standard should be determined from the perspective of landlord or tenant. Tenants will argue that any increase be limited to a percentage of the current rent, but landlords will retort that it should be set by the market, even if it results in a large increase over the existing rent. The courts will grapple with the amended RPL § 223-b for years.

***The practice of requiring pre-paid rent, typically as the "first and last months' rent," is now prohibited.***

## BLACKLISTS HAVE BEEN BANNED

The abusive use of so-called tenant blacklists in leasing practices has been widely publicized. Blacklists are lists of tenants named as respondents in Housing Court litigation. Landlords have used the lists to screen potential applicants.[4] These lists were often misleading; they provided minimal information about the proceeding or its outcome, including whether the tenant essentially prevailed or had a legitimate basis for litigating. Tenant advocates found these blacklists appalling because they came from data compiled and sold by the Unified Court System. HSTPA seeks to curb the use of blacklists by forbidding the denial of a rental application on the basis of past or present landlord-tenant actions or RPAPL Art. 7. summary proceedings. A rebuttable presumption arises that HSTPA has been violated if a landlord seeks information from a tenant-screening website or inspects court records. The landlord has the burden to provide an alternative reason for rejecting a tenancy. HSTPA now also forbids the Unified Court System from selling residential tenancy and eviction data.

While tenants' reception to the ban has been favorable, tenants are concerned that enforcement will be ineffective. New York's Attorney General has enforcement pow-

ers, and using a blacklist carries fines of between $500 and $1,000 per violation. But no private cause of action is available. Tenants worry that the AG's resources will be insufficient to stop what they believe is the widespread use of blacklists. Additionally, tenant advocates complain that blacklists will still apply out-of-state.

In the meantime, landlords have voiced their concern that HSTPA has hamstrung them from filtering prospective tenants who have histories of objectionable behavior or who chronically fail to pay rent. Landlords also argue that HSTPA blindfolds from examining information regarding potential threats or nuisances that tenants may pose to other tenants while exposing them to liability to other occupants if the tenant deals drugs from the apartment, throws loud parties late at night, sets fires in the building, or is hostile to neighbors. Furthermore, landlords argue that nothing is wrong in refusing a tenant based on past defaults in paying rent.

To the extent that the blacklist ban addresses real abuses, landlords maintain that HSTPA has provided a remedy ill-fitted to the problem and that a better solution would have permitted using records of holdover proceedings if the tenant was evicted for objectionable conduct or a judgment was entered against a tenant in a nonpayment proceeding without a finding that the tenant was entitled to an abatement. HSTPA was intended to protect tenants involved in Housing Court disputes because they needed repairs. But its actual effect, landlords say, is to prevent them from considering court records showing that the tenant was evicted for illegal activity or other legitimate reasons.

## NOTICE IS NOW REQUIRED TO RAISE THE RENT FOR UNREGULATED APARTMENTS; NEW TIME PERIODS TO TERMINATE MONTH-TO-MONTH TENANCIES

Prior to HSTPA, a month-to-month tenancy could be terminated with a 30-day notice. If a tenant held over at the end of a fair-market lease, a proceeding could be commenced without a predicate notice if no rent was accepted after the lease expired. HSTPA amends the RPL to require that if a residential landlord does not intend to renew a lease, or intends to raise the rent by 5% or more, the landlord must notify the tenant of the rent increase or vacate date. The notice required is determined by the length of the tenancy or occupancy: up to a year, the tenant must be given 30 days' notice; between a year and two years, the tenant must be given 60 days' notice; and two years or more, the tenant must be given 90 days' notice. If a landlord fails to provide the notice, the tenancy will continue on the same terms until the proper notice is given and the required time passes.

In New York City, delivery of the notice must be made by service under RPAPL 735.[5] HSTPA does not set forth a service requirement outside New York City, but some landlords will deem it prudent to effectuate RPAPL 735 service to avoid motion practice on the issue.

Under current and prior law, New York City tenants are not required to provide written notice before vacating. Outside New York City, a tenant must give a month's notice to terminate a month-to-month tenancy, but the notice need not be in writing. The effective date for these provisions is October 12, 2019. Some landlords and tenants are using their right to contract to waive or modify RPL § 232-b with lease clauses allowing tenants to terminate their tenancies with at least two month's written notice.

Landlords, particularly smaller landlords, complain that the new law forces them to choose between regaining an apartment and receiving rent. It is common for a tenant served with a termination notice not to pay rent. If a 90-day notice is required, the rent will not be paid for the next three months. Given HSTPA's other provisions, in which tenants have a right to adjourn a proceeding, it might be five months or more in some parts of New York before a landlord can seek a deposit of prospective rent. As to the five months not paid, a landlord might obtain a money judgment, but it might be from a judgment-proof tenant. Landlords will still be able to bring a nonpayment proceeding, but landlords argue that this adds to the burden and expense of removing tenants.

## EXPANDED TENANTS PROTECTIONS AND AMENDMENTS TO THE RPAPL INCREASE PAUSES BEFORE, DURING, AND AFTER EVICTION PROCEEDINGS

### *I. Pauses Getting to Court*

Changes to the RPL expand the notice requirements to terminate month-to-month tenancies and provide significant notice requirements for unregulated tenants. But HSTPA simultaneously passed comprehensive reforms to the RPAPL, the statutory authority governing summary-eviction proceedings. The Legislature enacted these pauses (landlords might call them "delays") to prevent evictions or to slow them down — or at least to postpone the life-crushing consequences of an eviction.

Before HSTPA, service of a holdover petition had to be made 5–12 days before the first court appearance. As amended, RPAPL 733 provides that holdover proceedings must be made returnable 10–17 days after the petition is served. Additionally, HSTPA eliminated the provision of RPAPL 733 that permitted a landlord in a holdover proceeding to demand an answer 3 days before the initial court date if the petition was served at least 8 days before the trial date. Landlords argue that this hollows out the operating assumption of summary proceedings. Although already rare in practice before HSTPA,

the RPAPL provided that a summary proceeding could go to trial on the first court appearance. But the summary nature of a proceeding is undermined if the landlord does not have a meaningful opportunity to review the answer and prepare for trial. The practical effect is that tenants will receive an automatic adjournment of the first court appearance.

HSTPA has similarly enlarged time periods in nonpayment proceedings. Previously, if a tenant did not pay rent, RPAPL 711 required that the tenant be given a written three-day rent demand or an oral demand (an oral demand did not have to give three days) before a landlord could commence a nonpayment proceeding. HSTPA amended RPAPL 711 to abolish oral rent demands and to increase the notice period for written rent demands to 14 days. HSTPA also amended RPL § 235-e to require that tenants be notified, by certified mail, if rent is not received within five days of the due date. If the landlord fails to serve this reminder notice before commencing a nonpayment proceeding, a tenant may raise that failure as an affirmative defense. RPAPL 732 has also been amended to increase from 5 to 10 days the time tenants have to answer a nonpayment proceeding. And if the tenant defaults in answering, the court still has the discretion to stay issuance of the warrant for five days.

It is also unclear whether the rent demand must give the new "reminder" notice in. Until the courts resolve the matter, conservative landlord-side practitioners will conclude that they should do so (to avoid motion practice). The practical result is that a rent demand can be made no earlier than the fifth day after the rent is due. Assuming that rent is due on the first, this would be the sixth day.

Under prior law, a landlord could make an oral rent demand and serve a nonpayment petition the next day. Now there will now likely be a nearly three-week delay when the time to effect service is added to the 14 days' notice required for a rent demand. Accounting for the additional 10 days a tenant has to answer the petition and, in New York City, the additional 3–8 days before the initial court appearance, another month's rent will come due before the parties ever get to court. Landlords complain that every tenant knows without being reminded that rent is due on the first of the month and that a "reminder" notice serves no function other than to graft a mandatory five-day grace period onto every New York lease. Landlords also complain about the cost of the required mailings.

Landlord advocates additionally contend by requiring that notice be issued by a landlord or agent "authorized to receive rent," HSTPA appears to preclude a landlord's attorney from giving notice. Additionally, HSTPA is silent about whether a reminder must be sent each month that rent is late or whether a single reminder for a number of months of arrears will suffice.

Tenant advocates offer that lengthening the time necessary to commence a nonpayment proceeding gives tenants living paycheck to paycheck time to pay rent arrears and perhaps avoid a nonpayment proceeding altogether. If a tenant has difficulty paying rent, missing work to make a court appearance is counterproductive, too. The reminder notice further alerts tenants before a proceeding is started if their rent check was lost in the mail or received and not accounted for by the landlord's managing agent.

Commercial landlords respond that these arguments might be relevant for residential tenants but have no bearing in the commercial context. They say that a reminder notice should not be required for a commercial tenant (the statute does not state that the reminder is required only for residential tenants) and that although a residential tenant paying $1,500 a month will benefit from a slower eviction process, the landlord of a commercial tenant paying $150,000 a month should not be forced to wait until $300,000 in arrears accrues before their first court appearance. Landlords argue that this is an issue that pervades much of HSTPA. Many policy objectives underlying the new laws are irrelevant to commercial tenants; businesses are less vulnerable to an imbalance in bargaining power, and evicting a business poses less of a societal concern than evicting a family. But HSTPA, business interests argue, fails in many instances to draw a meaningful distinction between residential and commercial matters.

HSTPA has also opened the floodgates to competing interpretations by providing that the failure to give a rent-reminder notice may be raised as an affirmative defense but giving no guidance about its application or consequences. On its face, HSTPA suggests that the mere failure to remind a tenant of a pre-existing, contractual obligation waives forever the obligation to pay rent, a draconian result. It could also act as a procedural bar, much like a failure to make a proper rent demand will result in a dismissal of the proceeding without prejudice to a landlord's ability to recover rent once the reminder is given. Alternatively, the affirmative defense, if established, could result in the landlord's being barred from recovering rent in a summary proceeding, but the claim could be asserted in a plenary action. Some landlords, however, are positing that the New York State Legislature has not prohibited modifications to RPL § 235-e. They are using their right to contract to waive or modify that section.

Additionally, RPAPL § 711 previously provided that if a tenant died during a term of the lease and the rent had not been paid, no representative or person has taken occupancy, and no administrator or executor had been appointed within three months of the tenant's death, a proceeding could be commenced against a surviving

spouse or, if none, then a surviving issue or distribute. HSTPA provides that when a tenant dies, rent is not paid, and the apartment is occupied by a person with a claim of possession, a proceeding may be commenced naming the occupants of the apartment seeking a possessory judgment against the estate. Entry of the judgment shall be without prejudice to the occupants' possessory claims, and any warrant shall not be effective against the occupants. Any succession claim will be litigated in a holdover proceeding.

***II. Pauses in Court***

HSTPA has altered the pace of summary proceedings by reforming the limits and disincentives to adjournments. Before HSTPA, RPAPL 745 discouraged excessive adjournments. It provided that after two adjournments by the tenant, or 30 days, the court was required to direct a tenant to deposit rent or use and occupancy that had come due since the petition was served. While often disregarded in practice, the law also limited adjournments to a maximum of 10 days, except with the parties' consent. RPAPL 745 has been amended to provide that an application for a rent deposit cannot be made until a tenant's second request for an adjournment or until the proceeding has been on the calendar for 60 days, where no delay is attributable to a landlord. The 10-day limit for adjournments has been replaced with a 14-day minimum. The first request for an adjournment by a respondent unrepresented by counsel does not count toward the 60-day limit, likely extending as a practical matter the minimum to 90 days or more. And although a court was required to grant use and occupancy under the prior law if the conditions were met, doing so is now discretionary.

Another change to RPAPL 745 that will generate pauses is that HSTPA has eliminated the practice of making an oral application for a rent deposit or use and occupancy. A written motion is now required. That creates the potential for additional adjournments of the motion itself and to brief the motion, in addition to any time a court takes to decide the motion. Furthermore, rent-deposit orders are prospective, requiring payment only of rent and use and occupancy accruing after the order issues. The tenant may not be required to pay any rent already due or which accrues while the motion is pending.

A tenant or occupant can also defend against a rent-deposit application by raising one of the following grounds or defenses: (i) the petitioner is not a proper party to the proceeding; (ii) actual, partial, or constructive eviction if the tenant has vacated the premises; (iii) a Social Services Law § 143-b (Spiegel Law) defense; (iv) a hazardous or immediately hazardous Housing Maintenance Code violation in the apartment or the building's common areas; (v) a colorable rent-overcharge defense; (vi) the apartment violates the certificate of occupancy


or is illegal under the Multiple Dwelling Law or Housing Maintenance Code; or (vii) the court lacks personal jurisdiction over the tenant or occupant.

The new law has greatly reduced, if not eliminated, the penalties for a respondent's failure to comply with a rent-deposit order. Under prior law, if the tenant failed to comply with a rent-deposit order, the court could dismiss the tenant's defenses and counterclaims and grant the landlord a money and even possessory judgment. Under HSTPA, a tenant's defenses or counterclaims are no longer stricken and no judgment may be granted. At the court's discretion, the tenant's time to comply may be extended for good cause, or the court may refer the matter for an "immediate" trial. Still, the urgency suggested by the word "immediate" is belied by HSTPA's statement that this means only that there will be no further adjournments at the respondent's sole request and that the case shall be assigned to a trial-ready part with the trial to commence "as soon as practicable."[6] In reality, the "immediate" trial might be held weeks or months later.

In setting the use and occupancy or rent to be paid, a court may not exceed the regulated rent or the tenant's share under a subsidy program (in effect or expired) unless the tenant has entered into a new agreement to pay the full rent. If the tenant or occupant is on a fixed income, the amount required to be deposited may not exceed 30% of income. Department of Social Services (DSS) and other government housing subsidies are not considered income under this section.

Tenants welcome the amendments to RPAPL 745. They are necessary, they argue, because the prior law thwarted tenants' basic right to invoke the warranty of habitability and withhold rent to compel urgent and necessary repairs to their apartments. The prior law was unjust, they argue, in that it required tenants exercising the right to withhold rent to begin paying rent soon after they began to withhold it, eliminating their only leverage to compel their landlords to fix uninhabitable apartments.

Landlords maintain that RPAPL 745 has been eviscerated. They argue that the bar has been set too low for tenants, who are required only to show that the defense has been "properly" raised, and that the qualifying grounds to defeat a rent-deposit application now encompass nearly all the defenses tenants typically raise. They contend, furthermore, that landlords have little reason to invoke RPAPL 745. Even if a landlord gets a rent-deposit order after months and motion practice, HSTPA penalties will be insufficient to compel tenant compliance. Landlords also note that although the amendments to RPAPL 745 are geared toward residential tenants, the amended RPAPL 745 conflates residential and commercial tenancies, arguably overlooking essential differences relevant to the law's core objectives. The nature of a commercial tenant's relationship to their commercial premises is different from the relationship residential tenants have to their homes, and commercial tenants need less protection. By not compelling commercial tenants to pay rent accruing during the pendency of a proceeding, HSTPA allows commercial tenants to weaponize summary proceedings against commercial landlords. Landlords emphasize the injustice of the Legislature's favoring the tenant's business interests over the landlord's business interests. Some landlords are positing that the Legislature has not prohibited modifications to RPAPL 745 and are modifying their leases accordingly. Whether these lease terms are valid remains to be seen.

### *III. Pauses at the Close of Eviction Proceedings*

Under prior law, if a landlord won a holdover proceeding based on a lease breach against a New York City residential tenant, the tenant had an automatic stay for 10 days under RPAPL 753 to cure the breach. The courts were also empowered to stay the issuance of the warrant for up to six months. HSTPA revised RPAPL 753 to expand to 30 days the automatic post-trial period on breach-of-lease holdovers. It also doubled the length of the discretionary stay to one year and made it available for nonpayment proceedings across New York State.

In exercising its discretion to stay an eviction, the courts may now consider a number of factors, including health, exacerbation of an ongoing condition, a child's enrollment in school, and any other extenuating circumstance affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. In determining whether to grant the stay or in setting the length or other terms of the stay, a court is also required to consider any substantial hardship the stay might impose on the landlord. The prior law carved out exceptions to the court's authority to grant the stay if the landlord intended in good faith to demolish the building and build a new one, or if the landlord established that the occupant is objectionable. HSTPA eliminated the demolition exception, but the exception for objectionable occupants remains. The stay must be conditioned on payment of the amount that will come due during the stay, but HSTPA permits payment by installment. The prior iteration of RPAPL 753 made mandatory the payment of all rent unpaid before a stay could be granted. The amended RPAPL 753 makes this requirement discretionary.

***Tenants believe that HSTPA's additional protections are a small but necessary bulwark against New York's housing-affordability crisis.***

Before HSTPA, the law did not address a tenant's payment of all or some portion of the rent on the disposition of a nonpayment proceeding. By conditioning a New York City stay on the respondent's payment or deposit of the judgment amount prior to execution of the warrant, however, RPAPL 747-a limited the courts' discretion in a nonpayment proceeding to stay issuance or execution of a warrant of eviction or re-letting the premises. HSTPA repealed RPAPL 747-a and enacted RPAPL 731(4), which provides that if a tenant pays the full amount of rent due to the landlord "prior to the hearing of the petition," the payment "shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced."

Many landlords view this as codifying the practice in many courts. Courts generally dismissed these cases, or the parties discontinued them. Nonetheless, landlords question the application of the provision and whether it permits a tenant to make payment before the first court appearance or any later court appearance and whether a tenant must pay the petition amount or the amount that has accrued at the time of payment.

That provision must also be considered in conjunction with the amendments to RPAPL 702, which redefines "residential rent" narrowly to exclude fees, charges, and other penalties. Some argue that although HSTPA precludes a demand for attorney fees allegedly due prior to

the proceeding, attorney fees incurred in connection with the proceeding itself are still recoverable. Others argue that because RPAPL 702 provides that "[n]o fees . . . other than rent may be sought in a summary proceeding," a landlord is relegated to a plenary action to recover its attorney fees. Some courts, we hear, allow attorney fees in a separate, nonpossessory money judgment. Other courts, we are told, believe that landlords may not seek attorney fees in a summary proceeding but that tenants may. Still other courts, we understand, believe that attorney fees may not be awarded as part of a claim or counterclaim but only when fashioning an equitable remedy to restore a tenancy after an eviction or in the context of sanctions. No published opinion has addressed these important questions yet. And RPAPL 702 provides that attorney fees may not be granted on a default judgment, even when a respondent is served personally.

This aspect of HSTPA might lead landlords to eliminate from their leases the right of a prevailing party to collect attorney fees. It might also cause landlords to bring plenary ejectment actions, in which attorney fees may be sought and (for market tenancies) be part of a possessory judgment.

RPL § 238-a now limits late fees to 5% or $50, whichever is less. Fees for background checks are limited to $20 or the actual cost, whichever is less, and the landlord is required to give a tenant a copy of the background check and a receipt for payment and may not charge a fee for a background check if a tenant provides a copy of a background or credit check less than 30 days old. Controversies abound over this new rule, because background checks exceed $20 and because the courts must resolve whether a third party like a real-estate broker may accept fees a landlord may not accept.

Landlords fear that if a residential tenant can pay the rent sought in the petition after many court appearances and many months into the proceeding, and thereby avoid both eviction and any late fees, interest, or legal fees incurred by the landlord in prosecuting the proceeding, they will effectively become interest-free lenders to tenants. The inequity of the situation will be exacerbated if tenants successfully argue that RPAPL 731(4) requires that the tenant pay only the petition amount. That would force landlords to commence another proceeding to recover rent arrears that accrued while the first proceeding was pending.

Although the exclusion of attorney fees applies only to residential tenants, if a commercial tenant in a nonpayment proceeding pays rent under RPAPL 731(4), the landlord may lose its claim for attorney fees, because the matter was not litigated to conclusion, such that the landlord can claim to be the prevailing party, a requirement to recover attorney fees.

Before HSTPA, RPAPL 749 provided that the issuance of a warrant of eviction operated to cancel the lease and annul the landlord-tenant relationship, depriving the court of the authority to vacate the warrant. The issuance of a warrant of eviction no longer annuls the tenancy. The court may, for good cause, stay or vacate a warrant, stay reletting or renovation, and restore a tenant to possession unless the landlord establishes that the tenant withheld the rent due in bad faith. And, profoundly, the new RPAPL now requires vacatur of the warrant if the tenant pays everything prior to execution.

RPAPL 749 now also changes the marshal's notice of eviction from a 72-hour notice to a 14-day notice, thus giving tenants more time to move before an eviction and more time to file an order to show cause to stay an eviction.

## RESIDENTIAL LANDLORDS NOW HAVE A DUTY TO MITIGATE

Before HSTPA, landlords did not have an obligation to mitigate damages if a tenant broke the lease by vacating early. Following time-honored precedents like *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*,[7] New York courts permitted landlords to leave the apartment vacant for the remainder of the lease. The tenant would be liable for rent through the end of the term. HSTPA now provides in RPL § 227-e that landlords of residential units must "in good faith and according to the landlord's resources and abilities, take reasonable and customary efforts to rent the premises at fair market value or at the rate agreed to during the tenancy, whichever is lower." Any lease provision to the contrary is void as against public policy.

Landlords and tenants speculate about the standard courts will apply to determine whether a landlord has exercised a "reasonable and customary effort." With HSTPA's recent passage, no frame of reference determines what constitutes a "customary" effort at mitigation. It is an open question whether a landlord must accept a prospective tenant's first rent offer or whether it is reasonable to continue to market the property to obtain a higher rent if doing so will cause the apartment to remain unrented. In the case of rent-stabilized tenancies, it also remains to be seen whether, given that a preferential rent becomes the maximum rent that can be charged, it is reasonable for a landlord to delay renting an apartment to avoid becoming locked into a long-term tenancy at a reduced rate. It is similarly unclear what impact a landlord's failure to carry the burden of proving damages has on a tenant's liability. A court could find that a landlord's failure to carry the burden excuses the tenant from all liability, or the tenant could be excused from only that portion that accrued before the landlord re-rented the unit.

Landlords and tenants are divided on the fundamental fairness of RPL § 227-e. Landlords argue that HSTPA

has turned the tables on a bedrock assumption negotiated into every residential New York lease for decades. The Court of Appeals made the case against a mitigation rule 25 years ago in *Holy Properties*, stating in that commercial case that "[p]arties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. . . . This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside."[8]

Tenants point to the injustice of a tenant's rent continuing to accrue each month even though the tenant is no longer in possession, while landlords need do nothing to reduce the tenant's financial burden. At a time in New York when there is an affordability crisis, tenants say that the new mitigation rule advances New York's overarching housing policy goals. The rent arrears owed to a prior landlord will make it even more difficult for a tenant already in financial distress to find housing. This perpetuates the cycle of dislocation whose elimination is central to HSTPA.

## LANDLORDS MAY BE LESS WILLING TO SETTLE GARDEN-VARIETY CASES

Most landlord-tenant disputes are resolved through "hallway justice," when the parties reach an agreement on settlement terms before the case reaches trial. This is often the parties' pragmatic decision to avoid the cost, delay, and uncertainty of going to trial. Courts encourage settlements; they lack the resources to try every landlord-tenant case. An essential feature of many settlement agreements is that the tenant consents to a judgment of possession and the issuance of a warrant of eviction to enforce the tenant's agreement to resolve the claimed default. This allows the landlord promptly to recover possession if the tenant violates the terms of the agreement. Rather than go back to court on a motion to enforce the agreement, the landlord can notify the Marshal of the default, and an eviction will be scheduled.

HSTPA, however, has revised RPAPL 749 to require that warrants state the first date on which an eviction can occur, with the result that the "pay out" stipulations used to resolve many nonpayment proceedings must now provide for execution of the warrant on the last payment date (or such earlier date specifically approved by the court), rather than the first payment date, as was the common practice. Under the new law, if the tenant fails to make an earlier payment, the landlord must return to the court to request enforcement of the agreement and accelerate execution of the warrant. It remains to be seen whether the increased costs and pauses in enforcing settlement agreements will discourage landlords from entering into these stipulations. And that will slow the rate of settlement and inundate court calendars. Given HSTPA, some courts outside New York City now allow a landlord's attorney to submit a letter, on notice to the tenants or their attorney, specifying the default, and then the court issues the judgment and warrant without further appearances. And the State Court System is struggling to account for eviction dates for default judgments, for which no stipulation of settlement can provide an eviction date.

The revised RPAPL 749 also provides that a warrant permits eviction only of persons "named in the proceeding." In many cases, occupants' identities are unknown to the landlord and cannot be ascertained. That has led to the nearly universal practice of naming a "John Doe" or "Doe #1" in a summary proceeding to account for unknown occupants or known but unnamed occupants. HSTPA's ramifications on the practice of naming "Doe" respondents is unclear — what will happen when a Marshal or Sheriff will evict name someone not named at all? — but landlords might now provide for heightened surveillance of the people entering and leaving their buildings so they can now name the occupants' children in the eviction petition and warrant. This raises privacy concerns the Legislature did not intend.

To make sure that landlords comply with HSTPA, a new RPAPL 768 makes unlawful evictions a Class A misdemeanor throughout New York State. This carries a criminal connotation and civil penalties from $1,000.00 to $5,000.00 per violation. Conduct constituting an unlawful eviction include using threatening force; interfering or intending to interfere with an ability to use the dwelling; and engaging or threatening to engage in any conduct that prevents or is intended to prevent an occupant from lawful occupancy or to induce vacatur of lawful occupant. If there is a determination that an unlawful eviction occurred, the occupant must be restored to possession.

## COOPERATIVES: THE UNWILLINGLY PROTECTED

Cooperatives have been among HSTPA's most vocal opponents, because HSTPA makes no distinction between tenants in a traditional landlord-tenant relationship and shareholders who are the proprietary lessees of apartments in which they have an ownership interest.

Like other tenants, shareholders must get 30–90 days' notice under RPL § 226-c if the coop board intends to raise maintenance by more than 5%. A shareholder who fails to pay maintenance must be given a RPL § 235-e reminder notice. Failure to provide this notice gives rise to an affirmative defense for the shareholder, with all the open questions and issues associated with this new provision. If a shareholder fails to pay maintenance, the courts may grant a stay of eviction for up to a year, a potential hardship to buildings that rely on maintenance fees to pay a mortgage, real-estate taxes, and other expenses to maintain a building. Boards are also concerned that they

might be limited by the maximum of 5% or $50 for late fees under RPL § 238-a. Similarly, the automatic post-trial period under RPAPL 753 on breach-of-lease holdover proceedings applies to shareholders, extending the time period neighbors must deal with odors, noise, or dangerous or illegal conduct, even if management has been successful in proving that the shareholder's conduct is objectionable. And, like any other landlord, boards are now arguably unable to recover their attorney fees in a summary proceeding. Similarly, because of the new definition of "rent," many cooperatives will likely opt to revise their bylaws to remove additional rents unrecoverable in a summary proceeding under HSTPA. Moreover, coop disputes will be increasingly heard in Supreme Court ejectment actions (in which added rent and attorney fees may be sought) and *Pullman* actions (in which the court might enforce a board vote to evict a shareholder).[9]

Other provisions that seem likely to have been intended for traditional tenants, but which also cover cooperatives, include restrictions on taking more than one month's maintenance as a security deposit or requiring pre-paid maintenance, both of which the amended GOL now prohibits.

## CONCLUSION: DE FACTO RENT REGULATION FOR FAIR MARKET TENANTS, UNENDING PAUSES PREDICTED FOR HOUSING COURTS – LANDLORDS WARN OF DIRE CONSEQUENCES AND FINANCIAL RUIN FOR SMALL LANDLORDS; TENANTS CALL IT A STEP IN THE RIGHT DIRECTION

Many landlords claim that HSTPA's new laws, from the expanded notice requirements and the anti-retaliation provisions of RPL § 223-b to the courts' broad discretion to grant a stay of up to a year and the lengthy delays under the revised RPAPL, create a form of *de facto* rent regulation for unregulated apartments.

The aggregate impact of the many pauses HSTPA created is that many landlords will be unable to traverse a summary proceeding from commencement to warrant in less than a year. This, according to landlords, is an optimistic approximation when the court's nearly unlimited discretion to grant a year-long stay is factored in. HSTPA takes the pauses endemic to the system and makes it a defining, central feature of the eviction process itself.

In the past, the daunting prospect of late and legal fees, as well as a black mark next to the name of a tenant when renting in the future, deterred a tenant's capitalizing on systemic delays. These inherent safeguards have been swept away, landlords say. A tenant will likely face no late or legal fees, even if the tenant loses decisively in court after a protracted legal battle, and future landlords are now barred from basing leasing decisions on blacklists.

Institutional landlords may be able to withstand HSTPA's rules, but small landlords might not. Devastating consequences can befall small landlords deprived of rental income they need to offset the financial burden of a mortgage, taxes, insurance, utilities, and the many costs of property ownership. Small landlords warn that the net effect of these laws will undermine the summary nature of summary proceedings. Summary proceedings were originally enacted to replace the common-law ejectment action, an expensive and dilatory proceeding that can lead to denials of justice. And whereas good-government advocates prefer simple, quick, and inexpensive litigation, landlord advocates worry that HSTPA has turned landlord-tenant litigation into an even more complex, time-consuming, and expensive debacle.

HSTPA's supporters, on the other hand, argue that a landlord will still be able to obtain a judgment for arrears owed, even if obtaining the judgment is postponed. With close to 70,000 homeless in New York City alone, two-thirds of whom are families, and the steady, year-by-year hemorrhaging of rent-stabilized apartments through deregulation, estimated to be approximately 170,000 to date, tenants believe that HSTPA's additional protections are a small but necessary bulwark against New York's housing-affordability crisis. Landlords respond that mitigating the housing affordability crisis is a worthwhile goal, but one that rests with the State of New York to achieve, and that HSTPA abdicates state responsibility for creating affordable housing. Landlords wonder whether the same concern shown for tenants' financial struggles will apply to them if they default on their mortgage.

And in response, tenants say that, some way, somehow, landlords will find a way to make money in New York real estate. They always have.

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1. It is "HSTPA," not "the HSTPA." A definite article (*the*) does not go before an acronym (a short form that one can pronounce). One can pronounce HSTPA as "HISTPAH." But no one would pronounce the initialized "F-B-I" as "Fibee." Thus, a "the" must precede "FBI" but not "HSTPA."

2. *See Asquith v. Redevelop Albany LLC*, 2019 N.Y. Slip Op. 29295, 2019 WL 4666210, at *2 (City Ct., Albany Co.) (granting tenant's claim for return of security deposit based on landlord's failure to provide itemized statement within 14 days of vacatur).

3. DHCR Fact Sheet #9 Renting an Apartment —Security Deposits and Other Charges (Revised 10/19).

4. *See, e.g.*, Gerald Lebovits & Jennifer M. Addonizio Rozen, The Use of Tenant Screening Reports and Tenant Blacklisting — 2019, LEGALEase Pamphlet, N.Y. St. Bar Ass'n (2019), *available at* https://works.bepress.com/gerald_lebovits/345/.

5. *See* RPL § 232-a.

6. *See, e.g.*, *151 Realty LLC v. Alava*, 2019 N.Y. Slip Op. 29311, 2019 WL 5058609, at *2 (Civ. Ct., Bronx Co.).

7. 87 N.Y.2d 130, 87 N.Y.S.2d 964 (1995)

8. *Id.* at 134 (internal citations omitted).

9. *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 1174 (2003); *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 782 N.Y.S.2d 554 (Civ. Ct., N.Y. Co. 2004); *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 790 N.Y.S.2d 813 (Civ. Ct., N.Y. Co. 2004).