LANDLORD-TENANT LAW: FOUNDATIONAL KNOWLEDGE FOR AN EVOLVING PRACTICE AREA

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INTRODUCTION

Ask any landlord about tenants' rights and they are bound to tell you the same answer that any tenant would give about the rights of landlords in New York State. We, the authors, assure you: you are due for an earful. You are bound to hear how tough it is for all parties engaged in real property disputes between property owners and property occupants. Enter the realm of landlord and tenant law but enter at your own risk.

The purpose of our survey is to introduce practitioners to a vital and vibrant practice area with an immense impact on the ways that housing underpins the fabric of our communities. Our purpose is also to provide some orientation to practicing in the area since it has undergone monumental permanent and temporary shifts over the past half-decade or so. We aim to provide a balanced vantage point to colleagues who may advocate for our neighbors on either side of these disputes. As such, it is our position that property owners and occupants face equally important and valid challenges.

First, we will introduce summary proceedings for the right to recover possession of real property in New York. Next, we will highlight some of the recent changes to the laws governing these matters and discuss some of the temporary and emergency measures taken due to the COVID-19 pandemic. Last, we will provide a glimpse of what is to come from the newly enacted laws that provide a private right of action for the remediation of housing quality issues. The contents of this *Survey* have been compiled by practitioners in upstate New York. As such, we hope to reach colleagues across the state, but caution that local rules, especially in New York City, may be in effect where some readers may practice.

I. GENERAL OVERVIEW OF LANDLORD-TENANT LAW

Landlord and tenant law is only partially about landlords and tenants. It is completely about the rights and responsibilities of owners and occupants. These rights and responsibilities are important, and the best way to ensure success within the practice area is to understand the procedural systems that have been created for the swift resolution of disputes. We will explore what these rights, responsibilities, and special systems are and how they are used to resolve applicable disputes.

First, "landlord and tenant law" refers to a dynamic collection of statutes from a variety of legal topic areas codified in the laws of the State of New York. Primarily, these laws come from article 7 of the Real Property Law (RPL)[1] or article 7 of the Real Property Actions and Proceedings Law (RPAPL).[2] This subject area also includes relevant sections of the General Obligations Law (GOL),[3] the Multiple Residence Law (MRL),[4] the Human Rights Law (HRL),[5] and, because most of these laws are invoked during a civil dispute, we cannot leave out the Civil Practice Laws and Rules (CPLR).[6] Local ordinances also play a vital role, especially concerning housing and building standards, so it is important for practitioners to be aware of what local rules apply.

This cadre of rules and regulations governs both a major industry and provides basic human rights. As such, it is inherently impossible for these laws to please everyone. However, it is possible for them to provide an important balancing force. The current legal landscape brings this balance and allows for the flexibility needed when temporary challenges affect either party to a potential dispute, while also acting as a stable foundation for policy innovations yet to come.

The landscape is home to both permanent and temporary rules. The foundation of these rules drastically shifted with the

1. N.Y. REAL PROP. LAW art. 7 (McKinney 2023).
2. N.Y. REAL PROP. ACTS. LAW art. 7 (McKinney 2023).
3. *See* N.Y. GEN. OBLIG. LAW art. 7 (McKinney 2023).
4. *See generally* N.Y. MULT. RESID. LAW (McKinney 2023).
5. *See* N.Y. EXEC. LAW. art. 15 (McKinney 2023).
6. *See generally* N.Y. C.P.L.R. (McKinney 2023).

Housing Stability and Tenant Protection Act (HSTPA) in 2019.[7] As we have learned by living through the COVID-19 pandemic, temporary rulemaking measures are subject to come and go as needed and have recently appeared in the form of temporary executive and administrative orders, as well as legislation that has been designed to expire.[8] As the pandemic ramped up, advocates, parties, and the bench had just begun to get acquainted with the HSTPA changes. Then, COVID-19 prompted law and policymakers to enact temporary relief measures[9] that brought joy to some, outrage to others, and uncertainty to all. We will delve into these changes in detail later.

For the adjudication of disputes regarding the right to possess and recover real property, the law creates special adjudications called summary proceedings.[10] These summary proceedings are condensed civil actions, and they exist to allow parties to seek resolutions more efficiently than pursuing the same relief through a standard civil action at the trial level.[11] Many are more familiar with the colloquial name for these types of actions—evictions—based on the primary remedy available for litigants, the removal of an occupant from an owner's property.[12] The RPAPL article 7 provides rules to determine, as a matter of statutory authority, exactly who has and does not have standing to use summary proceedings.[13]

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7. Housing Stability and Tenant Protection Act, 2019 N.Y. Sess. Laws 154–214 (McKinney).

8. *See, e.g.*, 9 N.Y.C.R.R. § 8.202.8 (2020) (providing for a 90-day pause on evictions in late March 2020); *see also* Administrative Order AO/268/20, Seventh Judicial District (Nov. 17, 2020), https://ww2.nycourts.gov/sites /default/files/document/files/2020-11/ao%20eviction%20proceedings%20268.pdf (revising the correct form for eviction petitions in light of the COVID-19 pandemic); COVID-19 Emergency Rental Assistance Program of 2021, 2021 N.Y. Sess. Laws 163–69 (McKinney).

9. *See* 9 N.Y.C.R.R. § 8.202.8; *see also* Administrative Order AO/268/20, Seventh Judicial District (Nov. 17, 2020), https://ww2.nycourts.gov/sites/default/files/docu ment/files/2020-11/ao%20eviction%20 proceedings%20268.pdf.

10. *See* N.Y. REAL PROP. ACTS. LAW § 701 (McKinney 2023).

11. *See* N.Y. REAL PROP. ACTS. LAW art. 7 (McKinney 2023). These proceedings differ greatly from non-summary proceedings, which the Court of Appeals once described as "expensive and dilatory proceeding[s] which in many instances amount[] to a denial of justice." Reich v. Cochran, 94 N.E. 1080, 1081 (N.Y. 1911).

12. *See* N.Y. REAL PROP. ACTS. LAW § 749 (McKinney 2023).

13. *See* N.Y. REAL PROP. ACTS. LAW § 721 (2023).

These summary proceedings to recover possession of real property are narrow in scope. An action to recover real property under article 6, formerly known as ejectment, is the name for a civil matter seeking to remove an occupant from an owner's real property when the facts of the case do not allow litigants to use summary proceedings to pursue resolution.[14]

II. PROCEDURAL & CASELAW DEVELOPMENTS

A. Types of Eviction Proceedings

1. The Nuts & Bolts of Summary Proceedings

Article 7 of the RPAPL is the primary source of structure to these special proceedings. RPAPL section 701 establishes which courts may have original jurisdiction.[15] First, the law imposes a geographical restriction.[16] Typically, this means a justice court in a town or village, or an appropriate city or district court that has jurisdiction based on the location of the subject property.[17] RPAPL section 702 defines rent, and RPAPL section 711 further defines the status of a tenant, who is an occupant of one or more rooms in a rooming house or a residence, but excludes transient occupants.[18] The key components to defining a lawful occupant are time and intent, as the law grants this protective status to people who purposefully engage in a relationship to rent a room, apartment, or entire dwelling, and who have continued to live there for at least thirty days.[19]

2. RPAPL Section 711 - Existence of Landlord-Tenant Relationship

RPAPL section 711 defines numerous grounds where landlord-tenant relationships exist, and in doing so, defines the two most

14. *See generally* N.Y. REAL PROP. ACTS. LAW art. 6 (McKinney 2023) (prescribing rules and procedures for such actions).
15. N.Y. REAL PROP. ACTS. LAW § 701(1) (McKinney 2023).
16. *Id.* § 701(2).
17. *See id.* § 701(1).
18. *See* N.Y. REAL PROP. ACTS. LAW §§ 702(1), 711 (McKinney 2023).
19. *Id.* § 711.

common types of cases.[20] RPAPL section 711(1) defines an eviction matter in its simplest form: the holdover. A holdover tenant is someone who had the right to possess the property, but whose right has terminated.[21] Adverse positions in a holdover case are simple. The petitioner claims that the yearly or month-to-month lease has expired, yet the respondent is an occupant who remains in possession.[22] Here, a warrant for eviction is the remedy sought.[23] However, when delinquency of rent is the basis of the dispute, the petitioner seeks either the rental arrears or possession. This situation is the basis of a non-payment case, pursuant to RPAPL section 711(2).[24] Interestingly, non-payment cases are distinguished from cases where other contractual breaches are at play, as any case alleging that a lease violation has occurred for reasons other than rental arrears are a function of holdover cases and come along with additional requirements.[25] These actions are called "objectionable tenancy" cases.[26]

Additional grounds for evictions are carved out in some instances where specific types of legal violations may exist. For instance, an eviction action may be appropriate if taxes are unpaid, where safety equipment is inadequate, or if the place being occupied is used for illegal purposes.[27]

3. RPAPL Section 713 - No Landlord-Tenant Relationship

Article 7 goes on to further define specific instances where no landlord-tenant relationship exists, but summary proceedings are still appropriate.[28] In these matters, as defined by RPAPL section 713, only a 10-day notice is required before an action may be brought.[29] These 10-day notices are among the shortest notice periods afforded before a case may be brought, and allow for the owner to bring what are colloquially referred to as a "squatter's petition."[30]

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20. *Id.*
21. N.Y. REAL PROP. ACTS. LAW § 711(1) (McKinney 2023).
22. *See id.*
23. *See* N.Y. REAL PROP. ACTS. LAW § 749 (McKinney 2023).
24. N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 2023).
25. *See id.* § 711(1).
26. *See id.*
27. *See* N.Y. REAL PROP. ACTS. LAW §§ 715(1), 715-a(1) (McKinney 2023).
28. *See* N.Y. REAL PROP. ACTS. LAW § 713 (McKinney 2023).
29. *Id.*
30. *See id.* § 713(3).

Additionally, no landlord-tenant relationship may exist if the property changes ownership.[31] For instance, if the property is sold, ownership rights are transferred due to the termination of a life estate, or a property is foreclosed-upon and its sale or transfer is perfected, circumstances may exist where the new owner does not engage in any action that may lead to the creation of a landlord-tenant relationship, and summary proceedings pursuant to RPAPL section 713 may be appropriate.[32]

Practitioners should lean on the blackletter law but should also remain wary of circumstances that could change the overall theory of a case. For instance, if a home is foreclosed-upon, and the occupant, post-foreclosure, is the former owner, it is safe to conclude that no landlord-tenant relationship exists.[33] Such a situation would imply the type of required preliminary notice to be served. However, if the occupant, post-foreclosure, was a tenant to the owner that was foreclosed-upon, advocates may make an argument that the occupant is a lawful occupant and deserves to be noticed in a different way.[34] Types of predicate notices will be discussed later but know this: they matter and are required for a case to be viable. Similar issues may arise when other non-traditional fact patterns present themselves, such as when a rent-to-own contract may be at play or if an occupant entered under an atypical tenancy, such as a tenancy-at will.[35]

4. RPAPL sections 713-a, 715 and 715-a - Elderly, Medical Care, Improper Use & Illegal Cannabis Businesses

In rare circumstances, government entities are given the power to commence an action to remove an occupant. RPAPL section 715 provides a mechanism to confront occupancies which

31. *See* N.Y. REAL PROP. ACTS. LAW §§ 713(1), (5), (6).

32. *Id.*

33. *See* REAL PROP. ACTS. § 713(5) (implicitly characterizing an eviction after a foreclosure as one where "no landlord-tenant relationship exists).

34. *See* N.Y. REAL PROP LAW § 1305(2) (McKinney 2023); *see also Tenants Rights in Foreclosed Properties*, N.Y. DEP'T OF FIN. SERVS., https://www.dfs.ny.gov/consumers/help_for_homeowners/tenants_rights_foreclosure#:~ :text=While%20the%20Foreclosure%20is%20Pending&text=Before%20ownership%20is%20transferred%20to,while%20the%20action%20is%20pending (last visited Feb. 27, 2024).

35. *See* N.Y. REAL PROP. LAW § 228 (McKinney 2023).

further illicit purposes.[36] If a tenant is determined to be operating some sort of organization that is against the law, authorized government agencies are granted the power to demand that the owner take action within five days, or the agency is given license to petition for the occupant to be removed.[37]

These threshold provisions have been the subject of periodic updates over the years as policy evolves. For instance, RPAPL section 713-a was enacted to steer parties toward protections and procedures specific to circumstances regarding the elderly and occupants who require medical care.[38] RPAPL section 715-a was only enacted in 2023 to address the developing needs and regulation of the cannabis industry, giving both government entities and owners enhanced rights to take swift action to remove illegal cannabis-related businesses from possession of property.[39] Here, a government agency with police powers is given a license to provide an ultimatum to the landlord: "Bring an action to evict a tenant who is breaking the law, or we will!" Survivors of domestic violence are also afforded unique rights in the context of eviction matters.[40]

B. Procedural Requirements Imposed by RPAPL

1. The Prima Facie Case

Much like any other civil litigation, practitioners seeking to bring an action may only have access to an incomplete view of the dispute. That is, an allegation of harm experienced, and relief sought. Because summary proceedings are so technical, it's important to focus on creating a solid case foundation so that it can stand up to the litigation process. The pleadings must contain certain elements and be predicated by proper notice to be viable.[41] To do so, practitioners must establish the elements of a prima facie case. These elements are

36. *See* N.Y. REAL PROP. ACTS. LAW § 715(1) (McKinney 2023).
37. *Id.*
38. *See* N.Y. REAL PROP. ACTS. LAW § 713-a (McKinney 2023).
39. N.Y. REAL PROP. ACTS. LAW § 715-a(1) (McKinney 2023).
40. *See* N.Y. REAL PROP. LAW § 227-c(1) (McKinney 2023); *see also* N.Y. REAL PROP. ACTS. LAW § 744(1) (McKinney 2023).
41. *See generally* N.Y. REAL PROP. ACTS. LAW § 741 (McKinney 2023) (describing the required contents of a petition).

standing, possession, privity of contract, and conforming to procedural due process by serving the correct predicate notice.

A. Proper Petitioners & Standing

The petitioner must have a right to possession that supersedes and is impeded by the occupant's possession.[42] After all, the purpose of these actions is to recover—not obtain—possession. Commonly, this would mean a landlord, lessor, or other owner who has lost possession and is entitled to have it returned. However, there are some exceptions created to further public policy.[43] As such, standing is established based on the rights of the petitioner. RPAPL section 721 provides a lengthy list of 11 types of proper petitioners.[44] These petitioners are primarily owners or agents of owners.[45] In short, establishing standing is sometimes simple, but technicalities abound. You've been warned.

If these provisions do not seem to describe a given owner and occupant situation, an action under RPAPL article 6 may be the only option.[46] Whether approaching any given occupancy dispute from the position of a petitioner or respondent, it's important to determine whether the party seeking to re-possess the property has an ultimate right to it, and under what circumstances.

B. Is There Actual Possession or Abandonment?

The second part of the case which a landlord needs to establish is whether the tenant or occupant remains in actual possession of the rental unit.[47] This is important since possession is at the heart of these summary proceedings and must be established for the court to retain subject-matter jurisdiction over the case.[48] There are many instances which show that the tenant or occupant remains in

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42. *See* N.Y. REAL PROP. ACTS. LAW § 721 (McKinney 2023).

43. *See id.* (listing several other categories of people authorized to maintain a proceeding).

44. *Id.*

45. *See id.*

46. *See generally* N.Y. REAL PROP. ACTS. LAW §§ 621, 623, 625 (McKinney 2023) (prescribing parties who may maintain an action under RPAPL article 6).

47. *See* N.Y. REAL PROP. ACTS. LAW § 741(2) (McKinney 2023); *see also* Cammarota v. Bella Vista Dev. Corp., 451 N.Y.S.2d 3309, 310 (App. Div. 3d Dep't 1982); Warrin v. Haverty, 133 N.Y.S. 959, 962 (App. Div. 1st Dep't 1912).

48. *See Cammarota*, 451 N.Y.S.2d at 310.

possession. The easiest to show is that the respondent still has keys to the property.[49] By showing to the court that the respondent continues to have unfettered access to the rental unit, the court will be able to easily establish subject-matter jurisdiction.[50]

A petitioner can also demonstrate that the respondent maintains their personal possessions in the rental unit in such a way as to make a showing of having control and dominion over the rental unit.[51] The receipt of mail at the unit or if the utilities remain switched on also reflect that the respondent remains in possession of the rental unit.[52] However, there are some hazards with this approach. The respondent may assert to the court that the unit is abandoned and all items that remain are likewise abandoned.[53] Practitioners should take steps to ascertain whether the unit remains occupied or not. This can be done through the sending of notices seeking communication from the tenant or occupant. Assumptions should not be made about whether the unit is abandoned or not as there are potential complications which could arise in the form of unlawful entry or illegal eviction allegations being raised.

C. Privity of Contract - Prime Tenant or Subtenant

Petitioners and practitioners should be fully aware of who is residing on the property and what that person's lawful right to possession derives from. In many instances, the landlord should know the name or names of the persons who are renting the unit. There are situations in which a tenant may move in their spouse and other family members who were not originally part of the lease agreement.

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49. Fishel's Est. v. Baronelli, Ltd., 463 N.Y.S.2d 1009, 1010 (N.Y.C. Civ. Ct. N.Y. Cnty. 1983) ("Traditionally, keys are considered to be a symbol of possession.").

50. *Cf.* 34 Crescent St. Assocs. LLC. V. U.S. Fish Depot Corp., 2002 N.Y. Slip. Op. 50720(U), at 1 (App. Term 2d Dep't 2002) (implicitly equating possession with access); *see also* Eight Cooper Equities v. Abrams, 539 N.Y.S.2d 673, 675–76 (Sup. Ct. N.Y. Cnty. 1989).

51. *See* Hudsoncliff Bldg. Co. v. Houpouridou, 874 N.Y.S.2d 654, 655 (App. Term 1st Dep't 2008); *see also* Knowles v. 21st Mortg. Corp., 199 N.Y.S.3d 917, 922–23 (N.Y.C. Civ. Ct. Queens Cnty. 2023).

52. *See Houpouridou*, 874 N.Y.S.2d at 655 (mail); *see also* 542 E. 14th Street LLC v. Lee, 883 N.Y.S.2d 188, 191 (App. Div. 1st Dep't 2009) (utilities).

53. *See* Riverside Rsch. Inst. V. KMGA, Inc., 497 N.E.3d 669, 670–71 (N.Y. 1986) (describing implicit and explicit abandonment).

While this may be frustrating, it is not improper as the law allows a tenant the right to move these family members into the unit.[54] A failure to determine the names of all occupants in the property may have an unintended consequence on the eviction case in that not all persons may be removed by the marshal or sheriff.[55]

There are of course times when the tenant who entered into a lease with the landlord decides to sublet the unit to another. This new occupant has no privity of contract with the landlord and therefore there is no direct cause of action against this occupant without also bringing an action against the prime tenant.[56] The need to evict the prime tenant is because the subtenant derives their right of possession from the prime-tenant and the only legal way to recover possession against this occupant will be to remove the prime-tenant as well.[57] It should be noted that only possession may be sought against a subtenant while possession and a money judgment may be sought against the prime tenant.[58]

D. Predicate Notices

Finally, a viable case must be brought upon the proper predicate notice for the type of case being pursued. These notices are intended to be simple and ultimately safeguard against frivolity and unnecessary litigation. RPL section 226-c establishes the requirements for notices before a holdover case may be commenced.[59] Petitioners must notify prospective respondents, typically tenants, that the lease will not be renewed, and if the tenant stays beyond the expiration date, the petitioner may commence a summary proceeding.[60] The law mandates the same requirement in the event that a landlord wishes to raise the rent by more than five percent,[61] so this notice essentially exists to allow the landlord to alter the contract. These notices are also timed, and based on the amount of time a tenant or occupant has

54. N.Y. REAL PROP. LAW §235-f(2) (McKinney 2023).

55. *See* N.Y. REAL PROP. ACTS. LAW § 749(1) (McKinney 2023).

56. *See* Asherson v. Schuman, 483 N.Y.S.2d 253, 254–55 (App. Div. 1st Dep't 1984).

57. *See id.*

58. *See id.*; *see also* Stewart v. Long Island R.R. Co., 8. N.E. 200, 201–02 (N.Y. 1886).

59. N.Y. REAL PROP. LAW § 226-c (McKinney 2023).

60. *See id.* § 226-c(1).

61. *Id.*

maintained possession.[62] For occupation of less than a year, 30 days' notice is required.[63] For between one and two years, a 60-day notice is required, and for more than 2 years, tenants are afforded the right to 90 days of notice.[64] This is to be contrasted with the 10 days of notice provided to an occupant who is not otherwise entitled to possession.[65] Further requirements exist for a case to proceed due to an alleged breach of a lease, aside from the non-payment of rent. An additional notice to cure must be issued before a notice to terminate can be effective.[66]

Notices for non-payment proceedings are different. First, landlords must notify tenants that current rent is late by issuing a 5-day late notice pursuant to RPL section 235-e(d).[67] Then, a demand for rent must be made pursuant to RPAPL section 711(2) to include the amounts owed.[68] Oftentimes, landlords choose to issue these notices together, and they may colloquially be referred to as the "5-and-14-day notice." Like the predicate notice requirements for holdover cases, the notices allow the tenant to respond and solve the alleged issue before the dispute can be brought before a judge.

Whether pursuing or defending against an action for non-payment or a holdover, ensuring that the elements of a prima facie case are met are critical. Along with these elements, practitioners should pay close attention to the notice requirements for predicate notices, as well as petitions and notices of petition that are required pursuant to RPAPL section 735.[69] Additionally, RPAPL section 741 lists requirements for the contents of the petition itself, which are rather technical and subject to local rules.[70]

62. *Id.* § 226-c(2)(a).
63. *Id.* § 226-c(2)(b).
64. N.Y. REAL PROP. LAW §§ 226-c(c), (d) (McKinney 2023).
65. N.Y. REAL PROP. ACTS. LAW § 713 (McKinney 2023).
66. N.Y. REAL PROP. ACTS. LAW §711(6) (McKinney 2023).
67. N.Y. REAL PROP. LAW § 235-e(d) (McKinney 2023).
68. REAL PROP. ACTS § 711(2).
69. *See* N.Y. REAL PROP. ACTS. LAW § 735 (McKinney 2023).
70. N.Y. REAL PROP. ACTS. LAW § 741 (McKinney 2023).

2. Landlord-Tenant Law Post-HSTPA

In 2019, New York State passed the Housing Stability and Tenant Protection Act (HSTPA).[71] This overhauled the laws governing landlord-tenant relationships across the state. These changes primarily serviced the rights of tenants and occupants.

The most significant change that HSTPA brought about was an increase in the amount of time that an eviction could take from notice to execution of a warrant. Prior to HSTPA, a tenant could expect to be served with pleadings five to twelve days before court, now the tenant must be served between ten and seventeen days before they are to appear.[72] RPAPL section 745 was also amended to provide that any party can request an adjournment of at least fourteen days, which the court is obligated to provide.[73] This time may be used to conduct further information-gathering or to consult with counsel.

Another effective protection is that tenants can redeem their tenancy by paying the total amount owed after the case has concluded if there was a money judgment issued.[74] Tenants may satisfy the judgment up to the date of the warrant of eviction being executed by the marshal or sheriff.[75] But the new protections were not only aimed at changing the procedural landscape of evictions, it also addressed the unlevel playing field that existed between landlords and their tenants. Gone are the days where a landlord could charge a late fee of their choosing, and while daily late charges were frowned upon by the courts, it was finally eliminated by HSTPA.[76] Landlords were also prohibited from charging excessive administration fees from tenants applying for a rental unit, limiting those amounts to twenty dollars total for background and credit checks.[77] Further, the use of "Do Not Rent" lists were banned, and prior evictions could not be a basis to deny a rental unit to a tenant.[78]

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71. Housing Stability and Tenant Protection Act, 2019 N.Y. Sess. Laws 154–214 (McKinney).

72. N.Y. REAL PROP. ACTS. LAW § 733(1) (McKinney 2023).

73. N.Y. REAL PROP. ACTS. LAW §745(1) (McKinney 2023).

74. *See* N.Y. REAL PROP. ACTS. LAW § 749(3) (McKinney 2023).

75. *Id.*

76. *See* N.Y. REAL PROP. LAW § 238-a(2) (McKinney 2023).

77. *Id.* § 238-a(1)(b); *see also* N.Y. JUD. LAW § 212(1)(x).

78. *See* N.Y. REAL PROP. LAW § 227-f (McKinney 2023).

Changes were also implemented that addressed security deposits. There is no longer a "reasonable time" standard for a landlord to return the deposit.[79] The landlord is required to address it within fourteen days after the tenant surrendered possession.[80] Further, if a tenant chooses to break their lease early, landlords can no longer allow the unit to sit empty and then sue for the unpaid future rent without first showing their efforts to mitigate their losses.[81]

Significantly, the law governing unlawful evictions was strengthened to include criminal penalties for engaging in self-help eviction efforts.[82] Hefty penalties were created which allow the courts to impose fines of up to $100 per day until a tenant is restored to possession, and damages of $1,000 to $10,000 per violation may be assessed at the court's discretion.[83] Unlawful evictions were also expanded to include constructive evictions, including course of conduct actions by landlords that resulted in tenants eventually giving up and moving when faced with unsavory behaviors initiated by the landlord.[84]

C. Tenant Protections Under RPAPL

1. Defenses to Non-Pay Cases

The non-payment eviction case is certainly the quicker of the evictions to bring to court, however, this does not mean that it will be the easiest. There are several defenses that a tenant may be able to raise in response to an eviction based upon non-payment of rent.

A. Payment of Rent

The most obvious defense that a tenant can present to a non-payment case is that the rent alleged due and owing was in fact paid in full.[85] This payment could have taken place following the service of the Demand for Rent, or at any time prior to the hearing of the

79. N.Y. GEN. OBLIG. LAW § 7-108(e) (McKinney 2023).
80. *Id.*
81. *See* N.Y. REAL PROP. LAW § 227-e (McKinney 2023).
82. N.Y. REAL PROP. ACTS. LAW § 768(2)(a) (McKinney 2023).
83. *Id.* § 768(2)(b).
84. *See id.* § 768(1).
85. *See* N.Y. REAL PROP. ACTS. LAW § 731(4) (McKinney 2023).

petition.[86] Proof from a tenant will generally be in the form of receipts for the rent being paid. Landlords are obligated to provide receipts for all rental payments, except for those made by personal checks; however, a tenant can make a request for a receipt for any rent paid with a personal check.[87] While mobile banking options have made many disputes over payments easier, there is still no shortage of landlords taking payment in cash only. This can make proving payments difficult, especially if tenants do not hold on to receipts. However, if a tenant is able to prove they paid the amounts required in the petition, the case will be dismissed.[88]

Further, as discussed above, petitions cannot seek amounts which are not deemed to be rent under the law.[89] Where the petition is seeking amounts other than rent, such as late fees, legal fees, and utilities, as the basis for eviction, the court is likely to dismiss the petition for lacking a cause of action.[90]

B. The Warranty of Habitability

Every tenant has a right to live in a property which is habitable.[91] When a tenant is in a unit which needs repair but has a landlord who refuses to make needed repairs, the tenant may withhold their

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86. *Id.*

87. N.Y. REAL PROP. LAW § 235-e (McKinney 2023).

88. REAL PROP. ACTS. § 731(4).

89. N.Y. REAL PROP. ACTS. LAW § 702(1) (McKinney 2023).

90. *See id.*; *see also* N.Y. REAL PROP. LAW §§ 234-a(a), 235-a(1), 238-a(2) (McKinney 2023).

91. REAL PROP. LAW § 235-b(1).

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.
>
> *Id.*

rent.[92] Withholding rent is when a tenant does not pay their landlord due to the conditions on the property.[93] The tenant can hold on to the money until the landlord remedies the issues.[94] If a landlord takes a tenant to court over this issue, the court can allow the tenant to hold on to the money until the landlord makes repairs, at which time the back rent will become due.[95]

This mechanism is a powerful tool that tenants can use to persuade their landlords to make repairs when they otherwise would have been unable to. It should be noted by tenant advocates that should a tenant choose to withhold their rent to force a landlord to make repairs, those funds should be placed in escrow or otherwise held each month and should always be available. Although many tenants are successful in securing an abatement from the court for this issue, those same tenants fail to save the monthly rent.

There is a modified version of this defense which relies upon the assistance of the local Department of Social Services. Where some or all of the rent is being paid by the local Department of Social Services and there has been a stop rent ordered by the local code enforcement department, the tenant may have a complete defense to an action seeking to evict for non-payment of rent.[96] Prior to a non-payment petition being filed, the tenant is entitled to certain notices prior to the filing of the case. These are the five- and fourteen-day

92. The right to withhold rent is not codified specifically in law but is rather interpreted through REAL PROP. LAW § 235-b, REAL PROP. ACTS. LAW § 755 (McKinney 2023), and *Park West Management Corporation v. Mitchell*, 391 N.E.2d 1288, 1294 (N.Y. 1979).

93. *See Mitchell*, 381 N.E.2d at 1294.

94. *See id.*

95. *See* Law v. Franco, 690 N.Y.S. 2d 893, 896 (Sup. Ct. Bronx Cnty. 1999).

96. N.Y. SOC. SERVS. LAW § 143-b(5)(a) (McKinney 2023).

> It shall be a valid defense in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building wherein such welfare recipient resides which relate to conditions which are dangerous, hazardous or detrimental to life or health as the basis for non-payment.
>
> *Id.*

notices.[97] These notices must be served on the defendant personally, or by nail and mail service.[98]

C. Laches or "Stale Rent"

Another issue that may come up in non-payment cases is where the landlord has chosen to wait an overly long period of time before seeking to evict for non-payment of rent.[99] Whether the landlord was simply waiting to see whether the tenant would come through on a promise to make payment or simply forgot to bring an action, timeliness may be a factor in whether the landlord can get the relief being sought.

This equitable defense is when a landlord waits a significant amount of time (six months or more) before filing a case against the tenant for back rent.[100] This is referred to as laches.[101] It involves a tenant who has been paying on time for six or more months but had arrears previously that were never paid.[102] For whatever reason the landlord did not petition for these amounts when they were due. Often in these cases the courts will rule that the landlord cannot sue for the possession of the apartment and rather can only sue for the back amounts, in an alternative forum.[103]

There are four elements to the defense of laches.[104] The first is that there is conduct by an offending party giving rise to the present situation.[105] Second, there must have been some delay by the

97. N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 2023); N.Y. REAL PROP. LAW § 235-e(d) (McKinney 2023).

98. N.Y. REAL PROP. ACTS. LAW §735 (McKinney 2023).

99. *See* Dedvukaj v. Madonado, 453 N.Y.S.2d 965, 967 (N.Y.C. Civ. Ct. 1982).

100. *See id.* at 967–68 (citing City of New York v. Betancourt, 362 N.Y.S.2d 728, 729–30 (App. Term 1st Dep't 1974)); *see also* Levister Redevelopment Co., LLC v. Mongomery, 824 N.Y.S.2d 763 (Mount Vernon City Court 2006) (table) (describing the Second Department's practice of adhering to a six-month period); Rodriguez v. Torres, N.Y.L.J., Jan. 22, 2003 (N.Y.C. Civ. Ct. Kings County), https://www.law.com/newyorklawjournal/almID/12025389 26512/.

101. *Dedvukaj*, 453 N.Y.S.2d at 968.

102. *See id.* at 967 (citing City of New York v. Betancourt, 359 N.Y.S.2d 707, 709 (N.Y.C. Civ. Ct. N.Y. Cnty. 1982)).

103. *See id.* at 969.

104. *Dedvukaj*, 453 N.Y.S.2d at 968.

105. *Id.*

landlord in seeking relief despite having the opportunity to do so.[106] Third, the tenant has relied upon the delay or lack of notice that the landlord would seek to evict for the alleged arrears.[107] Lastly, the tenant will suffer injury or prejudice if the case is allowed.[108]

2. Defenses to Holdover Petitions

Although a holdover eviction may require more time before the matter reaches court, the benefit that a landlord will see in being patient is that the tenant will have fewer defenses available to them. There are, however, a couple of matters that practitioners will want to be aware of when commencing this type of action.

A. Retaliation

While there is no requirement for "good cause" evictions in New York and since the landlord does not need to state a reason why they are seeking to terminate the tenancy, a tenant may be able to raise a defense of retaliation.[109] This defense is an affirmative defense and must be asserted at the first available opportunity.[110] Tenant advocates may wait to raise this defense at the first adjourned hearing in order to take advantage of the right to request a fourteen-day adjournment and gather further information to support the defense.[111]

If the tenant can establish that the landlord is seeking to substantially alter the terms of the tenancy, served a notice to quit, or commenced an eviction proceeding there is a presumption[112] that the landlord is retaliating against the tenant if any of the following was done by the tenant within the past twelve months: 1) made a good faith complaint to the landlord, their agent, or a local codes department; 2) taking action to enforce rights under the lease or local, state,

106. *Id.*
107. *Id.*
108. *Id.*
109. N.Y. REAL PROP. LAW § 223-b(4) (McKinney 2023).
110. *Id.*; *see also* N.Y. REAL PROP. ACTS. LAW § 731(2) (McKinney 2023) (requiring notice to respondent that any defenses he or she may have could be waived if not raised).
111. N.Y. REAL PROP. ACTS. LAW § 745(1) (McKinney 2023).
112. REAL PROP. §§ 223-b(5).

or federal laws; or 3) engaged in a tenant's union.[113] The effect of the presumption of retaliation requires the landlord to establish a non-retaliatory motive by a preponderance of the evidence.[114]

B. Reinstatement of the Tenancy

Practitioners should also be aware of what actions their client landlords may be taking after they have been asked to bring a holdover eviction. Termination of the tenancy is not without pitfalls. There are myriad ways in which this can be undone, and the most common is the acceptance of rent and invalidation of the notice to quit that was served.

Tenants have a small window of time between when the notice to quit becomes effective and when the petition is filed with the court. It is during that time that rent can be paid to reinstate the tenancy agreement.[115] This is not absolute however as the tenant may be owing arrears for prior months, or the landlord may receive the rent, but may not actually accept it.[116]

Acceptance varies based upon the method of payment. Cash and electronic money transfers have a much smaller window of time for a landlord to return the funds as they have knowledge that the rent was paid. Checks and money orders however differ based upon how long the landlord retains the form of payment. While there is no definitive amount of time set, it would be wise for any practitioner to be aware of their client's actions during this window of time.

D. COVID-19 and Evictions in New York State

A little over six months after the enactment of the Housing Stability and Tenant Protections Act of 2019, the world shifted profoundly with the emergence of COVID-19. When the virus began to sweep across New York, then Governor Cuomo acted alongside the Judiciary to place a pause on all court proceedings. On March 16,

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113. REAL PROP. §§ 223-b(1)(a)–(c).

114. REAL PROP. §§ 223-b(5).

115. Associated Realties v. Brown, 554 N.Y.S.2d 975, 976 (N.Y.C. Civ. Ct. N.Y. Cnty. 1990).

116. *See* Georgetown Unsold Shares, LLC v. Ledet, 12 N.Y.S.3d 160, 164 (App. Div. 2d Dep't 2015); 205 E. 78th St. Assoc. v. Cassidy, 598 N.Y.S.2d 699, 699 (App. Div. 1st Dep't 1993) (mem.).

2020, Chief Administrative Judge Lawrence Marks issued an administrative order closing the New York court system to all in-person business and staying any pending cases.[117]
Over the following months, the court began to implement, in coordination with executive orders from the governor, how the courts could operate. While some legal matters were deemed vital, such as criminal arraignments, nearly all other matters were administratively stayed.[118] Pending eviction cases were held in abeyance while tenants and landlords waited to hear when their case would resume, and new filings were turned away at many of the courthouses across the State.[119]

1. Executive and Administrative Orders Issued

Following the declarations of a global pandemic by the World Health Organization on January 30, 2020, and the public health emergency by then-Secretary of Health and Human Services Alex Azar, II, on January 31, 2020, Governor Cuomo issued Executive Order 202: Declaring a Disaster Emergency in the State of New York on March 7, 2020,[120] after confirmed cases of COVID-19 were detected.

With the ongoing shutdown of places of business, education, and worship across the state, it quickly became apparent to the courts that there would be an unprecedented increase in cases should the courthouses remain open to the public. Therefore, Chief Administrative Judge Marks issued AO/68/20 on March 16, 2020, shutting the statewide court system to all non-essential matters at 5:00 p.m. that day.[121] The only housing matters that would be deemed essential going forward at that time were emergency applications for illegal evictions, housing code violations, and emergency repair orders.[122]

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117. Administrative Order of the Chief Administrative Judge of the Courts AO/68/20, at 1 (March 16, 2020) (hereinafter "AO/68/20").
118. *Id.* at 2.
119. *See id.*
120. 9 N.Y.C.R.R. § 8.202 (2020).
121. AO/68/20 at 1.
122. *Id.* at 2.

> Effective 5 p.m. on Monday, March 16, all non-essential functions of the courts will be postponed until further notice. All essential court functions will continue, as described below.

Several days later on March 20, 2020, Governor Cuomo issued a general stay on all evictions across New York for a period of ninety days from that date, or upon further review at or before April 19, 2020.[123]

It soon became clear that although the courts were no longer hearing any matters that were pending as of March 16, 2020, this did not stop further filings from being submitted electronically, adding to the mounting backlog across the state. On May 7, 2020, Governor Cuomo issued a new executive order prohibiting the commencement of new non-payment eviction cases against residential and commercial tenants.[124] Although the prohibition was against the commencement of new evictions based upon non-payment of rent, Executive Order 202.28 did not suspend or supersede the provisions contained within Executive Order 202.8 and this was very clear when Judge Marks issued Administrative Order 127/20 on June 18, 2020, requiring that new filings contain either an affirmation or affidavit along with notices to the tenant about how to obtain legal representation.[125]

. . .

> **Housing matters:** Essential applications as the court may allow, e.g., landlord lockouts, serious housing code violations, and repair orders. All eviction proceedings and pending eviction orders shall be suspended statewide, and court-ordered auctions of property shall be postponed, until further notice.

Id. (emphasis added).

123. 9 N.Y.C.R.R. § 8.202.8 (2020) ("There shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days.").

124. 9 N.Y.C.R.R. § 8.202.28 (2020).

> There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent . . . that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

Id.

125. Administrative Order of the Chief Administrative Judge of the Courts AO/127/20, at 1 (June 18, 2020).

It further continued the stay on eviction proceedings, whether commenced on or after March 16, 2020.[126]

Only a few weeks would pass before the prohibition would be rescinded. On July 6, 2020, a new executive order was issued by Governor Cuomo ending the prohibition on commencement of nonpayment proceedings against residential and commercial tenants due to the passage of new legislation.[127] The effect that this new

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> [E]ffective June 20, 2020, petitions in eviction proceedings involving residential or commercial property pursuant to Article 7 of the Real Property Actions and Procedures Law (RPAPL), whether brought on the ground that the respondent has defaulted in the payment of rent or on some other ground, shall require the inclusion of (1)(a) an attorney affirmation in the form attached as Exh. 1a, in cases where the petition is represented by counsel, or (1)(b) a petitioner's affidavit in the form attached as Exh. 1b, in cases where the petition is self-represented; and (2) a Notice to Respondent Tenant in the form attached as Exh. 2a . . . or Exh. 2b . . . .

Id.

126. *Id.*

> Consistent with prior and current gubernatorial Executive Orders (EO/202.8, EO/202.14, EO/202.28, EO/202.38) and Administrative Order AO/68/20, RPAPL eviction matters commenced on or before March 16, 2020 shall continue to be suspended until further order; eviction proceedings filed after March 16, 2020 shall, upon the filing of the petition (if no answer is filed thereafter) or the filing of an answer, be suspended until further order.

Id.

127. 9 N.Y.C.R.R. § 202.48 (2020).

> The directive contained in Executive Order 202.28, as extended, that prohibited initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, is continued only insofar as it applies to a commercial tenant or commercial mortgagor, as it has been superseded by legislation for a residential tenant, and residential mortgagor, in Chapters 112, 126, and 127 of the Laws of 2020.

Id.

legislation has on evictions will be discussed below. It would take approximately a month for the courts to put into place mechanisms by which the backlog of cases could proceed. When AO/160A/20 was issued by Judge Marks, the nearly six months stay on pre-COVID eviction cases commenced prior to March 17, 2020, had come to an end. Courts across the state were directed to proceed in accordance with a specific process in reviewing and disposing of the cases.[128] However, despite this resumption of the court system, any case commenced after March 16, 2020, would remain stayed pending further order.[129]

It would be a further two months before all eviction proceedings were allowed to resume. Despite the massive number of backlogged cases seen in courts, the stay was finally lifted on October 12, 2020, by Judge Marks as New York began to experience a slowdown in the number of COVID cases statewide.[130] Although cases resumed, there were still several requirements that remained in effect from prior Administrative Orders, in addition to any other state or federal legislation in effect at that time[131]

2. Tenant Safe Harbor Act

As stated above, the myriad orders from the Governor and courts being issued and replaced, the State Legislature recognized that as the pandemic continued to progress and remain in place, many tenants remained unable to work or pay their rent. The legislature advanced the Tenant Safe Harbor Act (TSHA) to protect tenants from the increasing amount of rental arrears.[132] For all rental arrears that accrued from the start of the pandemic, recognized as March 7, 2020, through January 15, 2022,[133] a landlord would not be able to

128. Administrative Order of the Chief Administrative Judge of the Courts AO/160A/20, at 1–2 (August 13, 2020).

129. *Id.* at 2.

130. Administrative Order of the Chief Administrative Judge of the Courts AO/231/20, at 1 (October 9, 2020).

131. *Id.*

132. Tenant Safe Harbor Act, 2020 N.Y. Sess. Laws 821–22 (McKinney).

133. 2021 N.Y. Sess. Laws 1242 (McKinney) ("For the purposes of this act, 'COVID-19 covered period' means March 7, 2020 until January 15, 2022.")

obtain a possessory judgment against any tenant brought to court for a non-payment eviction during the COVID-19 covered period.[134] For a tenant to invoke the protections of the TSHA, a defense of financial hardship would have to be advanced.[135] Once advanced, the court would consider several factors including the pre-COVID income of the household, the income during the COVID-19 covered period, whether the household had any liquid assets, and whether the household was eligible for or receiving assistance from local departments of social services, Supplemental Nutrition Assistance Program (SNAP), New York disability, Home Energy Assistance Program (HEAP) or Unemployment Insurance Benefits (UIB).[136]
What the legislature failed to consider was how the various courts across the State would apply this legislation. Various courts would improperly conclude that tenants or lawful occupants in possession were not eligible for the protections based upon a lack of evidence showing that a suitable financial hardship existed based upon little change in income or because benefits from local or state agencies were providing a higher income than what was being provided pre-COVID.

3. COVID-19 Emergency Eviction and Foreclosure Prevention Act

To combat this varied interpretation of the TSHA, the State Legislature enacted the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA).[137] The new legislation created the "Tenant's Declaration of Hardship" which allowed tenants and lawful occupants to self-certify to the courts that they were suffering a financial hardship.[138] Because the legislation imposed an automatic stay based upon the completion of the "Declaration of Hardship" and subsequent filing with the court or being provided to the

134. 2020 N.Y. Sess. Laws 821 ("No court shall issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period for the non-payment of rent that accrues or becomes due during the COVID-19 covered period.").

135. *See id.* at 821–22.

136. *See id.*

137. COVID-19 Emergency Eviction and Foreclosure Prevention Act, 2020 N.Y. Sess. Laws 1194–1206 (McKinney).

138. *Id.* at 1195–96.

landlord, the courts were required to stay any pending eviction cases.[139] The requirement to consider factors such as those found in the TSHA was no longer required.[140] This would become a thorny issue for parties on all sides in landlord-tenant matters where use of this declaration would subsequently bring the court process to a grinding halt.

While the legislature had found a way to ensure that the courts applied the TSHA in the way that it was envisioned, landlords across New York found that they were being denied the ability to simply challenge what was otherwise a self-certification by their tenants and lawful occupants of their rental units. What came next were a series of challenges by various landlords in New York City over what they saw as an overreach by the state by preventing them from recovering their property through legal means. Instead of dealing with all the cases separately, the United States District Court for the Eastern District of New York consolidated the various constitutional challenges to the law under the case of *Chrysafis v. Marks*.[141]

A. Chrysafis v. Marks - The District Court Challenge

When the original law known as CEEFPA was signed by Governor Cuomo in the last few days of 2020, it placed an automatic stay on all eviction cases across New York through May 1, 2021.[142] As already stated above, it also created a mechanism by which tenants and lawful occupants would be able to ensure that the defense afforded to them under the THSA would not be ignored or otherwise dismissed by the courts.[143]

Landlords were at first complacent, but their frustration grew as they increasingly found themselves in positions of being unable to move forward in the recovery of their rental units. The case brought against Chief Administrative Judge Marks was to seek an injunction to enjoin Part A of CEEFPA—the portion of the law that protected tenants and lawful occupants—from being enforced and thereby allow the landlords the right to move forward with their cases to

139. *Id.* at 1197.
140. *See id.*
141. Chrysafis v. Marks, 544 F. Supp. 3d 241, 248–49 (E.D.N.Y. 2021).
142. *Id.* at 247-48 (quoting 2020 N.Y. Sess. Laws. 1194).
143. *Id.* at 248.

recover the rental units.[144] The landlords also alleged that the law denied their due process rights by being unable to challenge the self-certification of the hardship declaration form being submitted by tenants and lawful occupants.[145] Interestingly, the landlords seeking to challenge the law did not have any problems with the self-certification that was granted to them as property owners to prevent or stay any foreclosure action commenced by a mortgagor.[146]

Despite the arguments raised by the landlords, the district court found that the procedural due process argument was flawed since the treatment given to legislative acts is different from case-specific determinations.[147] The court further distinguished between legislative and adjudicative acts, with the latter being subject to due process claims where they involve factual information about the litigants and the controversy before the court; whereas the former entails the creation of general rules to be applied at a later date in time.[148] By this measure the court reasoned that CEEFPA was clearly legislative in nature and not subject to the requirements of due process.[149] The remaining claims raised by the landlords—vagueness, right to petition, and compelled speech were also dismissed. Despite this decision by the court, the legal challenge was not yet ended as the landlords sought an expedited appeal to the United States Court of Appeals for the Second Circuit which was denied on June 26, 2021.[150] An application was submitted to the Supreme Court of the United States.[151]

B. Chrysafis v Marks – The SCOTUS Injunction

On August 12, 2021, the Supreme Court of the United States issued an unsigned opinion, following an expedited briefing schedule by the parties, enjoining enforcement of Part A of CEEFPA 2020.[152]

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144. *Id.*

145. *Id.* at 252–53.

146. COVID-19 Emergency Eviction and Foreclosure Prevention Act, 2020 N.Y. Sess. Laws 1199–1206 (McKinney).

147. *Chrysafis*, 544 F. Supp. 3d at 253 (citing Bi-Metallic Inv. Co. v State Bd. Of Equilization, 239 U.S. 441, 445 (1915)).

148. *Id.* at 254–55.

149. *Id.*

150. *See* Chrysafis v. Marks, 15 F.4th 208, 212 (2d Cir. 2021).

151. *See* Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021).

152. *Id.*

The only reasoning issued by the Court was that "no man can be a judge in his own case" and that the self-certification by a tenant violates the Due Process Clause.[153] Of note was the dissent by Justice Breyer noting that precedent would not have otherwise allowed such "extraordinary" relief against the enforcement of a presumptively constitutional legislative act.[154] Justice Breyer also noted that precedent does not make it "indisputably clear" that a delay, as opposed to complete denial, violates due process.[155]

C. Chrysafis v Marks – Second Circuit Court of Appeals

Following the decision from the Supreme Court of the United States, the parties were informed on August 30, 2021, that the appeal would be heard by the Second Circuit on September 21, 2021.[156] However, on August 31, 2021, Part A of CEEFPA had expired, and the New York Legislature enacted a new moratorium statute—2021 New York Laws Ch. 417 (S50001), or Subpart C(A). Subpart C(A) 2021 contained language resembling Part A CEEFPA 2020 as well as new provisions.[157] Prior to the scheduled hearing, the landlords filed a motion seeking to enjoin this new statute on September 9, 2021.[158]

The question before the court was whether the due process claim was now moot considering the expired statute and newly enacted Subpart C(A) 2021, as well as the First Amendment and void-for-vagueness claims raised on appeal. The court found that the replacement of Part A CEEFPA 2020 following its expiration with Subpart C(A) 2021 was a sufficient change to the moratorium that the landlords were no longer disadvantaged in the same fundamental way.[159] After determining that the appeal was moot, the court turned to the First Amendment and void-for-vagueness claims. The court rejected the claim that the injunction issued by the Supreme Court of the United States enjoined that part of Subpart C(A) from

153. *See id.* (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

154. *Id.* at 2483 (Breyer, J., dissenting) (quoting Respect Me. Pact v. McKee, 562 U.S. 996, 996 (2010)).

155. *Id.* at 2483–84.

156. *See* Chrysafis v. Marks, 15 F.4th 208, 212 (2d Cir. 2021).

157. *Id.*

158. *Id.*

159. *Id.* at 213–14, 215.

enforcement as the statute was not enacted until after the decision was issued.[160] The court reasoned that because the Supreme Court addressed only the due process claim, the challenge on First Amendment and void-for-vagueness claims were unlikely to succeed on the merits and deferred the matter for a district court to address on a new filing if the landlords chose to bring a new claim.[161]

D. Chrysafis v Marks – Amended District Court Challenge

Following the remand from the Court of Appeals for the Second Circuit, the landlords filed an amended complaint seeking to enjoin enforcement of Subpart C(A) 2021.[162] The district court applied the direction of the Second Circuit and looked at the implementation of the new statute.[163] Its findings were that many landlords were in fact being granted hearings to challenge the hardship declarations.[164] The court cited many instances where landlords presented "discreet [sic], specific, non-conclusory facts" to support a "good faith" belief that the tenant was not suffering from a hardship.[165] Further, the court noted that "the Legislature did not require landlords to, for example, show 'knowledge' of a tenant's hardship status to obtain a hearing. Rather, landlords only have to show a 'belief,' albeit one that has a good-faith basis."[166]

What would "prove fatal" to the new challenge was that none of the landlords had sought to obtain a hearing to challenge the hardship in their pending cases.[167] Based upon the testimony that was obtained during the hearing, the court concluded that while all the landlords claimed serious harm without the injunction, none had even requested the hearing or demanded discovery.[168]

The court denied the application requesting an injunction on three grounds: a lack of standing; a failure to show a likelihood of

160. *Id.* at 215.
161. *Chrysafis*, 15 F.4th at 215–16.
162. Chrysafis v. Marks, 573 F. Supp. 3d 831, 835 (E.D.N.Y. 2021).
163. *Id.* at 843.
164. *See id.* at 841.
165. *Id.* at 844 (quoting Harbor Tech LLC v. Correa, No. 60788/2019, 2021 WL 4945158, at *3 (N.Y.C. Civ. Ct. Kings Cnty. Oct. 25, 2021)).
166. *Id.* at 846 (quoting *Correa*, 2021 WL 4945158, at *3).
167. *Chrysafis*, 573 F. Supp. 3d at 846–47.
168. *Id.*

success on the merits; and a lack of irreparable harm.[169] The court held that the landlords lacked standing as they had not attempted to utilize the available remedies and were the chief cause of their own injury.[170] The likelihood of success on the merits was undercut by this failure because the landlords failed to invoke the remedies available under the statute[171] as supported by the finding that hundreds of landlords in New York by this time had requested and availed themselves of the opportunity to request these hearings.[172] Lastly, as to whether the landlords would suffer irreparable harm, the court's findings showed that New York was in the process of distributing funds under the ERAP (Emergency Rental Assistance Program) and LRAP (Landlord Rental Assistance Program) to alleviate the need for evictions.[173] The court also noted that a party claiming to suffer harm "cannot mask an ongoing failure on its part to mitigate its damages as an ongoing instance of irreparable harm."[174]

4. COVID-19 Emergency Rental Assistance Program

In response to the U.S. Supreme Court's decision in *Chrysafis*, the legislature issued a brand-new version of CEEFPA in September of 2021. The COVID-19 Emergency Rental Assistance Program[175] legislation that was previously implemented to assist with the distribution of the federal funds allocated under the American Rescue Plan Act by Congress was retooled to specifically address the decision in *Chrysafis* which impacted the rights of tenants in eviction cases. The September amendment, which would be referred to as S50001A, created a narrow exception to the hardship stay that was automatically imposed by statute upon a tenant applying for emergency rental assistance.[176] The application process could be done either through the state, or in some cases, through local municipalities which had chosen to locally administer the funds that were allocated by

169. *Id.* at 849.
170. *Id.* at 847.
171. *Id.* at 847–48.
172. *Chrysafis*, 573 F. Supp. 3d at 848.
173. *Id.* at 848–49.
174. *Id.* at 849 (quoting Lanvin Inc. v. Colonia, Inc., 739 F. Supp. 182, 192–93 (S.D.N.Y. 1990)).
175. 2021 N.Y. Sess. Laws 163, 167, *amended by* 2021 N.Y. Sess. Laws 1216 (McKinney).
176. 2021 N.Y. Sess. Laws 1216.

Congress.[177] The narrow exception created by the amendment allowed a landlord to bypass the automatic stay through the commencement of a nuisance petition against the tenant or lawful occupant.[178] However, in the same stroke that the legislature created a way in for landlords, they also set a very high bar to overcome the stay on evictions.

Due to a few administrative issues, the New York Emergency Rental Assistance Program (ERAP) suffered from numerous delays. It was not implemented until June 2021, several months after the distribution of the funding allocated through the American Rescue Plan Act.[179] As soon as the online application portal was opened, it was inundated with so many applications that the website crashed.[180] While these are mainly small technical issues, they foreshadowed what would become a procedural quagmire for many cases across New York.

Due to the wording of the statute, many tenants or lawful occupants who were living in subsidized housing were given the lowest priority to receive funding.[181] This has since had the effect of leaving many of New York's most vulnerable low-income tenants and lawful occupants in a position where their rental arrears continue to mount and the likelihood of the ERAP application rendering any assistance less and less likely. But it was not just those who lived in subsidized housing that would suffer prolonged delays. Many across the state—landlords and tenants alike—would be subject to months long waits hoping to hear that the application was approved.[182] The lingering result is that eviction cases which were stayed as a result of the tenant,

177. *See id.*

178. *See id.* at 1217–18.

179. *See* Sarah Toledo, *When Will NY Distribute Rent Relief Funds? What Tenants and Landlords Need to Know*, DEMOCRAT & CHRON., https://www.democratandchronicle.com/story/news/2021/07/22/new-york-rent-relief-program-eligibility-application-payment-landlords/8048166002/ (July 22, 2021, 4:15 PM).

180. *See* Michael Gold, *State's Rent Relief Program is Off to a Slow Start*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/nyregion/new-york-tenants-need.html.

181. 2021 N.Y. Sess. Laws 165.

182. *See* Sarah Taddeo, *$156M Distributed So Far From NY Rent Relief Program as Officials Address Delays*, DEMOCRAT & CHRON. (Aug. 20, 2021, 3:43 AM), https://www.democratandchronicle.com/story/ news/2021/08/20/ny-rent-relief-program-delays/8200748002/.

lawful occupant, or landlord applying for these funds found that the funds issued were no longer sufficient to cover the accumulated arrears as many cases stretched beyond the 15-month period which ERAP would cover.

5. The Aftermath of COVID-19 and Evictions in New York

What many practitioners across New York must now face is a resumption of many of the provisions that were brought into effect under HSTPA. The many months that saw evictions prohibited, whether through executive and administrative orders, or by statute, allowed most legal aid agencies and private tenant attorneys to revisit their approach to how the provisions of HSTPA should be interpreted by the courts and new arguments crafted using the new(ish) statutory scheme which was only in use for a brief amount of time prior to the pandemic beginning.

E. RPAPL Article 7-C & 7-D: Statewide Housing Court

In December of 2022, Governor Hochul signed into law the Tenant Dignity and Safe Housing Act. The new legislation created two new Articles under the RPAPL—article 7-C,[183] and article 7-D.[184] Although the Tenant Dignity and Safe Housing Act was passed by the legislature in June of 2022, it was not until December 30, 2022 that it was finally approved and signed by Governor Hochul.[185] Nearly identical, these two statutory provisions bring into being a state-wide scheme which allows tenants to hold landlords accountable for breaches of the warranty of habitability through proactive litigation. New York City was exempted from this new legislation as there is already a statutory scheme which allowed for tenants and lawful occupants to take their landlord to court over deplorable housing conditions.[186]

183. 2022 N.Y. Sess. Laws 1926–33 (McKinney) (codified at N.Y. REAL PROP. ACT. LAW §§ 796–796-m (McKinney 2023)).

184. 2022 N.Y. Sess. Laws 2184–87, *amended by* 2023 N.Y. Sess. Laws 59 (McKinney) (codified at N.Y. REAL PROP. ACTS. LAW §§ 797–797-j (McKinney 2023)).

185. *See* N.Y. Senate Bill No. S4594-B, Approval Memorandum No. 103, ch. 825, 245th Sess. (2022).

186. 2022 N.Y. Sess. Laws 1927; 2023 N.Y. Sess. Laws 60.

1. RPAPL Article 7-C

The proceedings under this article are for tenants to seek relief from the courts through an order directing the deposit of rents into the court for the purpose of remedying the conditions at the dwelling which are "dangerous to life, health or safety."[187] This proceeding may be commenced by either the tenants in the dwelling or the commissioner of the department charged with the enforcement of housing maintenance codes.[188] Where the proceeding is commenced by the commissioner of the department charged with enforcement of housing codes, one-third or more of the tenants may seek to substitute themselves as petitioner.[189] Whether the proceeding is commenced by either the tenants or commissioner, there are very specific grounds upon which the matter may be based.[190]

In a manner similar to summary proceedings brought under article 7 of the RPAPL, the article 7-C petitions have a very specific format that is required, and the time and manner of service are also strictly set out by statute.[191] The contents of the petition must allege the grounds upon which the petition is based, and if brought by the tenants of the premises it must state the number of petitioners making the petition.[192] Further, there must be a brief summation of the nature of the work necessary to cure the conditions alleged and provide an estimate of the cost to complete the work.[193] Lastly, each

187. REAL PROP. ACTS. § 796-a(1).
188. *Id.* § 796-a(1), (2).
189. *Id.* § 796-a(2)(a).
190. N.Y. REAL PROP. ACTS. LAW § 796-b (McKinney 2023). Those grounds are:

> 1. a lack of heat, running water, light, electricity, adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions; or
>
> 2. a course of conduct by the owner or the owner's agents of harassment, illegal eviction, continued deprivation of services or other acts dangerous to life, health or safety.
>
> *Id.*

191. *See* N.Y. REAL PROP ACTS. LAW § 796-c(2) (McKinney 2023).
192. N.Y. REAL PROP. ACT. LAW § 796-d (McKinney 2023).
193. *Id.* § 796-d(3).

petitioner (if brought by the tenants) shall state their monthly rent.[194] Although the answer is required to be in writing regardless of when the petition is served upon the respondent,[195] it will have to be seen whether the courts will adopt their own local rules about how to accept answers to the petitions.

If any triable issues of fact are raised, the matter may be taken to a bench trial.[196] Jury trials are specifically excluded under these provisions.[197] Should the parties need time to gather witnesses or consent to an adjournment, the case may be adjourned for no more than five days except by express consent of the parties.[198] Aside from any procedural matters that may be raised in answer to the petition, the respondent may also raise several statutory defenses to the petition.[199] These defenses require that the respondent establish that the alleged conditions never existed, or that the conditions complained of were caused by the tenant, their family or guests, or there has been a refusal of entry.[200] Following either a hearing or a trial on the issues, the court must enter judgment either dismissing the petition for failing to establish the allegations or because the respondent established their defenses to the allegations,[201] or direct that rents shall be deposited with the court and released only for the purpose of remedying the conditions set forth in the petition.[202] Should a judgment be entered in favor of the petitioner, it shall be a complete defense to any action for non-payment of rent subsequently brought by the respondent for rents due for that same period covered in the judgment.[203]

If the respondent is unable to establish a defense to the petition, but can demonstrate that it is ready, willing, and able to repair the conditions in the petition through application to the court, the court may instead issue an order requiring that such work is to be

194. *Id.* § 796-d(4).

195. N.Y. REAL PROP. ACTS. LAW § 796-e (McKinney 2023) ("At the time when the petition is to be heard, the owner and any mortgagee or lienor of record, shall answer in writing.").

196. N.Y. REAL PROP. ACTS. LAW § 796-f (McKinney 2023).

197. *See id.*

198. *Id.*

199. *See* N.Y. REAL PROP. ACTS. LAW § 796-g (McKinney 2023).

200. *Id.*

201. N.Y. REAL PROP. ACTS. LAW § 796-h(1)(a) (McKinney 2023).

202. *Id.* § 796-h(1)(b).

203. *Id.* § 796-h(2)(b).

completed within a time fixed by the court.[204] However, should it appear that the work is not being performed as ordered, the petitioner may apply to the court for a hearing on whether a judgment should immediately be issued.[205] If the court finds that judgment should issue, it will be in accordance with the provisions of RPAPL section 796-h.[206]

To enforce its judgment, the court has the power to appoint an administrator to oversee the work that needs to be done and to disburse the funds held on account.[207] The court, or any administrator appointed by the court, must keep a full accounting of all funds held and disbursed to ensure compliance with the judgment.[208] It is against public policy for any lease or other agreement to waive the provisions of RPAPL article 7-C.[209] If the court appoints an administrator for the purpose of collection and disbursement of the rents due, and a non-payment proceeding is commenced by the administrator against a tenant who is in default of paying rent, the defense of warranty of habitability is inapplicable.[210]

2. RPAPL Article 7-D

This new statute, which became effective on December 30, 2023,[211] is in many ways like article 7-C; but there are key differences which practitioners should be aware of if seeking to bring a petition in this way. Under this statute, only those persons who are recognized as tenants or lawful occupants may bring a proceeding, and there is no requirement that the tenants of the unit act in concert to bring this petition.[212] Interestingly, the category of those who may be listed as a respondent is much broader than under article 7-C.[213] The person or entity which has legal title to the property, anyone listed on

204. N.Y. REAL PROP. ACTS. LAW § 796-i(1) (McKinney 2023).
205. *Id.* § 796-i(2).
206. *Id.* § 796-i(3).
207. *See* N.Y. REAL PROP. ACTIONS AND PROC. LAW § 796-j (McKinney 2023).
208. *See* N.Y. REAL PROP. ACTS. LAW § 796-k (McKinney 2023).
209. N.Y. REAL PROP. ACTS. LAW § 796-l (McKinney 2023).
210. N.Y. REAL PROP. ACTS. LAW § 796-m (McKinney 2023).
211. *See* N.Y. Senate Bill No. S4594-B, Approval Memorandum No. 103, ch. 825, 245th Sess. (2022).
212. *See* N.Y. REAL PROP. ACTS. LAW § 797-a (McKinney 2023).
213. *See* N.Y. REAL PROP. ACTS. LAW § 797-b (McKinney 2023).

any residential registration statement, property management companies and public housing authorities or governmental agencies which own or maintain the property can all be listed in the petition as a respondent.[214]

The procedure for commencement of the petition follows the same process that currently exists for the commencement of article 7 eviction proceedings.[215] The only noticeable change is that instructional material shall be promulgated by the court to ensure sufficient access to justice for non-English or limited-English proficient individuals.[216] Service also follows the established "10 & 17" rule that was set forth under RPAPL section 733, however a petition may be commenced through an order to show cause.[217] Where the procedure deviates from the process found under article 7, is in the manner of service.[218] Instead of setting out what constitutes service necessary to establish jurisdiction, the statute refers to service being completed in accordance with the process described in article 3 of the CPLR.[219] The strict grounds found under article 7-C do not exist under article 7-D. The contents of the petition are much looser and allow the petitioner to include all matters which violate state or local housing standards or RPL section 235-b.[220] The relief requested may be any combination of repair orders, monetary judgment in favor of the petitioner for the diminished value, an order reducing future rent until the repairs are made, or any other relief that the court finds necessary.[221] All petitions must be verified by the person bringing the petition, or by their legal representative in accordance with statute.[222] Once the petition has been filed, the clerk of the court shall notify the appropriate government agency charged with enforcement of the local or state housing standards.[223]

At the time that the petition is noticed to be heard, an answer may be submitted in writing or orally containing any legal or

214. *See id.*
215. *See* N.Y. REAL PROP. ACTS. LAW § 797-c (McKinney 2023).
216. *See id.* § 797-c(3).
217. N.Y. REAL PROP. ACTS. LAW § 797-d (McKinney 2023).
218. *See* N.Y. REAL PROP. ACTS. LAW § 797-e (McKinney 2023).
219. *See id.*
220. N.Y. REAL PROP. ACTS. LAW § 797-f(2)(c) (McKinney 2023).
221. *See id.* § 797-f(2)(d).
222. *Id.* § 797-f(1).
223. N.Y. REAL PROP. ACTS. LAW § 797-g (McKinney 2023).

equitable defenses that the respondent may wish to assert.[224] If, at the time an answer is entered, there are triable issues of fact, the court may set a hearing, unless a party demands a trial by jury.[225] Either party may request an adjournment for a period of not less than fourteen days.[226] Following a hearing or trial the court shall enter a final judgment determining the rights of the parties.[227] This judgment may include repair orders and any other relief that the court deems necessary.[228]

CONCLUSION

The rights of landlords and tenants interact through a delicate balance of the law, and it is most important for practitioners to understand the complex nature of this practice area. Housing is a fundamental aspect of our society, with numerous facets of personal and economic well-being underpinned by this most basic of necessities. It is also imperative to expect that landlord-tenant law is ever-evolving. It should be. Since 2019, the balance has shifted to strongly favor the rights of tenants, and it continues to be shifting that way. Ignoring these changes will be to the detriment of any practitioner who already takes on this type of litigation, or those who may yet enter the fray. We only hope that this balanced presentation has been a useful primer to advocates seeking to engage and a helpful refresher for those wishing to re-engage in this vibrant and practical area of law. Whether you are bringing a case or defending against one, never forget that your advocacy is shaping the ways that our neighbors live and work together so, begin as we have all been told by our professors: read the statute.

224. N.Y. REAL PROP. ACTS. LAW § 797-h (McKinney 2023).
225. N.Y. REAL PROP. ACTS. LAW § 797-i (McKinney 2023).
226. *Id.*
227. N.Y. REAL PROP. ACTS. LAW § 797-j(1) (McKinney 2023).
228. *Id.* § 797-j(2).