

*State of New York
Unified Court System*



*Lawrence K. Marks
Chief Administrative Judge*

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MEMORANDUM

September 8, 2021

To: Hon. George J. Silver
Hon. Norman St. George
Hon. Edwina G. Mendelson

From: Lawrence K. Marks *LM*

Subject: Residential and Commercial Eviction Proceedings as required by Chapter 417 of the Laws of 2021, Relating in Part to Residential and Commercial Evictions.

On September 2, 2021, Governor Hochul signed into law chapter 417 of the Laws of 2021 ["Act" (effective September 2, 2021); Exh. A], which reinstates many COVID-19 related protections for respondents in residential and commercial eviction proceedings that were previously set forth in statute and in part invalidated by the United States Supreme Court. Under the Act, the law now requires such proceedings be stayed through January 15, 2022. Additional guidance is set forth in the accompanying administrative order [AO/261/21; Exh. B] and as follows:

A. Residential Eviction Matters

1. Stay of Eviction Proceedings, or Tolling of Commencement of Proceedings, Upon Submission of a Tenant's Hardship Declaration: **The Act requires that where a tenant delivers a Hardship Declaration to a landlord, a landlord's agent, or the court (in a pending matter), a proceeding must be stayed until at least January 15, 2022, or its commencement be tolled until January 15, 2022 (unless the Nuisance Exception in Paragraph 5 below applies), including Hardship Declarations previously filed pursuant to chapter 381 of the laws of 2020 ("COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020") (Act, Part C, Subpart A §§1, 4). Where no Hardship Declaration is submitted,**

the matter may proceed in the normal course following expiration of the stay or the holding of the appropriate status conference or hearing.

2. Additional Stays: The Amendment continues to impose additional stays or novel hearing requirements that may be immediately relevant in a pending proceeding:

a. Default Judgments: It continues to provide that, prior to January 15, 2022, no court shall issue a default judgment authorizing an eviction in a residential eviction matter or authorizing the enforcement of an eviction pursuant to a default judgment, without first holding a hearing upon motion of the petitioner (Act, Part B, Subpart A, §5). If a default judgment was issued prior to December 28, 2020 or between August 13, 2021 and September 2, 2021, it must be “removed” (i.e. vacated), and the matter restored to the calendar, upon the respondent tenant’s written or oral request to the court before or during that hearing (id.).

b. Stay of Execution of Warrants in Residential Eviction Proceedings: The Act continues through January 15, 2022 that, in any residential eviction proceeding in which a warrant of eviction has been issued but has not yet been executed, execution of the warrant shall be stayed until the court has held a status conference with the parties. (Act, Part C, Subpart A, §6[a][i]). Such warrant will not be effective for execution unless the warrant instrument specifies, i) proper service of the Hardship Declaration by the petitioner and the dates on which respondent-tenant was served, ii) the respondent-tenant is ineligible for a stay under the Act because the certified hardship was deemed invalid pursuant to a hearing, or iii) the respondent-tenant is ineligible for a stay under the Act because they have been found to have caused significant damage to the property, persistently and unreasonably engage in nuisance behavior or cause a safety hazards for others. The warrant must include a specific description of such behavior. The Act does not authorize the Sherriff or Marshal to execute a warrant of eviction if such information is absent. (Act, Part C, Subpart A, §6[b]).

c. Prior Judgments Based on Objectionable or Nuisance Behavior: The Amendment continues to provide through January 15, 2022 that, if a court has awarded judgment against a respondent prior to September 2, 2021 on the basis of objectionable or nuisance behavior, and the petitioner is alleging that the respondent continues to intentionally cause property damage, prior to permitting an eviction the court shall hold a hearing to determine whether the tenant is continuing to intentionally cause such damage. If the court has awarded judgment against a respondent-tenant prior to December 28, 2020 or between August 13, 2021 and September 2, 2021, and the petitioner is alleging the respondent-tenant is persistently engaging in unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard to others, the court shall hold a hearing to determine whether the tenant is persisting in such conduct. (Act, Part C, Subpart A, §7[2]).

d. As Prima Facie Evidence of Hardship: The Act provides that the Hardship Declaration shall serve as prima facie evidence establishing a rebuttable presumption that a residential tenant is experiencing financial hardship in a proceeding as a defense under any federal or state executive order, local or state law, or other regulation limiting the eviction of a tenant suffering financial hardship due to COVID-19. However, the absence of a Hardship Declaration does not create a presumption that no hardship is present. (Act, Part C, Subpart A, §9). *This “prima facie” evidentiary effect is the single consequence of the Act’s Hardship Declaration provisions that extends beyond January 14, 2022.*

3. Notice of Hardship Declaration in Pending Matters: As set forth in the Act, such proceedings are now stayed through January 15, 2022. A copy of the revised hardship declaration and notice will be posted to the UCS website reflecting the amended stay through January 15, 2022, as well as translations of such documents and a list of legal service providers as required by the Act. (Act, Part C, Subpart A, §8).

4. Court Practice Upon Commencement of a New Proceeding: The Act continues to prohibit the court from accepting a new residential eviction proceeding filing unless it is accompanied by both (1) an affidavit of service of the Hardship Declaration,¹ and (2) an affidavit from the landlord stating that no Hardship Declaration has been received from the tenant, the Nuisance Exception applies (see paragraph 5) or the respondent has returned a Hardship Declaration but the petitioner believes in good faith that the hardship certified does not exist (see paragraph 6). (Act, Part C, Subpart A, §3). In review of proposed petitions, the court must determine that the petition contains a blank copy of the hardship declaration in English and, where practicable, the tenant’s primary language. Personal service of the notice of petition and Hardship Declaration is required, unless such service cannot be made with due diligence, in which case alternative service may be pursued.

The court must continue to expediently seek confirmation by the tenant, on the record or in writing, that the tenant has received the blank Declaration and has not submitted a completed Declaration to petitioner-landlord, an agent of the petitioner-landlord or the court. If the court determines a respondent-tenant has not yet received a Declaration, it must stay further proceedings for no less than 10 business days and provide the tenant-respondent with a copy of a blank Declaration in both English and the tenant’s primary language (Act, Part A, §5[2]; Amendment §5). **Under the Amendment, in any case where a Hardship Declaration is submitted to a landlord, a landlord’s agent, or the court, the matter must be stayed until at least January 15, 2022 (unless the nuisance or invalid Hardship Declaration exception applies). Where these procedures have been followed and no Hardship Declaration is submitted, the matter may proceed in the normal course.**

5. Nuisance Exception: Where a pending or new petition alleges “intentional and significant damage to the property” or “unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes substantial safety hazard to others,”

¹ Petitioners are still required to serve a blank copy of the Hardship Declaration and the list of local legal service providers with all future pre-eviction notices (Act, Part C, Subpart A, §3)

the matter may be reviewed in the normal course and a warrant of eviction may issue (Act, Part C, Subpart A, §4). However, in any pending proceeding where a nuisance holdover has not been previously pleaded, the landlord must submit a new petition containing those allegations. If nuisance is not proven, and the tenant has submitted a Hardship Declaration, unless the Hardship Declaration is deemed invalid pursuant to a court hearing, the court must now stay the eviction until at least January 15, 2022 (Act, Part C, Subpart A, §4).

a. Nuisance Behavior in Residential Evictions and Eviction Protections Under the COVID-19 Emergency Rental Assistance Program Protections: Pursuant to the COVID-19 Emergency Rental Assistance Program (ERAP), established by Part BB, Subpart A of Chapter 56 of the Laws of 2021, under Section 8 of the law, upon application by respondent-tenant for rental assistance, the eviction proceedings are stayed until a determination is made on the ERAP application. Under the Act, the stay provisions under ERAP do not apply if a respondent-tenant intentionally causes damage to the property or persistently and unreasonably engages in objectionable or nuisance behavior. If the court has awarded a judgment against a respondent-tenant prior to September 2, 2021 on the basis of such objectionable or nuisance behavior, the court shall hold a hearing to determine whether the tenant intentionally caused significant damage to the property or persistently and unreasonably engaged in such behavior. (Act, Part A, §6).

6. Invalid Hardship Declaration Exception and Hearing in Residential Eviction Proceedings: In response to the Supreme Court ruling in *Chrysaflis*, the Act establishes a process by which a petitioner may contest the hardship certified by a respondent-tenant that has submitted in a Hardship Declaration. Upon filing and submitting the affidavit as set forth by the Act with the court, in addition to attesting that a respondent-tenant has not submitted a Hardship Declaration or they continue to cause property damage or engage in objectionable or nuisance behavior, a petitioner may attest that a respondent-tenant has submitted a Hardship Declaration, but the petitioner believes in good faith that the certified hardship does not exist. A petitioner is required to provide the respondent-tenant with notice of contesting the certified hardship by serving a copy of the affidavit attached to the notice of petition or summons of complaint. The court must also provide notice of the filing to the respondent-tenant, as provided by the Act, that the petitioner is contesting the validity of the Hardship Declaration and the court will hold an evidentiary hearing on the matter. In a pending proceeding commenced prior to the Act in which a Hardship Declaration was previously submitted, a petitioner may make a motion on notice to respondent-tenant attesting they have a good faith belief that the respondent has not experienced the certified hardship. The court must grant a hearing to determine the validity of the hardship. If the court finds that the hardship certified by respondent-tenant is invalid, the matter may be reviewed in the normal course and a warrant of eviction may issue. If the court finds that such certified hardship is valid, and it appears that the respondent-tenant may qualify for rental assistance funding, the court is required to direct them to apply to a program for rental assistance within two weeks and the court must stay the eviction until at least January 15, 2022. (Act, Part C, Subpart A, §3, §10).

B. Commercial Eviction Matters

1. Stay of Execution of Warrants in Commercial Eviction Proceedings: The Act continues to provide that, in any commercial eviction proceeding in which a warrant or judgment of possession or ejectment has been issued prior to September 2, 2021, but has not yet been executed, execution of the warrant shall be stayed until the court has held a status conference with the parties (Part C, Subpart A, §6[1][a]). *This conference requirement now expires on January 15, 2022.*

2. Eviction Proceeding Required. No commercial tenant shall be removed from possession of the property prior to January 15, 2022, except by an eviction proceeding pursuant to RPAPL Article 7 (Act, Part B, Subpart A, §2).

3. Notice of Hardship Declaration in Pending Matters: As set forth in the Act, such proceedings are now stayed through January 15, 2022. A copy of the revised hardship declaration and notice will be posted to the UCS website reflecting the amended stay through January 15, 2022, as well as translations of such documents as required by the Act. (Act, Part B, Subpart A, §8).

4. Eligibility to Submit a Hardship Declaration: The Act defines a tenant eligible for submission of the Hardship Declaration as a commercial tenant that is a resident of New York State, independently owned and operated, not “dominant” in its “field” and employing one hundred or fewer persons (Act, Part B, Subpart A §1[3]). The Act provides no further definitions of such criteria.

a. Recipients of Hardship Declarations: The Act provides that eligible tenants who are parties in pending matters may submit Hardship Declarations to either their landlord, their landlord’s agent, or the courts. Prior to the commencement of a matter, an eligible tenant may submit a Hardship Declaration to the landlord or landlord’s agent. (Act, Part B, Subpart A §4). *This provision now expires on January 15, 2022.*

(1) In a Pending Matter: The submission of a Hardship Declaration by an eligible commercial tenant in a pending matter requires that the matter be stayed until at least January 15, 2022 (unless the Nuisance or Invalid Hardship Declaration Exception in Paragraphs 7 and 8 applies) (Act, Part B, Subpart A §5).

(2) In a Matter Not Yet Commenced: The submission of a Declaration to a landlord prior to commencement of a matter will (i) preclude the landlord from commencing an eviction proceeding against the tenant until January 15, 2022; and (ii) toll the limitations period for the commencement of that eviction proceeding until January 15, 2022 (Act, Part B, Subpart A, §§1,4).

b. As Prima Facie Evidence of Hardship: The Act provides that the Hardship Declaration shall serve as prima facie evidence establishing a rebuttable presumption that a commercial tenant is experiencing financial hardship in a proceeding as a defense under any federal or state executive order, local or state law, or other

regulation limiting the eviction of a tenant suffering financial hardship due to COVID-19. However, the absence of a Hardship Declaration does not create a presumption that no hardship is present. (Act, Part B, Subpart A, §9). *This “prima facie” evidentiary effect is the single consequence of the Act’s Hardship Declaration provisions that extends beyond January 15, 2022.*

5. **Court Practice Upon Commencement of a New Proceeding:** The Act continues to provide that a court cannot accept a new commercial eviction proceeding filing unless it is accompanied by both (a) an affidavit of service of the Hardship Declaration,² and (b) an affidavit from the landlord stating that no Hardship Declaration has been received from the tenant or that the Nuisance Exception or Invalid Hardship Declaration exception applies (see paragraphs 7 and 8) (Act, Part B, Subpart A, §4). In review of proposed petitions, the court must determine that the petition contains a blank copy of the hardship declaration in English and, where practicable, the tenant’s primary language. Personal service of the notice of petition and Hardship Declaration is required, unless such service cannot be made with due diligence, in which case alternative service may be pursued. *These provisions expire on August 15, 2022.*

The court must expeditiously seek confirmation by the tenant, on the record or in writing, that the tenant has received the blank Declaration and has not submitted a completed Declaration to petitioner-landlord, an agent of the petitioner-landlord or the court. If the court determines a respondent-tenant has not yet received a Declaration, it must stay further proceedings for no less than 10 business days and provide the tenant-respondent with a copy of a blank Declaration in both English and the tenant’s primary language (Act, Part B, Subpart A, §4). In any case where a Hardship Declaration is submitted to a landlord, a landlord’s agent, or the court, by an eligible commercial tenant, the matter must be stayed until at least August 31, 2021 (unless the nuisance exception in Paragraph 7 or the invalid hardship exception in paragraph 8 applies). Where these procedures have been followed and no Hardship Declaration is submitted, the matter may proceed in the normal course. *These provisions expire on January 15, 2022.*

6. **Nuisance Exception:** Where a pending or new petition alleges “intentional and significant damage to the property” or “unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes substantial safety hazard to others” the stay provisions of the Act do not apply: the matter may be reviewed in the normal course and a warrant of eviction may issue (Act, Part B, Subpart A, §4). However, in any pending proceeding where a nuisance holdover has not been previously pleaded, the landlord must submit a new petition containing those allegations. (Act, Part B, Subpart A, §7[2][a]). If nuisance is not proven, and the tenant has submitted a Hardship Declaration, the court must stay the eviction until at least January 15, 2022. *This provision expires on January 15, 2022.*

Post-Judgment Nuisance Exception: If a court awarded judgment against a respondent-tenant prior to March 9, 2021 on the basis of objectionable or nuisance behavior, that eviction may proceed only after the court has held an additional hearing to determine whether the tenant is persisting in such conduct

² Until January 14, 2022, petitioners are required to serve a blank copy of the Hardship Declaration with all future pre-eviction notices (Act, Part B, Subpart A, §3).

(“unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes substantial safety hazard to others”) If a court has awarded judgment against respondent-tenant prior to September 2, 2021 on the basis of causing significant damage to the property, the eviction may proceed only after the court has held an additional hearing to determine whether the tenant is continuing to intentionally cause such damage. (Act, Part B, Subpart A, §7[2]). *This hearing requirement now expires on January 15, 2022.*

7. Invalid Hardship Declaration Exception and Hearing in Commercial Eviction Proceedings: The Act establishes a process by which a petitioner may contest the hardship certified by a respondent-tenant that has submitted in a Hardship Declaration. Upon filing and submitting the affidavit as set forth by the Act with a court, in addition to attesting that a respondent-tenant has not submitted a Hardship Declaration or they continue to cause property damage or engage in objectionable or nuisance behavior, a petitioner may attest that a respondent-tenant has submitted a Hardship Declaration, however the petitioner believes in good faith that the certified hardship does not exist. Upon such a filing, the court must provide notice to the respondent-tenant, as provided by the Act, that the petitioner is contesting the validity of the Hardship Declaration and the court will hold an evidentiary hearing on the matter. If the court finds that the hardship certified by respondent-tenant is invalid, the matter may be reviewed in the normal course and a warrant of eviction may issue. If the court finds that such certified hardship is valid, the court must stay the eviction until at least January 15, 2022. (Act, Part B, Subpart A, §4). *This hearing requirement now expires on January 15, 2022.*

Please distribute this memorandum and attachments to judges and non-judicial staff as you deem appropriate. Questions on the subject may be addressed to Jessica Cherry of Counsel’s Office (jcherry@nycourts.gov).

c: Hon. Carolyn Walker-Diallo