

ALERT

April 2020

Guide For Commercial Landlords When Tenants Fail To Pay Rent & Evictions Are Temporarily Not Permitted By Law

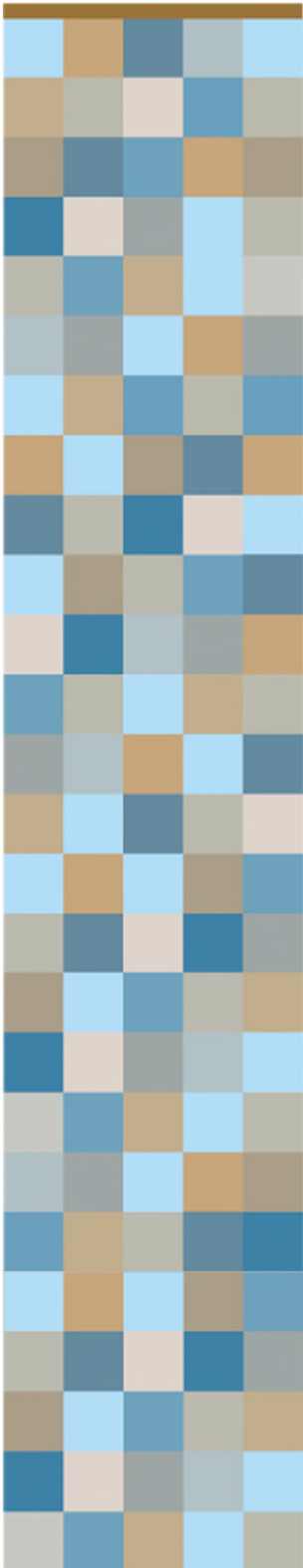
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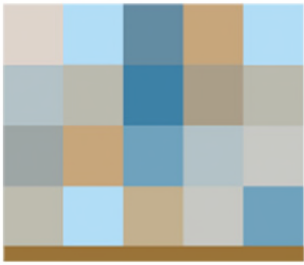
Among the many economic repercussions of the COVID-19 pandemic, are commercial tenants who are unable or unwilling to pay rent. Although no one knows how long the pandemic will last or what government action, if any, will be offered to assist property owners, commercial landlords should have a plan and strategies in place to limit their liability and financial risk. Landlords need to weigh the benefits of entering into lease modification agreements with struggling commercial tenants, while at the same time plan for potential legal action as a result of tenant defaults if no agreement can be reached.

LANDLORDS NEED TO HAVE A PLAN & STRATEGIES IN PLACE

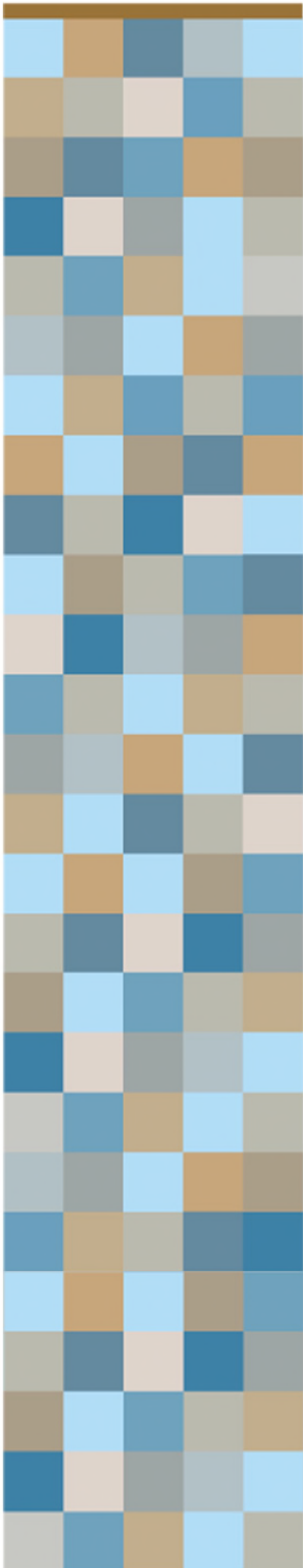
- **Successful landlords are proactive**
- **Consider short-term *conditional* lease modification agreements**
- **Plan for potential legal action if no modification agreement can be reached**
- **Memorialize amounts owed and that lease obligations are not waived**
- **Have rent demands and pleadings prepared in advance**
- **When courts reopen, courts will be back-logged, legal cases will be processed at a slow pace as court staff will continue to be limited, and, summary proceedings will be significantly delayed**

In normal circumstances, when commercial tenants default in payment obligations required by a lease, commercial landlords generally serve predicate rent demands by process servers. If commercial tenants thereafter fail to tender payments and remain in possession, landlords commence summary nonpayment proceedings. Now however, while landlords may still serve rent demands, landlords are unable to commence litigation to enforce lease terms because emergency orders were issued in New York State restricting court access for only a small class of matters deemed to be urgent. The courts are not currently permitting the commencement of commercial nonpayment or holdover





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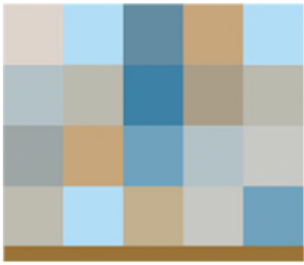
proceedings. Additionally, there is currently a moratorium in effect throughout New York State, staying all commercial evictions until further notice. It is currently unknown when these restrictions will be lifted or modified.

Consequently, due to the temporary inability of commercial landlords to pursue rights in court and due to the expected large number of commercial tenants that will be seeking financial relief at the same time when restrictions are lifted, it is recommended that landlords consider changing their strategies in order to maintain streams of income. Many commercial landlords are entering into carefully drafted short-term lease modification agreements with their tenants. Agreements have been entered into to temporarily lower monthly rent and additional rent payments and to defer tenant payments, while other agreements provide rent concessions as either partial or full abatements for a limited time period, conditioned upon future compliance with the lease terms along with assignments to the landlord of tenant's "bailout" loan proceeds.

Each landlord and tenant situation is unique. Business decisions on what type of terms should be considered must be made by landlords on a case-by-case basis. What a landlord will deem acceptable, depends upon a plethora of variables such as: the terms and length of a lease; the commercial tenant's payment history; the projected viability of the tenant's business after the pandemic; the financial resources of the tenant and of the landlord; the credit history of lease guarantors; the landlord's carrying charges, costs, expenses; and, the landlord's profit margin.

Most importantly however, is that a lease modification agreement not only be realistically viable for a tenant's compliance, but the agreement must be well-drafted, clearly written, provide strong and enforceable default language, and be properly executed by all parties including the lease guarantor, if applicable. While it is always important to have clear language in all lease documents, it is particularly important with these lease modification agreements because the judges, who will be interpreting the language of these modification agreements in the event of default, will likely be sympathetic to commercial tenants. Unambiguous language in a modification agreement will not only set forth each party's respective expectation but it will simplify and expedite a resolution in court if a tenant fails to adhere to the negotiated terms.

Unfortunately, not all commercial landlords are able to enter into lease modification agreements with tenants. Many commercial landlords are advised by commercial tenants that no rent will be paid until businesses reopen. Other commercial tenants are non-responsive. Landlords in these situations have a choice to either wait to see what happens, or alternatively, take proactive measures by immediately arranging for the preparation of rent demands and pleadings. While some commercial landlords are still having rent demands served by process server to keep pressure on commercial tenants who refuse to negotiate or who are non-responsive, there is an ethical factor as to whether the health and safety of the process servers should be risked for non-emergency purposes. Responsibly,



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many commercial landlords are arranging for rent demands to be prepared and sending them by email and regular mail. While such rent demands do not serve as a proper predicate notice for the commencement of a nonpayment proceeding, they serve two meaningful purposes: to memorialize that lease obligations are not waived and to prepare for when the pandemic ends.

When the nation returns to a new normal, if commercial tenants continue to fail to pay rent or fail to pay the arrears owed, most commercial landlords will need to serve rent demands and commence summary proceedings. It is anticipated that the courts will be back-logged, legal cases will be processed at a slow pace as court staff will continue to be limited, and, summary proceedings will be significantly delayed for many months. Landlords who take proactive measures now by arranging for rent demands to be correctly drafted and regularly updated, and who are arranging for notices of petitions and petitions to be prepared in advance, will have their claims adjudicated faster than those who are not taking proactive measures.

The steps outlined here are provided as a general guide for commercial landlords to protect legal rights and provide opportunities to save landlords both time and money. However, as each commercial lease is unique and affords different protections, responsibilities, and liabilities, before a commercial landlord decides on how to proceed, it should have all governing lease documents (including the original lease, lease modification agreements, lease amendments, lease renewals, and guaranty agreements) reviewed and analyzed by legal counsel who specializes in and is familiar with the nuances of landlord and tenant law.

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