

Practice Update

# Second Circuit Explores Constitutional Challenges to COVID-19 Tenant Protections in New York City

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As the COVID-19 pandemic ravaged the United States in the spring of 2020, federal, state and local governments scrambled to enact legislation addressing the innumerable economic, housing, health, safety, and other issues materially impacted by the pandemic. The New York City Council, in particular, enacted several new statutory protections intended to safeguard residential and commercial tenants and personal guarantors whose lives and businesses were impacted by the pandemic. These protections included (1) certain amendments to the City’s existing Residential and Non-Residential Tenant Harassment Laws prohibiting landlords from “threatening” residential or commercial tenants based on their COVID-19 status, *see* N.Y.C. Admin. Code §§ 22-901 *et. seq.*, 27-2004 *et seq.*, (the “Harassment Laws”), and (2) the enactment of a new provision rendering permanently unenforceable personal liability guaranties of certain commercial lease obligations arising between March 7, 2020 and June 30, 2021, *see* N.Y.C. Admin. Code § 22-1005 (the “Guaranty Law”).

By way of background, New York City tenants have long been shielded from landlords’ “threatening” conduct predicated on tenants’ perceived age, race, national origin, sexual orientation, citizenship status, and other protected grounds. The Harassment Laws,

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as amended, extend this prohibition to threatening conduct predicated on a residential and/or commercial tenant's "status as an essential employee," status as a person or business "impacted by COVID-19," or the tenant's "receipt of a rent concession or forbearance for any rent owed during the COVID-19 period."

The Guaranty Law extinguishes liability for a personal guarantor under a commercial lease if two conditions are satisfied. First, the default or other event causing such natural persons to become wholly or partially personally liable for such obligation must occur between March 7, 2020 and June 30, 2021. Second, the tenant must satisfy one of the following three conditions: (1) the tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020; (2) the tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or (3) the tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

On July 10, 2020, a coalition of New York City landlords ("Plaintiffs") brought a lawsuit in the United States District Court for the Southern District of New York against the City of New York and certain of its agents ("Defendants") challenging the Harassment Laws and the Guaranty Law as unconstitutional. Specifically, Plaintiffs claimed that the Harassment Laws violated the First and Fourteenth Amendments of the United States Constitution by being overly broad, vague, and restricting landlords' commercial speech in the ordinary collection of rents. Plaintiffs also claimed that the Guaranty Law violated the Contract Clause "impairing" the rights and obligations under landlords' existing contracts with their tenants,

effectively nullifying the personal liability guaranties on which landlords relied. *See Melendez v. City of New York*, 503 F. Supp. 3d 13, 17-27 (S.D.N.Y. 2020).

The District Court dismissed the Plaintiffs' First and Fourteenth Amendment claims, holding that the Harassment Laws neither implicated nor chilled Plaintiffs' free speech rights as alleged because the laws only prohibit threatening conduct that is "based on" a tenant's status of having been impacted by COVID-19, leaving intact the landlords' rights to issue "lawful" "demand[s] [for] rent because the rent is due", which are not threats as a matter of course. The District Court also found that the Harassment Laws were not impermissibly vague. *Melendez*, 503 F. Supp. 3d at 27-31. The Contracts Clause claims fared no better for Plaintiffs. While the District Court acknowledged that the Guaranty Law effected a "substantial impairment" of Plaintiffs' contracts by rendering the personal liability guaranties therein permanently unenforceable, it concluded that the law advanced a legitimate public purpose and constituted a reasonable and necessary response to the COVID-19 pandemic. *Id.* at 31-36.

Plaintiffs appealed the decision to the Second Circuit, which rendered its decision on October 28, 2021. The Second Circuit affirmed dismissal of the Plaintiffs' First and Fourteenth Amendment challenges to the Harassment Laws, agreeing with the District Court's reasoning and holding that "[t]he relevant statutory text, viewed in context and as construed by New York courts, indicates that the prohibitions of 'threatening' conduct do not apply to reasonable, lawful demands for the payment of past-due rent." *Melendez v. City of New York*, --- F.4th ---, No. 20-4238-CV, 2021 WL 4997666, at \*13-16 (2d Cir. Oct. 28, 2021). The Court's holding is limited in scope, given that "plaintiffs challenge[d] these amendments as applied to a narrow area of conduct in which they would like to engage: making routine rent demands of delinquent tenants." *Id.* at \*13. *See also id.* at \*16 ("In this case, we conclude simply that the word 'threatening' as used in the challenged Harassment

Amendments ... does not, as a matter of law, proscribe the otherwise lawful, routine rent demands that plaintiffs wish to communicate.”) The Court also rejected Plaintiffs’ due process claim, again agreeing with the District Court’s conclusion that the Harassment Laws are sufficiently specific and provide adequate notice as to the scope of their application. *Id.* at \*16-17.

The Second Circuit, however, reversed the dismissal of Plaintiffs’ Contracts Clause claims, finding that “Plaintiffs pleaded sufficient facts to preclude a court now finding as a matter of law that the Guaranty Law is a reasonable and appropriate means to serve the City’s proffered public purpose.” *Id.* at \*18. The Second Circuit agreed with the District Court’s conclusion that the Guaranty Law substantially impairs the contract rights of landlords whose commercial lease agreements are secured by personal guaranties and that the City asserted a legitimate public purpose that appeared at least plausible on the pleadings record. However, the Second Circuit determined that whether the Guaranty Law is a reasonable and appropriate means to serve the City’s proffered public purpose could not be decided as a matter of law. *Id.*

The Second Circuit held that the reasonableness of the Guaranty Law could not be determined as a matter of law given that the Guaranty Law (1) effected a permanent, not temporary, unenforceability of the guaranties subject thereto, (2) is not conditioned or otherwise limited to circumstances in which the statutorily-released guarantors actually own or intend to reopen the defaulting tenant businesses operating at the subject premises, (3) allocates the economic risk of a tenant defaulting under the subject commercial leases to a different party (*i.e.*, to the landlords rather than the guarantors), (4) is not conditioned on either the tenant or guarantor demonstrating an actual financial need for a release from the guaranty, and (5) fails to provide landlords or their principals with any alternative remedial avenues to redress

damages or losses sustained as a result of the guaranties' impairment (such as tax breaks). *Id.* at \*35-41. The Second Circuit therefore remanded Plaintiffs' Contract Clause claim back to the District Court, directing that the parties proceed to discovery. *Id.* at \*41-42

The Second Circuit's opinion in *Melendez* suggests that emergency legislation enacted at the height of the pandemic may not be immune from judicial scrutiny. Commercial and residential landlords, tenants, and guarantors should be advised that, following this decision, it is effectively settled that a landlord's routine demand for payment of past-due rent, issued "because" the rent is past due, cannot alone constitute harassment of a tenant "based on" COVID-19 status under the amended Harassment Laws, even where the tenant's underlying default may be attributable to the consequences of a COVID-19 infection. Whether the Guaranty Law's statutory release of personal guaranties on certain leases violates the Contracts Clause remains unsettled, and further developments should be monitored closely.

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