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A Law That Voids a Residential Lease

The New York Real Property Law Section 235-bb could render your residential lease agreement void without you even knowing about it.

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The Legislature passed New York Real Property Law ("NYRPL") Section 235-bb with the stated intent of protecting tenants. This law effects one to three family residential rentals statewide. Under this law, landlords must provide written notice to their tenants as to whether their rented unit has a current and valid certificate of occupancy. This very brief statute prohibits landlords from offering rentals that do not conform with their local building codes.

New York Real Property Law Section 235-bb states in full:

1. Prior to executing a residential lease or rental agreement with a tenant, the owner of real property consisting of three or fewer rental units shall provide conspicuous notice in bold face type as to whether a certificate of occupancy, if such certificate is required by law, is currently valid for the dwelling unit subject to the lease or rental agreement. Owners who provide the tenant with an actual copy of the valid certificate of occupancy shall be deemed to have complied with the requirements of this subdivision.
2. Any agreement by a lessee or tenant of premises for dwelling purposes waiving or modifying his or her rights as set forth in this section shall be void as contrary to public policy.

The legislature justified the passage of RPL 235-bb on the grounds that "[s]ome tenants may assume that when a landlord is offering a place to rent, that those housing accommodations are safe and up to code" and the law's purpose is "to help reduce the incidence of illegal conversions by requiring landlords to disclose to tenants that a certificate of occupancy is current and valid for the property being rented."

This statute is applicable in a number of scenarios that residential landlords on Long Island are likely to encounter. Take the example of a landlord who, without a permit, constructs a wall in the middle of a large bedroom to convert a large one-bedroom apartment into a two-bedroom apartment. Under this law, the landlord cannot comply with the statute by simply

providing the one-bedroom certificate of occupancy to their prospective tenant because the certificate of occupancy would not be for a "current" and "valid" structure. The same holds true for additional bedrooms, bathrooms in the unit, finished basements, garage conversions or illegal cottages.

While this statute has no penalty provision on its face, violations of this law renders a lease void. This means that provisions in a lease such as those concerning maintenance and repairs, defining a default, rent increases, late fees or your right to collect attorney fees in any eviction action would all be rendered illegal and unenforceable. When a lease is rendered illegal and unenforceable, what you're left with is an oral month-to-month lease.

Worse than that, where injury is caused by and within a property violating this law, the injured party could have a strong claim for negligence or even absolute liability against the landlord. This is a tremendous risk for the landlord of a non-conforming unit. Furthermore, since the risk arises from a landlord's failure to comply with applicable law, it's likely that a property insurance carrier will disclaim coverage for any damages the landlord sustains.

In a place like Long Island where thousands of structures are not up to code and where illegal rentals are rampant, the effects of this law can't be overstated. So, what can you do about it?

Ideally, you'll want to make sure that your rental units are fully compliant with local building codes or specifically excepted by certificate of compliance or letter in lieu for improvements that pre-date the current code. This can be done by pulling a current copy of the Certificate of Occupancy for a property from the building department and comparing it to the improvements as they currently exist. If you're not sure how to do this, it might be a good idea to hire an expeditor who is knowledgeable about the local building codes. Then if any non-conformities are discovered, you can attempt to get them permitted and then added to the Certificate of Occupancy for the property.

In addition to addressing the non-conformities in the structure, you'll want to have your lease agreement reviewed, and if necessary revised to include the proper notifications within the lease as required by NY RPL 235-bb. An attorney with knowledge of this statute can assist in this regard.

What can you do if your rental unit has non-conformities that you are unable to bring into compliance?

While the only sure way to avoid exposure is to take the rental unit out of service, for some that's not an option. In that event, you'll need to get comfortable with the fact that you won't be able to have an enforceable written lease agreement. You can use your written lease and hope that your tenant won't call you out on your violation of this statute, or you can continue to rent the unit with no lease agreement and as an oral month-to-month lease.

The larger issue, however, is the potential lack of insurance coverage in the event someone is injured on your property. You'll need to have your current insurance policy reviewed to evaluate how your insurer might handle a claim arising from what is now an illegal rental unit. If, by the terms of your policy, you're advised that you may not have coverage in such instances, you'll want to check with your insurance broker to find out if any other coverage might be available to mitigate this potentially significant liability. And, if that's not possible, and if you still cannot take the unit out of rental service, then you'll need to be prepared to self-insure in the event an injury occurs on the property. Self-insuring means potentially paying for damages on a personal injury claim out of your own pocket.

Heavy things to think about, I know. It's amazing how two short paragraphs of legislation could have such an outsize impact on the liability exposure of landlords, but they can and do. NY RPL 235-bb creates an area of tremendous vulnerability for residential landlords.

If you'd like to have your rental unit inspected for compliance with local building codes, I'd recommend that you contact a knowledgeable local expeditor. In our practice we maintain relationships with some of the best expeditors in the business, so if you don't have an expeditor of your own, give us a call and we'd be happy to make a referral.

In addition, as landlord advocates, we represent residential landlords in enforcing their rights through eviction actions, town code matters and otherwise as well as assisting in maintaining a compliant residential rental business. If you'd like to have your lease agreement or insurance policies reviewed for compliance with this law, please give us a call, and if we can't help, then we'd be happy to point you in the right direction.

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