

STATE OF NEW YORK

5155

2017-2018 Regular Sessions

IN ASSEMBLY

February 6, 2017

Introduced by M. of A. O'DONNELL -- read once and referred to the
Committee on Small Business

AN ACT to amend the administrative code of the city of New York, in
relation to enacting the "small business survival act"

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "small business survival act".

3 § 2. Legislative intent. The legislature finds that the small business
4 sector of the city of New York remains vulnerable at a time when New
5 York city is more dependent than ever on small business for job growth
6 and revenues. The New York city commercial rental market has been nega-
7 tively influenced by speculators for such an extended period of time
8 that the interest of small businesses and job creation, and the broader
9 general economic interest of the city, are being harmed. An unacceptable
10 number of established small businesses are being forced out of business
11 solely as a result of the commercial lease renewal process. Whereby a
12 breakdown has taken place in normal processes of bargaining and freedom
13 of contract has become an illusory concept during the commercial lease
14 renewal process. The current commercial rental market results in
15 unjust, unreasonable, and oppressive leases for the payment of rent for
16 commercial space in New York city. Landlords continue to exact such
17 agreements from tenants under stress of prevailing market conditions and
18 unequal bargaining power, without any tenants' rights to allow for
19 bargaining in good faith to arrive at fair and reasonable lease terms.
20 The absence of legal protection for the interests of commercial tenants
21 in the lease renewal process has unnecessarily accelerated the closing
22 of small businesses and resulted in lost jobs, lost tax revenues caused
23 higher inflation and cost of living rates, decreased job growth opportu-
24 nities for New Yorkers and community instability. It is the intent of
25 the legislature, through this legislation, to give small businesses some

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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rights in the commercial lease renewal process, and therefore, a measure of predictability of future costs through a two-step procedure of mediation and, if necessary, arbitration for negotiating commercial lease renewals. This process would create a fair negotiating environment, which would result in more reasonable and fair lease terms to help small businesses survive and encourage job retention and growth in the city of New York.

§ 3. Title 22 of the administrative code of the city of New York is amended by adding a new chapter 10 to read as follows:

CHAPTER 10

COMMERCIAL LEASE ARBITRATION AND MEDIATION

Section 22-1001 Scope.

22-1002 Definitions.

22-1003 Manner of service.

22-1004 Rental guidelines.

22-1005 Security deposits.

22-1006 Retaliation.

22-1007 Waiver.

22-1008 Evaluation.

22-1009 Penalties.

22-1010 Inconsistency with other laws.

§ 22-1001 Scope. This chapter shall apply only to all commercial lease renewals for commercial premises. On any occasion wherein a landlord and tenant are required to negotiate the terms of a lease renewal for commercial uses the provisions of this chapter shall apply. The provisions of this chapter shall apply to any landlord and current tenant whose lease expired on or after July first, two thousand eighteen.

§ 22-1002 Definitions. a. "Administering agency" shall mean any city agency, office, department, division, bureau or institution of government, the expenses of which are paid in whole or in part from the city treasury, as the mayor shall designate.

b. "Arbitrator" shall mean the person chosen by the parties or by the American Arbitration Association, or any other recognized arbitration organization, to resolve a dispute between a landlord and a tenant concerning a commercial lease renewal or the rent to be charged for the commercial premises.

c. "Commercial premises" shall mean a building or space occupied for non-residential purposes including, but not limited to, manufacturing, retail, professional services, offices, assembling, processing, cultural and not-for-profit entities that are present in the city of New York, who have a valid commercial lease.

d. "Landlord" shall mean any owner, lessor, sublessor or other person entitled to receive rent for the use or occupancy of any commercial premises, or an agent thereof.

e. "Mediator" shall mean any person, agreed upon by the parties to the dispute or chosen by the American Arbitration Association or any other recognized mediation or arbitration association, to act as an intermediary between the parties. The mediator shall not offer a binding decision concerning the matter in dispute.

f. "Negotiation" shall mean the process of conferring with one another through conferences, discussions and compromise, to arrive at a mutually agreeable settlement.

g. "Rent" shall mean any and all consideration, including but not limited to pass-alongs, received by the landlord in connection with the use or occupancy of any commercial premises.

1 h. "Services" shall mean those facilities which enhance the use of the
2 commercial premises, including, but not limited to, repairs, mainte-
3 nance, painting, heat, hot and cold water, utilities, elevator service,
4 security devices and patrols, furnishings, storage, janitorial and land-
5 scaping services, refuse removal, insurance protection, parking spaces
6 and facilities in common areas of the building or parcel in which the
7 rental unit is located.

8 i. "Tenant" shall mean tenant, subtenant, lessee, sublessee, or any
9 other persons lawfully entitled to use or occupancy of any commercial
10 premises.

11 § 22-1003 Manner of service. All papers and notices which, by the
12 terms of this chapter are required to be served, shall be served by a
13 process server, or shall be sent by first class mail and certified mail,
14 return receipt requested or by any express mail service.

15 § 22-1004 Rental guidelines. a. All leases of a commercial premises
16 may be renewed at the option of a tenant who did not lose the right to
17 renew a lease under the grounds described in subdivision d of this
18 section. Such lease renewals shall be for a minimum term of ten years,
19 provided however, that at the tenant's option, and with the written
20 approval of the landlord, a lease of shorter or longer duration may be
21 selected.

22 b. No period of lease extension required by this chapter shall extend
23 beyond the landlord's lawful ability to rent the premises to the tenant,
24 where such ability is limited by:

25 (1) the obligation to rent the premises to a third party pursuant to a
26 bona fide lease entered into prior to the effective date of this chap-
27 ter;

28 (2) the exercise by a third party of a bona fide option to rent the
29 premises provided that such option was given prior to the effective date
30 of this chapter; or

31 (3) any other lawful reason arising prior to such effective date.

32 c. Any landlord whose obligations under this chapter are limited by
33 the provisions of this section shall not be required to negotiate or to
34 arbitrate as otherwise provided for in this chapter but shall remain
35 obligated to negotiate and to arbitrate a renewal lease for such period
36 of time for which the landlord has a lawful ability to rent the commer-
37 cial premises to the tenant. The landlord shall provide notice to the
38 tenant one hundred eighty days before the termination of the lease of
39 the basis on which the lease cannot be extended for a full ten-year
40 term.

41 d. A tenant shall lose the right of renewal and a landlord may refuse
42 to renew a lease only on the following grounds:

43 (1) The tenant has persistently delayed rent payments without cause.
44 For the purpose of this subdivision, "cause" is defined as the withhold-
45 ing of rental payments by the tenant due to the alleged violations of
46 the rental agreement by the landlord. In order for the landlord to be
47 excused from renewal on this ground, the landlord must have served the
48 tenant at least three prior notices during the term of the lease to the
49 tenant for demand of payment within thirty days, and then show that the
50 lessee has not paid within such thirty day period. The landlord shall
51 not serve such notice unless the rent payment was in arrears for a mini-
52 mum of fifteen days;

53 (2) The tenant uses the commercial premises in a manner substantially
54 different from that described in the lease;

55 (3) The tenant conducts or permits any form of illegal activity on the
56 premises;

1 (4) The tenant has substantially breached any substantive obligation
2 under the current lease and has failed to cure such breach within thirty
3 days following written notice to cure by the landlord;

4 (5) Upon the termination of the current tenancy, the landlord intends,
5 in good faith, to demolish or substantially reconstruct the premises or
6 a substantial part thereof, or to carry out substantial work or
7 construction on the commercial premises or substantial part thereof
8 which he or she could not reasonably do without obtaining possession of
9 the commercial premises. The landlord shall notify the tenant of his or
10 her decision to reoccupy the commercial premises at least one year prior
11 to the termination of the lease. In the event that the lessor fraudu-
12 lently invokes this justification for a refusal to renew a commercial
13 lease, the defrauded tenant may collect treble damages for any loss
14 suffered as a result of such action;

15 (6) The current tenancy was created by the subletting of the property,
16 whereby the prime tenant did not notify the landlord by certified mail
17 of the subtenant's existence and did not obtain the written consent of
18 the landlord. This ground is void if the landlord and tenant had agreed
19 in the lease to allow subleasing rights without the consent of the land-
20 lord and all obligations of the prime tenant on the issue, were in
21 compliance;

22 (7) It has been determined by the administering agency or by a civil
23 court of competent jurisdiction that the tenant is a gross and persist-
24 ent violator of New York city tax laws, of any license obligations
25 related to the use of the premises or of any laws of the city of New
26 York;

27 (8) Upon the termination of the current tenancy, the landlord intends
28 to occupy the retail premises in order to carry out its own business,
29 which cannot be the same type of business that the current tenant is
30 operating, unless the landlord compensates the tenant at fair market
31 value as determined by an arbitrator as restitution for the loss of such
32 tenant's business. The landlord shall notify the tenant of his or her
33 decision to reoccupy the premises at least one hundred eighty days prior
34 to the termination of the lease. In the event that the landlord fraudu-
35 lently invokes this justification for a refusal to renew a commercial
36 lease, the defrauded tenant may collect treble damages for any loss
37 suffered as a result of such action.

38 e. Procedure for lease renewals. (1) Where the landlord agrees to
39 renew the lease of the current tenant, such landlord shall notify the
40 tenant at least one hundred eighty days prior to the expiration of the
41 lease of his or her willingness to negotiate the renewal of the commer-
42 cial lease agreement. If the landlord and tenant agree, they may at any
43 time renegotiate a new lease, with any agreed to terms and conditions,
44 not inconsistent with the provisions of this chapter. The tenant is to
45 continue rent payments as set forth in the lease until the parties reach
46 an agreement on a lease renewal or until a decision is otherwise
47 rendered through the arbitration or mediation processes described in the
48 provisions of this subdivision. The first ninety days of the one
49 hundred eighty-day notice period is for the purpose of negotiations.
50 Alternatively, either party may compel the other party to the dispute to
51 use that ninety-day period, or any part thereof, for the purposes of
52 mediation. If either the landlord or tenant chooses mediation, he or she
53 shall notify the other party that a mediation session is requested. The
54 parties shall choose a mediator who is agreeable to both the landlord
55 and tenant, or if no such person is agreeable, then the American Arbi-
56 tration Association shall appoint a mediator or any other recognized

1 mediation or arbitration association. The full costs of mediation shall
2 be equally shared by both parties. The mediator shall notify the land-
3 lord and tenant, no more than ten days after his or her appointment, of
4 the date, time, place and rules of the hearing. The mediator shall
5 follow his or her customary rules and may render an opinion concerning
6 the dispute, which shall not be binding on the parties. If after ninety
7 days of negotiation and any mediation sessions, the landlord and tenant
8 do not reach an agreement on a new lease, then the tenant is to notify
9 the American Arbitration Association or any other recognized mediation
10 or arbitration association, within fourteen days of the expiration of
11 the first ninety day period, that an arbitration hearing is requested.
12 Failure by the tenant to notify the American Arbitration Association or
13 any other recognized mediation or arbitration association within four-
14 teen days of the expiration of the first ninety day period shall result
15 in the forfeiture of the tenant's right of renewal.

16 (2) Where the landlord refuses to renew a lease with the current
17 tenant, such landlord is to notify the tenant a minimum of one hundred
18 eighty days before the expiration of the lease that such landlord is not
19 going to renew the tenant's lease and state the reason or reasons for
20 such denial in detail. Failure of the landlord to give such notice shall
21 subject the parties to the provisions of paragraph three of this subdi-
22 vision. The landlord is to furnish the tenant with all pertinent data
23 supporting such reason or reasons. If the tenant still wishes to chal-
24 lenge the refusal to renew the lease and apply for a renewal of the
25 lease, then the tenant must notify the landlord within thirty days after
26 the receipt of the landlord's notice of his or her intent to challenge
27 the refusal and seek arbitration solely on the validity of the land-
28 lord's grounds for denial of tenants' right to renewal on the issue of
29 renewal. The tenant shall then notify the American Arbitration Associ-
30 ation or any other recognized mediation or arbitration organization
31 within fourteen days after notification by the tenant to the landlord
32 that a hearing is requested to determine whether the landlord's grounds
33 for refusal are valid.

34 (3) If an arbitration hearing is requested pursuant to either para-
35 graphs one or two of this subdivision:

36 (a) The landlord and tenant shall choose the arbitrator from a list of
37 arbitrators provided by the American Arbitration Association or any
38 other recognized mediation or arbitration association. If they cannot
39 agree on the selection of the arbitrator within thirty days of the
40 tenant's notice to such association that a hearing is requested, the
41 tenant shall notify within fourteen days such organization of the
42 parties' failure to make a selection and such arbitration organization
43 shall determine the arbitrator within five days of receipt of such
44 notice from the tenant. Both parties shall follow the rules established
45 by the arbitration association in preparing for and holding an arbi-
46 tration hearing.

47 (b) The arbitrator shall notify both parties of the date, place, time
48 and rules of the hearing within fourteen days of receipt by the arbi-
49 tration association of the request for a hearing. The hearing shall take
50 place in the borough where the commercial premises are located unless
51 otherwise agreed to by the landlord and tenant. The landlord and tenant
52 shall furnish the arbitrator with all relevant documentation, and the
53 arbitrator shall conduct a preliminary meeting or conference telephone
54 call prior to the hearing to review the data and familiarize himself or
55 herself with the case. The matters the arbitrator shall determine during
56 the preliminary meeting shall include, but not be limited to, the need

1 to inspect the property requesting additional data from either party and
2 any facts deemed relevant to the arbitrator, list of potential witnesses
3 with backgrounds of each, and the need to hire expert consultants to
4 certify the accuracy of data. The arbitrator may seek to conduct an
5 inspection of the property after notifying both parties at least three
6 days in advance of the inspection and informing them of their right to
7 be present during the inspection.

8 (c) The hearing before the arbitrator may be recorded by digital, tape
9 or video device, at the request of either party and agreed to by the
10 arbitrator and whose costs will be borne by the party who decided on
11 this method to create a record of the hearing. If both parties are in
12 agreement, the costs for recording the hearing will be shared equally.
13 Such recording may be transcribed upon the request of any party who
14 posts in advance the estimated cost of the transcription. Either party
15 may provide, at their expense, a reporter to transcribe the hearing. The
16 official record of the hearing shall include all documents and offers of
17 proof presented to the arbitrator, the written decision of the arbitra-
18 tor and any transcript of the hearing. The landlord and tenant will each
19 be given adequate time to present their cases, as determined by the
20 arbitrator to present testimony, witnesses, pictures, videos, documents,
21 including charts, comparable rent data and any other relevant data. Each
22 party shall be allowed to confront and cross-examine adverse witnesses.
23 The arbitrator can choose to investigate any aspect of the case to help
24 arrive at a decision.

25 (d) For a dispute brought before an arbitrator under paragraph one of
26 this subdivision, such arbitrator shall render a written determination
27 setting the rent to be paid during a renewal period of ten years,
28 together with the basis for the determination of the rent, and shall
29 notify the parties of such determination no later than thirty days after
30 the hearing has been concluded. Failure to notify the parties within
31 thirty days shall not affect the enforceability of such determination.
32 Article seventy-five of the civil practice law and rules governs arbi-
33 tration procedure in New York state. Therefore, the ruling of the arbi-
34 tration will be governed by this New York state statute. Such determi-
35 nation shall be based on (i) the cost of maintenance and operation of
36 the entire property including land and building improvements, including
37 all service debt such as mortgages, (ii) the kind, quality and quantity
38 of services furnished by the landlord, (iii) the condition of the space
39 including capital improvements made by the tenant, (iv) current interest
40 rates on bank deposits and United States government bonds, (v) the
41 current fair market rates for comparable properties in the area in which
42 the property is located, (vi) the lease history and any relevant
43 sublease history, (vii) the longevity of the business, (viii) the
44 location of the business, (ix) the extent to which the business is bound
45 to its particular location, (x) the size of the space, (xi) the cost of
46 leasing similar premises within a one mile radius of the property, (xii)
47 the past ten year rental market history within a one mile radius of the
48 property, as well as, the length of time of any consistent real estate
49 speculation occurring in the market and degree of real estate specu-
50 lation for a particular area which the business is located in, the
51 existence of empty storefront property for extended periods of time and
52 the impact upon the local commercial rental market of unusual conditions
53 and (xiii) all other relevant factors. The arbitrator shall consider
54 that each small business and landlord relationship should be dealt with
55 on a case-by-case basis. Where the commercial premises is located in a
56 mixed-use building with less than twenty-five residential units, the

1 arbitrator shall give special consideration to the criteria listed in
2 items (i) and (ii) of this subparagraph. Within thirty days of the hear-
3 ing, the arbitrator shall send the decision as to the rent price to the
4 parties involved by certified mail. The costs of arbitration shall be
5 borne equally by landlord and tenant. Article seventy-five of the civil
6 practice law and rules governs arbitration procedure in New York state.
7 Therefore, the ruling of the arbitration will be governed by this New
8 York state statute.

9 (e) For a dispute brought before an arbitrator under paragraph two of
10 this subdivision, such arbitrator shall render a written determination
11 stating the basis for such determination and notifying the parties of
12 such determination no later than thirty days after the hearing has been
13 concluded. Failure to render a timely, written determination and to
14 notify parties within thirty days shall not affect the enforceability of
15 such determination. Such determination shall be based on (i) appropriate
16 laws applicable to commercial spaces; (ii) the terms of the lease and
17 compliance therewith; (iii) rental guidelines as set forth by the admin-
18 istering agency; (iv) follow the provisions of paragraphs one through
19 eight of subdivision d of this section; and (v) any other relevant and
20 material factors that the arbitrator shall deem proper. If the arbitra-
21 tor decides in favor of the landlord, then the tenant shall have until
22 the end of the current lease to vacate. If the arbitrator decides in
23 favor of the tenant, the parties will begin the renegotiations of new
24 lease terms and if necessary, the mediation period as detailed in para-
25 graph two of subdivision e of this section. The maximum length of time
26 permitted for this renegotiation/mediation period will be reduced from
27 ninety days to thirty days from the date of receipt of arbitrator's
28 ruling. If the parties have not reached a mutual agreement on the terms
29 of a new lease, and mediation failed to achieve agreement within the
30 thirty day period after arbitrators' ruling on "right of renewal", then
31 the parties are to proceed to arbitration as detailed in paragraph two
32 of subdivision e of this section.

33 (f) The arbitrator's decision setting the rent price shall be final
34 and binding on both parties except as provided herein, and they shall
35 enter into a lease incorporating such rent which lease does not diminish
36 any services provided by the landlord pursuant to the existing lease.
37 Such renewal lease shall be entered into by the termination date of the
38 current lease and shall commence at the time of expiration of the exist-
39 ing lease. If, however, the tenant elects not to pay the rent set by the
40 arbitrator, then the landlord and tenant shall not enter into a new
41 lease agreement or renew the existing lease.

42 (g) If, pursuant to subparagraph (f) of this paragraph, the tenant
43 elects to not pay the rent set by the arbitrator, the tenant will be
44 allowed to remain in possession at a rent no greater than a ten percent
45 increase of the average rent charged during the final twelve months of
46 the last rental agreement between the landlord and tenant from the
47 termination date of the existing lease until such date on which the
48 tenant shall remove his or her property from the premises as provided
49 herein. In the event the landlord receives a written bona fide offer
50 from a prospective tenant to rent the premises, the landlord must first
51 offer the current tenant the option of entering into a lease at the rent
52 and other terms agreed to by the prospective tenant to the landlord. The
53 landlord is to notify the tenant of such offer within three days of
54 receipt of such written bona fide offer. If the tenant declines to pay
55 the rent or fails to accept the offer within fourteen days of receipt of
56 the landlord's notification to the tenant of such offer, then the tenant

1 has thirty days, from the date such notice is received, to remove prop-
2 erty from the commercial premises provided that the lease has expired.
3 If the tenant accepts the option of first refusal, the landlord and
4 tenant shall enter into a lease based upon the terms of the bona fide
5 offer received by the landlord from the prospective tenant.

6 § 22-1005 Security deposits. Security deposits shall not exceed an
7 amount equal to two months rent. All security deposits shall be placed
8 in escrow in an interest-bearing account at a federally insured bank
9 located in New York state. The tenant shall be notified in writing of
10 the location of such escrow account. Interest paid on the account shall
11 be paid in full to the tenant upon termination of the lease. The amount
12 of interest paid to the tenant shall equal the interest paid by such
13 federally insured bank less one percent for the landlord's administra-
14 tive costs.

15 § 22-1006 Retaliation. No landlord shall in any way retaliate against
16 any tenant for the tenant's assertion or exercise of any rights under
17 this chapter. Any such retaliation may subject the landlord to a suit
18 for actual and punitive damages, injunctive relief, and attorney's fees.
19 Proof of retaliation by the landlord occurring prior to or during the
20 arbitration proceeding shall be considered by the arbitrator in making a
21 determination as to the rent to be paid.

22 § 22-1007 Waiver. No provision in any lease, rental agreement, or
23 agreement made in connection therewith which waives or diminishes any
24 right of tenant under this chapter is valid.

25 § 22-1008 Evaluation. At the end of each fifth year, the administering
26 agency shall report to the mayor and the council on the effectiveness of
27 this chapter in carrying out the purposes set forth in the legislative
28 findings. The recommendations should take into account the existing
29 commercial rental market which includes among other factors the
30 inflation and interest rates. This report shall also identify any other
31 positive or negative effects of the law.

32 § 22-1009 Penalties. a. A landlord or tenant may seek injunctive
33 relief mandating arbitration and/or appropriate damages against any
34 landlord or tenant who fails to submit voluntarily to arbitration or
35 otherwise fails to act in good faith.

36 b. Any and all legal expenses incurred by one party as a result of its
37 attempt to compel the other party to comply with the provisions of this
38 chapter may be awarded to the appropriate party by the arbitrator or a
39 civil court of competent jurisdiction.

40 § 22-1010 Inconsistency with other laws. In the event of any incon-
41 sistency with any other laws of the city of New York, this law shall
42 take precedence.

43 § 4. Severability. If any clause, sentence, paragraph, section or part
44 of this act shall be adjudged by any court of competent jurisdiction to
45 be invalid and after exhaustion of all further judicial review, the
46 judgment shall not affect, impair or invalidate the remainder thereof,
47 but shall be confined in its operation to the clause, sentence, para-
48 graph, section or part of this act directly involved in the controversy
49 in which the judgment shall have been rendered.

50 § 5. This act shall take effect on the one hundred thirtieth day after
51 it shall have become a law.