

# Did the CARES Act Preempt New York's Rent Demand Rules?

A Practical Guidance® Article by Andrew Darcy, Mobilization for Justice, Inc.



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For many attorneys, the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (CARES Act), is ancient history. Many laws, executive orders, and administrative procedures relating to eviction proceedings have been issued since March 2020. It can be challenging to keep up with this fluid area of law. Landlord-tenant litigants should be aware, however, that if certain landlords serve only a 14-day rent demand upon a New York tenant, the rent demand is likely defective and the proceeding subject to dismissal under the CARES Act. This article argues that Section 4024(c) of the CARES Act preempts certain provisions of New York's Real Property Actions and Proceedings Law (RPAPL), at least when lessors of "covered dwellings" (as defined by the CARES Act) are involved.

For more on residential landlord-tenant matters in New York, see [Tenant Representation in a Residential Nonpayment Proceeding \(NY\)](#) and [Residential Tenant Representation Resource Kit \(NY\)](#).

## CARES Act – Background and Eviction Protections

The CARES Act was signed into law on March 27, 2020. It is a broad law that covers various subjects, including housing. The economic fallout from COVID-19 made millions of renters across the country housing unstable, leaving them at risk of eviction for nonpayment of rent. To

combat this potential wave of displacement, the CARES Act created a limited eviction moratorium that was to last for 120 days and a stringent notice requirement to take effect thereafter. See generally Pub. L. 116-136 § 4024. These restrictions on residential evictions include an enhanced notice requirement for certain tenants. Section 4024(c)(1) of the CARES Act provides: "The lessor of a covered dwelling unit . . . may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate." Pub. L. 116-136 § 4024(c). Unlike other provisions of the CARES Act, this notice requirement does not sunset and, thus, is still the law.

The CARES Act's eviction restrictions were not universally applicable. Rather, they applied only to lessors of "covered dwellings." Pub. L. 116-136 § 4024(b), (c). That term was defined, in sum and substance, as a residential dwelling unit in a property that either participates in federal rental subsidy program or has a federally subsidized mortgage. Pub. L. 116-136 § 4024(a)(2). Section 4024(b) of the CARES Act provides that during the 120-day period beginning on the date that the statute was enacted, "the lessor of a covered dwelling may not . . . make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges." The following subsection added that lessors of a "covered dwelling" were prohibited from issuing a notice to vacate until the 120-day moratorium had expired.

Critically relevant to this article, after expiration of the 120-day moratorium, lessors of covered dwellings were prohibited from requiring "the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to

vacate.” Pub. L. 116-136 § 4024(c). Unlike the moratorium provision, the notice requirement has no sunset date and is, therefore, still effective. HUD explicitly says so: “Notwithstanding the expiration of the CARES Act eviction moratorium, the CARES Act 30-day notice to vacate requirement for nonpayment of rent, in Section 4024(c)(1), is still in effect for all CARES Act covered properties.” See [Eviction Moratorium FAQs for HUD’s Office of Public and Indian Housing](#).

## The CARES Act and New York’s RPAPL

The notice provision directly impacts New York landlord-tenant proceedings based on nonpayment of rent. (This article does not address the argument that the CARES Act notice provision is applicable to cases other than ones based on nonpayment of rent, but practitioners should be aware that the statute could be read to encompass holdover eviction proceedings.) Section 711 of New York’s Real Property Actions and Proceedings Law provides that “[n]o tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding” and provides the bases. One basis is when “[t]he tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a written demand of the rent has been made with at least fourteen days’ notice requiring, in the alternative, the payment of the rent, or the possession of the premises[.]” RPAPL § 711(2) (emphasis added).

A rent demand in New York must comply strictly with RPAPL § 711(2); otherwise, a petitioner risks dismissal of a nonpayment proceeding premised upon the demand. Rent demands often mirror language such as a warning to pay a sum certain “on or before the expiration of the fourteen (14) days from the day of the service of this Notice, or surrender up the possession of said Premises to the Landlord, in default of which the Landlord will commence summary proceedings under the Statute to recover the possession thereof.” In other words, tenants can pay or vacate; they risk eviction if they fail to do either.

“A proper rent demand is a condition precedent to a nonpayment proceeding which Petitioner must plead and prove along with the other elements of its case.” *Promesa HDFC v. Frost*, 2017 NY Slip Op 50808(U), \*3-4 (Civ. Ct. Bronx Cty. 2017). A rent demand that fails to provide the minimum statutory notice period is defective and requires the petition to be dismissed. See, e.g., *WFHA Creston Ave. LP v. Votaw*, 2020 NY Slip Op 50083(U), \*4 (Civ. Ct. Bronx Cty. 2020) (dismissing nonpayment case because “petitioner

did not comply with the statute when it served a 10-Day Notice” as opposed to a 14-day notice).

While the author is unaware of any case directly on point, given that rent demands must instruct a tenant to pay or vacate, they are “notices to vacate” under the CARES Act. This position finds additional strength in the fact that the CARES Act eviction moratorium was specifically addressed to prevent evictions based on nonpayment of rent. See Pub. L. 116-136 § 4024(b).

The CARES Act should preempt the less protective RPAPL. “By operation of the Supremacy Clause of article VI of the US Constitution, federal law can supersede state or local laws.” *Mother Zion Tenant Ass’n v. Donovan*, 55 A.D.3d 333, 335 (1st Dep’t 2008). There are various situations in which federal law will preempt state law, including “where the state or local law actually conflicts with the federal law.” 55 A.D.3d at 335 Where there is a conflict in terms of the amount of notice required to be given to tenants or occupants of residential housing, federal law “preempts state law that is less protective of tenants.” *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 165 (6th Cir. 2014).

In *Mik*, the Sixth Circuit held that the federal Protecting Tenants at Foreclosure Act of 2009 (PTFA), which requires that tenants be provided with 90 days’ notice to vacate, preempted less protective Kentucky state law because “[t]he purpose of the PTFA could not be accomplished if it did not preempt state laws that set lower standards for successors in interest than the Act requires.” *Mik*, 743 F.3d at 165; see also *956 Rogers Ave NDB LLC v. Blair*, 67 Misc. 3d 403, 406 (Civ. Ct. Kings Cty. 2020) (“Therefore, under these circumstances, the PTFA, which protects tenants in foreclosed properties against abrupt evictions . . . provides greater protections for tenants than the protection available under RPAPL sec 1305.”). The same reasoning applies here. There is no doubt that the CARES Act conflicts with the RPAPL since it requires more notice to, and is more protective of, residential tenants in the wake of the COVID-19 pandemic.

While the author is unaware of any New York decisions, courts in other jurisdictions have dismissed eviction proceedings that failed to comply with the CARES Act notice provision. See, e.g., *Newcastle Lake LLC v. Carmichael*, Case No. 2020-005609-CC-20 (Fla. 11th Jud. Cir. Miami-Dade Cty. Oct. 21, 2020) (dismissing nonpayment case in October 2020 where tenant received only a three-day notice). *Newcastle* is an interesting decision that explores the breadth of the CARES Act as it pertains to landlords receiving federal subsidies. The court explained with great clarity: “Section 4024 of the CARES ACT applies to ‘covered dwellings,’ not covered tenants . . . 4024(a)(1)

defines a ‘covered dwelling’ as a dwelling that is occupied by a tenant and is on a covered property. The plaintiff, New Castle Lake LLC, as a participant in Section 8 Housing Choice Voucher program (42 U.S.C. 1437f), is a covered property.” Id. Thus, the court dismissed the proceeding without any assessment of whether the tenant received any federal rent assistance and based solely on the fact that the landlord has some tenants with a Section 8 voucher. This holding comports with the plain language of the statute and means that a landlord who receives an applicable federal subsidy, even if not on behalf of the tenant who allegedly defaulted on the rent, must comply with the CARES Act’s notice provision.

## Looking Ahead

In some ways, March 2020 feels like a lifetime ago and a myriad of laws, executive orders, and administrative procedures relating to eviction proceedings have been issued since then. But as we move into 2022, many of these protections have expired or will expire soon. Tenants’ counsel in New York should remember if a landlord of a “covered dwelling” serves only a 14-day rent demand upon

a tenant, the CARES Act remains a viable tool and the rent demand is likely defective with the proceeding subject to dismissal.

*Note: While the author was writing this article, the Department of Housing and Urban Development (HUD) issued an interim final rule regarding notice to certain tenants of federally subsidized housing. See 86 Fed. Reg. 55693 (Oct. 7, 2021). The rule states that “during the COVID-19 pandemic and other future emergencies, the Secretary may require that public housing authorities (PHAs) and PBRA owners provide tenants with specified information regarding any Federal funding that is made available to prevent eviction for nonpayment of rent during such emergency. The Secretary may also extend the time period before lease termination for nonpayment of rent to a minimum of 30 days after the tenant has received such information.” Thus, during certain emergencies, HUD can require landlords of public housing tenants and tenants in buildings that are part of the Project Based Section 8 program to provide 30 days’ notice before terminating leases for nonpayment of rent. It is a helpful rule but narrower in its reach and temporal scope than the CARES Act.*

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