# The HSTPA Extended Lockout Protections for Non-tenant Occupants: Did the Courts Get the Message?

**A Practical Guidance® Article by Andrew Darcy and Caroline Roe, Mobilization For Justice**

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*They changed the locks*. There are few calls that cause housing advocates more concern than ones that begin like this. This statement, or some variation of it, usually signifies the onset of a conversation about an illegal lockout. This article explains the legal challenges when a lawful occupant who is not a tenant is the target of an illegal lockout in New York City. Focusing on amendments to New York's Real Property and Proceedings Law (RPAPL) enacted through the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the article discusses a split in authority under these circumstances, ultimately concluding that any person who has been illegally evicted should be restored to possession. This conclusion is drawn from the text of the amended RPAPL, the legislative history of the HSTPA, and the foundational principle that "[a] legal right without a remedy would be an anomaly in the law." Peck v. Jenness, 48 U.S. 612, 623 (1849).

For more guidance on representing residential tenants in New York City, see Regina Metro One Year On: Residential Tenants in New York City Can Still Conduct Robust Discovery in Rent Overcharge Cases, Commencing a Virtual Housing Part Proceeding in New York City Checklist, Tenant Representation in a Residential Nonpayment Proceeding (NY), and De Facto Rent Stabilization in New York City.

## Overview and Legal Background

In New York City, self-help evictions are, in almost all situations, illegal. New York City's unlawful eviction law provides that "[i]t shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit[.]" NYC Admin. Code § 26-521(a).

While the language of the statute is crystal clear, over many years, a string of decisions gutted protections for residents who were not officially recognized as "tenants." These decisions left many New Yorkers with a right not to be unlawfully evicted, but without a practical remedy when they were. Eviction, in any situation, is traumatic. It has been linked to loss of property, loss of employment, and depression. See Why Eviction Matters (Eviction Lab). It stands to reason that losing one's home without notice or an opportunity to assert one's rights is likely to result in devastating outcomes.

In 2019, New York's HSTPA was signed into law. It made critical amendments to the RPAPL that —in the authors' view—were a direct and specific response to people being illegally evicted without any apparent consequence.

We are not the only ones to hold this view. Some courts have rightly interpreted these legislative changes as a clear

signal to the judiciary: if lawful occupants are evicted without due process, they should be restored to possession. Period. Others, however, have taken a different stance and relied on pre-HSTPA case law to hold that lawful occupants, even if unlawfully evicted, have no right to be restored to possession.

As noted above, this article highlights the split in authority and explains why any person found to have been illegally evicted should be restored to possession. This conclusion is drawn from the text of the amended RPAPL, the legislative history of the HSTPA, and the foundational principle that "[a] legal right without a remedy would be an anomaly in the law." Peck v. Jenness, 48 U.S. 612, 623 (1849).

## Pre-HSTPA Case Law

Before the passage of the HSTPA, it was not uncommon for courts to take the position that "the unlawful eviction provisions of NYC Administrative Code 26-521 do not operate to change a license or other nonpossessory interest into a possessory interest" and thus "do not provide an avenue through which [an occupant] can be restored to possession of an apartment." Andrews v. Acacia Network, 70 N.Y.S.3d 744, 746 (App. Term 2d Dep't 2018). Although these decisions were in keeping with precedent, as a matter of policy, they were harsh.

An example of this can be seen in *Andrews*, where the petitioner alleged that he had been "denied entry to a room he shared in a supportive living facility." In response to these claims, the respondent—a supportive housing provider—argued that "it was entitled to use self-help to regain possession since petitioner was a licensee." The Appellate Term sided with the landlord, arguing that because a "licensee does not have 'possession,' he cannot maintain an unlawful entry and detainer proceeding." 70 N.Y.S.3d at 745.

Although the outcome of this case was disappointing to tenant advocates, it was not wholly unexpected. Historically, judges have been sympathetic to landlords who have opted to remove non-tenants from apartments without a full eviction procedure. See Bliss v. Johnson, 73 N.Y. 529 (1878) (an owner has a common law right to oust an "interloper" by use of reasonable force); Napier v. Spielmann, 196 N.Y. 575 (1909) (affirming decision that held "[a]n action for forcible entry and detainer will not lie where the ousted occupier is a servant or mere licensee").

This case law was codified, in part, by the RPAPL. The RPAPL has two specific provisions that govern the commencement and maintenance of summary eviction proceedings: NY CLS RPAPL § 711 "Grounds where landlord-tenant relationship exists" and NY CLS RPAPL § 713 "Grounds where no landlord-tenant relationship exists." Prior to the passage of the HSTPA, Section 711 provided that a "tenant . . . shall not be removed from possession except in a special proceeding." Section 713, on the other hand, provided that a special proceeding "may be maintained" against someone who does not meet the definition of a tenant. These two provisions served, and continue to serve, as the framework for summary eviction proceedings.

Unfortunately, the language of NY CLS RPAPL §§ 711 and 713 suggested to certain courts that, in the case of someone who is not a "tenant," self-help may be permissible. In 1992, the Appellate Division held as much, reasoning as follows: "While it is true that tenants as defined in RPAPL 711 may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected . . . . Thus, RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of non-tenants, but it does not replace an owner's common-law right to oust an interloper without legal process." P & A Bros., Inc. v. N.Y. Dep't of Parks & Recreation, 585 N.Y.S.2d 335, 336 (App. Div. 1992) (citation omitted).

This trend continued into the 2000s, when a slew of cases reinforced the precedent that tenants are the only occupants who are entitled to due process in the case of an eviction. See Coppa v. LaSpina, 839 N.Y.S.2d 780 (App. Div. 2007) (holding that supportive housing provider was permitted to "peaceably exclude [a mentally ill homeless adult] from the house without resort to legal process" because "she was not a 'tenant' (RPAPL 711)"); Padilla v. Rodriguez, 110 N.Y.S.3d 865 (App. Term 1st Dep't 2018) (affirming dismissal of illegal lockout proceeding and holding that "since a licensee does not have 'possession,' she cannot maintain an unlawful entry and detainer proceeding").

The HSTPA brought about significant statutory changes.

## The HSTPA and Post-HSTPA Case Law

On June 14, 2019, the HSTPA was signed into law. It contained two critical amendments. First, it amended RPAPL Section 711 to specify that, in addition to "tenants," no "*lawful occupant* of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." NY CLS RPAPL § 711. The class of lawful occupants encompasses a much broader one than tenants. Indeed, it includes anyone who occupies a premises "based upon color of right or consent and not as a squatter." Torres v. N.Y.C. Hous. Auth., 2020 NYLJ LEXIS 1650, at *6 (2020).

The HSTPA also added RPAPL Section 768, which states, in pertinent part, "It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order." NY CLS RPAPL § 768.

## Proper Application of HSTPA Amendments to the RPAPL

These combined changes were, in our view, a signal to the judiciary that the statutory basis upon which its prior cases relied, was no more. Certain courts shared our view. For example, in Byas v. New York City Hous. Auth., 2020 N.Y. Misc. LEXIS 4443 (Civ. Ct. Bronx Cty. 2020), the petitioner was the grandson of the deceased tenant of record, who had lived at the subject apartment for nearly two decades. Upon returning to the apartment from college, he found that additional locks had been placed on the door to the apartment, impeding his access. New York City Housing Authority (the NYCHA), the landlord, refused to provide him with access. After noting the pre-HSTPA case law that suggested restoration might be futile because the petitioner was not a tenant, the court stated:

> However, the enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSPTA") made many changes to the law surrounding alleged lockouts. RPAPL § 768 was added . . . . [and] RPAPL § 711, also amended by the HSPTA, provides, in pertinent part, that "[n]o tenant or lawful occupant of a housing accommodation shall be removed from possession except in a special proceeding."

Byas, 2020 N.Y. Misc. LEXIS 4443, at *10–11. Based on these amendments, the court restored the petitioner to possession.

The court in Salazar v. Core Servs. Grp., Inc., 2020 N.Y. Misc. LEXIS 1427 (2020) took a similar approach. There, the respondent argued that the petitioner was not entitled to any legal process because he "was not a rent paying tenant but rather a participant in a program." Salazar, 2020 N.Y. Misc. LEXIS 1427, at *2. The court disagreed:

> Upon the plain reading of the statute applicable to this case, this Court finds that petitioner was an occupant of the subject premises. RPAPL Sec 711 guides the Court here - petitioner was an occupant of one or more rooms in a rooming house or a resident who was in possession for thirty consecutive days or longer. As such, he was entitled to the benefit of legal process. Respondent's argument that petitioner is merely a licensee and not entitled to legal process are not persuasive since the passage of the HSTPA. The legislature did not carve out any exceptions in RPAPL Sec 711 to differentiate between the different types of occupancy.

Salazar, 2020 N.Y. Misc. LEXIS 1427, at *3–5.

As yet another example, the court in Watson v. NYCHA-Brevoort Houses, 138 N.Y.S.3d 830 (2020) reached the same result but for a different reason. There, the petitioner was the son of the tenant of record of an NYCHA apartment. He claimed that after a fire in the apartment, the fire department had placed an extra latch on the door, barring him from entry. NYCHA argued that he did not have the right to be restored to possession and lacked standing. Again, considering the HSTPA, the court disagreed.

While it found the amendments to RPAPL § 711 to be unpersuasive, it found that the newly added NY CLS RPAPL § 768 is far more important. "If RPAPL § 768 must be read to mean something different from RPAPL § 853 and N.Y.C. Admin. Code § 26-521 [which were existing laws regarding illegal lockout], then a reasonable read of the statute could be to expand standing to commence an illegal lockout proceeding." Watson, 138 N.Y.S.3d at 832. The court explicitly noted that it was considering the equities, noting that "[t]o lose one's home of that duration with no notice or opportunity to plan for an orderly relocation in the midst of a pandemic weighs against holding any futility of restoration against Petitioner." Watson, 138 N.Y.S.3d at 833. While the equities may have given the court the required push to rule in petitioner's favor, the amendments to the RPAPL are undoubtedly what allowed the court to make the ruling that it did. See also Smith v. Park Central 1 LLC, 2020 NYLJ LEXIS 1024, at *9 (2020) (restoring non-tenant occupant to possession in part because "Section 768 of the RPAPL, a new section added to the RPAPL following the Housing Stability and Tenant Protection Act of 2019 ('HSTPA') appears to have codified the prohibition against self-help").

## Improper Application of the HSTPA Amendments to the RPAPL

What we view as a clear legislative response to the courts is apparently not unanimously viewed as such. Some courts continue to take the position that it is futile to restore certain lawful occupants to possession, even if there has undoubtedly been an unlawful eviction. For example, in Jimenez v. 1171 Wash. Ave, LLC, 128 N.Y.S.3d 150 (2020), the petitioner-occupant argued, "that he should be restored to possession under RPAPL § 711 because the amendment to that statute made by HSTPA eliminated common-law self-help evictions against any person who lawfully occupies residential premises for thirty days or more." The court rejected that argument, holding, in relevant part:

> Here, Petitioner makes no claim of a landlord-tenant relationship with Respondent . . . . Accordingly, RPAPL § 711—"Grounds where landlord-tenant relationship exists" - does not apply. While the new sentence in the opening paragraph of RPAPL § 711 added by HSTPA appears to establish a blanket proscription against the removal of any "lawful occupant" from possession without resort to a special proceeding under the RPAPL, this sentence must be read in its context, which is a paragraph that defines who is a "tenant" for purposes of a nonpayment or holdover proceeding brought by a landlord against a tenant under RPAPL § 711. Jimenez, 128 N.Y.S.3d at 150.

The *Jimenez* court misapplied the law. As discussed in the previous section, the futility doctrine's genesis is the fact that RPAPL § 711 used to provide that a "tenant . . . shall not be removed from possession except in a special proceeding," which the Appellate Division interpreted as giving implicit permission to use self-help against non-tenants. The HSTPA changed that, and therefore, the pre-HSTPA cases do not provide sound footing to prevent a lawful occupant from being restored after an unlawful eviction. Moreover, to the extent there is any conflict between RPAPL § 711 and § 713, "courts should adopt the interpretation that preserves the principal purposes of each." SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 27–28 (2d Cir. 2000). The purpose and policy of the RPAPL is undoubtedly to provide the proper judicial procedure for summary eviction proceedings. It should not be read to condone extrajudicial evictions.

# Conclusion

In conclusion, the fear that housing advocates feel during the dreaded "they-changed-the-locks" conversations should be somewhat assuaged by the passage of the HSTPA. In theory, housing advocates need only read the amendments made to the RPAPL to assure these callers that they are entitled to due process in eviction proceedings. Unfortunately, decisions such as *Jimenez*, reflect the court's continued reliance on archaic ideas of possessory rights when establishing standing in an illegal lockout case.

This threat is particularly worrisome in New York City, where 42% of tenants are rent burdened and 23% are severely rent burdened. See New York's Housing Insecurity by the Numbers (The Stoop, NYU Furman Blog (Mar. 24, 2021)). The high cost of rent makes it impossible for many New York City residents to qualify for a lease, leading many to reside in apartments where they have no leaseholder rights to their homes. See Kirk Semple, When the Kitchen is Also a Bedroom: Overcrowding Worsens in New York.

The amendments to the RPAPL made in the HSTPA acknowledge the reality of nontraditional tenancies and function to protect all occupants from the sudden onset of homelessness. When deciding illegal lockout proceedings, judges cannot ignore the devastating realities of eviction, just as they cannot ignore the plain language set forth in the RPAPL. When making these decisions, courts must fairly and evenly apply the post-HSTPA amendments to ensure that due process is available to all New Yorkers, and not just those with the benefit of a written lease.

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