

THE AFTERMATH

A Guide to When to Pay Rent, or Not, After Hurricane Sandy

Monday, November 5, 2012, by Sara Polsky

One of the most frequently asked questions about life in a Sandy-affected building has been this: do tenants of buildings in Zone A **need to pay their rent** for the time they've been evacuated? We offered some preliminary advice on this over the weekend, and we've since reached out to real estate attorney **Adam Leitman Bailey** for more information. It turns out we're not the only ones asking questions, and **Bailey** sent along a Q&A he's prepared for affected tenants. Here now, an actual lawyer's answers to some of the questions we've been getting.



Is the tenant entitled to a return of the security deposit in a storm damaged or destroyed apartment?

The landlord is only allowed to deduct from the security deposit for tenant-caused damage and rent that should have been paid. In most of the Sandy cases, it will be hard to show that the damage was caused by the tenant, but whether the rent should have been paid will be a question of whether the tenant really had to live in a substandard apartment or had to move elsewhere.

What if the tenant is allowed back in the building after a week or less?

Under nearly all leases, the lease would be in full force, but the tenant would be entitled to a rent credit for each of the days of forced absence.

Does the landlord have to pay for the tenant's hotel or other emergency accommodations?

No, the landlord does not have to pay for the tenant's hotel, emergency accommodations, or eating out expenses.

Can the landlord be compelled to repair the building?

In both regulated and unregulated buildings, tenants who are forced out of the building by storm damage can compel the landlord to repair the building by bringing an HP action in the Housing Court. While such proceedings can compel the landlord to restore the building's ability to accept utilities (safe wiring, safe plumbing, etc.), it cannot compel the utility companies to restore those utilities. In some extremely rare cases, the landlord can claim "economic infeasibility" by showing that the expense of repairing the building would exceed the value of the building once restored. Courts recognize this doctrine but are extremely hostile to it and assembling convincing proof of it is both expensive and difficult. Tenants can also call in the City's Department of Buildings to place violations for storm related failures of the building's structure (such as sidewalks torn up by fallen trees). Such things are prosecuted before the Environmental Control Board (the ECB), rather than the courts. Generally, before the ECB, only the owners and the City participate in the hearings, but the ECB can allow tenant testimony. In the regular courts, the tenants normally testify.

Is there any difference in the law between how regulated and unregulated apartments are handled when the tenant cannot live there because of storm damage?

Rent regulation makes almost no difference in the legal treatment of storm damaged or destroyed apartments. In unregulated apartments, the lease may give the landlord the option to cancel the lease in the event of serious damage to the apartment or the building in which the apartment is located. However, in regulated apartments, such clauses are almost completely unenforceable.

Normally, if there is serious damage to the building, New York State's Division of Housing (the DHCR) will allow the tenants to move away temporarily and pay rent at \$1/month to hold on to their tenancies post-reconstruction.

What if a building is subject to a vacate order?

In regulated buildings, the rent gets reduced to \$1/month. In unregulated buildings, the rent goes to zero and, if the lease allows, either party can cancel the lease.

What if the tenant won't be allowed back in the building for a month or more?

Under nearly all leases, the lease would be in full force, but the tenant would be entitled to a rent credit for each of the days of forced absence, but if the building can be fixed up in a month, the tenant may not be allowed to break the lease. However, under many leases, if it would take the landlord a month or more to fix the building, the landlord may be entitled to cancel the lease.

Does the landlord have any responsibility for loss of value of the apartment due to the storm damage or due to the apartment's now apparent vulnerability to storms?

Neither in a conventional rental nor in a cooperative will any loss of value of the apartment make any difference in the economic responsibilities of the parties in nearly all cases. The one place where this may make a difference is in apartments newly entering the rent stabilization system for any reason (decontrol, J51, 421-a, etc.) where a new rent has to be set at fair market value for that neighborhood, the tenants may be able to dispute the validity of the proofs of comparable rents in the neighborhood by proving that due to the effects of Sandy, that neighborhood could no longer command those rents.

Does the tenant have to pay rent for the period the tenant is sitting in an apartment with no electricity and no heat?

In both regulated and unregulated buildings, the requirement to pay rent in a less than completely functional apartment is on a sliding scale, not an on/off switch. Unless the parties can agree to an appropriate dollar adjustment to the rent while the apartment or building is being repaired or while certain utilities are shut down, it will be up to the Housing Court (principally, but it could be other courts, even including Small Claims) to figure out how much is a reasonable discount. If the apartment is both unusable and the tenant actually goes somewhere else during the period of unusability, the courts will likely find that the tenant is entitled to complete rent forgiveness on a per diem basis for that period the tenant is absent. If the apartment is substantially unusable, but the tenant is still living there anyhow, the court will have to determine a reasonable percentage downward adjustment to the rent for the affected period. Some outages are fairly predictable from the case precedents: 25% for lack of hot water, 25% for lack of heat, 50% for lack of electricity, 10% for broken windows, 10% for plaster damage from water penetration, and so on. None of these figures are hard and fast.

Is the landlord liable for damage to the tenant's property caused by the storm?

Generally speaking, the landlord is not liable for damage to the tenant's property caused by the storm. However, there is an exception for conditions of which the landlord had notice that were defective prior to the storm, conditions that allowed the storm to do damage when a proper apartment would not have. Examples of this are missing window panes and façade brick work damaged to the point that the exterior walls of the apartment were already leaky prior to the storm.

Can the landlord cancel the lease?

In regulated apartments, the landlord cannot cancel the lease except under exceptional circumstances. In unregulated apartments, it depends on the wording of the lease. While some of the Bailey/Treiman residential leases (blumberglegalforms.com/Forms/56.pdf, blumberglegalforms.com/Forms/59.pdf, and blumberglegalforms.com/Forms/62.pdf) at paragraph 32 allow the landlord to cancel the lease if the apartment is totally or partially unusable and tenant may cancel the lease if it becomes completely unusable, not all leases contain such a clause. In unregulated apartments, there is no doubt that the landlord can always enforce these clauses.

There is such a clause in paragraph 21 of many Real Estate Board leases. There are other leases commonly used, but these are among the most common. Different form leases have different clauses. In regulated apartments, the exact circumstances of the case will determine whether the courts (and DHCR) will or will not allow the landlord to enforce these clauses.

Can the tenant cancel the lease?

In both regulated and unregulated apartments, this depends on the terms of the lease. In Bailey/Treiman leases and some Real Estate Board leases, the tenant can only cancel the lease if the apartment is made completely unusable or is not repaired within thirty days.

What if there is no lease?

In an unregulated apartment without a lease, the landlord has to give 30 days notice to cancel the tenancy in New York City or one month's notification outside the City. Inside the City, the tenant has no obligation to give notice, but outside the City the tenant must notify the landlord one calendar month ahead of time.

Should the tenant escrow the rent?

There is no legal authority for a tenant to escrow the rent. However, failing to do so under some circumstances could be a serious mistake. If the landlord is generally responsible and appears to be an honest businessperson, the tenant can simply pay the rent and if the parties cannot agree on an appropriate deduction to it, the tenant has the option of going to Small Claims Court to recover it.

While the tenant could theoretically refuse to pay the next month's rent in order to recover the loss, this would be a very bad idea. Provoking a lawsuit would show up both on the tenant's credit report and tenancy history, making it difficult to rent somewhere else. If the landlord has previously proven irresponsible or unethical, the tenant could make the decision to withhold the rent at the risk to credit rating and tenancy history, but although it won't help with either of these ratings, placing the funds in an escrow account could have the beneficial effects of (1) not getting caught short in the event the

court finds that the money is owed and (2) convincing the landlord that the money is there an available and that negotiations should simply proceed in good faith.