

# Court Upholds Governor's Executive Order 128, Rejects Challenge to Deny Residential Tenants From Using Their Security Deposit to Pay Rent

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On July 20, 2021, in a [published decision](#), the New Jersey Appellate Division in *Charles Kravitz v. Philip Murphy* (A-1584-20), upheld Governor Philip Murphy's Executive Order 128 (EO 128) that allows residential tenants in New Jersey to use their security deposits to pay rent.

## Executive Orders for Homeowners, Landlords and Tenants and the Applicability of EO 128

In its decision, the New Jersey Appellate Division discussed the applicability of EO 128 and other programs put into law by Governor Murphy in response to economic and public health crises resulting from COVID-19. For example, for residential homeowners, Governor Murphy implemented a mortgage relief program to provide a 90-day grace period for mortgage payments, waive late fees and freeze new foreclosures for 60 days.

For New Jersey landlords, the Governor started the [Small Landlord Emergency Grant Program](#) to reimburse small residential property owners for lost rent revenue due to the pandemic. For residential tenants, the Governor issued Executive Order 106 which placed a temporary moratorium on evictions, expiring two months after the pandemic emergency ends. EO 128 was then passed to permit tenants to pay portions of their rent with the security deposit that they own. EO 106 and EO 128 were both adopted in response to the financial hardships affiliated with the pandemic, including substantial loss or drop in income and additional health care expenses.

In adopting EO 128, the Governor concluded that, "enabling individuals to pay portions of their rent with their security deposit they own will allow those individuals to mitigate the consequences

regarding evictions and accumulation of interest and upon termination of [EO 106]....” It should be noted that EO 128 contains language that tenants are still responsible to pay their rent and are responsible for any damage caused to the leased premises.

On June 4, 2021, the Governor signed into law A5820, terminating most of the executive orders, including EO 128 effective on July 4, 2021. The Appellate Division noted that the actual effective termination date of EO 128 is January 4, 2022, six months after the termination of EO 128.

## **The Case Before the Appellate Division: Property Owners Argue Against EO 128**

The appellants in this case were New Jersey property owners comprised of five individuals and three businesses who leased to residential tenants. All of the tenants had paid a security deposit to appellants prior to the start of their leases. Appellants contended that EO 128 exceeded Governor Murphy’s power under the Emergency Health Powers Act; violated the Separation of Powers; and violated their rights under the contract and due process clauses of the New Jersey Constitution.

The leases prepared by appellants and signed by the residential tenants all stated that the security deposit could not be used for rent payments and that within thirty days after the termination of the lease the security deposit plus accrued interest would be returned to the tenants less the cost of any damage to the leased premises.

## **Summary of Appellants-Property Owners’ Arguments Against Enforceability of EO 128**

Appellants’ arguments included the following:

- The law was not rationally related to the emergency and that tenants would be more likely to cause damage to the leased premises if they used their security deposit for rent.
- Increasing the rights of the tenants and decreasing the rights of landlords unjustly favored one group of New Jersey citizens over the other.
- Because only the legislature should be allowed to adopt laws, the Governor’s actions in adopting EO 128 violated the Separation of Powers.
- EO 128 violated their private contracts rights whereby their tenants had contractually agreed not to use the security deposit for rent.

## Appellate Division Rules EO 128 is Valid Exercise of Gubernatorial Power

In upholding the validity of EO 128, the Appellate Division's decision demonstrates that the Governor is empowered to take any action necessary to protect the citizens of New Jersey during a public emergency, and that EO 128 was a valid exercise of gubernatorial power.

Specifically, the Appellate Division countered the appellants' arguments as follows:

- Given the nature of the pandemic and the significant economic effects on New Jersey residents, the law was rationally related to the COVID-19 emergency.
- EO 128 was adopted to protect the health, safety and welfare of New Jersey residents in response to an emergency. Appellants were not without recourse if tenants used security deposits for rent because appellants could still pursue litigation for breach of contract (failure to pay rent or causing damage to the leased premises) and obtain judgments if tenants did not pay rent or caused damage to the leased premises. There was no substantial impairment of contract. The court found that the law aids both landlords and tenants trying to financially survive the pandemic.
- The New Jersey's Disaster Control Act specifically gave the Governor the right to adopt laws during a public emergency.
- The violation of due process argument was flawed because appellants failed to demonstrate a substantial impairment of their property rights.

More information on New Jersey landlord and tenant issues can be found on our [Real Estate Blog](#). For coverage on pandemic related matters, visit our [COVID-19 resource section](#).