

*State of New York  
Unified Court System*



*Lawrence K. Marks  
Chief Administrative Judge*

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**MEMORANDUM**

September 9, 2021

To: Hon. George J. Silver  
Hon. Norman St. George

From: Lawrence K. Marks *LM*

Subject: Residential, Commercial, and Tax Foreclosures under Chapter 147 of the Laws of 2021.

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On September 2, 2021, Governor Hochul signed into law Chapter 147 of the Laws of 2021 which relates to residential, commercial, and tax foreclosures (Exhibit A). Previously, under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 and the COVID-19 Protect Our Small Businesses Act of 2021, covered property owners and mortgagors who submitted a Hardship Declaration setting forth the ground(s) by which they were adversely affected by the COVID-19 pandemic had their cases stayed through August 31, 2021. Under the new law, that stay is now extended through January 15, 2022. The new law also creates, for the first time, a mechanism by which mortgagees and foreclosing parties can challenge a Hardship Declaration and seek to have the stay lifted.

Guidance regarding the conduct of foreclosure proceedings is set forth in Administrative Order 262/21 (Exhibit B) and as follows:

1. Residential Foreclosure Matters

Updated Hardship Declarations: Under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, covered defendants who submitted a Hardship Declaration had their cases stayed through August 31, 2021. The new law stays covered cases through January 15, 2022 (Part C, Subpart B, § 2). An updated Hardship Declaration reflecting the new stay period will be posted to the UCS website.

**Challenging a Hardship Declaration:** The plaintiff may file a motion to challenge a defendant's Hardship Declaration. After a hearing, if the court finds that the Hardship Declaration is valid, the stay must continue. If the court finds that the Declaration is invalid, the matter may proceed in the normal course (Part C, Subpart B, § 9).

- The Clerk may accept a new foreclosure filing, even if the homeowner has submitted a Hardship Declaration, if the foreclosing party submits a detailed affidavit attesting to their good faith belief that the hardship certified by the homeowner does not exist (Part C, Subpart B, § 4).
- Notwithstanding CPLR 3408(n), the court may schedule and decide a hardship validity motion while a case is pending in the foreclosure settlement part.

**Court Practice Upon Commencement of a New Proceeding:** The court cannot accept a new residential foreclosure filing unless it is accompanied by both (1) an affidavit of service of the Hardship Declaration and either (A) an affidavit that neither the foreclosing party nor its agent have received a Hardship Declaration from the mortgagor, or (B) a detailed affidavit attesting that the foreclosing party has received a Hardship Declaration from the mortgagor, but the foreclosing party believes in good faith that the hardship certified in the Hardship Declaration does not exist (Part C, Subpart B, § 4).

- Where a mortgagor submits a Hardship Declaration to a foreclosing party or the foreclosing party's agent pre-filing, and the foreclosing party does not seek to challenge same, the commencement of the action is tolled through January 15, 2022.
- If the court determines that the mortgagor has not received a Hardship Declaration, the court must adjourn the proceeding for at least ten business day to ensure the mortgagor has time to consider whether to submit a Hardship Declaration.
- If the court confirms that the foreclosing party or its agent provided the mortgagor with a blank Hardship Declaration and that the mortgagor did not submit a completed Hardship Declaration to the foreclosing party, the foreclosing party's agent, or to the court, the matter may proceed.
- If the court, after a hearing, finds that the hardship certified in the Hardship Declaration does not exist, the matter may proceed.

**Pending Pre-Judgment Cases:** Where a mortgagor delivers (or has already delivered) a Hardship Declaration to the foreclosing party, the foreclosing party's agent, or the court, a pending proceeding must be stayed until at least January 15, 2022 (Part C, Subpart B, § 5). If an appropriate conference has been held in a pending covered matter, and no Hardship Declaration has been submitted to the foreclosing party, its agent, or to the court, the matter may proceed.

**Post-Judgment Cases:** Where a judgment of foreclosure and sale was issued in a covered matter but has not yet been executed, the auction must be stayed at least until the court has held a conference with the parties. During this conference, if the defendant submits a Hardship Declaration to the court, the foreclosing party, or to the foreclosing party's agent prior to the execution of the judgment, the action/auction must be stayed until at least January 15, 2022 (Part C, Subpart B, § 6). If the mortgagor does not submit a Hardship Declaration, the matter may proceed to auction.

## 2. Commercial Foreclosure Matters

Updated Hardship Declarations: Under the COVID-19 Protect Our Small Businesses Act of 2021, covered defendants who submitted a Hardship Declaration had their cases stayed through August 31, 2021. The new law stays covered cases through January 15, 2022 (Part B, Subpart B, § 2). An updated Hardship Declaration reflecting the new stay period will be posted to the UCS website.

Challenging a Hardship Declaration: The plaintiff may file motion to challenge the defendant's Hardship Declaration. After a hearing, if the court finds that the Hardship Declaration is valid, the stay must continue. If the court finds that the Declaration is invalid, the matter may proceed in the normal course (Part C, Subpart B, § 9).

\* Note – The Clerk may accept a new foreclosure filing, even if the owner has submitted a Hardship Declaration, if the foreclosing party submits a detailed affidavit attesting to their good faith belief that the hardship certified by the property owner does not exist (Part B, Subpart B, § 4).

Court Practice Upon Commencement of a New Proceeding: The court cannot accept a new commercial foreclosure filing unless it is accompanied by both (1) an affidavit of service of the Hardship Declaration and either (A) an affidavit that neither the foreclosing party nor its agent have received a Hardship Declaration from the mortgagor, or (B) a detailed affidavit attesting that the foreclosing party has received a Hardship Declaration from the mortgagor, but the foreclosing party believes in good faith that the hardship certified in the Hardship Declaration does not exist (Part B, Subpart B, § 4).

- Where a mortgagor submits a Hardship Declaration to a foreclosing party or the foreclosing party's agent pre-filing, and the foreclosing party does not seek to challenge same, the commencement of the action is tolled through January 15, 2022.
- If the court determines that the mortgagor has not received a Hardship Declaration, the court must adjourn the proceeding for at least ten business day to ensure the mortgagor has time to consider whether to submit a Hardship Declaration.
- If the court confirms that the foreclosing party or its agent provided the mortgagor with a blank Hardship Declaration and that the mortgagor did not submit a completed Hardship Declaration to the foreclosing party, the foreclosing party's agent, or to the court, the matter may proceed.
- If the court, after a hearing, finds that the hardship certified in the Hardship Declaration does not exist, the matter may proceed.

Pending Pre-Judgment Cases: Where a mortgagor delivers (or has already delivered) a Hardship Declaration to the foreclosing party, the foreclosing party's agent, or the court, a pending proceeding must be stayed until at least January 15, 2022 (Part B, Subpart B, § 5). If an appropriate conference has been held in a pending covered matter, and no Hardship Declaration has been submitted to the foreclosing party, its agent, or to the court, the matter may proceed.

Post-Judgment Cases: In a pending covered matter where a judgment of sale was issued but has not yet been executed, the auction must be stayed at least until the court has held a conference with the parties. During this conference, if the defendant submits a Hardship

Declaration to the foreclosing party, its agent, or to the court prior to the execution of the judgment, the action/auction must be stayed until at least January 15, 2022 (Part B, Subpart B, § 6). If the mortgagor does not submit a Hardship Declaration, the matter may proceed to auction.

3. Tax Lien Foreclosures

- The new law applies to actions to foreclose on delinquent taxes or to sell a tax lien relating to residential and commercial real property (Part B, Subpart C; Part C, Subpart C). This includes in-rem tax foreclosures commenced pursuant to article 11 of the Real Property Tax Law and local laws related to real property tax lien sales and real property tax foreclosures, including, but not limited to, the New York City Tax Law. It is the responsibility of the enforcing officer (or other entity conducting the sale) to notify the respondent of their rights and provide a link to the Hardship Declaration on the New York State Department of Tax and Finance's website. Where the owner/respondent in a tax lien foreclosure has submitted or hereafter submits a Hardship Declaration, the case must be stayed through at least January 22, 2022 (unless the lienholder successfully challenges the certified hardship).
- Moving forward, all tax lien foreclosure matters pending in New York City shall be assigned to the appropriate foreclosure settlement conference part in the first instance.
- Moving forward, tax lien matters pending in Supreme Courts outside New York City shall be assigned to the appropriate foreclosure settlement conference part in the first instance. Tax lien matters pending in County and City courts should be actively conferenced and compliance/settlement calendars established as appropriate.

4. Case Conferencing – Regardless of whether a Hardship Declaration has been filed in a case, courts should still conduct conferences as needed, including settlement conferences in residential mortgage foreclosure matters as required by CPLR 3408. Courts should also continue to determine whether a matter is subject to a government moratorium or forbearance program, refer unrepresented parties to local civil legal service providers and housing counseling agencies, provide unrepresented parties with contact information for the Homeowner Assistance Fund (see below), and use best efforts to resolve any outstanding issues. Courts should also conduct conferences in tax lien foreclosure matters as set forth above. Whenever possible, settlements, loan modifications, and other loss mitigation options should be encouraged. If, after conducting conferences as appropriate in the circumstances, settlement of the case cannot be achieved, the case must remain stayed until January 15, 2022 if the defendant has filed a Hardship Declaration.

5. Homeowner Assistance Fund - The Homeowner Assistance Fund established under the American Rescue Plan Act of 2021 provides upwards of \$500,000,000 in financial assistance to New York State. The New York State Office of Housing and Community Renewal is operating the Homeowner Assistance Fund. In addition to referring homeowners to local civil legal services providers and housing counseling agencies, Judges, Court-Attorney Referees, and other non-judicial personnel presiding over foreclosure matters should, whenever practical, refer homeowners to the Homeowner Assistance Fund. Where the court determines that a successful Homeowner Assistance

Fund application may lead to a settlement, the court should continue to actively conference the case and give appropriate adjournments. More information about the Homeowner Assistance Fund will be provided when it becomes available.

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Please distribute this memorandum and attachments to judges and non-judicial staff as you deem appropriate. Questions on the subject may be addressed to Steven Helfont of the Office for Justice Initiatives – Division of Policy & Planning, at [shelfont@nycourts.gov](mailto:shelfont@nycourts.gov).

cc: Hon. Edwina G. Mendelson  
Michelle Smith  
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