

GOVERNOR'S PROGRAM BILL

2009

MEMORANDUM

AN ACT to amend the real property actions and proceedings law, the uniform commercial code, the civil practice law and rules, the banking law and chapter 472 of the laws of 2008 amending the real property actions and proceedings law and other laws relating to foreclosure actions on home mortgage loans, in relation to home mortgage loans; to amend the penal law, in relation to the crime of mortgage fraud

Purpose:

This bill would: (1) allow a larger population of distressed homeowners to benefit from consumer protection laws and foreclosure prevention opportunities currently available only to borrowers of "high-cost," "subprime" and "non-traditional" home loans; (2) establish certain requirements for plaintiffs in foreclosure actions to maintain the foreclosed property; (3) establish protections for tenants residing in foreclosed properties; and (4) strengthen certain consumer protections to prevent distressed homeowners from falling prey to rescue scams.

Summary of Provisions:

Section 1 of the bill would amend Real Property Actions and Proceedings Law ("RPAPL") § 1303 to provide tenants with a notice if the property they reside in has become the subject of a foreclosure action. The notice is to be delivered to the tenant at approximately the same time as the summons and complaint is served on the landlord and will advise the tenant of certain rights under the circumstances.

Section 1-a of the bill would amend RPAPL § 1304 to: (1) expand the 90-day notice requirement, currently applicable to "high-cost," "subprime" and "non-traditional" home loans, to all home loans; (2) make clear that the requirement to send a 90-day notice applies not only to the original lender, but to its assignee as well, if applicable; (3) require lenders, servicers and assignees to mail the 90-day notice to the borrower in a separate envelope from any other mailing or notice; and (4) eliminate the requirement that the principal amount of loan be less than the Federal National Mortgage Association ("Fannie Mae") conforming loan size limit in order for the loan to qualify as a "home loan."

Sections 2 and 3 of the bill would amend the Uniform Commercial Code ("UCC") to require similar notices for cooperatives.

Section 4 of the bill would add a new RPAPL § 1305 to establish protections for tenants in foreclosed residential real property by requiring a "successor in interest," as such term is defined in the bill, to provide written notice to the tenant: (1) that the tenant is entitled to remain in occupancy of such property for the remainder of the lease term, or a period of 90-days from the date of mailing of the notice, whichever is greater, on the same terms and conditions as were in effect at the time of issuance of the judgment of foreclosure and sale, or the time of transfer of ownership, if such order is not issued; and (2) of the name and address for communication with the new owner. This section of the bill would also make clear that the rights conferred upon

tenants by this provision are in addition to any other rights of the tenant under law. Furthermore, this section of the bill would provide that a "successor in interest" who intends to occupy a single unit as his or her primary residence, under certain circumstances, may limit the tenant's right of occupancy for that unit to 90 days. For a lease to qualify under this provision of the bill, the lease must require the payment of rent that is not substantially less than the fair market rent for the unit.

Section 5 of the bill would add a new RPAPL § 1306 to require each lender, assignee or mortgage loan servicer to make a filing with the Superintendent of Banks ("Superintendent"). In particular, the filing would be made within three business days of the mailing of the 90-day notice to the borrower under RPAPL § 1304, or in the case of cooperatives, UCC § 9-611(f), and would include the name, address and the last known telephone number of the borrower, the amount claimed as due and owing on the mortgage, and any other information the Superintendent may require to determine the type of loan at issue.

Section 5 of the bill would also require the Superintendent, with the assistance of the Commissioner of the Division of Housing and Community Renewal ("Commissioner"), to, among other things, develop an electronic database capable of receiving all filings required by this section, and to compile information allowing the State to target counseling and foreclosure prevention efforts to borrowers at risk of foreclosure. The information acquired by the Superintendent under this section of the bill would be exempt from the Freedom of Information Law and various parts of the Personal Privacy Law. Finally, this section of the bill would authorize the Superintendent to promulgate rules and regulations to implement the purpose of this section.

Section 6 of the bill would impose a duty to maintain foreclosed residential real property upon a plaintiff in a foreclosure action once a judgment of foreclosure and sale issued pursuant to RPAPL § 1351 has been entered. This duty would continue until ownership is transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded. In particular, the bill would require the plaintiff in a foreclosure action to keep vacant property in a manner consistent with certain sections of the New York State Property Maintenance Code. If the property is occupied by a tenant, the plaintiff would have the additional obligation of keeping the property in a safe and habitable condition. The municipality in which the property is located, any tenant, a board of managers of a condominium or a homeowners association may enforce this obligation.

This section of the bill is not intended to diminish any obligations of the mortgagor or receiver to maintain the property prior to the closing of the title and does not diminish or reduce the rights of the parties under existing law against the mortgagor of the property for failure to maintain such property. In addition, the bill relieves the plaintiff of the responsibility to maintain the property for the period that a receiver of such property is serving. It should also be noted that this bill does not include within its scope circumstances where a municipality or a governmental entity is a plaintiff in a foreclosure on a tax lien and specifically exempts municipalities and governmental entities from its scope, as provided in the bill, in order to prevent any unfunded mandates on local governments and governmental entities. Finally, this section of the bill does not preempt, reduce or limit any rights or obligations imposed by any local laws with respect to property maintenance and the locality's ability to enforce those laws.

Sections 7 and 8 of the bill would make technical amendments to RPAPL §§ 221 and 713 in recognition of the additional rights afforded to tenants under section 4 of the bill.

Section 9 of the bill would amend the Civil Practice Law and Rules ("CPLR") Rule 3408 to, among other things: (1) expand the scope of the mandatory settlement conference in foreclosure proceedings to include cases pertaining to all home loans; (2) impose upon both plaintiff and defendant a duty to negotiate in good faith to reach a mutually agreeable resolution if possible; (3) require the court to compile and report on certain foreclosure information; (4) require the parties to bring certain key documents to the mandatory settlement conference; (5) require the plaintiff to file a motion of discontinuance and vacatur of the lis pendens within 150 days following the execution of any settlement agreement or loan modification; and (6) impose certain restrictions on the imposition of attorney's fees and costs for appearance or participation in the settlement conference.

Section 10 of the bill would amend Chapter 472 of the Laws of 2008 to require notice to a defendant in a pending foreclosure case of his or her right to a settlement conference.

Section 10-a of the bill would require the chief administrator of the courts to promulgate rules to conduct settlement conferences within 90 days of the enactment of this chapter and to submit a report to the Governor and certain legislative leaders on the adequacy and effectiveness of the settlement conferences.

Section 11 of the bill would amend Banking Law § 6-f to authorize the Banking Board to promulgate rules and regulations pertaining to shared appreciation agreements within certain statutory parameters.

Section 12 of the bill would amend Banking Law § 6-l to clarify that the definition of "home loan" does not include loans made or fully or partially guaranteed by SONYMA.

Section 13 of the bill amends Banking Law § 6-l to make clear that the prohibition on pre-payment penalties is not overridden by General Obligations Law § 5-501, which allows prepayment penalties during the first year of a loan.

Section 14 of the bill would amend Banking Law § 6-m to: (1) clarify the definition of "fully indexed rate"; (2) clarify that the definition of "subprime home loan" includes loans for the purchase of cooperatives; (3) clarify that mortgage bankers, like mortgage brokers are prohibited from giving or accepting kickbacks; and (4) make certain other technical and conforming changes.

Sections 15 and 16 of the bill would make technical changes to Banking Law §§ 6-m and 590 provide or modify titles for each subdivision.

Section 17 of the bill would permit the promulgation of rules and regulations pertaining to the origination, sale or servicing of manufactured home loans.

Section 18 of the bill would amend Banking Law § 590 to make clear that the Superintendent may require all registrations and notifications of mortgage loan servicers to be made through the Nationwide Mortgage Loan System and Registry, and that such an application must be accompanied by a fee as provided by law.

Section 19 of the bill would amend Banking Law § 595-a to prohibit a licensee or registrant from taking any upfront fees in connection with activities constituting the business of distressed property consulting.

Sections 20 and 21 of the bill would amend the definition of "person" in Penal Law § 187.00 due to a technical error with that definition and add a new Penal law § 187.01 to create an exemption from mortgage fraud for an individual person who applies for a loan and who intends to occupy the mortgaged property, other than as part of a criminal conspiracy. Section 20 of the bill also amends the definition of "residential mortgage loan" to conform it to the definition in Banking Law §§ 6-1 and 6-m.

Section 22 of the bill would amend the Real Property Law § 265-b to make certain technical and conforming changes.

Section 23 of the bill provides that this act shall not be construed as restricting any rights or causes of action the parties to a mortgage, lease or other agreement concerning real property may otherwise have under New York law.

Section 24 of the bill contains the severability clause of the legislation.

Section 25 of the bill provides for the effective date.

Existing Law:

The RPAPL at present does not require notice to tenants at the time of service of a summons and complaint on the mortgagor in a foreclosure action.

RPAPL § 1304(1) requires lenders and servicers to send a notice to borrowers of "high-cost," "subprime" and "non-traditional" home loans made between January 1, 2003 and September 1, 2008, advising the borrower of, among other things, the availability of counseling in their area. This notice must be sent to the borrower at least 90 days before any legal action may be commenced against the borrower.

RPAPL §§ 221 and 713 provide for a mechanism to evict occupants from foreclosed property. Tenants who are named in the underlying foreclosure action may be evicted by the foreclosure auction purchaser in various ways, including by the service of a 10-day notice to quit under Article 7 of RPAPL. Rent controlled and rent stabilized tenants are immune from eviction post foreclosure.

The law does not currently provide for the collection of statewide pre-foreclosure statistics.

CPLR Rule 3408 currently requires a mandatory settlement conference for high-cost, subprime and non-traditional home loans made between January 1, 2003 and September 1, 2008.

The duty to maintain abandoned foreclosed property, or property occupied by a tenant is not currently imposed on the plaintiff in a foreclosure action at the issuance of a judgment of foreclosure and sale. The duty is imposed upon transfer of title, which could be a few months following the issuance of the judgment.

Banking Law § 590(b-1) does not require mortgage loan servicers to register with the Superintendent using the Nationwide Mortgage Licensing System and to pay the annual fees of such system.

Banking Law § 595-a does not specifically prohibit a mortgage banker or broker acting as a distressed property consultant from taking an upfront fee. However, Banking Department regulations permit only specified upfront fees before there is a commitment from a mortgage lender.

Penal Law § 187.00 contains mortgage fraud provisions of the Penal Law.

Legislative History:

This is a new proposal.

Statement in Support:

The mortgage crisis of the past several years has uprooted families, devastated neighborhoods, and contributed to the collapse of our financial markets. In 2008, New York State had over 50,000 foreclosure filings – an increase of almost 30% from 2007. In response to this crisis, and in light of inaction by the federal government, New York enacted comprehensive subprime lending reform legislation in 2008. See Chapter 472 of the Laws of 2008. That legislation was designed to accomplish two purposes – to protect borrowers at risk of losing their homes, and to prevent similar crises from occurring in the future. As the mortgage crisis has worsened, however, it has become evident that more must be accomplished to protect New Yorkers in these difficult times and beyond.

This bill would build upon the reforms enacted in the 2008 legislation. In particular, this bill would: (1) allow a larger population of distressed homeowners to benefit from consumer protection laws and foreclosure prevention opportunities currently available only to borrowers of “high-cost,” “subprime” and “non-traditional” home loans; (2) establish certain requirements for plaintiffs in foreclosure actions to maintain the foreclosed property; (3) establish protections for tenants residing in foreclosed properties; and (4) enhance consumer protection provisions to prevent distressed homeowners from falling prey to rescue scams.

1. Helping Protect Distressed Homeowners and Providing Foreclosure Prevention Opportunities

A. Expansion of 90-Day Notice Requirement

In 2008, the Legislature enacted RPAPL § 1304 to require lenders and mortgage loan servicers to provide a notice to distressed borrowers with “high-cost,” “subprime” or “nontraditional” loans consummated between January 1, 2003 and September 1, 2008. RPAPL § 1304 requires that the notice contain, among other things, the names and telephone numbers of government approved housing counseling agencies serving the borrower’s area, and further mandates that the notice must be sent at least 90 days before any legal action may be commenced against the borrower.

This bill would expand the scope of this notice by requiring lenders, mortgage loan servicers and assignees to send the notice to distressed borrowers of *all* “home loans.” In addition, the bill would amend the definition of “home loan” under current law to remove the requirement that the principal amount of the loan not exceed the “Fannie Mae” conforming loan size limit of \$417,000 (with some exceptions) to meet the definition of “home loan.” Finally, the

bill would include within the definition of "home loans" loans that are made for the purchase of cooperative apartments.

Taken together, these changes would significantly expand the number of borrowers who would benefit from the information contained in the notice and from the 90-day time period during which the lender and the borrower may attempt to reach a mutually agreeable resolution without imminent threat of a foreclosure action. The bill will therefore help reduce the number of foreclosures in the State, while preserving the remedy of foreclosure where a settlement is not possible.

B. Expansion of Mandatory Settlement Conference

The 2008 legislation created CPLR Rule 3408 – a rule that established an early mandatory settlement conference before a court between the litigants in a foreclosure action. In particular, CPLR Rule 3408 requires the court in a residential foreclosure action involving a "high-cost," "subprime," or "non-traditional" home loan made between January 1, 2003 and September 1, 2008, to schedule a mandatory settlement conference within 60 days of the filing of the proof of service of the complaint with the county clerk. Under the law, the plaintiff, or a representative with authority to settle the matter, must appear at that conference. If the homeowner appears and does not have an attorney, he or she will be deemed to have made a motion to proceed as a "poor person" under CPLR § 1101 and the court may, in its discretion, waive certain procedural requirements and even appoint counsel for the homeowner under CPLR § 1102(a).

This bill would expand the number of borrowers who are eligible to receive the benefit of this settlement conference by eliminating the requirement that the loans be "high-cost," "subprime" and "non-traditional" home loans made after January 1, 2003. As such, all borrowers with cases involving home loans would be eligible for the settlement conference for a period of five years, at which point the law would revert back to the current law. In addition, this bill would also establish a requirement for the litigants to negotiate in good faith to try to reach a mutually agreeable resolution and would require them to bring certain critical documents to the settlement conference. The purpose of the good faith requirement is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution. Finally, this provision of the bill would also require the court to compile certain information on newly filed foreclosure actions so that enhanced outreach may be conducted in particular parts of the State. These provisions of the bill would therefore allow more homeowners to benefit from the "second opportunity" afforded by participation in the mandatory settlement conference after the 90-day notice period expires.

C. Establishment of Data Collection Efforts to Target Help for Distressed Homeowners

In order to help reduce the number of preventable foreclosures, it is critical to identify distressed homeowners as soon as possible, and to target counseling help effectively and expeditiously. Toward that end, this bill would require lenders, servicers and assignees to make a filing with the Superintendent containing information on borrowers who have been served a 90-day notice. The Superintendent, in consultation with the Commissioner of DHCR, would be required to create a database of information gleaned from such filings so that the State may effectively monitor distressed borrowers and target counseling help efficiently.

2. **Helping Protect Neighborhoods and Tenants**

A. Requiring Plaintiffs in Foreclosure Actions to Maintain Certain Property

A significant issue confronting the State as a result of the spike in foreclosure filings is the maintenance of abandoned property. Homeowners often abandon their homes upon commencement of a foreclosure action, and the property goes into disrepair, serving as an eye sore and nuisance for the rest of the neighborhood. The problem is compounded when multiple homes are foreclosed upon in the same neighborhood. Eventually, these properties may become a haven for crime and drugs, thus decreasing property value in the surrounding areas and beyond.

This bill would require a plaintiff in a foreclosure action, upon the issuance of a judgment of foreclosure and sale pursuant to RPAPL § 1351, to maintain the property. In particular, the bill would require the plaintiff, post-judgment, to keep the property in a manner consistent with the certain provisions of the property maintenance code. If the property is occupied by a tenant, the plaintiff must also maintain the property in a safe and habitable condition. This provision of the bill may be enforced by the municipality in which the property is located, the tenant occupying the property, or the board of managers or homeowners association, if applicable.

This provision of the bill is not intended to diminish in any way the obligations of the mortgagor of the property or the receiver to maintain the property prior to the closing of title pursuant to the foreclosure sale. Indeed, this bill does not include within its scope circumstances where a municipality or a governmental entity is a plaintiff in a foreclosure due to a tax lien and specifically exempts municipalities and governmental entities from its scope, as provided in the bill, in order to specifically prevent any unfunded mandates on local governments and governmental entities. Finally, this section of the bill does not preempt, reduce or limit any rights or obligations imposed by any local laws with respect to property maintenance and the locality's ability to enforce those laws.

B. Establishing Notice Requirement to Protect Tenants in Foreclosed Property

The Joint Center for Housing Studies of Harvard University has found that in 2007, 20% of all foreclosure filings across the country were in non-owner occupied properties. New York University's Furman Center for Real Estate and Urban Policy conservatively estimates that 15,000 renter households or about 38,000 New York City residents were impacted by foreclosure. Often, renters have been unaware that their landlords are in default until utilities are shut off or an eviction notice appears on their door.

This bill would establish protections for tenants in foreclosed residential real property. The bill would require that the plaintiff deliver a notice to the tenant informing the tenant that a foreclosure action has been commenced and advising the tenant of certain rights to remain in the property. This provision will allow tenants to be fully aware of the status of the property and allow them to make informed decisions about whether they should remain in such property.

In addition, the bill would require a person or entity that acquires title to the property to provide notice to the tenant: (1) that he or she is entitled to remain in occupancy of the property for the remainder of the lease term, or a period of 90 days from the mailing of the notice, whichever is greater, on the same terms and conditions as were in effect at the time of issuance of

the judgment of foreclosure and sale, or as were in effect at the time of transfer of ownership of the property if no judgment is issued; and (2) of the name and address of the new owner. This provision would make clear that the rights conferred upon a tenant under this bill would be in addition to any other rights of such tenants as provided by law. It would also provide that a "successor in interest" who intends to occupy a single unit as his or her primary residence, under certain circumstances may limit the tenant's right of occupancy for that unit to 90 days. For a lease to qualify under this provision of the bill, the lease must require the payment of rent that is not substantially less than the fair market rent for the unit.

3. Protecting Distressed Homeowners from Rescue Scams

Chapter 472 of the Laws of 2008 enacted comprehensive protections for distressed homeowners to protect them from falling prey to rescue scams. One such protection prohibited distressed property consultants from accepting upfront fees. Because mortgage bankers and brokers are regulated by the Banking Department, they were exempted from the scope of this provision. This bill would expressly preclude any licensees or registrants from accepting up front fees in connection with performing the business of distressed property consulting. The bill would also extend certain provisions of the rescue scam legislation contained in Chapter 472 of the Laws of 2008 to certain attorneys.

Budget Implications:

This bill will not have an impact on State finances.

Effective Date:

This bill would take effect immediately, except as provided in section 25 of the bill.