



Lawrence K. Marks
Chief Administrative Judge

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MEMORANDUM

March 15, 2021

To: Hon. George J. Silver
Hon. Vito C. Caruso

From: Lawrence K. Marks *LM*

Subject: Commercial Foreclosure Proceedings Under the COVID-19 Emergency
Protect Our Small Businesses Act of 2021 (L. 2021, c. 73)

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Governor Cuomo has signed into law chapter 73 of the Laws of 2021 (the COVID-19 Emergency Protect Our Small Businesses Act of 2021 [“Act” (effective March 9, 2021); Exh. A]), which, inter alia, provides COVID-related protections to defendants in certain commercial foreclosure matters (Act, Part B). Modeled upon the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (“EEFPA”) enacted last December, the Act imposes a 60-day stay upon (1) certain pending commercial foreclosure proceedings and (2) certain proceedings commenced within 30 days of the Act’s effective date (i.e., on or before April 8, 2021).

In a manner similar to its treatment of commercial eviction proceedings – a subject addressed in a separate memorandum – the Act also sets forth a number of procedural requirements in commercial foreclosures similar to those imposed upon residential foreclosures under the EEFPA – the posting of Hardship Declarations by the Court System; the delivery of Hardship Declarations to thousands of property owners in pending matters; the holding of additional status conferences in matters where a judgment of sale has been issued but not yet executed. All of these requirements expire on May 1, 2021 (Act, Part B, Subpart A, §12). Highlights of the Act are as follows:

1. Matters and Owners/Mortgagors Covered by the Act: The Act applies to any action to foreclose a mortgage relating to commercial real property if the owner or mortgagor owns ten or fewer commercial units and is a business that is “resident in New York State, independently owned and operated, not dominant in its field, and employs fifty or fewer persons” (“Covered Matters”) (Act, Part B, Subpart A, §1). The Act applies to tax lien foreclosure matters, with special provisions discussed in section 8 below.

Not covered: The Act does not apply to or affect mortgage loans “made, insured, purchased or securitized by a corporate governmental agency of the state constituted as a political subdivision and public benefit corporation....” (Act, Part B, Subpart A, §1).

2. Stay of Covered Matters: The Act immediately stays pending Covered Matters for sixty days (i.e., through May 8, 2021), including actions in which a judgment of sale has been issued but not executed (see paragraph 6, below). In addition, Covered Matters commenced between March 9, 2021 and April 8, 2021 shall be stayed for 60 days from commencement (Act, Part B, Subpart A, §3). An administrative order effectuating this stay (AO/95/21) is attached as Exh. B. **Commercial foreclosure actions that are not Covered Matters are not stayed, or otherwise impacted, by the Act.**

3. Notice to Commercial Mortgagor and Hardship Declaration – Publication and Translation: The Act contains a Notice to Commercial Mortgagor and a Hardship Declaration (collectively, “Hardship Declaration”; Exh. C), to be provided in blank format to defendants in Covered Matters, setting forth various grounds by which an owner/mortgagor might be adversely affected by the COVID-19 pandemic (Act, Part B, Subpart A, §2). The Act requires that the Declaration be posted on the Court System’s website (Act, Part B, Subpart A, §9).

4. Mailing of Hardship Declaration in Pending Matters: The Act directs the Court System to mail copies of the Hardship Declaration to all defendants in pending Covered Matters (Act, Part B, Subpart A, §3). Our Division of Technology will perform this task.

5. Further Stay of Pre-Judgment Foreclosure Proceedings, or Tolling of Commencement of Proceedings, Upon Submission of a Mortgagor’s Hardship Declaration: Where an owner or mortgagor delivers a Hardship Declaration to the foreclosing party or an agent of the foreclosing party in a Covered Matter, the Act requires that such action (if pending) be stayed until at least May 1, 2021,¹ or (if not yet commenced) tolls the time limit for the commencement of the action until May 1, 2021 (Act, Part B, Subpart A, §5). Where no Hardship Declaration is submitted in a Covered Matter, the matter may proceed in the normal course following expiration of the 60-day stay or the holding of the appropriate status conference or hearing.

6. Stay of Actions in Which a Judgment of Sale Has Been Issued But Not Yet Executed: In a pending Covered Matter where a judgment of sale was issued on or before March 9, 2021 but has not yet been executed, execution of the judgment shall be stayed at least until the court has held a status conference with the parties. During this conference, if the defendant submits a Hardship Declaration to the foreclosing party, the court, or an agent of the foreclosing

¹ Where a Hardship Declaration is delivered in a Covered Matter in which a 60-day stay is already in force, this second stay has no practical impact. However, it may be consequential, for a short period, in matters filed after April 8, 2021.

party or the court prior to the execution of the judgment, the action shall be stayed until at least May 1, 2021 (Act, Part B, Subpart A, §8).²

7. Court Practice Upon Commencement of a New Proceeding: The court cannot accept a new commercial foreclosure proceeding filing unless it is accompanied by both (1) an affidavit of service of the Hardship Declaration,³ and (2) an affidavit that neither the foreclosing party nor an agent of the foreclosing has received a Hardship Declaration from the mortgagor (Act, Part B, Subpart A, §6). This requirement expires on May 1, 2021 (Act, Part B, Subpart A, §§6, 12).

“At the earliest possible opportunity” following a new filing, the court must seek confirmation by the mortgagor, “on the record or in writing”, that the mortgagor has received the blank Declaration and has not submitted a completed Declaration to the foreclosing party or an agent of the foreclosing party. If the court determines that a mortgagor has not yet received a Hardship Declaration, the court must stay further proceedings for no less than 10 business days to ensure that the mortgagor has received and fully considered whether to submit a Declaration (Act, Part B, Subpart A, §6). Where these procedures have been followed and a mortgagor fails to deliver a Hardship Declaration to a foreclosing party, agent of a foreclosing party, or the court, the matter may proceed in the normal course. This requirement expires on May 1, 2021 (Act, Part B, Subpart A, §§6, 12).

8. Tax Lien Foreclosure Matters: The Act also applies to any action to foreclose on delinquent taxes or sell a tax lien relating to commercial real property (Act, Part B, Subpart B). This includes in-rem tax foreclosures commenced pursuant to article 11 of the real property tax law, but also any other local law related to real property tax lien sales or real property tax foreclosures (including, but not limited to, the New York City Tax Law).

Importantly, courts are not required to mail Hardship Declarations to respondents in these cases. Instead, it is the responsibility of the enforcing officer (or other entity conducting the tax lien sale or tax foreclosure) to notify the respondent of their rights under the Act at least thirty days prior to the date on which a sale of a tax lien is scheduled to occur, or upon the filing of a new petition of foreclosure of a tax lien. Should the respondent submit a Hardship Declaration, the Act requires that the proceeding be stayed through May 1, 2021.

9. Hardship Declaration as Prima Facie Evidence of Hardship: The Act provides that the Hardship Declaration shall serve as prima facie evidence establishing a rebuttable presumption that a commercial mortgagor is experiencing financial hardship in a proceeding as a defense under any federal or state executive order, local or state law, or other regulation limiting the eviction of a tenant suffering financial hardship due to COVID-19. However, the absence of a Hardship Declaration does not create a presumption that no hardship is present. (Act, Part B, Subpart A, §10). *This “prima facie” evidentiary effect is the single consequence of the Act’s*

² Because these stays are in addition to the 60-day stay applicable to all Covered Matters pending on March 9, 2021 – and because this conference requirement expires on May 1, 2021 – the practical consequence of this provision is likely minimal.

³ Foreclosing parties or agents are required to serve a blank copy of the Hardship Declaration and contact information with all future notices provided to the owner or mortgagor. (Act, Part B, Subpart A, §4).

Hardship Declaration provisions that extends beyond May 1, 2021 (Act, Part B, Subpart A, §§11, 12).

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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.

c: Hon. Edwina G. Mendelson
Steven Helfont