

NEW RESIDENTIAL FORECLOSURE LAW PLACES A GREATER BURDEN ON FORECLOSING PARTIES

Bankruptcy, Restructuring & Commercial Litigation Alert
March 19, 2010

On December 15, 2009, Governor Paterson signed into law the Governor's Program Bill No. 46, which includes comprehensive foreclosure legislation designed to provide additional protections for New York state homeowners at risk for foreclosure.

The biggest impact of the new laws is the additional burden placed on lenders in the form of duties and administrative hurdles. These new duties not only increase the cost and time associated with foreclosure actions but also create potential pitfalls of which foreclosure defendants can take advantage.

Notice Requirements

There are multiple new or expanded notice requirements under the new foreclosure laws, each containing statutorily defined language, required information, procedures, and time frames. A summary of the notice requirements follows.

Notice must be given:

- To the borrower, at least 90 days prior to the commencement of a foreclosure action (this requirement has been expanded to include owners of condominiums and co-ops)
- To any mortgagor of residential real property, at the initiation of a foreclosure action, to be delivered with the summons and complaint
- To tenants of residential real property subject to foreclosure, delivered within 10 days of the service of the summons and complaint

Filing Requirements

The foreclosing party is also required to file specified information with the superintendent of banks through the State of New York Banking Department Web site (<http://www.banking.state.ny.us/>). The filings are triggered by the notices and are designed to allow the superintendent to monitor the extent of foreclosure filings within the state, to perform an analysis of loan types that were the subject of pre-foreclosure notices, and to direct appropriate public and private foreclosure

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prevention services to borrowers at risk of foreclosure.

Mandatory Settlement Conference

The scope of actions subject to the mandatory settlement conference requirement has been expanded to include all home loans, as defined by statute. The settlement conference is held within 60 days of the filing of the proof of service with the county clerk. Both the foreclosing party and the homeowner are required to “negotiate in good faith to reach a mutually agreeable resolution, including a loan modification,” while the foreclosing party is prohibited from passing on the costs of participating in the settlement conference to the borrower.

Tenants’ Rights

The rights of tenants occupying foreclosed properties have also been greatly expanded. In addition to the required notice, a tenant whose rent is not substantially less than fair market rent has the right to remain in occupancy under the original lease terms for the greater of 90 days or the remainder of the lease term. The successor-in-interest to the property is required to apprise the occupying tenants of these rights through written notice.

Duty to Maintain Property

One of the most potentially onerous burdens on foreclosing parties is the new affirmative duty to maintain the foreclosed property. Effective April 14, 2010, a plaintiff in a foreclosure action who obtains a judgment of foreclosure and sale involving residential real property that is vacant, becomes vacant after issuance of the judgment, or is abandoned has a duty to maintain that property until ownership is transferred or the property is otherwise disposed and the deed for the property has been duly recorded.

Proposed Legislation

Despite the above expanded duties and burdens, there is additional legislation pending in the state Senate that will further expand the protections afforded to tenants of properties that have been foreclosed, expand the scope of the notice requirements, and overall impair the ability of a foreclosing party to affect a tenant’s legal interest through a foreclosure judgment.

The pending legislation also proposes to extend the foreclosure process further by allowing the court to hold foreclosure actions in abeyance for a period of 90 days to nine months if a mortgagor is receiving counseling from an approved nonprofit assistance provider. The pending legislation, like the new foreclosure laws, will not only increase the costs and time involved with foreclosure actions but will also provide foreclosure defendants with further defenses against foreclosing lenders that fail to comply with the new requirements. Even if you are not directly involved with the prosecution of foreclosure actions, it is important to get familiar with the new procedural and notification requirements as they place greater burdens on both the attorney prosecuting the foreclosure action and the lender on whose behalf the action is being

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prosecuted.

It is imperative that residential mortgage lenders keep abreast of the new laws affecting foreclosure actions and learn how to comply with them so as not to derail what has already become a more onerous, expensive, and time-consuming foreclosure process.

Please contact a member of Hodgson Russ's Bankruptcy, Restructuring & Commercial Litigation Practice Group if you have any questions about the new foreclosure requirements or to discuss foreclosure actions in general.