ONE YEAR FORECLOSURE MORATORIUM LAW PROPOSED

***By Bruce J. Bergman**

Assembly Bill 10553B dated May 29, 2020 (Senate companion bill is S8445B) proposes a ban on foreclosure actions for at least a year and creates enormous problems and confusion for mortgage holders. The proposed statute has many unfortunate provisions and is also not clearly written as to some aspects.

Perhaps the best way to parse it, make it understandable and reveal its dangers is to first recite the categories of its provisions.

Which Mortgage Holders Are Covered?

Should the law pass, it will effect state regulated servicers, banks and/or credit unions. While it therefore appears not to constrain private lenders or entities not licensed in these categories in New York, it nonetheless has a broad impact.

What Properties Are Excepted?

Foreclosures *can* proceed or continue as against vacant or abandoned property. (While this is welcome, only a minority of properties fall into this category and it is apparent that the legislature is happy to have lenders clean up these properties for local municipalities.)

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What is Barred?

Initiation of any “judicial process”, moving for a foreclosure judgment or executing a foreclosure related eviction or foreclosure sale of real property.

Duration of Ban

The bar against proceeding is for twelve months after the date that the covered period ends. The covered period in turn is defined as being from the date the Governor declared the state of disaster on March 7, 2020 until 365 days after the date the last region and/or county of New York State entered into Phase 3 of the Governor’s re-open plan.

Continuing Obligations Upon Mortgage Holders

Even though mortgage holders suffer a moratorium in enforcing their rights, the statute still obliges them to take certain steps. One is that the mortgagee is compelled to send the borrower a notice of default in accord with the terms of the mortgage loan which must in turn include a list of state certified housing counseling agencies and a list of state funded legal services where the property is located. This is specifically stated not to be a substitute for the 90-day notice required by RPAPL 1304.

Immediately this is odd and confounding. The Fannie Mae / Freddie Mac uniform mortgage instrument – used for residential properties – does have a 30-day notice provision which has always been separate from the much later statutorily invoked 90-day notice. But the 30-day correspondence never required the listing of any agencies or help groups. So this new statute is grafting something entirely new on to an existing contractual obligation, something heretofore only associated with the 90-day

notice. The mortgagee is thus forced to advise of a default, and present certain information, when it is powerless to take any enforcement action based upon that default.

When a foreclosure is already pending, although the plaintiff must otherwise cease any action, it is nevertheless bound to participate in the mandatory settlement conference. This is so even if the borrower appeared at a prior settlement conference and the case was marked unsettled. (If the borrower defaulted in appearing at a settlement conference then no further conferences are required.)

As an alternative, the mortgagee can engage the borrower in a pre-foreclosure work-out to negotiate in good faith a modification or forbearance agreement in accord with the settlement conference statute. (How this is actually different from the statutory settlement conference procedure is elusive.)

Problems with the Proposed Statute

The main issue of course is that a lender's or servicer's rights to collect money justly do to it is denied for a period of *at least* a year. Mindful that New York foreclosures are already so time consuming and laden with lender compliance mandates, this further delay – the moratorium - creates a conspicuous burden. And at the end of that hiatus, the debt will be all the greater, rendering reinstatement all the more difficult. It will tend to assure that the case cannot be settled – unless a lender will be willing to add the debt to a balloon at the conclusion - something which may not be palatable for any number of mortgage holders.

A ready consequence of the proposed legislation likely not contemplated by the statute's drafters is the instant peril to obtaining a mortgage. Surely lenders will be

exceptionally reluctant to make a mortgage loan at the outset of the moratorium (and for at least some period thereafter) knowing that the borrower has *carte blanche* to default, with the mortgagee concomitantly prohibited from taking any enforcement action for the duration of the ban.

As to duration, one would have to determine precisely when the last area of New York State has reached the Phase 3 status. Even when that date arrives, lamentably, it is conceivable for the virus to have created new lockdowns, thus placing areas back into earlier phases. How might the statute apply then? It is not beyond comprehension to assume that the statute would be interpreted to re-impose the ban, although what its duration would be then cannot be envisioned. (Or, the legislature might feel compelled to amend the statute to extend the moratorium to match the change in phase circumstances)

In barring foreclosure actions those are precisely the words used: "foreclosure actions". It presents no differentiation between a commercial case and a home loan. There are two reasons, however, to conclude that application will be solely to home loans. First, an earlier version of the bill (labelled with an "A") specifically included commercial foreclosures. That has been removed in the B version, although regrettably the original New York State Assembly Memorandum in Support of Legislation (as to the "A" version) has not been replaced and recites the now erroneous application to commercial mortgages. Next, it is manifest that home loans are the lone subject because the references to settlement conferences and related aspects apply *only* to home loans. Nevertheless, when a commercial foreclosure is pursued, the lack of statutory clarity in the wording itself might energize an opponent to argue that a commercial case too is barred. Whether the apparently all-inclusive language will create arguable defenses – likely to be raised – cannot be predicted with certainty. It is

to be hoped, though that the change of language from the earlier bill will assure courts' recognition of exclusion of the commercial case.

Where a judgment of foreclosure and sale has already been obtained, given the length of foreclosure cases in New York, it must mean that the default pre-dated and accordingly had nothing to do with the virus calamity. Therefore, barring the *foreclosure sale* is particularly misdirected. Stalled in proceeding with a judgment in hand and a sale otherwise imminent not only denies recompense to the mortgagee, it requires that mortgagee whilst handcuffed to advance taxes and insurance for at least another year, thereby creating a significant cash outflow and a still larger debt. This also reduces possible surplus and increases the likelihood of deficiencies (for which borrowers will be liable).

Further related to this stage, if an auction sale has been conducted, it is not clear if the statute bars delivery of a referee's deed. If it does, it thrusts the bidder (whether that be the mortgagee or a third party) into the tenuous netherworld of being an equitable owner, but neither a legal or record owner. (This dilemma is surprisingly expansive, discussed at length at 1 *Bergman On New York Mortgage Foreclosures* § 2.24 to which attention is invited.)

And for the mortgagee who may have already conducted a sale and received a deed, any occupants of the premises – the mortgagor and others – are still free to repose at the premises for at least a year without need to pay rent; they are immune from eviction. The bidder at the sale, whether the mortgagee or a third party, is denied use of its own property. Again, however, the property owner will be obliged to maintain its property and pay both taxes and insurance. Quite the irony.

Requiring the mortgagee to send the 90-day notice (even though it is prohibited from actually beginning an action) portends that the one year period during which the

notice is valid will expire, requiring the lender to send a new notice the following year when finally it may be empowered to proceed – seems baseless and wasteful.

Finally, when the hiatus period eventually passes, the mortgage holder (erroneously referred to in the statute as "mortgagors") is mandated to demonstrate compliance with the requirement of notice or the conference or the settlement procedure in order to commence or proceed with a foreclosure action. Indeed, the failure to demonstrate the compliance is denominated as an affirmative defense to the foreclosure action and the borrower may request a bad faith hearing for the lender or servicer's non-compliance with the negation obligations. This can, by the statue itself, lead to loss of interest accrued during the entire moratorium. So, this law goes even further than merely creating the one year delay; it reserves imposition of serious punishment upon a foreclosing party founded upon a list of possible defalcations.

Unfortunately, difficulty (and with this statute, the inability) in prosecuting a mortgage foreclosure in the Empire State may compel many a mortgage lender to leave the New York market. It will have become just too parlous and unprofitable.