



Moratorium on commercial foreclosures extended to January 15, 2022 - by Michael Caruso

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Moratorium on Commercial Foreclosures Extended to January 15, 2022

On September 2, 2021, New York governor Kathy Hochul signed into law a revised and extended moratorium on foreclosures against qualifying commercial property owners impacted by the COVID-19 pandemic. The recent legislation Chapter 417 (Senate Bill S50001/Assembly Bill A40001) of the Laws of 2021, Part B, Subpart B, Section 1 (the Act), made effective September 2, 2021, continues until January 15, 2022. The continued moratorium for the remainder of 2021 and into early 2022 will affect debtor-creditor relations among certain commercial property owners and mortgage lenders. As the end of the year approaches, with commercial mortgage loans defaulting and forbearance periods expiring, it is important for New York property owners and lenders to be aware of the Act, including its protections, exemptions, requirements for compliance, and bases for challenge.

By way of background, the Act incorporates and reinstates most of the language contained in prior statutes enacted in New York since the start of the pandemic in early 2020, including the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381) (CEEFPFA) and the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (L. 2021, c. 73) (CEPOSBA). The moratoriums under both the CEEFPFA and CEPOSBA expired on August 31, 2021. The revised and extended moratorium imposed by the Act largely preserves the earlier laws, with some modifications, as explained below.

This article explains the scope of the Act and the commercial property owners that qualify for, or are exempt from, protection under the Act. Next, this article summarizes the procedures for lenders to demonstrate compliance with the Act before instituting a foreclosure lawsuit. This article also describes the new process introduced by the Act, absent from CEEFPFA and CEPOSBA, that permits lenders to challenge in court a commercial property owner's self-declared financial hardship and, if successfully challenged, terminate the foreclosure stay. Finally, this article concludes by analyzing the practical implications of the Act.

Protected and Exempted Commercial Property Owners Under the Act

The Act imposes a foreclosure moratorium to January 15, 2022 for qualifying commercial property

owners that declare economic hardship from the ongoing pandemic. During the foreclosure stay, the property owner remains in possession of the real property collateral while the mortgage debt continues to accrue interest, fees, and costs according to the parties' loan documents. The Act applies to qualifying commercial property owners of apartment buildings, co-ops, condominiums, and mixed-used real estate. CEPOSBA contained similar terms.

The Act postpones until January 15, 2022:

Any action to foreclose a mortgage relating to commercial real property, provided the owner or mortgagor of such property:

- Owns ten or fewer commercial units whether directly or indirectly,
- Is a business that is resident in New York State,
- Is independently owned and operated,
- Is not dominant in its field, and
- Employs 100 or fewer persons (increased from 50 or fewer persons under CEPOSBA)

The ten or fewer commercial units may be in more than one property or building as long as the total aggregate number of ten units are currently occupied by a tenant or are available for rent. Importantly, the Act does not protect property owners of more than ten commercial units in the aggregate. So, for example, a New York limited liability company that is an owner and mortgagor of an apartment building containing eleven commercial units is beyond the scope of, and exempt from, the statutory protections of the Act. A lender may commence or continue a mortgage foreclosure action against such LLC owner and its commercial real property collateral without having to comply with the Act.

Pre-Foreclosure Compliance with the Act

Before instituting or continuing foreclosure proceedings, the Act requires lenders to provide a two-page prescribed form of "Hardship Declaration" to qualifying property owners. The hardship declaration requires the property owner to attest, under penalty of law, to having experienced financial hardship and an inability to pay the mortgage because of:

- Significant loss of revenue during the COVID-19 pandemic;
- Significant increase in necessary expenses related to preventing the transmission of COVID-19 within the business;
- Moving expenses and difficulty in securing an alternative commercial property for relocating the business; or,
- One or more of the business's tenants has defaulted on a significant amount of their rent payments since March 1, 2020.

If the property owner signs and delivers the hardship declaration to the lender or to the court, and the lender believes in good faith that the financial hardship does in fact exist, then the foreclosure action will be stayed from commencement or continuation until January 15, 2022.

Alternatively, after service of the hardship declaration, a foreclosure action may commence provided that the lender files with the court an affidavit (1) of service demonstrating the manner in which the lender or lender's agent served a copy of the hardship declaration on the property owner; and (2) attesting that at the time of filing of the foreclosure complaint, the lender either (a) had not received a hardship declaration from the property owner, or (b) had received a hardship declaration from the property owner, but the lender believes in good faith that the financial hardship does not exist. In this latter context, a lender will challenge and seek to lift the foreclosure stay.

Basis and Procedure for a Lender to Challenge and Lift the Foreclosure Stay

Under CEEFPA and CEPOSBA, qualifying property owners had an almost absolute right to stay and postpone a foreclosure upon submitting a hardship declaration. Lenders had no real opportunity or procedure to challenge the self-declared financial hardship. Now, by contrast, under the express provisions of the Act, lenders may challenge in court the property owner's declaration of hardship. Specifically, the lender may move the court, either by motion or by order to show cause, with notice to the property owner, to lift the foreclosure stay based on lender's good faith belief that the property owner has not experienced a financial hardship as required by the Act. In response to the lender's challenge, the court shall grant a hearing to determine whether defendant's hardship claim is valid, in which event the foreclosure action will be postponed until January 15, 2022, or invalid, in which event the foreclosure action shall continue to a determination on the merits.

Practical Implications of the Act

As a practical matter, although the Act is an improvement on CEEFPA and CEPOSBA, foreclosing lenders continue to face obstacles for several reasons. First, property owners do not carry the burden of proving the validity of the hardship declaration. Instead, foreclosing lenders carry the burden of proving the invalidity of the hardship declaration, which is arguably unfair. Second, it is unlikely that the courts will expeditiously grant hearings or render decisions on challenged hardship declarations. The reason is because of the volume of backlogged foreclosure cases in the courts, which was heavy before the pandemic and is now even more pronounced. By the time a lender obtains a hearing date and decision from the court, the moratorium might be over (unless the legislature and governor further extend the Act beyond January 15, 2022). As a result, there are legitimate concerns about whether the Act and/or its implementation violates constitutional rights to due process by not providing any real opportunity for lenders to contest the hardship declaration and continuation of the foreclosure stay within a reasonable time.

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