

NY Stays Residential Evictions, Foreclosures through Feb. 27

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On December 28, 2020, New York Governor Andrew M. Cuomo signed the [COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 \(EEFPA\)](#) which became effective immediately. The new law includes separate components related to residential evictions, mortgage foreclosures, tax foreclosures, negative credit reporting, credit discrimination, and tax renewal exemption protections. This alert will primarily focus on the EEFPA's effect upon **mortgage foreclosures, negative credit reporting, and credit discrimination**.

The EEFPA **stays any pending residential eviction and mortgage foreclosure proceedings** (with the limited exceptions discussed below), including proceedings filed on or before March 7, 2020 or proceedings that are commenced within 30 days of December 28, 2020 (January 27, 2021), **for at least 60 days** (until February 27, 2021). The stay may also be extended to a later date that the chief administrative judge determines is necessary to ensure that courts are prepared to conduct proceedings in compliance with the EEFPA and to give tenants and mortgagors an opportunity to submit the new "Hardship Declaration" pursuant to the EEFPA. An Administrative Order, [AO/341/20](#), was issued on December 31, 2020, which directed the stay imposed by the EEFPA. The courts must also promptly mail the tenant or mortgagor a copy of the Hardship Declaration in English, and, to the extent practicable, the tenant or mortgagor's primary language, if other than English.

If a tenant or mortgagor files or otherwise provides a Hardship Declaration to the landlord, mortgagee or their agent, the active proceedings for eviction or mortgage foreclosure against the tenant or mortgagor are **stayed until at least May 1, 2021**. If there is no pending eviction or foreclosure proceeding and the tenant or mortgagor returns the Hardship Declaration to the landlord, mortgagee or their agent, a new action cannot be initiated until at least May 1, 2021. In this case, the statute of limitations will be tolled until May 1, 2021.

A foreclosing party is now required to **include Hardship Declaration with every notice** provided to the mortgagor pursuant to Real Property Actions and Proceedings Law (RPAPL) §§ 1303 and 1304 (the RPAPL § 1304 notice is commonly referred to as the "90-Day Notice"). The Hardship Declaration must be provided in 14-point type, and in the mortgagor's primary language, if other than English. Notably, RPAPL § 1304 contains a requirement that the 90-Day Notice be sent "in a separate envelope from any other mailing or notice." However, in contrast, the EEFPA states the Hardship Declaration must be included with every notice provided to a mortgagor pursuant to RPAPL §§ 1303 and 1304. At this time, no further clarification with respect to these two conflicting directives has been provided by the courts or the legislature. The Hardship Declaration **must also include a mailing address, telephone number, and active email address** the mortgagor can use to contact the foreclosing party and return the hardship declaration. Mortgage servicers and foreclosing parties are recommended to begin preparing designated contact information for this purpose and preparing form notices to be provided to mortgagors prior to the commencement of a foreclosure action. Use of the form notices

provided by the courts will help foreclosing parties ensure compliance with the EEFPA. However, some additional language will be required to accompany the Hardship Declaration to provide a mailing address, telephone number, and active email address the mortgagor can use to contact the foreclosing party.

Additionally, the courts will not accept the filing of any new action to foreclose a mortgage unless the foreclosing party or an agent of the foreclosing party files an affidavit, under of penalty of perjury, addressing service of the Hardship Declaration and attesting that at the time of the filing, a Hardship Declaration has not been received from the mortgagor. In addition, the court is required to seek confirmation on the record or in writing that the mortgagor received a copy of the Hardship Declaration and that the mortgagor did not return the declaration to the foreclosing party. If the court determines a mortgagor has not received a Hardship Declaration, then the court must stay the proceeding for a reasonable period of time, which shall be no less than ten (10) business days, to ensure the mortgagor received and fully considered whether to submit the Hardship Declaration.

In any action to foreclose a mortgage in which a judgment of sale has not been issued, if the mortgagor provides a Hardship Declaration to the foreclosing party, the court, or an agent of the foreclosing party, the proceeding must be **stayed until at least May 1, 2021**. If a judgment of sale has been issued but has not yet been executed prior to December 28, 2020, the court must stay the execution of the judgment at least until the court has held a status conference with the parties. In those cases, if the mortgagor provides a Hardship Declaration to the foreclosing party, the court, or an agent of the foreclosing party prior to the execution of the judgment, the execution must be stayed until at least May 1, 2021.

The EEFPA does not apply to property that is vacant and abandoned as defined in NY RPAPL § 1309 and listed as such in the statewide vacant and abandoned property electronic registry prior to March 7, 2020 and that remains on the registry. Nor does the EEFPA apply to mortgage loans made, insured, purchased or securitized by a corporate governmental agency of the state constituted as a political subdivision and public benefit corporation. The EEFPA applies to an action to foreclose a mortgage on residential real property, provided the owner or mortgagor of such property is a natural person, regardless of how title is held, and owns 10 or fewer dwelling units in the aggregate, whether directly or indirectly.

The EEFPA also prohibits a lender from negative credit reporting to a credit reporting agency with respect to the granting of a stay of mortgage foreclosure proceedings, tax foreclosure proceedings, or tax lien sales provided by the act, or with respect to an owner of residential real property who is currently in arrears and has filed a Hardship Affidavit with the lender.

The act also prohibits lending institutions from discriminating in determining whether to extend credit to an owner of residential real property who is granted a stay of mortgage foreclosure proceedings, tax foreclosure proceedings or of a tax lien sale, or with respect to an owner who is in arrears and also filed a Hardship Declaration with the lender. Guidance regarding the scope of this provision would be very helpful; however, on its face, the provision could be construed broadly to impact the underwriting of non-real estate secured loans to protected borrowers by non-mortgage lenders.

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