RAS LEGAL GROUP

VALUED CLIENTS:

I write to you from RAS Boriskin, LLC in New York to share a mortgage foreclosure and case law update.

New Administrative Order

Yesterday, Chief Administrative Judge Marks released Administrative Order 232/20, a copy of which is attached. The relevant aspects of Administrator Order 232/20 is set out below.

(1) **No default judgments**: Courts will not be permitted to enter a default judgment upon the failure of a party to answer the complaint until such time as Governor Cuomo lifts the suspension of statutory time limits. At this time, the suspension is in effect until November 3, 2020, but it is likely that Governor Cuomo will continue to extend such suspension in his next Executive Order later this month. As such, while we can file motions for default judgment, they will not be granted. Additionally, we will focus on filing motion practice not seeking default judgments such as Orders of Reference (without default judgments), Judgments of Foreclosure and Sale, Summary Judgment and any pleading in contested cases.

(2) **Hearings/Conferences**: In cases where the defendant has appeared (not defaulted), hearings and conferences are subject to local restrictions where the courts are required. In his memo, Judge Marks specifically states that there may be lengthier periods of time for scheduling, hearing and issuance of decisions.

(3) **Covid-Conference Update**: This Administrative Order confirms that covid-19 conferences are required even on post-judgment cases. However, with respect to vacant and abandoned properties, to the extent that a property is deemed to be vacant and abandoned and affirmed as much by the plaintiff, no covid-19 conference will be required. We have been requesting covid-19 conferences on eligible files since AO/157/20 was released.

(4) Foreclosure Sales must be conducted in accordance with the court's covid-19 health and safety protocols.

Foreclosure Sales

- While we were anticipating an Administrative Order, we were hopeful that the Administrative Order would amend the judgments of foreclosure and sale to conform to the new foreclosure sale requirements as set forth in the county/district auction plans and provide an additional 90 days to schedule sale. Since it did not, those counties' judgments that require amendment (and are not addressed in the respective district auction plans) will require a motion, a so-ordered letter or the resettling of the judgment. The approach will vary from judge to judge.
- All judicial districts and counties have submitted their foreclosure sales proposals which have been approved by the Unified Court System. To date, all but a couple have been released to us for review and we have built processes for them.
- We have been requesting covid-19 conferences on eligible files since the release of AO/157/20 at the end of July 2020. Some judges are electing not to proceed with post-judgment conferences. In those instances, we have been able to move forward with scheduling a sale.
- In Nassau County, once we complete the pre-sale requirements as set out in the auction plan, the Court will set a sale date.
- Many courts have restrictions on volume of sales per day and frequency of sales being held. For example, in 1 county, a sale can take place once every half hour for 5 hours, limiting the total sales volume to 10 sales. Sales typically take place 1 day a week.
- As the information is continuously updated, we continue to revise our approach.

Case Law

Yesterday, the Appellate Division, 3rd Department decided an appeal (handled by RASB) that impacts deceased parties and the statute of limitations. Specifically, the Appellate Court held that the mortgage debt was not accelerated upon the commencement of a prior foreclosure action because the prior action, commenced against a deceased party, was a nullity. I'm attaching a copy of this decision and analysis for your review. Notably, while this is an important decision for foreclosure plaintiffs, the 3rd Department (located in Albany) does not have as much volume or sway as compared to the 2nd Department. There is a trial court decision in the 2nd Department which has held to the contrary and which is in line with 2nd Department cases. Nonetheless, this is a win, one we hope we can transform into more wins for our valued clients.

If I can be of assistance or if you'd like to discuss this further, please do not hesitate to contact me.

Thanks,

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State of New York
Unified Court System

Lawrence K. Marks
Chief Administrative Judge

25 Beaver Street
New York, N.Y. 10004
(212) 428-2100

MEMORANDUM

October 22, 2020

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

From: Lawrence K. Marks LM

Subject: Revised Procedure for Addressing Foreclosure Proceedings

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Continuing our progress towards the fuller resumption of court operations, attached please find a copy of AO/232/20 (Attachment A), which amends the protocol for handling foreclosure proceedings.

1. Effective October 22, 2020, all foreclosure matters may resume statewide, with several important caveats:

   (a) Suspension of Statutory Time Limits: At this time, all proceedings continue to be governed by the suspension of "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state," set forth in Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.60, and 202.67 (Attachment B).[1] So long as this suspension of time limits continues, no default judgment may be entered upon the failure of a respondent to answer a complaint or petition in a foreclosure matter.

   (b) Scheduling Once Issue Has Been Joined: Once a matter has been filed and answered, the further hearing of a foreclosure proceeding remains subject to local court circumstances and health/safety assessments for courthouse use. The safety of judges, non-judicial personnel, and court visitors remains the paramount concern in all court operations. Given the ongoing need to restrict foot traffic in courthouses for reasons of health and safety, the scheduling, hearing and issuance of decisions in foreclosure matters may require lengthier time periods than anticipated in statutes and prevalent under pre-COVID conditions.

[1] Executive Order 202.67 extended this suspension to November 3, 2020.

(c) Conference Requirement: The requirement of a status or settlement conference in all foreclosure matters (including matters where a judgment of foreclosure issued or an auction was scheduled prior to March 17), set forth in AO/157/20 (Attachment C) shall remain in effect, with two modifications:

(i) Conference Requirement for Vacant and Abandoned Property: No conference need be held in a foreclosure matter where the foreclosing lender submits an affirmation to the court averring that, following diligent inquiry, it knows the property at issue to be currently abandoned and vacant.

(ii) Conference Requirement for In Rem Foreclosures: The conference requirement shall apply to in rem foreclosure proceedings only where the enforcing officer (e.g., the county attorney or other person filing the proceeding) deems such a conference to be in the public interest (for example, the conference is likely to result in a settlement beneficial to all parties).

2. Foreclosure proceedings and remedies continue to be governed by provisions of federal and State law, as well as gubernatorial executive orders, that specifically address COVID-19 concerns. These include, without limitation:

(a) Forbearance in Residential Foreclosures– State Law and Executive Order: Chapters 112 and 126 of the Laws of 2020 – provide for forbearance and other protections to certain residential mortgagors who are experiencing financial hardship due to COVID-19.

(b) Moratorium on Commercial Foreclosures: Governor Cuomo's Executive Orders 202.28, 202.48, 202.57, 202.64, and 202.70 (Attachment D) have imposed and extended a moratorium addressing commercial foreclosures for nonpayment due to a COVID-19-related financial hardship.[2]

(c) CARES Act/Federal Housing Finance Agency Relief: The Coronavirus Economic Stabilization Act of 2020 (CARES Act) provides for forbearance of mortgage payments for up to 360 days to qualified borrowers for COVID-related reasons. In addition, Fannie Mae and Freddie Mac have extended moratoriums on certain single-family foreclosures until at least December 31, 2020.

3. Filing and service of documents in foreclosure proceedings continue to be governed by AO/121/20 (Attachment E). Consequently, initiating documents by represented petitioners must be filed through NYSCEF or mail only at this time. (Unrepresented parties may file papers in person.)

4. Foreclosure auctions are to be conducted pursuant to the judicial district auction plans developed pursuant to AO/157/20, and must comply with the Court System's COVID-19 mitigation protocols: social distancing, wearing masks, and screening practices (including temperature checks) if conducted indoors. No auction may be conducted that

[2] EO 202.70, dated October 20, 2020, extended this moratorium through January 1, 2021.

does not comply with these protocols, Finally, foreclosure plans within the City of New York should provide for both indoor and outdoor auctions, as circumstances require.

Please distribute this memorandum and attachments to judges and non-judicial staff as you deem appropriate.

Attachments

c: Hon. Sherry Klein Heitler
Steven Helfont, Esq.

Attachment A

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, at the direction of the Chief Judge, and consistent with the Governor's determination approving the easing of restrictions on commerce imposed due to the COVID-19 health emergency, I hereby direct that, effective October 23, 2020:

1. Resumption of Foreclosure Matters: All residential, commercial, and in rem foreclosure matters may proceed in the normal course, subject to (a) current or future federal and state emergency relief provisions governing time limits for the commencement and prosecution of matters, limitation of foreclosure-related remedies, and similar issues, (b) individual court scheduling requirements occasioned by health and safety concerns arising from the coronavirus health emergency, and (c) the foreclosure conference requirement set forth in AO/157/20, as modified in paragraphs 2 and 3 below.

2. Vacant and Abandoned Property: The status or settlement conference requirement of AO/157/20 shall not apply where the foreclosing lender submits an affirmation to the court averring that, following diligent inquiry, it knows the property at issue to be currently abandoned and vacant.

3. In Rem Foreclosures: The status or settlement conference requirement of AO/157/20 shall apply to in rem foreclosures only when the enforcing officer believes that such a conference would be in the public interest.

4. Filing and Service: Filing and service of process in foreclosure proceedings shall continue as set forth in Administrative Order AO/121/20.

5. Remote Proceedings: Foreclosure proceedings should be conducted remotely whenever appropriate.

6. Auctions:

   (a) Notwithstanding the provisions of any judgment of foreclosure, all foreclosure auctions shall be conducted in accordance with the applicable judicial district foreclosure auction plan and rules in effect at the time of the auction.

   (b) All foreclosure auctions, without regard to location, shall comply with UCS COVID-19 related protocols addressing social distancing, wearing of masks, and (if indoors) screening of attendees. If such compliance is not possible, the auction shall be relocated or, if necessary, postponed.

   (c) All foreclosure auction plans within the City of New York shall provide for the contingencies of both outdoor and indoor auctions.

This order supersedes the provisions of any other Administrative Order inconsistent with its terms.

Chief Administrative Judge of the Courts

Dated: October 22, 2020

AO/232/20

Attachment B

No. 202.67

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby find that a disaster continues to exist for which affected state agencies and local governments are unable to respond adequately. Therefore, pursuant to the authority vested in me by the Constitution of the State of New York and Section 28 of Article 2-B of the Executive Law, I hereby continue the declaration of the State Disaster Emergency effective March 7, 2020, as set forth in Executive Order 202. This Executive order shall remain in effect until November 3, 2020.

IN ADDITION, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202 up to and including 202.21, and 202.27, 202.28, 202.29, 202.30, 202.38, 202.39, 202.40, 202.48, 202.49, 202.50, 202.55 and 202.55.1, as extended, and Executive Order 202.60 for another thirty days through November 3, 2020, except:

- Subdivision 1 of Section 491 of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a non-driver identification card, shall no longer be suspended or modified as of November 3, 2020;

- Sections 401, 410, 2222, 2251, 2251, and 2282(4) of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a registration certificate or number plate for a motor vehicle or trailer, a motorcycle, a snowmobile, a vessel, a limited use vehicle, and an all-terrain vehicle, shall no longer be suspended or modified as of November 3, 2020;

- Section 420-a of the Vehicle and Traffic law, to the extent that it provides an expiration for temporary registration documents issued by auto dealers shall no longer be suspended or modified as of November 3, 2020; and

- The suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule,

or regulation, or part thereof, is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be tolled, and provided further:

- The suspension and modification of Section 30.30 of the criminal procedure law, as continued and modified in EO 202.60, is hereby no longer in effect, except for felony charges entered in the counties of New York, Kings, Queens, Bronx, and Richmond, where such suspension and modification continues to be effective through October 19, 2020; thereafter for these named counties the suspension is no longer effective on such date or upon the defendant's arraignment on an indictment, whichever is later, for indicted felony matters, otherwise for these named counties the suspension and modification of Section 30.30 of the criminal procedure law for all criminal actions proceeding on the basis of a felony complaint shall no longer be effective, irrespective, 90 days from the signing of this Executive order on January 2, 2021.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this fourth day of October in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

Attachment C

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, at the direction of the Chief Judge, and consistent with the Governor's determination approving the easing of restrictions on commerce imposed due to the COVID-19 health emergency, I hereby direct that, effective July 27, 2020, notwithstanding the terms of any prior administrative order, the following procedures and protocols shall apply to the conduct of residential and commercial foreclosure matters before the New York State courts:

1. Stay of Commencement and Enforcement of Commercial Foreclosure Matters: Consistent with Executive Order 202.28, "[t]there shall be no initiation of a proceeding or enforcement of ... a foreclosure of any ... commercial mortgage, for nonpayment of such mortgage, owned ... by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic" for a period ending on August 19, 2020.

2. Filing and Service: Filing and service of process in residential and commercial foreclosure proceedings shall continue as set forth in Administrative Order AO/121/20 (Exh. A), as amended.

3. Procedures in Pending and Newly-Filed Matters: Except insofar as a matter may be stayed or otherwise governed by Governor Cuomo's Executive Orders 202.8, 202.14, 202.28, 202.38, and 202.48, residential and commercial foreclosure matters may proceed as set forth below.

4. Conferences:

    a. Prior to conducting any further proceedings in any foreclosure matter, the court must initiate a status or settlement conference (including, where applicable, a settlement conference pursuant to CPLR Rule 3408). If any party does not appear at the conference, the court shall reschedule and make a second attempt to hold the conference before undertaking further proceedings.

    b. At the conference, the court shall review the procedural history of the matter; confirm compliance with notice requirements, inquire into the effects, if any, that the COVID-19 pandemic has had upon the parties; review any special relief under state or federal law to which the parties may be entitled in light of the pandemic; refer unrepresented parties to local civil legal service providers and housing counseling agencies; assess any pending and anticipated motions; approve briefing schedules proposed by stipulation of the parties; and use best efforts (including referral to alternative dispute resolution) to resolve any outstanding issues.

5. Remote Proceedings: Any foreclosure conference or proceeding will be conducted remotely to the fullest extent practicable.

6. Motions: Following the conference in a foreclosure matter, the court may (1) direct further briefing of any motion as needed, and (2) issue a decision on any motion, including a motion for foreclosure and sale. Pending and newly-filed motions may be considered and decided in all foreclosure matters -- including residential and commercial matters, matters in which one or both parties are self-represented, and matters commenced prior to and during the COVID-19 pandemic. In ordering relief in a commercial foreclosure matter, the court shall stay enforcement if and as required under Executive Orders 202.28, 202.48, and related Executive Orders.

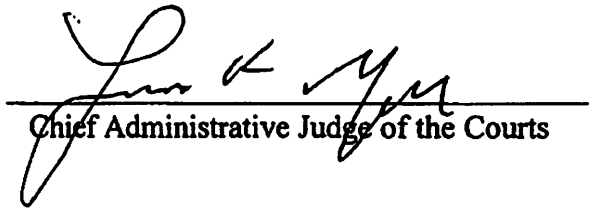
7. Auctions:

    a. Continued Suspension of Auctions: No auction or sale of property in any residential or commercial foreclosure matter shall be scheduled to occur prior to October 15, 2020.

    b. Assessment of Auction Practices: Prior to September 1, 2020, the appropriate administrative judge for civil matters in each judicial district shall develop appropriate procedures and protocols for the safe and healthful conduct of such auctions within their districts in light of the COVID-19 pandemic.

8. Other Applications and Hearings: Courts may entertain other applications in foreclosure matters, including but not limited to post-judgment applications. Where necessary, courts may also conduct hearings, including but not limited to good-faith hearings pursuant to CPLR 3408(f). All such hearings will be conducted remotely to the fullest extent practicable.

9. This order shall not affect procedures for the filing and service of essential matters, and otherwise supersedes the provisions of any Administrative Order inconsistent with its terms.



Chief Administrative Judge of the Courts

Dated: July 23, 2020

AO/157/20

Attachment D

State of New York

Executive Chamber

No. 202.64

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Order 202.22 through 202.26, 202.32, 202.33, 202.34, 202.35, 202.44, 202.45, and 202.53 as continued and contained in Executive Order 202.57 for another thirty days through October 18, 2020, and I hereby temporarily suspend or modify the following from the date of this Executive Order through October 18, 2020:

- Section 522 of Labor Law is modified to exclude from the definition of "total unemployment" per diem, part-time work performed between September 18, 2020 and November 3, 2020 for the New York State Board of Elections or a local board of elections where the total earnings for the week from all work performed for any employer do not exceed $504.00 and the employer is not the separating employer identified in the original claim, and not to require claimants to report such part-time work when certifying for weekly benefits.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directives through October 18, 2020:

- The directive contained in Executive Order 202.48, which modified the directive in Executive Order in 202.28 that prohibited the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through October 20, 2020.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this eighteenth day of September in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

State of New York

Executive Chamber

No. 202.70

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue:

NOW THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202.36, 202.37, 202.46, 202.47, 202.54, 202.58, and 202.59, as continued and contained in Executive Order 202.65 for another thirty days through November 19, 2020;

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directive through November 19, 2020:

- The directive contained in Executive Order 202.64, which modified the directive in Executive Order in 202.28 that relates to eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through January 1, 2021.

- The directive contained in Executive Order 202.3, as extended, that closed movie theatres, is hereby modified to provide that movie theatres shall be allowed to open effective October 23, 2020 at 25% capacity with up to 50 people maximum per screen, subject to adherence to Department of Health guidance, provided that movie theatres in the New York City region, in counties with infection rates above 2% over a 14-day average, and in counties with red cluster zones continue to be closed.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twentieth day of October in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

Attachment E

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, at the direction of the Chief Judge, and consistent with the Governor's determination approving the easing of restrictions on commerce imposed due to the COVID-19 health emergency, I hereby direct that, effective June 10, 2020:

1. In courts and case types approved for electronic filing through the New York State Courts Electronic Filing System (NYSCEF), represented parties must commence new matters or proceed in pending matters exclusively by electronic filing through NYSCEF, and must file and serve papers in such matters (other than service of commencement documents) by electronic means through NYSCEF or, where permitted under NYSCEF court rules, by mail. Unrepresented parties must file, serve and be served in such matters by non-electronic means unless they expressly opt in to participate in NYSCEF.

2. To the extent that NYSCEF electronic filing is unavailable in courts or case types in the trial courts, represented parties must commence new matters exclusively by mail, except where otherwise authorized by the Chief Administrative Judge. Following commencement of a new matter, and in pending matters, represented parties must file papers through the Unified Court System's Electronic Document Delivery System (EDDS) or by mail, and must serve papers (other than commencement documents) by electronic means or by mail. Unrepresented parties must file, serve and be served in such matters by non-electronic means unless they provide written notification to the court and all parties that they wish to file, serve and be served electronically.

3. This order shall not affect procedures for the filing and service of papers in essential matters.

4. The court shall not request working copies of documents in paper format.

Chief Administrative Judge of the Courts

Dated: June 9, 2020

AO/121/20