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LAW OFFICES

MEMORANDUM

**TO:** RAS CLIENTS  
**FROM:** Joseph F. Battista, Esq., General Counsel – New York  
**RE:** S09114 & A11181 and A6370  
**DATE:** December 28, 2020

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We are writing to advise you that the New York State Legislature has called a special session and is expected to pass new legislation, Bill S09114 & A11181, entitled “The COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020” (“The Act”). The Governor has publically announced that an agreement has been reached and that it is his intention to sign the bill once it has been passed by the legislature. The Act will become effective immediately upon being signed by the Governor and is set to expire on May 1, 2021.

**NEW COVID-19 FORECLOSURE REQUIREMENTS**

The Act applies to real property and co-ops meeting the following requirements:

- i) The mortgagor, or the current owner, is a natural person; and
- ii) The mortgagor, or the current owner, does not own more than 10 residential units; and
- iii) The property is occupied (in order to qualify as a vacant property, the property must have been deemed to be vacant & abandoned pursuant to RPAPL 1309 and the property added to the NYS vacant and abandoned property registry.)

The Act exempts mortgages made, insured, purchased or securitized by a state corporate governmental agency. The Act does not discuss federally backed mortgages, but presumably they will be deemed exempt from the new requirements.

**Currently Pending Foreclosure Actions:**

- i) Currently pending cases will be stayed for at least 60 days while the court implements processes to comply with the new requirements.
- ii) The court will issue an order directing the stay, and mail to the mortgagor(s) a “Hardship Declaration” in 14 point font in both English and the mortgagor(s) primary language if other than English. The text of the “Hardship Declaration” is provided by the statute and a copy is enclosed for your reference.
- iii) If the case is pre-judgment and the mortgagor(s) provides an executed “Hardship Declaration” the action shall be stayed until at least May 1, 2021.
- iv) If the case is post-judgment/pre-sale, no sale may take place until a status conference has been held, and if the mortgagor(s) provides an executed “Hardship Declaration” no sale may be held prior to May 1, 2021.

New foreclosure actions:

- i) A copy of the “Hardship Declaration” in 14 point font in both English, and the mortgagor(s) primary language if other than English, must be included with the 90 day notices pursuant to RPAPL 1304. **Notably, this requirement conflicts with RPAPL 1304 which requires the 90 day notices to be sent separately from any other notice.**
- ii) An affidavit attesting to (1) the method and manner of service of the “Hardship Declaration” together with the 90 day notices pursuant to RPAPL 1304, and (2) that the mortgagor(s) has not returned an executed “Hardship Declaration” must be filed with the summons and complaint.
- iii) A copy of the “Hardship Declaration” must be served together with the RPAPL 1303 notice, which is served by the process server together with the summons and complaint.
- iv) If a mortgagor provides an executed “Hardship Declaration” prior to the filing of the complaint, the foreclosure complaint may not be filed prior to May 1, 2021, and the statute of limitations shall be tolled until May 1, 2021.

Impact on Foreclosure Process

- Pre-First Legal: On pre-first legal loans, the following processes need to be established:
  - Mailing of the “Hardship Declaration” together with the 90 day notice and proof of same;
    - Mailing must be both first class and certified or registered mail to the mortgaged property and last known mailing address.
  - Affidavit execution attesting to service of the declaration & 90 day notice, and that no executed declaration was received. Our office is able to provide a proposed affidavit template which will be compliant with the statutory requirements. Notably, this requirement is in addition to the Statement of Review, Banking Law 9-x and Certificate of Merit statutory requirements.
  - A process for tracking receipt of executed mortgagor declarations must be established. Notably, the statute does not provide a time frame following the mailing of the “Hardship Declaration” by which the mortgagor must return the completed and executed declaration. We suggest a reasonable time frame of up to 30 calendar days following the mailing.
- Pre-First Legal and Post-First Legal: Since there is a post-first legal compliance requirement related to the “Hardship Notification,” please provide our office with a mailing address, telephone number and email address for the “Hardship Declarations” which is required by law. This information is required for post-first legal “Hardship Declarations” that must be served with the foreclosure complaint or later as required by the Courts.
- RAS Can Help:
  - New 90 day notices & Hardship Declarations: Our office is able to serve the 90 day notices and “Hardship Declarations” on your behalf and execute an affidavit of service, however, we will require an affidavit from the servicer attesting that an executed declaration was not received. A power of attorney authorizing our office to send the 90 day notices and declarations is recommended.
  - Pre-First Legal Files Already Referred: We can send such notices on pre-first legal files already referred and provide an affidavit of service. However, our clients will have to execute the pre-first legal affidavit attesting to lack of hardship declaration receipt from the mortgagor.

- Affidavit Template: As previously mentioned, our office is able to assist in providing a proposed affidavit template for compliance with pre-first legal filing requirements.

### **FORECLOSURE ACTIVITIES NOT SUBJECT TO THE NEW STAY PROVISIONS**

We anticipate that the Office of Court Administration will issue further guidance outlining the new procedures to be followed in foreclosure and eviction cases shortly after The Act has been signed by the Governor. At this time, the following activities appear to be permitted by The Act and should proceed:

- i) Covid conferences, settlement conferences or status conferences, subject to court guidance Service of filed complaints can continue together with a Hardship Declaration
- ii) Surrogate proceedings
- iii) Although we are temporarily stayed from filing our motion practice or responsive pleadings, litigation may continue
- iv) Appellate proceedings will proceed absent guidance from the appellate courts to the contrary
- v) Sales may proceed once the required conference has been held, assuming no “Hardship Declaration” is received
- vi) First legal may be filed, provided that our clients were able to comply with the new Hardship Declaration requirement. In addition to the mailing requirement, our clients must attest to (1) the method and manner of service of the “Hardship Declaration,” and (2) that an executed “Hardship Declaration” has not been received
- vii) Post-sale matters, including third party closings, title curative and code violations may proceed
- viii) The preparation and execution of affidavits, assignments and other documents is permitted
- ix) Proceeding with conversion of non-e-file cases to e-file cases may proceed

### **NEW COVID-19 EVICTION REQUIREMENTS**

The Act includes in its definition of eviction proceedings any judicial or administrative proceeding to recover possession of a residential dwelling. As such, the prior exemptions to COVID requirements for post-foreclosure holdover proceedings do not appear to apply to the new requirements.

#### **Currently Pending Eviction Actions:**

- i) Currently pending cases will be stayed for at least 60 days while the court implements processes to comply with the new requirements.
- ii) The court will issue an order directing the stay and mail to the mortgagor(s) a “Hardship Declaration” in 14 point font in both English and the mortgagor(s) primary language if other than English. The text of the “Hardship Declaration” is provided by the statute and a copy is enclosed for your reference.
- iii) No default judgment may be taken prior to May 1, 2021, nor an existing default judgment enforced prior to May 1, 2021, unless the petitioner files a motion on notice seeking a hearing. At the hearing any default judgment shall be vacated upon the tenant’s oral request.

- iv)** If the case is pre-warrant and the mortgagor(s) provides an executed “Hardship Declaration” the action shall be stayed until at least May 1, 2021.
- v)** If the case is post warrant, no eviction may take place until a status conference has been held, and if the mortgagor(s) provides an executed “Hardship Declaration” no eviction may be held prior to May 1, 2021.
- vi)** Any warrants issued prior to the effective date of The Act will need to be reissued with additional language indicating that either the tenants failed to submit a “Hardship Declaration” or that the court has found the tenant has persistently engaged in unreasonable behavior or caused a substantial safety hazard.

New eviction actions:

- i)** A copy of the “Hardship Declaration” in 14 point font in both English, and the mortgagor(s) primary language if other than English, must be served with the notice to quit and any other notices served to the tenants.
- ii)** An affidavit attesting to (1) the method and manner of service of the “Hardship Declaration”, and (2) that the tenant(s) has not returned an executed “Hardship Declaration” must be filed with the eviction petition.
- (iii)** If a mortgagor provides an executed “Hardship Declaration” prior to the filing of the petition, the eviction petition may not be filed prior to May 1, 2021, and the statute of limitations shall be tolled until May 1, 2021.

If you would like to schedule a call to discuss the new statutory requirements and the impact on the foreclosure process, please feel free to contact me at [jbattista@raslg.com](mailto:jbattista@raslg.com) or 516-280-7675 ext. 1059.