

Consumer Finance Litigation



MAY 12, 2021 • NO. 8

New York's COVID-19 Eviction and Foreclosure Prevention and Small Businesses Acts Extended to August 31, 2021 – What You Need to Know

Lenders, mortgage servicers, and other financial institutions should take note that New York State passed legislation extending the protections set forth in the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 and the COVID-19 Emergency Protect Our Small Businesses Act of 2021 to August 31, 2021. Thus, the requirements and stays with respect to residential and commercial foreclosures and evictions imposed by the legislation remain effective through August 31, 2021.

On May 4, 2021, Governor Cuomo signed a bill extending both (i) the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the “EEFPA”);¹ and (ii) the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (“SBA”), to August 31, 2021² (S.6362-A/A.7175-A) (the “Extended Act”). The purpose of the Extended Act, which is effective immediately, is to maintain protections prohibiting residential and commercial evictions, foreclosure proceedings, credit discrimination, and negative credit reporting related to the COVID-19 pandemic until August 31, 2021, if the borrowers, mortgagors, and/or tenants submit the required Hardship Declaration with the foreclosing party, landlord/their agent, or the Court. In practice, however, some courts have extended the stay even without the required Hardship Declaration.

Highlights of the Extended Act are summarized below, but please refer to the full text of the Extended Act for additional information.³

LIMITS OF THE EXTENDED ACT

- The Extended Act still does **not** apply to residential eviction and foreclosure actions involving vacant and abandoned properties, listed on the statewide vacant, and abandoned property electronic registry (as such terms are defined in Sections 1309(2) and 1310 of New York’s Real Property Actions and Proceedings Law) prior to March 7, 2020, and which remain on such registry.⁴

1. On December 28, 2020, in response to the COVID-19 pandemic, the New York legislature passed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the “EEFPA”) (S.9114/A.11181), which became effective immediately. The EEFPA aimed at providing relief to tenants facing residential eviction (Part A) and mortgagors/borrowers facing pending or future residential foreclosure proceedings (Part B, Subpart A). In addition, the EEFPA (i) prohibited local governments from proceeding with tax lien sales or commencing tax foreclosures until May 1, 2021 on residential properties (Part B, Subpart B); (ii) prohibited credit discrimination and negative credit reporting (Part B, Subpart C); and (iii) required local governments to carry-over the Senior Citizens’ Homeowners Exemption and the Disabled Homeowner Exemption to 2021 (Part B, Subpart D). The initial EEFPA can be located [here](#).

2. On January 6, 2021, the New York legislature passed the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (“SBA”) (S.471A/A.3207), which became effective immediately. The SBA aimed at providing commercial eviction protections for small businesses of under 50 employees that demonstrate financial hardship and commercial foreclosure protections to small businesses that have 10 or less units. The initial SBA can be located [here](#).

3. The Extended Act can be located [here](#).

4. See the Extended Act, EEFPA, Part B(B)(1)(b).

- The Extended Act also does not apply to, and does not affect, any residential or commercial mortgage loan made, insured, purchased, or securitized by a corporate governmental agency of the state constituted as a political subdivision and public benefit corporation or the rights and obligations of any lender, issuer servicer, or trustee of such obligations.⁵
- The portion of the Extended Act addressing the SBA still only applies to commercial tenants, *who independently own and operate their business*, have 50 or fewer employees, and experience financial hardship and are unable to pay the rent or other financial obligations under the lease in full or obtain an alternative suitable commercial property as a result of:
 - (i) significant loss of revenue during the COVID-19 pandemic; and/or
 - (ii) significant increase in necessary expenses related to providing personal protective equipment to employees or purchasing and installing other protective equipment to prevent the transmission of COVID-19 within the business; and/or
 - (iii) moving expenses and difficulty in securing an alternative commercial property make it a hardship for the business to relocate to another location.
- The Extended Act still permits residential and commercial evictions of tenants, who persistently and unreasonably engage in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or cause a substantial safety hazard to others.

RESIDENTIAL EVICTION HIGHLIGHTS – PART A OF THE EXTENDED EEFPA

- Allows residential tenants to extend the stay in a pending residential eviction proceeding or prevent the commencement of an eviction proceeding until August 31, 2021⁶, by submitting to their landlord and/or filing with the Court,

a Hardship Declaration,⁷ under penalty of perjury regarding their inability to pay their rent or secure alternative housing and suffering a financial hardship or suffering a health-related hardship;

- Certain proceedings can continue if the Court receives an authorized new petition stating that the tenant is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others;
- Requires the landlord and the Court to serve on tenants, the Hardship Declaration Form, along with all required notices of petition;
- Requires the state Office of Court Administration to post such information and forms on its website in multiple languages;⁸
- Allows tenants to vacate default judgments upon motion by the petitioner or an agent of the petitioner, which shall include an affidavit attesting that the petitioner or petitioner's agent has served notice of the date, time[and place of such hearing on the respondent, including a copy of such notice⁹; and
- Extends the presumption of financial hardship upon filing a Hardship Declaration that would support a defense based on financial hardship under the Tenant Safe Harbor Act.¹⁰

RESIDENTIAL FORECLOSURE HIGHLIGHTS – PART B OF THE EXTENDED EEFPA

Stay of Residential Foreclosures

- Any owner, mortgagor, or natural person who owns 10 or fewer residential dwelling (as long as this includes the borrower's primary residence) and experiences a financial hardship, can file a Hardship Declaration¹¹ with the lender, its agent, or with the Court, to extend the stay in a pending residential foreclosure action or prevent the commencement of a residential foreclosure action through August 31, 2021.¹²

5. See the Extended Act, EEFPA, Part B(A)(1)(b).

6. See the Extended Act, EEFPA, Part A.

7. The Hardship Declaration Form is available on the State of New York Unified Court System and can be located [here](#).

8. The Office of Court Administration posted such information on its website and provided the Hardship Declaration in multiple languages [here](#).

9. See the Extended Act, EEFPA, Part A(7).

10. The Tenant Safe Harbor Act was enacted on June 30, 2020 in response to the COVID-19 pandemic to help tenants avoid eviction for unpaid rent if they can demonstrate a financial hardship during the covered period. Additional information is available [here](#).

11. In executing the Hardship Declaration, the borrower/mortgagor must swear to one of the enumerated circumstances and certain additional statements set forth in the declaration. Please see the Hardship Declaration for the specific circumstances and statements.

12. The portion of the EEFPA that covered foreclosure actions involving shares in a residential cooperative was not amended, and thus still applies. See the Extended Act, EEFPA, Part B(B)(1)(a).

- Where a judgment of foreclosure and sale was issued prior to May 4, 2021, but has not yet been executed, execution of the judgment shall be stayed until the Court holds a status conference with the parties. If borrower/mortgagor submits a Hardship Declaration prior to the execution of the judgment, the action shall be stayed until August 31, 2021.

Statute of Limitations

- The Extended Act provides that “any specific time limit for the commencement of an action to foreclose a mortgage shall be tolled until August 31, 2021.”¹³

Requirements for New Residential Mortgage Foreclosure Actions

- New York courts will **not** accept new foreclosure Complaints for filing, unless the foreclosing party files an Affidavit of Service stating that:
 - (a) the required notices under RPAPL § 1303 (Help for Homeowners in Foreclosure/Notice to Tenants or “1303 Notice”) and RPAPL § 1304 (the “90-Day Notice”) and the Hardship Declaration (in English and mortgagor’s primary language, if other than English¹⁴) were served on borrower/mortgagor; and
 - (b) attesting that at the time of filing, neither the foreclosing party nor its agent has received a Hardship Declaration from the mortgagor.
- Importantly, the foreclosing party should **not** rely on 1303 Notices served, or 90-Day Notices that were mailed, **before** the EEFPA was effective. Rather, the foreclosing party should serve new 1303 Notices and mail new 90-Day Notices with the required Hardship Declaration.¹⁵
- After a foreclosure action is commenced, the Court shall seek confirmation on the record or in writing that borrower/mortgagor has received a Hardship Declaration and has **not** returned the Hardship Declaration to the foreclosing party or its agent.
- If the Court determines that the borrower/mortgagor has not yet received a Hardship Declaration form, the Court

must stay further proceedings for no less than 10 business days to ensure borrower/mortgagor receives and fully considers whether to submit a Hardship Declaration.

Tax Lien Foreclosures

- Local governments cannot proceed with or commence any tax lien sale or tax foreclosure until August 31, 2021 on residential properties, where the owner owns 10 or fewer units, including their primary residence, who is experiencing a financial hardship and files a Hardship Declaration, unless withdrawn by the owner.¹⁶
- The enforcing entity conducting the tax lien sale or tax foreclosure **must** notify the owner of the property of their rights and that a copy of the Hardship Declaration can be accessed on the New York State Department of Tax and Finance’s website and must provide a link to the form. If the owner of the property submits a Hardship Declaration, any pending or potential tax lien sale or tax foreclosure action is stayed until August 31, 2021.

Extension of Credit/Credit Reporting Protections

- Prohibits lenders from discriminating in the determination of whether to extend credit to any owner of residential real property (owning 10 or fewer units) because the owner has been granted a stay of mortgage foreclosure proceedings or tax foreclosure proceedings or tax lien sales, or the owner is currently in arrears and has filed a Hardship Declaration with the lender; and
- Prohibits lenders from negative credit reporting to any credit reporting agency based on (i) a stay of any mortgage foreclosure proceedings, tax foreclosure proceedings or tax lien sales; or (ii) mortgage arrears during the COVID-19 period with respect to an owner who has filed a Hardship Declaration with the lender.

Protections for Senior Citizens & Disabled Homeowners

- Requires local governments to carry over Senior Citizens’ Homeowner Exemption and Disabled Homeowner Exemptions from the 2020 assessment roll to the 2021 assessment roll at the same levels;

13. See the Extended Act, EEFPA, Part B(A)(5).

14. If borrower/mortgagor’s primary language is different from one of the eight languages the Hardship Declaration has been translated into by the New York State Unified Court System, the foreclosing party must provide a copy of the Hardship Declaration translated into that language.

15. While the Extended Act and the original Act do not expressly state that a foreclosing party must mail new 1303 Notices and new 90-Day Notices, this best practice is based on information provided at a New York State Bar Association Webinar on January 15, 2021, entitled “Eviction Moratorium: What Lawyers Need to Know About the COVID-19 Emergency Eviction and Foreclosure Prevent Act of 2020” with bill sponsors, Assemblyman Jeffrey Dinowitz and Senator Brian Kavanaugh.

16. See the Extended Act, EEFPA, Part B(B)(3)

- Requires local governments to provide renewal applications, via e-mail or regular mail for individuals who may be eligible for a larger exemption in 2021;
- Allows local governments to specify procedures by which local assessors may require renewal applications by recipients believed to no longer qualify for the exemption in 2021; and
- Bars any requirement for a recipient to personally appear to file a renewal, if a renewal is required.

COMMERCIAL EVICTION HIGHLIGHTS – PART A OF THE EXTENDED SBA

- Landlords must still include a Hardship Declaration¹⁷ with every written notice required by the commercial lease or tenancy agreement, law, or rule prior to commencement of an eviction proceeding.¹⁸
- If the translation of the Hardship Declaration in the language in which the commercial lease or tenancy agreement was written or negotiated is not available on the Court’s website, the landlord must provide a suitable translation of the Hardship Declaration.
- No commercial tenant can be removed from the property prior to August 31, 2021, except by an eviction proceeding.¹⁹
- If there is no pending eviction proceeding and a tenant provides a Hardship Declaration to the landlord or its agent, there shall be no initiation of an eviction proceeding until August 31, 2021 and “any specific time limit for the commencement of an eviction proceeding shall be tolled until August 31, 2021.”²⁰
- In any pending eviction proceeding where an eviction warrant or judgment of possession or ejectment has *not* been issued, if the tenant files a Hardship Declaration with the landlord, its agent, or the Court, the eviction proceeding shall be stayed until August 31, 2021.²¹ If the Hardship Declaration is filed with the landlord or its agent, they must file it with the Court.
- In any post-warrant eviction proceeding, where an eviction warrant or judgment of possession or ejection has been issued, but *has not yet been executed as of May 4, 2021*, if the tenant files a Hardship Declaration with the landlord, its agent or the Court prior to the execution of the warrant or judgment, the execution is stayed until August 31, 2021.²²
- If the landlord or its agent fails to establish that the tenant persistently and unreasonably engaged in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others and the tenant provides or has provided a Hardship Declaration to the landlord, its agent or the Court, the Court shall stay any further proceedings until at least August 31, 2021.²³

Requirements for New Commercial Eviction Proceedings

- New York courts will **not** accept new commercial eviction Complaints for filing, unless the plaintiff/landlord files an Affidavit of Service stating that:
 - (a) the required notices and the Hardship Declaration (in English and the language in which the commercial lease or tenancy agreement was written or negotiated) were served on borrower/mortgagor; and²⁴
 - (b) attesting that either (i) at the time of filing, neither the plaintiff or its agent has received a Hardship Declaration from the mortgagor or (ii) that the tenant has returned a Hardship Declaration, but is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others, with a specific description of the behavior alleged.
- After a foreclosure action is commenced, the Court will seek confirmation on the record or in writing that mortgagor has received a Hardship Declaration and has **not** returned the Hardship Declaration to the plaintiff/landlord or its agent.

17. The Commercial Eviction Hardship Declaration Form is available on the State of New York Unified Court System and can be located [here](#).

18. See the Extended Act, SBA, Part A(4).

19. See the Extended Act, SBA, Part A(2).

20. See the Extended Act, SBA, Part A(5).

21. See the Extended Act, SBA, Part A(7).

22. See the Extended Act, SBA, Part A(8)(a)(ii).

23. See the Extended Act, SBA, Part A(9)(4).

24. See the Extended Act, SBA, Part A(6).

- If the Court determines that the tenant has not received a Hardship Declaration, the Court must stay the proceeding for no less than 10 business days to ensure mortgagor receives and fully considers whether to submit a Hardship Declaration.

COMMERCIAL FORECLOSURE HIGHLIGHTS – PART B(A) OF THE EXTENDED SBA

- Any owner, CEO, president, or mortgagor of a commercial property (directly or indirectly, as long as they own ten or fewer commercial units) experiencing a financial hardship, can file a Hardship Declaration with the lender, its agent, or with the Court, to extend the stay in a pending commercial foreclosure action or prevent the commencement of a commercial foreclosure action through August 31, 2021.
- The lender must include a Hardship Declaration with every notice required to a mortgagor prior to filing a commercial foreclosure action and provide a mailing address for the mortgagor to return the Hardship Declaration.
- If a mortgagor sends a lender a Hardship Declaration, no foreclosure can be initiated until at least August 31, 2021 and “any specific time limit for the commencement of an action to foreclose a mortgage shall be tolled until August 31, 2021.”²⁵
- In any foreclosure proceeding where a judgment of sale has not been issued, if the mortgagor files a Hardship Declaration with the lender, its agent, or the Court, the proceeding will be stayed until August 31, 2021.
- In any foreclosure proceeding where a judgment of sale has been issued, but has not yet been executed as of May 4, 2021, the Court will stay the execution of the judgment at least until the Court has held a status conference with the parties and until August 31, 2021, if mortgagor files a Hardship Declaration.
- The Extended Act also extends the rebuttable presumption of financial hardship upon filing a Hardship Declaration, in any judicial or administrative proceeding, for the purposes of establishing a defense under an executive order of the governor or any other local or state law, order of regulation restrict actions to foreclose a mortgage against a mortgagor.

Requirements for New Commercial Foreclosure Actions

- New York courts will **not** accept new commercial foreclosure Complaints for filing, unless the lender/foreclosing party files an Affidavit of Service stating that:
 - (i) the required notices and the Hardship Declaration were served on mortgagor; and
 - (ii) attesting that at the time of filing, the lender/foreclosing party or its agent has not received a Hardship Declaration from the mortgagor.
- If the Court determines that the mortgagor has **not** received a Hardship Declaration, the Court must stay the proceeding for no less than 10 business days to ensure mortgagor receives and fully considers whether to submit a Hardship Declaration. The Court will then confirm that mortgagor received a Hardship Declaration and has **not** returned it to the lender.²⁶

Commercial Tax Lien Foreclosures

- Local governments cannot proceed with or commence any tax lien sale or tax foreclosure on commercial properties until August 31, 2021, where the owner or mortgagor owns 10 or fewer commercial units, is experiencing a financial hardship and files a Hardship Declaration (which has not since been withdrawn by the owner or mortgagor).
- Any applicable statutes of limitation for the commencement of any action or proceeding to sell a tax lien or foreclose a tax lien are tolled until August 31, 2021.²⁷
- The enforcing entity conducting the tax lien sale or tax foreclosure **must** notify the owners of the property of their rights, advise them that a copy of the Hardship Declaration can be accessed on the New York State Department of Tax and Finance’s website and provide them with a link to the form. If the owner of the property submits a Hardship Declaration, any pending or potential tax lien sale or tax foreclosure action is stayed until August 31, 2021.

Extension of Credit/Credit Reporting Protections for Commercial Owners

- Prohibits lenders from discriminating in the determination of whether to extend credit to any owner of commercial real property because the owner has been granted a stay of

25. See the Extended Act, SBA, Part B(A)(5).

26. See the Extended Act, SBA, Part B(A)(6).

27. See the Extended Act, SBA, Part B(B)(5).

mortgage foreclosure proceedings, tax foreclosure proceedings, or tax lien sales, or in circumstances where the owner is currently in arrears and has filed a Hardship Declaration with the lender; and

- Prohibits lenders from negative credit reporting to any credit reporting agency based on (i) a stay of any mortgage foreclosure proceedings, tax foreclosure proceedings or tax lien sales; or (ii) mortgage arrears during the COVID-19 period with respect to an owner who has filed a Hardship Declaration with the lender.

As of the date of publication of this alert, the Rent Stabilization Association and certain landlords had filed a complaint in the Eastern District of New York (case number 2:21-cv-02516) challenging the constitutionality of the EEFPA.

Mr. Streibich would like to thank Diana M. Eng and Alina Levi for their assistance in developing this alert.

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