

NEW YORK ENACTS LAW AFFECTING COMMERCIAL FORECLOSURES

On March 9, Governor Andrew Cuomo signed the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (NY State Senate Bill S471A; “EPOSBA”), which provides temporary eviction and foreclosure protections for small businesses that have experienced financial hardship relating to commercial real property. EPOSBA is distinct from the foreclosure moratoriums contained in the executive orders previously issued by Governor Cuomo and extends the foreclosure moratorium on some commercial properties through May 1, 2021.

SUMMARY – PART B, SUBPART A (FORECLOSURE RELATING TO COMMERCIAL REAL PROPERTY)

EPOSBA is divided into Part A, pertaining to commercial evictions, and Part B, pertaining to commercial foreclosures. Part B is divided into three subparts: Subpart A (foreclosures of commercial property), Subpart B (tax foreclosures on commercial real property), and Subpart C (prohibition of discrimination against commercial mortgagors by lending institutions in credit determinations until May 1, 2021). Part B, Subpart A is most relevant to our clients.

Applicable Commercial Mortgagors

The stated purpose of EPOSBA is primarily to provide temporary protections for small businesses. As such, EPOSBA applies only to an owner/mortgagor of commercial real property who:

- owns 10 or fewer commercial units, whether directly or indirectly (these units may be in more than one property or building as long as the total aggregate number of 10 or fewer units are currently occupied by a tenant or are available for rent); and
- is a business that:
 - is a resident in New York State;
 - is independently owned and operated;
 - is not dominant in its field; and
 - employs 50 or fewer persons.

EPOSBA does not apply to and does not affect loans made, insured, purchased, or securitized by a corporate governmental agency of the state.

Prior to the enactment of EPOSBA, Governor Cuomo announced on the Governor’s official website that he reached an agreement with legislators when the new legislation is signed into law to

expand the protections of the proposed bill “to small businesses with 100 or fewer employees, and to any business with 500 or fewer employees that was closed to in-person operations by executive order or department of health directive for two or more weeks between May 15, 2020 and May 1, 2021.”¹ However, such language is not currently included in EPOSBA.

Foreclosure Moratorium Extension

EPOSBA further extends the moratorium prohibiting certain foreclosures established by Governor Cuomo’s Executive Order 202.28 and subsequent executive orders by providing as follows:

“Any action to foreclose a mortgage pending on the effective date of this act, including actions filed on or before March 7, 2020, or commenced within thirty (30) days of the effective date of this act shall be stayed for at least sixty (60) days, or to such later date that the chief administrative judge shall determine is necessary to ensure that courts are prepared to conduct proceedings in compliance with this act and to give mortgagors an opportunity to submit the hardship declaration pursuant to this act.”²

If a mortgagor provides a Hardship Declaration to the foreclosing party, or an agent thereof, “there shall be no initiation of an action to foreclose a mortgage against the mortgagor until at least May 1, 2021, and in such event any specific time limit for commencement of an action to foreclose a mortgage shall be tolled until May 1, 2021.”³ The underlined language suggests that the Bill applies to all commercial foreclosures if the mortgagor submits a Hardship Declaration.

The extension of the foreclosure moratorium also applies to commenced commercial foreclosure actions, where a Hardship Declaration is provided by mortgagor, in which:

- a judgment of sale has not been issued, including actions filed on or before March 7, 2020; and
- a judgment of sale has been issued prior to the effective date of this act, including actions filed on or before March 7, 2020, and the Hardship Declaration is provided prior to the execution of the judgment.

¹ <https://www.governor.ny.gov/news/governor-cuomo-signs-covid-19-emergency-protect-our-small-businesses-act-2021-establishing>

² S. 471-A, Part B, Subpart A, § 3

³ S. 471-A, Part B, Subpart A, § 5

New Requirements for Lenders

The most notable new requirement under EPOSBA is the Hardship Declaration, first introduced in S. 9114, which applies to residential foreclosures. A copy of the model for the Hardship Declaration is attached hereto as Attachment A.

- Commercial foreclosure actions initiated on or before March 7, 2020 or commenced within 30 days of the Act’s effective date:
 - These mortgagors will have the opportunity to submit this Hardship Declaration due to the requirement that courts issue a stay of the proceeding for at least 60 days and mail a copy of the Hardship Declaration.
- Commercial foreclosure actions going forward:
 - Foreclosing lenders must include a copy of the Hardship Declaration with every notice required to be provided to a mortgagor prior to filing a foreclosure action. Such notice must include a mailing address, telephone number, and active email address that the mortgagor can use to contact the foreclosing lender and return the Hardship Declaration. If the mortgagor returns the Hardship Declaration, the foreclosure may not proceed until at least May 1, 2021. Additionally, upon receipt of a Hardship Declaration from a mortgagor, the foreclosing lender is obligated to file the Hardship Declaration with the court, “advising the court in writing the index number of all relevant cases.”
 - A court will not accept filing of any action to foreclose a mortgage unless the foreclosing lender, or an agent thereof, files an affidavit, under penalty of perjury:
 - › of service upon the mortgagor, demonstrating the manner in which the foreclosing lender’s agent served a copy of the Hardship Declaration, along with required notices; and
 - › attesting that at the time of filing, neither the foreclosing lender, nor any agent thereof, received a Hardship Declaration from the mortgagor. The court must then confirm that mortgagor has received a copy of the Hardship Declaration and has not returned it.

LEGISLATIVE HISTORY

EPOSBA was pre-filed on December 31, 2020 and was signed and approved by Governor Cuomo on March 9, 2021 – overall, a quick turnaround. It passed the Senate, 45-18, and the Assembly, 135-15.

Legislative Intent

“COVID–19 presents a historic threat to small businesses. Thousands of small businesses are facing eviction or foreclosure due to necessary disease control measures that closed or restricted businesses across the state. The pandemic has further interrupted court operations, the availability of

counsel, the ability for parties to pay for counsel, and the ability to safely commute and enter a courtroom, settlement conference and the like.”⁴

As such, the Legislature intends to avoid evictions and foreclosures and temporarily allow small businesses experiencing a financial hardship during the COVID-19 pandemic to remain in their place of business in order to set the stage for recovery.

If you have any questions about the information contained in this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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⁴ S. 471-A, § 3

ATTACHMENT A
Hardship Declaration

COMMERCIAL MORTGAGOR'S DECLARATION OF COVID-19-RELATED HARDSHIP

I am the owner, Chief Executive Officer, President, or similar officer of [name of the business], which is the mortgagor of the property at [address of commercial unit]. My business owns, whether directly or indirectly, 10 or fewer commercial units. My business is resident in New York State, independently owned and operated, not dominant in its field, and employs 50 or fewer persons. My business is experiencing financial hardship and is unable to pay the mortgage in full because of one or more of the following:

1. Significant loss of revenue during the COVID-19 pandemic.
2. 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.
3. Moving expenses and difficulty in securing an alternative commercial property make it a hardship for the business to relocate to another property during the COVID-19 pandemic.
4. One or more of the business's tenants has defaulted on a significant amount of their rent payments since March 1, 2020.

To the extent that the business has lost revenue or had increased expenses, any public assistance the business has received since the start of the COVID-19 pandemic does not fully make up for the business' loss of revenue or increased expenses.

I understand that the business must comply with all other lawful terms under my commercial mortgage agreement. I further understand that lawful fees, penalties or interest for not having paid the mortgage in full as required by the commercial mortgage agreement may still be charged or collected and may result in a monetary judgment. I also understand that the mortgage lender or other foreclosing party may pursue a foreclosure action against the business on or after May 1, 2021 if I do not fully repay any missed or partial payments and lawful fees.

Signed: _____

Printed Name: _____

Date Signed: _____

NOTICE: You are signing and submitting this form under penalty of law. That means it is against the law to make a statement on this form that you know is false.