

Chapter 507, Laws of 2009 Enforcing Real Estate Mortgages and Cooperative Unit Security Interests

Chapter 507 of the Laws of 2009, enacted December 15, 2009, adds requirements for lenders enforcing mortgages against residential real property and security interests on cooperative units (“cooperative interests”) in New York State. This article summarizes changes made by Chapter 507.

NOTICES

Chapter 507 mandates new notices and requires that the issuance of two of those notices be reported electronically to New York State’s Superintendent of Banks.

A. Real Property Actions and Proceedings Law (“RPAPL”) Section 1303 (“Foreclosures; required notices”) has been amended by Section 1 of Chapter 507, effective January 14, 2010, the 30th date after the date on which the Chapter was enacted, for notices required on or after such date.

The “Help for Homeowners in Foreclosure” notice under RPAPL Section 1303 was first required by Chapter 308 of the Laws of 2006, as amended by Chapter 154 of the Laws of 2007, to be delivered to the mortgagor with the summons and complaint in a mortgage foreclosure for owner-occupied property improved by a one-to-four family dwelling. Chapter 472 of the Laws of 2008 amended the text of the notice. [FN 1]

Chapter 507 does not change the requirement for service on the mortgagor or the form of that notice. However, an additional notice, in Exhibit A, must be provided to “any tenant of a dwelling unit”, in accordance with the requirements of new subdivision 4 of Section 1303. This is not limited to property improved by a 1-4 family dwelling.

In a building with fewer than 5 dwelling units, the notice is to be delivered to each tenant within 10 days of the service of the summons and complaint, by certified mail, return receipt requested and by first class mail to the tenant’s address if the identity of the tenant is known to the Plaintiff; by first class mail delivered to “occupant” for each tenant whose identity is not known to the Plaintiff. For a building with 5 or more dwelling units, a legible copy of the notice is to be posted on the outside of each entrance and exit of the building.

Section 1303 notices are required to be on a separate page in bold, 14-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned, in bold 20-point type, in the notice to the mortgagor, “Help for Homeowners in Foreclosure,” and, in the notice to tenants, “Notice to Tenants of Buildings in Foreclosure.”

B. RPAPL Section 1304 (“Required prior notices”) has been amended by Section 1-a of Chapter 507, effective January 14, 2010, the 30th date after the date on which the Chapter was enacted, for notices required on or after such date. This amendment is deemed repealed five years after its effective date.

RPAPL Section 1304 ("Required prior notices"), added by Chapter 472 of the Laws of 2008 effective September 1, 2008, has required the lender or mortgage loan servicer, when the loan is a "high-cost home loan" (as defined in Banking Law Section 6-l), a "subprime home loan" or a "non-traditional home loan"(as defined in Section 1304), to provide a "You Could Lose Your Home" notice to the borrower at least 90 days before commencing a legal action, such as a foreclosure. The text of the required notice, to be in at least 14-point type, is in Exhibit B.

The notice is to be given when the lender, assignee or mortgage loan servicer commences a "legal action" against the borrower and the loan is a "home loan", as defined in amended Section 1304. The notice is no longer limited to the foreclosure of a "high-cost home loan", a "subprime home loan" and a "non-traditional home loan". The definition of a "home loan", as amended, is a loan, including an open-end credit plan, other than a reverse mortgage transaction, as to which:

- (i) the borrower is a natural person;**
- (ii) the debt is incurred by the borrower primarily for personal, family, or household purposes;**
- (iii) the loan is secured by a mortgage on real estate improved by a 1-4 family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as his or her principal residence; and**
- (iv) the property is located in this state.**

The lender or mortgage loan servicer is to continue to send this notice to the borrower by registered or certified mail and also by first-class mail to the last known address of the borrower. If the borrower resides at an address other than the mortgaged property, the notice is also to be sent to the mortgaged property. Notice is considered given on the date it is mailed.

The notice is still to be given once in a 12 month period "to the same borrower in connection with the same loan". The 90 day period does "not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling".

C. Subsection "(f)" ("Additional pre-disposition notice for cooperative interests") has been added to UCC Section 9-611 ("Notification before disposition of collateral") by Section 2 of Chapter 507, effective January 14, 2010, the 30th day after the date on which the Chapter was enacted. The subsection applies to notices required on or after such date.

In addition to notices required to dispose of a cooperative interest on the enforcement of a security interest under subsection (b) of UCC Section 9-611 and UCC Section 9-613 ("Content and form of notification before disposition of collateral: Generally"), UCC Section 9-611 has been amended to require that a pre-disposition notice be sent, in the case of a residential cooperative interest used by the debtor, to the debtor after default, not less than 90 days prior to the disposition. It is assumed that this requirement applies not only when a security interest is to be enforced by a "foreclosure" sale under Article 9 but also when the cooperative interest is transferred to the secured party in full satisfaction of the

obligation secured, as provided for under amended UCC Section 9-620, discussed below. The form of this notice is in Exhibit C.

The notice is required to be in bold, 14-point type, printed on a colored paper other than the color of the notice required by UCC Section 9-611(b). The title of the notice is to be in bold, 20-point type, and the notice shall be on its own page.

D. Section 1305 (“Notice to tenants”) has been added to the RPAPL by Section 4 of Chapter 507, effective January 14, 2010, the 30th day after the date on which the Chapter was enacted. This Section applies to actions in which a judgment of foreclosure and sale is issued on or after such date.

Section 1305 affords rights to tenants in occupancy of “residential real property” (other than tenants protected by rent stabilization or rent control) enabling them to continue to occupy their dwellings, and requires a “successor in interest” to provide written notice to such tenants of their rights to remain in occupancy. The rights afforded to tenants by Section 1305, and requirements for lenders to provide tenants notice of these rights, are also required for actions affected by RPAPL Section 221 (“Compelling delivery of possession of real property”) and under Section 713 (“Grounds where no landlord-tenant relationship exists”) of RPAPL Article 7 (“Summary Proceeding to Recover Possession of Real Property”), as amended by Sections 7 and 8 of Chapter 507. There is no statutory form of this notice.

“Residential real property” is defined in Section 1305 as “real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential or commercial purposes”

A “successor in interest” is defined in Section 1305 as “any person or entity who or which acquires title in a residential real property as the result of a judgment of foreclosure and sale, or other disposition during the pendency of the foreclosure proceeding, or any time thereafter prior to the expiration of the time period” within which a tenant may remain in occupancy under subdivision “2” of Section 1305. This definition presumably encompasses the transferee of a conveyance in-lieu of foreclosure made after a notice of pendency to foreclose a mortgage is filed.

The notice is to set forth “(a) that they [the tenants] are entitled to remain in occupancy of such property for the remainder of the lease term, or a period of ninety days from the date of mailing of such notice, whichever is greater, on the same terms and conditions as were in effect at the time of transfer of ownership of such property; and (b) of the name and address of the new owner”.

“Any person or entity who or which becomes a successor in interest after the issuance of the ninety-day notice...shall notify all tenants of its name and address and shall assume such interest subject to the right of the tenant to maintain possession...”

E. Section 1306 (“Filing with superintendent”) has been added to the RPAPL by Section 5 of Chapter 507, effective February 13, 2010, the 60th day after the date on which the Chapter was enacted. This Section applies to notices under RPAPL Section 1304 and UCC Section 9-611(f) mailed on and after that effective date.

Within 3 business days of the mailing of the notice under either of RPAPL Section 1304 or UCC Section 9-611(f), the requirements for which are described above, the lender, assignee or mortgage loan servicer is to file with the State Superintendent of Banks, among other information, the name, address and last known telephone number of the borrower, the amount claimed as due and owing on the loan, and the type of the loan. The information, to be provided electronically on a form to be prescribed by the Superintendent, is to be used to monitor the extent of foreclosure filings within New York State, to enable an analysis to be made of loan types subject to foreclosure, and to direct foreclosure prevention and counseling services to borrowers at risk of foreclosure.

The Superintendent, with the assistance of the Commissioner of the State's Division of Housing and Community Renewal, is required to develop an electronic database to receive such filings within 180 days of the effective date of Section 5 or "such later time as the Superintendent may determine..". It is uncertain how the filings are to be made prior to the creation of that facility.

COOPERATIVE INTERESTS TRANSFERS "IN LIEU"

Subsection "(h)" ("Special provisions for cooperative interests") has been added to UCC Section 9-620 ("Acceptance of collateral in full or partial satisfaction of obligations") by Section 3 of Chapter 507, effective January 14, 2010, the 30th day after the date on which the Chapter was enacted.

Subsection "(h)" provides that a secured party may accept the transfer of a cooperative interest in full, not partial, satisfaction of the obligations of the debtor under the loan secured by its security interest.

When a secured party proposes that it receive a transfer of a residential cooperative interest used by the debtor in full satisfaction of the debtor's obligations, the proposal is required to be accompanied by the notice otherwise required by UCC Section, 9-611(f), described above, unless the secured party previously sent the debtor the notice. The proposal must be agreed to by the debtor in a record "authenticated" after default. The debtor may, alternatively, propose that the secured party take the cooperative interest in full satisfaction of the obligations secured.

SHARED APPRECIATION

Subdivision "1" of Banking Law Section 6-f ("Alternative mortgage instruments made by banks, trust companies, savings banks, savings and loan associations and credit unions") has been amended by Section 11 of Chapter 507, effective December 15, 2009.

Subdivision "1", as amended, authorizes the Banking Board to adopt regulations permitting a lender (within the scope of Section 6-f) to enter into a written "shared appreciation agreement" ("Agreement") with a borrower under which a lender, reducing the principal amount of a loan to assist a borrower, at risk of foreclosure of a residential mortgage loan or a cooperative apartment unit loan, may receive a share of the future appreciation of the real property or cooperative apartment which is the security for the loan.

The amount which the lender may receive is limited to the lesser of (i) the amount of such reduction in principal, plus interest on such amount from the date of such reduction to the date of payment at the same rate of interest as applies to the remaining principal amount of the loan, and (ii) 50% of the amount of such appreciation, payable when the property securing the loan is sold.

The subdivision provides that “[r]ecover of such reduction in the principal amount shall not be deemed interest for any purposes of the laws of this state”.

The Agreement must “expressly and conspicuously” state at the top of the agreement in at least 14-point type, the following: “In this agreement, you are giving away some of the future increase in the value of your home. Please read carefully”.

The Agreement must also be accompanied by a notice containing disclosures required by Section 6-f and the Banking Board, on a separate page with the following heading in bold, 14-point type: “Important disclosures about the contract in which you agree to give away a part of any future increase in the value of your home. Please read carefully”.

OTHER REQUIREMENTS

A. RPAPL Section 1307 (“Duty to maintain foreclosed property”) has been added by Section 6 of Chapter 507, effective the 120th day after the date on which the Chapter was enacted.

Under RPAPL Section 1307, a plaintiff (other than a governmental entity holding a subordinate mortgage) having obtained a judgment of foreclosure involving “residential real property” (as defined in RPAPL Section 1305) which is vacant, becomes vacant after issuance of the judgment of foreclosure, or is abandoned by the mortgagor but occupied by a “tenant” (also as defined in RPAPL Section 1305), “shall maintain the property” until a deed transferring the ownership of the property is recorded. The plaintiff is not responsible for maintaining the property while a receiver is serving or, if the mortgagor commences a bankruptcy proceeding, while the bankruptcy stay is in effect.

The municipality in which the property is located, any tenant lawfully in possession of the property, and, if applicable, a condominium board of managers or a homeowners association have the right to bring an action to enforce such obligations, and they can assert causes of action to recover costs they incur in maintaining the property.

B. Subdivision (a) of CPLR Rule 3408 (“Mandatory settlement conference in residential foreclosure actions”) has been amended by Section 9 of Chapter 507, and five new subdivisions have been added to Rule 3408, effective February 13, 2010, 60 days after the date on which the Chapter was enacted. These new provisions will apply to all legal actions filed on and after that date. The amendments to subdivision (a) are deemed repealed 5 years after the effective date.

Rule 3408(a) has required that a Court, in a residential foreclosure involving a high-cost, a subprime or a non-traditional home loan, hold a mandatory conference for settlement discussions within 60 days after the date when proof of service is filed with the County Clerk or on an adjourned date agreed to by the parties. Chapter 507 makes this requirement applicable broadly to residential foreclosures involving “home loans”, as defined in RPAPL Section 1304.

New subsection (f) of Rule 3408 requires that “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible”.

New subsection (g) of Rule 3008 provides that “[t]he plaintiff must file a notice of discontinuance and vacatur of the lis pendens within 150 days after any settlement agreement or loan modification is fully executed”.

C. Section 3-a in Chapter 472 of the Laws of 2008, amended by Section 10 of Chapter 507, effective December 15, 2009, expands requirements for the holding of settlement conferences.

In a foreclosure action involving a home loan (as defined in RPAPL Section 1304), which is not a high-cost home loan or a subprime home loan, when a judgment of foreclosure has not yet been entered, a Court is to notify the defendant-borrower that if he or she is a resident of such property he or she may request a settlement conference.

D. Chapter 507, Sections 12 and 13 amend Banking Law Section 6-l (“High-cost home loans”), and Sections 14 and 15 amend Banking Law Section 6-m (“Subprime home loans”). The amendments to Section 6-l and Section 15 are effective December 15, 2009; the amendments to Section 6-m by Section 14 are effective 60 days after the date on which the Chapter was enacted.

Among other amendments made to Banking Law Sections 6-l and 6-m by Chapter 507, the definitions, in those Sections, of a “home loan” have been amended to (i) exclude from the definition loans made or fully or partially guaranteed by the State of New York Mortgage Agency (“SONYMA”), (ii) include (in addition to property improved by a 1-4 family dwelling which is or will be occupied as the principal dwelling of the borrower) a condominium unit and a cooperative unit which is or will be occupied as the principal dwelling of the borrower, and (iii) include “jumbo mortgages” (under FNMA conforming loan size limits).

E. Sections 20 and 21 of Chapter 507 amend Penal Law Sections 187.00 (“Residential mortgage fraud”) and add new Penal Law Section 187.01 (“Limitation on prosecution”), effective December 15, 2009.

Chapter 472 of the Laws of 2008 codified the crime of “residential mortgage fraud”. Section 20 amended Penal Law Section 187.00 to amend the definition of “residential mortgage loan” to include loan modifications. Section 187.01 provides that an individual applying for a residential mortgage loan, intending to occupy the residential property, is not subject to prosecution unless the borrower “acts as an accessory” to the commission of the fraud.

F. Sections 16, 17, 18, 19 and 22 of Chapter 507 amend Banking Law Section 590 (“Licensed mortgage bankers”), Banking Law Section 595-a (“Regulation of mortgage brokers, mortgage bankers and exempt organizations”), and Real Property Law Section 265-b effective December 15, 2009, except for Section 16 which is effective February 13, 2010, 60 days after the date on which Chapter 507 was enactment.

Sections 16, 17 and 18 of Chapter 507 relate to the licensing of “mortgage loan originators”. Sections 19 and 22 of Chapter 570 concern “distressed property consultants”. In particular,

in Section 22, the definition of a “distressed property consultant”, which has excluded “an attorney admitted to practice in the state of New York”, has been amended to exclude from the definition “an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice”.

The changes made by Chapter 507 present numerous challenges to lenders’ and their counsel, and to title insurers

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FN 1 See Berey, “New N.Y. Mortgage Foreclosure Legislation”; NYLJ September 11, 2008

EXHIBIT A
RPAPL SECTION 1303
NOTICE TO TENANTS OF BUILDINGS IN FORECLOSURES

New York State Law requires that we provide you this notice about the foreclosure process. Please read it carefully.

The dwelling where your apartment is located is the subject of a foreclosure proceeding. If you have a lease, are not the owner of the residence, and the lease requires payment of rent that at the time it was entered into was not substantially less than the fair market rent for the property, you may be entitled to remain in occupancy for the remainder of your lease term. If you do not have a lease, you will be entitled to remain in your home until ninety days after any person or entity who acquires title to the property provides you with a notice as required by section 1305 of the Real Property Actions and Proceedings Law. The notice shall provide information regarding the name and address of the new owner and your rights to remain in your home. These rights are in addition to any others you may have if you are a subsidized tenant under federal, state or local law or if you are a tenant subject to rent control, rent stabilization or a federal statutory scheme.

If you need further information, please call the New York State Banking Department's toll-free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

EXHIBIT B
RPAPL SECTION 1304
YOU COULD LOSE YOUR HOME
PLEASE READ THE FOLLOWING NOTICE CAREFULLY

As of _____, your home loan is ___ days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of _____ dollars by _____.

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure you that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department's toll free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

EXHIBIT C
UCC SECTION 9-611
HELP FOR HOMEOWNERS AT RISK OF FORECLOSURE

New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

Notice

You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

Sources of Information and Assistance

The State encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures.

To locate a housing counselor near you, you may call the toll-free helpline maintained by the New York State Banking Department at _____ (enter number) or visit the Department's website at _____ (enter web address). One of these persons or organizations may be able to help you, including trying to work with your lender to modify the loan to make it more affordable.

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions or collateral sales in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign any papers that transfer rights of any kind to your cooperative apartment. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.