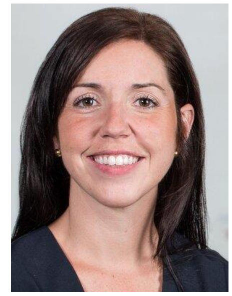
NJ Foreclosure Law Will Have Multifaceted Impact On Lenders

By **Christina Livorsi and Wael Amer** (January 23, 2024)



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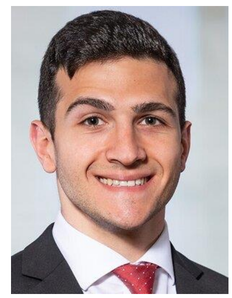

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On Jan. 12, New Jersey Gov. Phil Murphy signed into law A.B. 5664, which introduces significant reforms to foreclosure proceedings in the state.

The act establishes the Community Wealth Preservation Program, envisioning a fair and inclusive approach to property transactions arising from sheriff's sales.

With a primary focus on expanding avenues for community members to participate in foreclosure sales, providing extended time frames to complete foreclosure sales and introducing financing options, the act aims to strike a balance between the interests of foreclosed defendants and their community members and various other stakeholders.

The act goes into effect immediately and will have potential ramifications for lenders and servicers operating in New Jersey.

Rights of First and Second Refusal

In an effort to keep foreclosed properties community-owned, the act establishes rights of first and second refusal to defendants in foreclosure proceedings, their next of kin and tenants — the foreclosure community members — and nonprofit community development corporations, or NCDCs.

In cases where a foreclosed-upon property is residential, and the defendant is an individual, the act grants applicable foreclosure community members with specific rights of first refusal to purchase the property at the original upset price or the final starting upset price, whichever is less.

The upset price is the minimum amount for which a foreclosed property can be sold in a sheriff's sale as determined by the foreclosing plaintiff. This right exists even if the sale is delayed or postponed.

Under the act, foreclosure community members are deemed to have exercised their right of refusal if, prior to bidding, they pay a 3.5% deposit on the purchase price and pay off the remaining balance within 90 business days.

If financing or assets are not secured, foreclosure community members can request an NCDC to purchase the property. An NCDC that agrees in writing to purchase the property from foreclosure community members gains a right of second refusal, subordinate to the right of first refusal.

If the foreclosure community members do not participate in the sale, the NCDC can then purchase the property at the opening bid amount. The act outlines conditions for NCDCs to exercise the right of second refusal and on the use of the property following the purchase by the NCDC.

The act also places conditions on certain bidders who exercise their rights of refusal. With limited exceptions, aside from foreclosed-upon defendants, their next of kin or NCDCs, successful bidders who exercise the right of refusal to purchase the foreclosed property must reside at the property for 84 months from the date of the sheriff's sale.

This requirement must be explicitly stated in the deed for the property. The act imposes harsh penalties for noncompliance with this provision, up to $100,000 for the first violation and $500,000 thereafter for each subsequent violation.

Financing Options to Purchase Foreclosed Property

A critical provision of the act introduces financing options for foreclosure community members and NCDCs to purchase foreclosed properties, provided they can show preapproval from a financial institution.

Bidders who wish to finance their purchase must pay a 3.5% deposit of the original upset price during the foreclosure sale — or the final starting upset price, whichever is less — and must secure financing to pay off the remaining balance of the property within 90 days.

Such bidders may not submit bids greater than the amount they were preapproved for through financing. Other bidders, including bidders who primarily reside at the property for at least 84 months, may also use these financing options.

The act also outlines conditions placed on certain bidders, such as tenants and other successful bidders, to purchase foreclosed-upon properties through financing.

Specifically, tenants or successful bidders who occupy the purchased property for 84 months who have financed their purchase must receive eight hours of homebuyer education and counseling through a U.S. Department of Housing and Urban Development certified housing counseling agency, and present a certificate of completion or proof of enrollment in that program to the sheriff.

In addition, such a homebuyer must demonstrate that they entered foreclosure proceedings due to circumstances outside of their control. In any event, the financing provision of the act opens avenues for mortgage lenders and servicers to collaborate with buyers who present preapproved financing, potentially streamlining the acquisition process.

Additional Time to Purchase Foreclosed Property

Under the act, foreclosure community members and other qualifying bidders such as NCDCs also enjoy an extended period of 90 business days to complete the sale of a foreclosed property.

During the first 60 business days following the sale, no interest will accrue on the balance on the purchased property. A successful bidder that fails to fulfill the balance within the stipulated time frame risks forfeiting the deposit and incurring additional fees and penalties unless the failure is due to an inability to close a mortgage not of the bidder's own fault.

Changes to Notice of Sale Procedures

The act also places new requirements upon creditors, lenders and servicers with respect to the notice of sale for foreclosed properties. It requires that the notice of sale be mailed to the primary address of the foreclosed-upon defendant and to the address of the foreclosed-upon residential property.

The act also requires that the notice be provided at least four weeks prior to the sale and posted on the website of the sheriff's office and on any other medium used to provide notice. The act also specifies that the information and appearance of the notice must comply with the federal Fair Debt Collection Practices Act.

Under the act, the notice must include a good-faith determination of the upset price for the sheriff's sale. With limited exceptions, on the date of the sheriff's sale, the upset price may not increase by more than 3% from the figure provided in the notice.

However, if a sheriff's sale is delayed or postponed, or if circumstances occur that require unforeseen advances to protect the borrower or the foreclosed-upon property in the event of vandalism, weather damage or other emergency property preservation needs, the upset price may be adjusted to reflect these changes.

The act also prohibits creditors, lenders and servicers from inquiring of the relevant foreclosure community members or NCDCs whether they intend to participate in the sheriff's sale prior to providing the notice of the upset price to the sheriff's office.

Lenders and servicers also may not attempt to delay or postpone the sheriff's sale because the foreclosure community members or NCDCs intend to participate in the sale.

Execution Sale Fees and Form Deed

Additionally, the act amends the fee structure with respect to execution sales. Under the act, a sheriff may charge 10% in fees (up from 6%) on execution sales not exceeding $5,000, and 5% in fees (up from 4%) on sales exceeding $5,000.

The act also imposes a minimum flat fee of $150 to be charged on an execution sale, regardless of whether the property reverts to the foreclosing plaintiff. The act also provides the form deed that must be utilized in these transactions.

Conclusion

The impact of the act on mortgage lenders and servicers is multifaceted.

While the act attempts to introduce protective measures for borrowers and their affected communities, lenders and servicers may benefit from the extended time frames and financing options, in particular if there are other qualified buyers available to purchase a foreclosed-upon property.

This could in turn lessen the burden on lenders and servicers to continue to maintain vacant, abandoned or otherwise foreclosed property, among other potential obligations and costs.

However, the new act does preclude lenders from purchasing back residential properties at a foreclosure auction in the first instance, as well as seeking certain interest if the sale is not completed, and gives borrowers and the NCDCs additional time to complete the sale.

Significantly, lenders and servicers also need to be mindful of the new time frames and rules associated with the required notices of sale to avoid sales being challenged or potentially vacated at a later date.

Moving forward, it will be interesting to see if the act accomplishes the ultimate goal of helping communities plighted by foreclosures by infusing them with more affordable housing and at what cost to lenders and servicers this goal is accomplished.

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