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New Jersey Overhauls Foreclosure Sale Process By Establishing Community Wealth Preservation Program

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A new law has made sweeping changes to the foreclosure sale process for residential properties in New Jersey. The new law, which was signed into law on January 12, 2024 and took effect immediately, establishes a Community Wealth Preservation Program that expands access for certain buyers to purchase residential properties at sheriffs' sales. In doing so, it created certain rights of refusal in connection with sheriffs' sales and amended sheriffs' fees that are due for conducting such sales.

Generally, the new law applies to residential properties. It defines a "residential property" as real property located in New Jersey which is utilized as a primary residence or dwelling, and does not include any real property which is acquired for investment, commercial, or business purposes or real property containing more than four residential units. It is important to keep in mind that property may be owned in the name of a corporate entity but still fall within this definition of residential property.

Notice of Foreclosure Sale

There are now new requirements in connection with providing notice of the foreclosure sale, including that the notice be sent to the property address and the primary address of the foreclosed upon defendant. The language used on the envelope must plainly state that the envelope is a notice for the sale of foreclosed upon residential property and the language must comply with the Fair Debt Collection Practices Act.

Notice of Upset Price and Occupancy Disclosure

The foreclosing plaintiff must provide a good faith estimate of the upset price[i] at least four weeks prior to the sheriff's sale and it must be posted on the sheriff's website. Except in certain limited circumstances, on the day of the sale, the upset price cannot be increased by more than three percent from the upset price provided in the notice. Lenders should pay particular attention to this limitation when developing a bidding strategy.

The new law bars lenders from contacting borrowers, next of kin, or a nonprofit community development corporation (NCDC)[ii] to determine whether they intend to participate at the sale and bars lenders from delaying the sale if they are informed of any such intent to participate.

Prior to the sale, the plaintiff is required to disclose whether the property is vacant, tenant-occupied or owner-occupied and, if plaintiff has access to vacant property, the plaintiff must provide access to the successful bidder.

3.5% Deposit/90 Business Days to Close for Certain Buyers

For some bidders, the new law contains exceptions to the typical requirement that the successful bidder pay a 20% deposit at the time of the sale. Certain types of successful bidders are now permitted to pay a significantly lower deposit and have the benefit of much more time to close on the transaction. These include the foreclosed upon defendant, next of kin, tenants, NCDCs and those other bidders who must occupy the property as a primary residence for at least 84 months.

For those types of buyers, the deposit is reduced to 3.5% of the original upset price listed in the notice or the final starting upset price listed[iii] for the sale of the property, whichever is less. Moreover, for those buyers, the balance is due within 90 business days (as opposed to the typical 30-day deadline set by many sheriffs' offices), with no interest accruing against them until 60 business days after the sale.

Mortgages Permitted to Purchase Certain Foreclosed Properties

Notably, the new law includes conditions under which the above-mentioned types of buyers may take out a mortgage to purchase the foreclosed property. Moreover, if those buyers fail to close within 90 business days due to the inability to close a mortgage through no fault of their own, they shall be refunded the deposit and shall be responsible only for the payment of accrued interest. As discussed below, the new law also creates certain rights of first and second refusal, but if those buyers fail to close within 90 business days of the initial sheriff's sale, no such rights survive and any successful bidder at any subsequent sheriff's sale shall be subject to the typical 20% deposit and reduced deadline (usually set to 30 days by sheriff's offices) within which to close.

The Borrower, Next of Kin and Tenant's Right of First Refusal to Purchase

If the foreclosed upon defendant is an individual and not a corporate entity and if that defendant, his or her next of kin, or a tenant has secured financing or assets sufficient to meet terms offered by the foreclosing plaintiff or an alternative financial institution to purchase the property, then, for the initial sale, that individual now has a right of first refusal to purchase the property for the amount of the original listed upset price or the final starting upset price, whichever is less. Additionally, that individual retains the right of first refusal for a rescheduled sale date if the initial sale is delayed or postponed. The right of first refusal is exercised by paying a 3.5% deposit to the sheriff prior to the opening of bidding, with the balance due within 90 business days.

Generally, the benefits conferred on foreclosed upon defendants and next of kin are subject to the foreclosed upon defendant having entered foreclosure proceedings due to specific circumstances outside of the control of the foreclosed upon defendant.

Mortgage Pre-Approval Required

As indicated above, the new law expressly allows certain types of buyers to purchase by way of financing if they have been pre-approved by certain regulated financial institutions for at least the amount of the original listed upset price or the final starting upset price, whichever is less. However, bidding higher than the pre-approved amount is not permitted.

Restrictions and Penalties Applicable to Tenants and Other Bidders

A tenant or bidder who intends to occupy the property for 84 months, pays the 3.5% deposit and finances the purchase must have received homebuyer education and counseling through a HUD certified housing counseling agency and must provide the sheriff proof of completion or enrollment in that program.

Tenants must provide proof that they have resided at the property for at least a year, and that they are not in arrears on rent as of the date the foreclosed upon defendant received a notice of foreclosure. Tenants are allowed to purchase under the provisions of the new law if the foreclosed upon defendant or next of kin decides not to participate in the sheriff's sale or exercise rights under the new law.

As to properties sold to those bidders other than the foreclosed upon defendant, next of kin, or nonprofit community development corporation, who must occupy the property as their primary residence for 84 months, the deed must clearly state that the property may not be sold for 84 months from the date of the sheriff's sale, except under certain exceptions.[iv] Such a bidder who finances the purchase and does not occupy the property for 84 months shall be subject to a fine of $100,000 for the first violation and $500,000 for each subsequent violation. The new law includes provisions for testing and overseeing compliance with the 84-month occupancy requirement. A fraudulent violation of those provisions of the law outlining the exceptions to the 84-month residency requirement shall be an unlawful practice in violation of the New Jersey Consumer Fraud Act.

The NCDC's Right of Second Refusal

Under certain circumstances, the foreclosed upon defendant, next of kin, or tenant may request that a NCDC purchase the property for such party. If the NCDC has a written agreement for such a purchase, it must allow that party to reside on the property for a period of time as agreed to in an affordable lease to be negotiated, which must include an option to purchase the property from the NCDC. If the NCDC has such a written agreement to purchase, subject to certain other conditions, the NCDC shall also have a right of second refusal to purchase the property which is subordinate to the above mentioned right of first refusal.

If the foreclosed upon defendant, next of kin, or tenant decides not to participate in the sheriff's sale, enter into an agreement with the NCDC, or fails to secure financing or assets sufficient to meet the terms offered by the foreclosing plaintiff or an alternative financial institution to purchase the property, then (1) a NCDC shall have the right of second refusal to purchase the property in the amount approved for the final starting upset price at the time of the sale and (2) a NCDC may bid at the sheriff's sale. The right of second refusal is exercised by the NCDC registering its participation in the sale and paying a 3.5% deposit prior to the opening bid, with the balance due within 90 business days.[v] An NCDC that seeks to bid instead of exercising the right of second refusal must also register its participation, and if it is the successful bidder, it must put down a 3.5% deposit and close within 90 business days.

Restrictions and Penalties Applicable to NCDCs

NCDCs are subject to fines if they do not comply with certain additional restrictions. An NCDC that is the successful bidder of vacant or abandoned property must restore it "as need be" and either sell it to a household earning no more than 120 percent below area median income or rent to it to a household earning no more than 100 percent below area median income.

NCDCs must also ensure that these restrictions remain in place as to future owners in any future sale of the property by way of a renewable deed restriction with a minimum number of affordability years being 30 years and with the option to renew.

An NCDC that is the successful bidder of property occupied by a tenant or the foreclosed upon defendant with whom the NCDC does not have an existing agreement to purchase the property must negotiate with such occupant in good faith to enter into an affordable lease and can only evict if, after 120 business days, such occupant does not respond to requests to negotiate. Even after removal, the NCDC must comply with the above-mentioned requirement to restore the property "as need be" and sell or rent only to specific households.

The fine for an NCDC's non-compliance with the foregoing restrictions is $100,000 for the first violation and $500,000 for each subsequent violation.

Sheriffs' Fees

For all mortgage foreclosure sales, sheriffs were previously entitled to commissions based on the successful bid price. Those commissions were 6% on all sums not exceeding $5,000 and 4% on all sums exceeding that amount. Now, for all mortgage foreclosure sales, including commercial foreclosures, sheriffs are entitled to 6% on the entire successful bid price. Additionally, on execution sales other than mortgage foreclosures, on all sums not exceeding $5,000, sheriffs are entitled to 10% and for all sums exceeding $5,000, they are entitled to 5%. However, for any sale that reverts to the foreclosing plaintiff, the sheriff is only entitled to $150.00.

Conclusion

Proponents of the Community Wealth Preservation Program claim that it is aimed at preserving and protecting the wealth and assets within a community and address various economic, social, and environmental challenges that might threaten the financial stability and well-being of a particular locality. It remains to be seen whether the program's objectives will be met as the new law is applied. Given the extent of changes instituted by this law, many of its implications remain to be determined. As such, this article is intended to provide an overview of the new law rather than advice for any specific matter.

If you have any questions about the new law, please feel free to contact Samit G. Patel at (212) 510-2286 or via email at **spatel@cullenllp.com**.

Footnotes

[i] “Upset price” is defined in the new law as the minimum amount that a foreclosed upon property shall be sold for in a sheriff’s sale as determined by the foreclosing plaintiff.

[ii] The new law defines an NCDC as a not-for-profit organization whose mission includes community revitalization through the restoration of vacant and abandoned property to create or preserve affordable housing as indicated in the corporation’s most recent IRS form 1023 filing. Under certain circumstances, the new law provides for the participation of NCDCs in sheriffs’ sales.

[iii] There is a potential ambiguity in what it is that constitutes a “final starting upset price” and whether and when it is “listed.”

[iv] Exceptions include, among other events, death of the bidder, divorce and foreclosure—*i.e.*, foreclosure of the mortgage obtained to finance the purchase the property at the original foreclosure sale.

[v] The new law also sets forth priorities between and among multiple NCDCs holding rights of second refusal.

Practices

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