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MEMORANDUM IN OPPOSITION

May 25, 2021

A.2502 Weinstein (On Assembly Debate List, 5/25)
S.5785 Comrie (Passed Senate, 5/12)

AN ACT to amend the real property actions and proceedings law, in relation to foreclosure of mortgages

This memorandum in ***opposition*** is written on behalf of our client, the New York Bankers Association (NYBA). NYBA is comprised of the smaller community, mid-size regional, and large banks across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans. NYBA members also support their communities through an estimated $200 million in community donations and 500,000 employee volunteer hours.

This legislation amends RPAPL § 1302 in order to extend the additional allegation requirements that currently apply only to subprime and high-cost residential mortgages to ALL mortgages, including for commercial mortgages. The current text of RPAPL § 1302 requires a plaintiff foreclosing on a subprime or high-cost home loan to plead that they have complied with BNK § 6-l (High-cost homes loans), BNK § 6-m (Subprime home loans), RPAPL § 1304 (Required prior notices) as well as BNK § 595-a BNK (Regulation of mortgage brokers, mortgage bankers and exempt organizations) and any regulation or rule promulgated under BNK § 595-a.

According to the sponsor's memo, the sponsors' intention is to provide all home loan borrowers with the protections now afforded to borrowers of high-cost and subprime home loans. Critically, however, the title of the section is amended to read "Foreclosure of *Mortgages*" (*emphasis added*). It continues in section 1 to retain "any complaint served in a proceeding initiated pursuant to this article" (Article 13 governs all foreclosure actions) thereby removing any restriction of the provision to home or residential loans only. Thus, clearly on its face, the statute applies to *all* mortgages which would conspicuously include commercial mortgages as well.

The provisions and strictures of Banking Law § 6-l, 6-m and RPAPL § 1304 are anathema to commercial loans; those statutes refer to home loans, subprime loans and high-cost home loans. It is respectively submitted that this bill would destroy the commercial loan market in New York, as it would be impossible to comply and therefore predict the risk of extending commercial loans in New York as both a practical and a financial matter if this statute were to apply to "all mortgages."

Furthermore, and assuming that the bill should be interpreted as written, it is confusing and potentially perilous for plaintiffs seeking to foreclose on a commercial or traditional home mortgage to have to plead their compliance with sections of the Banking Law that only apply to subprime and high-cost home loans. RPAPL § 1304 only applies to home loans. The peril comes from the fact that the bill would create a legal defense against the foreclosure if the plaintiff fails to comply with these provisions that will not apply in many foreclosure cases. It is a catch-22: should the plaintiff plead their compliance with sections of laws that do not apply to the mortgage, or should they omit the pleading because those sections of law do not apply? Either way, they lose, and many banks will simply exit the market rather than take the risk of extending further lending.

Furthermore, BNK § 595-a authorizes numerous rules for financial institutions dealing with mortgages—some substantive and some technical—that are investigated and enforced by the Superintendent of the Department of Financial Services. If this bill becomes law, the mortgage-holder's compliance with BNK § 595-a and the myriad rules promulgated under that section will become an issue at the core of every foreclosure action, thus drawing out New York's already extremely long and damaging foreclosure process.

In endeavoring to add further defenses to borrowers in home loan foreclosure actions, RPAPL § 1304, and BNK §§ 6-l & 6-m would now specifically apply. But RPAPL § 1304 already applies to every home loan. Extensive case law holds that demonstrating compliance with RPAPL § 1304 is a condition precedent to the foreclosure proceeding. There is thus no need to extend a section of law that already applies.

Finally, the sponsors' "Justification" for the bill is the assumption that home loan borrowers are currently denied the ability to interpose a defense of standing, and that the new provisions will afford this to them. This is simply false. First, a foreclosing lender (in a home loan case) must be the holder of the note and mortgage and therefore must plead it. Even if it fails to do so (the complaint would then fail to state a cause of action), the defense of standing exists, and has always existed for any borrower in a mortgage foreclosure action. No such right need be given to any borrower. NYBA has compiled a list of no less than 748 mortgage foreclosure decisions where the issue of standing was raised and discussed by the court. The availability of defenses based on the doctrine of standing continues and needs no legislation to buttress it.

Another claimed justification is the fear that if a borrower does not raise standing as an affirmative defense in a pre-answer motion or in the answer, that the defense will then be waived. While this was always so as a matter of both statute and extensive case law, the legislature already changed that via creation of RPAPL § 1302-a effective as of December 23, 2019. This already causes considerable problems for foreclosing lenders in mortgage foreclosure actions and also reduces the availability of title insurance for such properties, in turn diminishing the sums that foreclosed properties will yield at a sale. This impacts all parties by reducing the possibility of surplus monies and increasing the

possibility of deficiencies for which borrowers will be liable. This existing statute already provides great benefit to borrowers.[1]

Banking Law §§ 6-l and 6-m currently apply to high-cost home loans and subprime loans. Attempting to apply them to commercial and traditional home loans is an ill-advised shotgun approach. Even a cursory reading of these two statutes confirms their specific application – and they say so precisely - to these other types of loans. They require announcements reciting their respective natures as high-cost or subprime which could not apply to a home loan. It would be entirely incongruous to use such statements and requirements for loans outside of the scope intended in current law.

For these reasons, the New York Bankers Association **opposes** this legislation and urges that it be **held**.

Respectfully Submitted,

SHENKER RUSSO & CLARK LLP

[1] See, Jason C. Bergman, *Title Insurance Coverage Narrowed For Properties Sold Through Foreclosure,* New York Law Journal (March 30, 2021) (https://www.law.com/newyorklawjournal/2021/03/30/title-insurance-coverage-narrowed-for-properties-sold-through-foreclosure/?slreturn=20210425143330)