December 26, 2020

S.9114 (Kavanagh) A.11151 (Dinowitz)

This memorandum is submitted on behalf of the Independent Bankers Association of New York State in opposition to the subject bill, which prohibits a mortgagee from initiation of a mortgage foreclosure action with respect to a residential property with 10 units or less, which includes the residence of the natural person requesting the relief, when a  of financial hardship is filed by the mortgagor.

Community Banks have worked diligently and successfully to enter into forbearance agreements with their mortgagees. Banks have worked with their mortgagees to prevent foreclosures as directed by the Department of Financial Services. The Governor through Executive Order has imposed a moratorium on foreclosures on commercial mortgages for non-payment due to Covid-19 related financial hardship. The courts resumed foreclosure matters on a statewide basis on 10/22/20, subject to several caveats, including that default judgments are not available. The opening of the court system however, permitted foreclosure actions to proceed with the requirement of proof of financial hardship as a predicate for the foreclosure moratorium.

This legislation prohibits a court from acceptance of a foreclosure filing once a declaration of financial hardship from the mortgagor has been filed. The mortgagor’s declaration of a Covid-19 hardship lists six reasons for the mortgagor to declare their inability to make the mortgage payments. Five of the reasons apply exclusively to mortgagor’s, who own the properties directly in their own name. The sixth option to determine financial hardship would be applicable to other forms of ownership as it provides that "one or more tenants defaulted on a significant amount of rent payments since March 1, 2020" This option is important because other forms of ownership corporate, LLC and LLP are more common. The term significant as it applies to rent payments is undefined so it provides wide latitude to the mortgagor to check that box on the declaration of financial hardship. The mortgagee has no ability or mechanism available to challenge the assertion of the mortgagor as to financial hardship. In the case of a mortgagor, who holds multiple properties in various forms of ownership other than direct personal ownership, the mortgagor is effectively permitted to compartmentalize one building with ten apartments. The mortgagor may hold ownership of other buildings in LLC’s, which may be providing profits. The ability to pay would not be dependent on other assets of the owner because properties are held in separate entities. Personal wealth would also be excluded from consideration because it would not be attributed to the separate entity. The mortgagee would in all likelihood be in a position to assess the mortgagor’s assets and ability to pay based on other income sources. This situation may result in making an inappropriate determination of hardship potentially enabling high-income individuals to avoid foreclosure. Although the bill appears to be intended to cover small owners, without focusing on income and assets there is a loophole in this approach.

The notice to the mortgagor that it is against the law to make a false statement contrasts with the requirement that the mortgagee affidavit to commence a foreclosure proceeding is subject to perjury penalties.

Most community banks have forbearance agreements in place with mortgagors negatively impacted by Covid-19.  The forbearance agreements either reduced or suspended payments with a repayment plan to recover the overdue payments in the future. Any forbearance agreement which is breached by the mortgagor may result in a foreclosure proceeding. This legislation does not differentiate between a forbearance agreement and the mortgage agreement. As a consequence, a breach of a forbearance where the mortgagor files a declaration of financial hardship halts the filing of a foreclosure proceeding despite the efforts of the mortgagee to restructure the mortgage repayment plan. The mortgagor is given a reprieve from the terms of their forbearance agreement.

Mortgage foreclosure actions have protection for the mortgagor and take years to reach a conclusion. To prohibit the commencement of a foreclosure action based on a hardship declaration raises due process of law questions. Particularly since a judgement of foreclosure is subject to a moratorium, there is no reason to hold the filing of an action in obeyance. It is significant that an exception is provided for mortgage loans made, insured, purchased or securitized by a governmental agency of the state. SONYMA mortgages are exempt but private banks are required to adhere to the requirements of this bill.

There is no valid public policy reason to implement this statute since under the current law, the moratorium protects mortgagors and the Governor has expressed no reservations in terms of continuing the extension of the moratorium.

It should also be noted that when the state mandated forbearance requirement for residential mortgages, bank compliance was linked to its liquidity to meet its obligations to operate in a safe and sound manner. Similarly, this bill prevents a bank from pursuing its financial obligation to collect on debts, this should not place a bank in a situation where safety and soundness are compromised.

This bill in subpart C prohibits a bank from discriminating with respect to the extension of credit to a mortgagor, who was granted a stay in mortgage or tax lien foreclosure proceedings. Community banks make loans based on the ability of customers to repay those loans. A stay along with the declaration of financial hardship that the mortgagor is in a difficult financial circumstance. This information is clearly material in making a loan decision.

Based on the foregoing, it is respectfully of requested that this bill not receive favorable consideration