

attorney for the lender to execute a substitution of trustee, rather than requiring that it be executed by the lender; clarifying that all foreclosure expenses are recoverable on reinstatement; requiring that foreclosure trustees be bonded; and clarifying that the foreclosing lender is entitled to all of the foreclosure sale proceeds up to the amount that it is owed and is not limited to the amount of its bid if it did not bid the full amount of the debt.

Massachusetts

by Kathryn D. Ryan

Partridge Snow & Hahn LLP
USFN Member (MA, RI)

Homestead Act

In November 2010, the legislature passed the Massachusetts Homestead Act, amending the existing law that allows homeowners in Massachusetts to protect their property up to \$500,000 of the value of their primary residence, per family. The new law affords additional protections from certain creditors' claims. The governor will likely sign the bill into law in the near future.

The bill grants homeowners an automatic homestead exemption of \$125,000 and allows for election of a "declared homestead exemption" of \$500,000 by filing a written declaration at the registry of deeds. Other changes include extending homesteads to 2-4 family homes and to homes in trust.

Most significantly, the new law clarifies that a borrower does not have to re-file a homestead after refinancing. Previously lenders would require homeowners to either subordinate or release homesteads upon refinance to protect their superior lien. Pursuant to the new law, however, homesteads are automatically subordinate to mortgages, and lenders are specifically prohibited from having borrowers waive or release a homestead. In addition, at closing, attorneys must now provide borrowers with a notice of availability of homestead.

Tenant Protections

On August 7, 2010, new tenant protections were enacted in Chapter 186A of Massachusetts law. Chapter 186A makes it almost impossible for foreclosing lenders who buy at foreclosure sale to establish and follow a schedule where they are able to evict post-foreclosure tenants so that the foreclosed property can be vacant for purposes of marketing and selling. Chapter 186A imposes a posting requirement and mandates "just cause" to evict. Although there is no provision in Chapter 186A that

addresses whether the law is to be applied retroactively to evictions in process as of the effective date of August 7, 2010, the Western Division Housing Court located in Springfield, Massachusetts has applied Chapter 186A in two eviction cases that involve foreclosure sales that took place before the new law's effective date, reasoning that the legislation is procedural in nature, rather than substantive, and was enacted on an emergency basis.

In *Deutsche Bank National Trust Company as Trustee for HASCO Mortgage – Pass Through Certificate Series 2006 HE2 v. Matos*, Case No. 10-SP-2731, the court's October 21, 2010 decision allowed the defendant's motion to dismiss the plaintiff's claim for possession. The plaintiff owned property in Springfield, Massachusetts, having purchased it at a foreclosure auction on May 18, 2009. The defendant was a tenant. Following service of a notice to quit and vacate, the plaintiff timely filed and served the summary process case on July 19, 2010.

The court opined that the act was effective immediately when signed by the governor on August 7, 2010, given its emergency preamble and procedural effect. In addition, the court cited various government initiatives enacted to address the effects of the "foreclosure crisis" on residential tenants, reasoning that the "legislature is presumed to have been aware of the relevant statutory scheme then in place, and is presumed to have added intentionally to that landscape."

In responding to the plaintiff's assertion that the law did not apply to the May 2009 foreclosure, the court stated that if the statute were to not be applied retroactively, it would be an arbitrary and unguided effort to determine where in the eviction process the owner would have to be situated in order to avoid Chapter 186A. In the alternative, by requiring immediate application of the law to all evictions in process, there is no need to determine where in the process of the eviction a tenant will be afforded the protections of Chapter 186A.

The court, finding Chapter 186A applicable, dismissed the plaintiff's case, as the statutory definition of "just cause" does not include the grounds alleged by the plaintiff in its notice to quit, namely, that the plaintiff wished to market and sell the property. In this court's second decision, *Federal National Mortgage Association v. Nunez*, Case No. 10-SP-01635, also issued on October 21, 2010, Chapter 186A was similarly applied and judgment was entered dismissing the plaintiff's claim for possession. In *Nunez*, the plaintiff owned property, having purchased it at foreclosure sale on November 30, 2009. The defendant was a tenant. Following a 90-day notice to vacate, the summary process case was timely served and filed on May 10, 2010.

The court's decision in *Nunez* contains reasoning that is identical to its *Matos* decision, except that it addresses one additional argument advanced by Fannie Mae, namely, that the Division of Banks' (DOB) interpretation on the retroactivity of the act



should be followed. The DOB has rejected any retroactivity of the *foreclosure* provisions of the new law, but the DOB opinion did not address the *eviction* provisions. The DOB based its decision concerning the retroactivity or non-retroactivity of the foreclosure provisions by stating that if the legislature had intended to make the law retroactive, it would have said it was retroactive. The plaintiff in *Nunez* made that argument to the court, which found the DOB position “neither controlling nor persuasive” and held that “the plain language of the statute requires that it be applied to all actions which take place after August 7, 2010.”

There is still another argument against retroactivity that is not addressed in these two decisions: because the right of an owner to evict a tenant for just cause is dependent on the owner having posted a notice within 30 days of the foreclosure sale, if Chapter 186A is applied retroactively, in the case of most pending evictions, the “within thirty (30) days of foreclosure sale” deadline would have already passed, making it impossible for a foreclosing owner to exercise its right to conduct an eviction for just cause.

Nonetheless, given these recent decisions, tenants’ counsel in eviction cases will likely file motions to dismiss lenders’ summary process actions or, in the alternative, counterclaim and raise Chapter 186A. It is recommended that foreclosing lenders who have summary process actions pending in Massachusetts should not proceed with their evictions unless: (1) they are evicting the former mortgagor(s) and his/her/their immediate family; (2) they have posted in compliance with Chapter 186A; and (3) they have “just cause” to evict.

New York

by Andrew Morganstern

Rosicki, Rosicki & Associates, P.C.
USFN Member (NY)

IN RESPONSE to numerous media reports regarding the “robo-signing” of affidavits, a new rule has been enacted in New York State that profoundly impacts the foreclosure of residential mortgages. The plaintiff’s attorney is now required to sign and file an affirmation stating that the attorney was informed by a representative of the plaintiff that he or she: (a) personally reviewed the plaintiff’s documents and records for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the complaint and any supporting affirmations filed with the court as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

The precise wording of the attorney’s affirmation to be filed



is prescribed by this rule, which was enacted by the chief administrative judge. This affirmation must contain a preamble that references “numerous and widespread insufficiencies in foreclosures” such as failure to review documents to establish standing and filing of notarized affidavits which falsely attest to such review. Immediately after the announcement of this new rule, this author’s firm, along with other law firms, sent letters to the chief administrative judge setting forth the unfairness of this requirement. As a result, the contents of the attorney’s affirmation, as well as the preamble, were modified.

Before an attorney will sign such affirmation, it is necessary to communicate with the client so as to obtain verification that there has been a personal review of the court filings and that the notarizations are accurate. The manner of communication isn’t specified, but the best practice is to obtain written confirmation in the event that a borrower or a judge questions compliance with these requirements. Various servicers have been reluctant to verify that prior affidavits were properly reviewed and notarized. Consequently, pending motions that relied on an “old” affidavit are being withdrawn and requests are being made to vacate judgments or orders that were signed before this rule became effective.

Unlike the attorney’s affirmation, the wording made in the communication between the servicer and the law firm is not prescribed. This author’s firm developed a “statement of review,” which it sends to the servicer, together with the summons and complaint and other pertinent documents. After receiving the executed statement of review, an attorney at the firm can then sign the required affirmation.

Although this rule had only recently been enacted, as of late November, there had already been two judicial decisions interpreting and expanding its requirements. While the rule requires that the law firm file an affirmation once in each case, a court issued an order stating that “the mandatory affirmation must accompany *all* applications made at *any* and *all* stages ... as a mere single filing would not comport with the intent of the Chief Administrative Judge’s Order.” Another judge has decided that the plaintiff’s representative must provide in their affidavit “her/his position, length of service, training, educational background as well as a listing of the documents and financial records reviewed substantiating the review of the amounts owed.”

Since this rule did not become effective until October 20, 2010, it is too soon to fully report on all of its consequences. However, it is already clear that this rule has created another obstacle in the foreclosure of a mortgage and is causing extensive delay. Judges have exacerbated the problem by imposing further requirements not found in the rule. It is also likely that this rule will spawn additional litigation as borrowers contend that the plaintiff and their attorney did not comply with all of the requirements. ■