STATE OF NEW YORK

4957

2017-2018 Regular Sessions

IN SENATE

March 3, 2017

Introduced by Sens. DIAZ, DILAN -- read twice and ordered printed, and when printed to be committed to the Committee on Banks

AN ACT to amend the banking law, the real property law, the real property actions and proceedings law, the general business law and the general obligations law, in relation to enacting the "Home Equity Fraud Act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "Home Equity Fraud Act".

§ 2. Legislative findings. The legislature hereby finds that many senior citizens and minority homeowners in New York have been targeted by unethical home improvement contractors, mortgage companies, mortgage brokers and finance companies who induce these homeowners into entering into high cost high interest rate mortgage agreements which the homeowner is often unable to afford with the intent of foreclosing on the home and stripping the equity.

The legislature further finds that in order to entice people into entering into these agreements they are promised refinancing of primary mortgages, consolidation of loans and outstanding bills and are given cash but often are not told or do not understand that they are securing the loan with a mortgage lien on their home which will lead to foreclosure in the event of default. Often these loans are documented with false and misleading documentation provided by brokers which could easily be determined to be false if checked by the lender. Despite prohibitions contained in federal law many of these loans are based on equity in the home and not on the borrower's ability to pay. Since many of these homeowners live on a fixed income, they are unable to make the required payments and end up losing their homes. This practice appears to be targeted in neighborhoods with a high concentration of senior and minority residents.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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The legislature further finds that it is in the best interest of the citizens of this state that these unethical practices should be prohibited by law and that unscrupulous individuals should be denied the ability to utilize the courts of this state to perpetrate these abuses upon senior citizens and minority residents of this state and does therefore enact this Home Equity Fraud Act in order to prevent predatory lending.

§ 3. Subdivision 1 of section 595-a of the banking law is amended by adding four new paragraphs (i), (j), (k) and (l) to read as follows:

(i) Engaging in any activity, transaction or course of business in connection with a home improvement contract as described in section seven hundred seventy of the general business law other than with regard to providing services directly connected with the making of a mortgage loan pursuant to the provisions of this article, and only if such services and the fees paid or to be paid in connection therewith are fully disclosed and agreed to in writing by all parties to the transaction.

(j) Charging or paying, either directly or indirectly, a fee in excess of the greater of five hundred dollars or three percent of the mortgage loan for the services rendered by the mortgage broker.

(k) The failure of a mortgage banker or exempt organization to assure that no more than a total of six percent of the value of the loan is charged for all services rendered in connection with qualifying for and receiving the loan, provided that any fees which are required to be paid to any public officer for the filing, recording or releasing in any public office of a document securing the loan and the costs of any title insurance or the fees of an attorney voluntarily engaged by and solely representing the interests of the borrower shall not be included within this limit.

(l) Charging a fee or anything of value in connection with the refinancing of a mortgage loan unless such refinancing is for the purpose of reducing the rate on the mortgage loan in an amount which exceeds the cost of such refinance and which will allow the mortgagor to recover the cost of refinancing the loan within two years of the date of such refinance. This provision shall not apply to any additional proceeds in excess of the original loan received by a mortgagor in connection with such refinancing.

§ 4. Paragraph (d) of subdivision 3 of section 595-a of the banking law, as relettered by chapter 400 of the laws of 1993, is relettered paragraph (e) and a new paragraph (d) is added to read as follows:

(d) Each mortgage broker, mortgage banker and exempt organization shall provide to each applicant for a mortgage loan at or before the time of application, in writing:

(1) A disclosure stating whether the mortgage loan will be retained by the original lender or sold after closing to a third party and if it is to be sold, the name of such third party; and

(2) A notice giving the applicant the right to designate a third party to receive copies of all written communications regarding the loan and setting forth the procedure for the applicant to exercise such right.

In the event that the disclosure and notices required by this section are not made, the mortgage loan made as a result of such application shall not be sold or transferred nor any action taken to enforce the lender's rights until thirty days after such disclosures are made and acknowledged by the borrower.

§ 5. Subdivision (d) of section 347 of the banking law, as amended by chapter 22 of the laws of 1990, is amended and a new subdivision (e) is added to read as follows:

(d) The licensee has engaged in the business of a sales finance company and has done or failed to do any act, except the failure to pay the fees required, which would be grounds for the suspension or revocation of its license pursuant to section four hundred ninety-five of this chapter were it required to obtain such a license[~~.~~]~~;~~

(e) The licensee has engaged in any activity, transaction or course of business or has paid or obtained any money or other thing of value in connection with a home improvement contract as defined in section seven hundred seventy of the general business law without fully disclosing such activity, transaction or course of business and any fees or thing of value paid or to be paid in connection therewith and without having obtained the agreement in writing from all parties to the transaction.

§ 6. Section 592-a of the banking law is amended by adding a new subdivision 3 to read as follows:

3. Any mortgage broker registered under this article who in any way places with or obtains a mortgage loan from a mortgage banker or exempt organization registered under this article shall for all purposes be deemed to be an agent of such banker or exempt organization. Any attempt by any person to void this provision by contract or in any other way shall be void as against public policy.

§ 7. The real property law is amended by adding a new section 254-e to read as follows:

§ 254-e. Certain mortgage provisions prohibited. No mortgage on a loan secured primarily by an interest in real property used as a primary residence by the mortgagor at the time such loan is made shall contain any provision which:

1. allows for a balloon payment; or

2. allows for a payment schedule with regular periodic payments that cause the principal balance to increase; or

3. allows for a provision stating that the interest rate of the loan underlying the mortgage increases after default.

§ 8. The real property actions and proceedings law is amended by adding a new section 1316 to read as follows:

§ 1316. Notice to mortgagor or owner. In all foreclosure actions the mortgagee, upon commencement of a foreclosure proceeding, shall serve the mortgagor at the same time as service of the summons and complaint, a notice in the following form:

"NOTICE TO MORTGAGOR OR OWNER:

YOU HAVE BEEN SERVED WITH A SUMMONS AND COMPLAINT IN A MORTGAGE FORECLOSURE PROCEEDING. IF YOU FAIL TO RESPOND TO THESE IMPORTANT LEGAL DOCUMENTS, YOU MAY LOSE YOUR HOME.

Read this carefully:

YOU MAY BE ABLE TO PREVENT YOUR HOME FROM BEING LOST IN A FORECLOSURE ACTION.

State and federal laws allow you to defend foreclosure proceedings in certain circumstances and may allow you to prevent a foreclosure on your home. You may be able to offer defenses in this foreclosure proceeding under the following circumstances:

1. If you gave a mortgage on your home as the result of a door to door transaction;

2. If you gave a mortgage on your home in order to finance a home improvement contract;

3. If you did not understand that you were signing a mortgage or were unaware that you had a mortgage on your home;

4. If you were on public assistance at the time you gave a mortgage on your home, or were retired and collecting Social Security or SSI and the person who took the mortgage on your home knew you had a fixed income;

5. If you were on a limited fixed income at the time you gave the mortgage on your home.

Also, your mortgage documents may contain language stating your rights under the contract in cases where you are subject to foreclosure.

If you think that you may have a defense to this foreclosure proceeding you must act promptly - failure to answer the enclosed summons and complaint will allow the mortgagee's or bank's attorneys to enter a default judgment against you.

The front of the summons will tell you how many days you have to answer before the mortgagee or bank may enter a default judgment against you.

YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law, (New York Real Property Actions and Proceedings Law Article 13) provides defenses for certain mortgagors and homeowners.

The phone numbers and office addresses for your local legal aid offices are contained in your telephone directory. If your phone book has government pages, the phone number and office addresses of your local legal aid offices should be listed there also.

ONLY A QUALIFIED ATTORNEY CAN TELL YOU ALL OF YOUR RIGHTS IN THIS PROCEEDING.

YOU MUST ACT PROMPTLY OR YOU MAY LOSE YOUR HOME."

§ 9. The real property actions and proceedings law is amended by adding a new section 1317 to read as follows:

§ 1317. Pleading required. 1. Any complaint served in a proceeding initiated pursuant to this article relating to a mortgage loan which was initiated by a mortgage banker or exempt organization registered pursuant to section five hundred ninety-one of the banking law must contain an affirmative allegation, which allegation must be proven to the satisfaction of the court, that such mortgage banker or exempt organization has complied with all of the provisions of section five hundred ninety-five-a of the banking law.

2. In any action brought under this article in which the mortgage to be foreclosed arose from the refinancing of a personal residence which was owned by the defendant for more than five years prior to the date of such mortgage it shall be an affirmative defense that: (a) at the time of the loan origination the mortgagor did not have the financial ability to repay the loan and that the financial institution knew or should have known that the mortgagor would not be able to repay such loan; (b) the mortgage broker, mortgage banker or exempt organization which originated the loan violated any provision of section five hundred ninety-five-a of the banking law; or (c) the mortgage document contains a provision prohibited by section two hundred fifty-four-e of the real property law. The court may consider factors including but not limited to the fact that the mortgagor was not employed and unlikely to obtain future employment, the fact that the mortgagor was living on a fixed income or was the recipient of federal or state entitlement of public assistance or that the payments required by such mortgage loan, together with the payments required by any other loan secured by the premises to be foreclosed, were more than fifty percent of the mortgagor's after tax monthly income as of the date of the loan. For purposes of this section, the term financial institution shall include any banking organization, mortgage broker, mortgage banker or licensed lenders involved in the origination of the mortgage being foreclosed and any assignee or successor of

such person or entity. In any action brought under this article in which any such affirmative defense is proven to the satisfaction of the finder of fact, the court may award reasonable attorney fees to the defendant.

§ 10. Paragraph (h) of subdivision 1 of section 771 of the general business law, as amended by chapter 32 of the laws of 1989, is amended to read as follows:

(h) A notice to the owner that, in addition to any right otherwise to revoke an offer, the owner may cancel the home improvement contract until midnight of the [~~third~~] fifteenth business day after the day on which the owner has signed an agreement or offer to purchase relating to such contract. Cancellation occurs when written notice of cancellation is given to the home improvement contractor. Notice of cancellation, if given by mail, shall be deemed given when deposited in a mailbox properly addressed and postage prepaid. Notice of cancellation shall be sufficient if it indicates the intention of the owner not to be bound. Notwithstanding the foregoing, this paragraph shall not apply to a transaction in which the owner has initiated the contact and the home improvement is needed to meet a bona fide emergency of the owner, and the owner furnishes the home improvement contractor with a separate dated and signed personal statement in the owner's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the home improvement contract within [~~three~~] fifteen business days. For the purposes of this paragraph the term "owner" shall mean an owner or any representative of an owner.

§ 11. The general business law is amended by adding a new section 771-b to read as follows:

§ 771-b. Responsibilities of home improvement contractors. 1. No home improvement contractor shall engage in any activity, transaction or course of business or pay or receive any fee, payment, money or other thing of value in connection with the financing of a home improvement contract without fully disclosing such activity, transaction or course of business and any fees, payment or other thing of value paid or to be paid in connection therewith and without having obtained the agreement in writing from all parties to the transaction to such activity and the payment therefor.

2. In addition to any right otherwise to revoke a home improvement contract, the buyer may cancel such contract until midnight of the fifteenth day after the home improvement contract was signed by both parties. Cancellation shall occur when written notice of cancellation is given to the home improvement contractor. Notice of cancellation, if given by mail, shall be deemed given when deposited in a mailbox properly addressed and postage prepaid. Notice of cancellation need not take any prescribed form and shall be sufficient if it indicates the intention of the signatory not to be bound. Notwithstanding the foregoing, this subdivision shall not apply to a transaction in which the owner has initiated the contact and the home improvement is needed to meet a bona fide emergency of the owner, and the owner furnishes the home improvement contractor with a separate dated and signed personal statement in the owner's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the home improvement contract within fifteen business days. For the purposes of this subdivision the term "owner" shall mean an owner or any representative of an owner.

3. No home improvement contract shall be enforceable unless at the time it is signed by the homeowner, the home improvement contractor

shall furnish to the homeowner a notice containing a statement in substantially the following form:

YOU THE HOMEOWNER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE FIFTEENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION.

§ 12. The general obligations law is amended by adding a new section 5-336 to read as follows:

§ 5-336. Certain home equity loan contracts; enforceability. 1. Any loan made in violation of section five hundred ninety-five-a of the banking law shall be unenforceable and no default judgment shall be entered in any action as a result of the alleged default of the defendant to make payments pursuant to a loan agreement which arose as the result of the refinance of a personal residence owned by the defendant whether or not secured by a mortgage unless the court makes an affirmative finding of fact in writing that the provisions of section five hundred ninety-five-a of the banking law have not been violated.

2. In any action brought seeking enforcement of a loan agreement which arose from the refinancing of a personal residence which was owned by the defendant for more than five years prior to the date of such loan it shall be an affirmative defense that: (a) at the time of the loan origination the borrower did not have the financial ability to repay the loan and that the financial institution knew or should have known that the borrower would not be able to repay such loan; (b) the mortgage broker, mortgage banker or exempt organization which originated the loan violated any provision of section five hundred ninety-five-a of the banking law; or (c) any mortgage document signed contemporaneously with the loan contains a provision prohibited by section two hundred fifty-four-e of the real property law. The court may consider factors including but not limited to the fact that the mortgagor was not employed and unlikely to obtain future employment, the fact that the mortgagor was living on a fixed income or was the recipient of federal or state entitlement of public assistance or that the payments required by such loan, together with the payments required by any other loan secured by the premises securing such loan, were more than fifty percent of the borrower's after tax monthly income as of the date of the loan. For purposes of this section, the term financial institution shall include any banking organization, mortgage broker, mortgage banker or licensed lender involved in the origination of the loan for which enforcement is sought and any assignee or successor of such person or entity. In any such action in which such affirmative defense is proven to the satisfaction of the finder of fact, the court may award reasonable attorney fees to the defendant.

§ 13. This act shall take effect on the first of October next succeeding the date on which it shall have become a law; provided, however, that any rules, regulations or actions necessary to implement the provisions of this act on its effective date are immediately authorized and directed to be promulgated, repealed or amended on or before such effective date.