STATE OF NEW YORK

1688

2019-2020 Regular Sessions

IN SENATE

January 15, 2019

Introduced by Sen. MONTGOMERY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the real property law, the civil practice law and rules, and the criminal procedure law, in relation to distressed home loans

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

Section 1. Paragraphs (c) and (e) of subdivision 2 of section 265-a of the real property law, as added by chapter 308 of the laws of 2006, are amended to read as follows:

(c) "Covered contract" means any contract, agreement, or arrangement, or any term thereof, between an equity purchaser and equity seller which:

(i) is incident to the sale of a residence in foreclosure; or

(ii) is incident to the sale of a residence in foreclosure or default where such contract, agreement or arrangement includes a reconveyance arrangement[~~.~~]**; or**

(iii) is incident to the sale of a residence that is the collateral for a "distressed home loan" as defined in paragraph (d) of subdivision one of section two hundred sixty-five-b of this article.

For purposes of this section, any reference to the "sale" of a residence by an equity seller to an equity purchaser shall include a transaction where an equity seller receives consideration from the equity purchaser, and a transaction involving a transfer of title to the equity purchaser where no consideration is provided to the equity seller.

(e) "Equity purchaser" means any person who **or entity which** acquires title to any residence in foreclosure or, where applicable, default, or [~~his or her~~] **the** representative **of such person or entity** as defined in this subdivision, except a person who acquires such title as follows:

(i) to use, and who uses, such property as his or her primary residence;

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

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(ii) by a deed from a referee in a foreclosure sale conducted pursuant to article thirteen of the real property actions and proceedings law;
(iii) at any sale of property authorized by statute;
(iv) by order or judgment of any court;
(v) from a spouse, or from a parent, grandparent, child, grandchild or sibling of such person or such person's spouse;
(vi) as a not-for-profit housing organization or as a public housing agency; or
(vii) a bona fide purchaser or encumbrancer for value.

§ 2. Paragraph (a) of subdivision 5 of section 265-a of the real property law, as added by chapter 308 of the laws of 2006, is amended to read as follows:

(a) In addition to the right of rescission described in subdivision eight of this section, the equity seller has the right to cancel any covered contract with an equity purchaser until midnight of the [~~fifth~~] **fourteenth** business day following the day on which the equity seller and equity purchaser sign a covered contract that complies with this section.

§ 3. Paragraphs (a) and (d) of subdivision 7 of section 265-a of the real property law, as added by chapter 308 of the laws of 2006, are amended to read as follows:

(a) Before midnight of the [~~fifth~~] **fourteenth** business day after the date on which the covered contract is executed, the equity purchaser shall not do any of the following:
(i) accept from any equity seller an execution of, or induce any equity seller to execute, any instrument of conveyance of any interest in the residence in foreclosure or, where applicable, default;
(ii) record with the county clerk any document, including, but not limited to, any instrument of conveyance, signed by the equity seller;
(iii) transfer or encumber or purport to transfer or encumber any interest in the residence in foreclosure or, where applicable, default to any third party;
(iv) pay the equity seller any consideration; or
(v) suggest, encourage, or provide any form which allows the equity seller to waive his or her right to cancel or rescind under this section.

(d) It is unlawful for any equity purchaser to initiate, enter into, negotiate, or consummate any covered contract involving residential real property in foreclosure or, where applicable, default if such [~~person~~] **equity purchaser**, by the terms of such covered contract, takes [~~unconscionable~~] **undue** advantage of the equity seller.

§ 4. Paragraph (e) of subdivision 1 of section 265-b of the real property law, as added by chapter 472 of the laws of 2008, subparagraphs (i) and (vii) as amended by chapter 507 of the laws of 2009, subparagraphs (iii) and (ix) as further amended by section 104 of part A of chapter 62 of the laws of 2011, is amended to read as follows:

(e) "Distressed property consultant" or "consultant" means an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes. A **distressed property** consultant does not include the following:
(i) an attorney admitted to practice in the state of New York when the attorney is directly providing [~~consulting services~~] **legal representation** to a homeowner **pursuant to a retainer agreement, and has entered**

an appearance on behalf of a homeowner, in the course of his or her regular legal practice. This exception shall not apply to non-attorney individuals engaged in activities covered by subdivision two of this section who are employed by, associated with, or consultants for law firms when such law firms are not providing legal representation to a homeowner in a foreclosure action pursuant to a retainer agreement;

(ii) a person or entity who holds or is owed an obligation secured by a lien on any property in foreclosure while the person or entity performs services in connection with the obligation or lien;

(iii) a bank, trust company, private banker, bank holding company, savings bank, savings and loan association, thrift holding company, credit union or insurance company organized under the laws of this state, another state or the United States, or a subsidiary or affiliate of such entity or a foreign banking corporation licensed by the superintendent of financial services or the comptroller of the currency;

(iv) a federal Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of such mortgagee, and any agent or employee of these persons while engaged in the business of such mortgagee;

(v) a judgment creditor of the homeowner, if the judgment creditor's claim accrued before the written notice of foreclosure sale is sent;

(vi) a title insurer authorized to do business in this state, while performing title insurance and settlement services;

(vii) a person licensed as a mortgage banker or registered as a mortgage broker or registered as a mortgage loan servicer as defined in article twelve-D of the banking law, provided that no such person shall take any upfront fee in conjunction with activities constituting the business of a distressed property consultant;

(viii) a bona fide not-for-profit organization that offers counseling or advice to homeowners in foreclosure or loan default; or

(ix) a person licensed or registered in the state to engage in the practice of other professions that the superintendent of financial services has determined should not be subject to this section.

§ 5. Paragraphs (d) and (e) of subdivision 2 of section 265-b of the real property law, as added by chapter 472 of the laws of 2008, are amended and nine new paragraphs (f), (g), (h), (i), (j), (k), (l), (m) and a closing paragraph are added to read as follows:

(d) retaining any original loan document or other original document related to the distressed home loan, the property or the potential loss of the home for nonpayment of taxes; [~~or~~]

(e) inducing or attempting to induce a homeowner to enter a consulting contract that does not fully comply with the provisions of this article[~~.~~];

(f) inducing the transfer of a deed to any person or entity, including to the distressed property consultant;

(g) accepting or taking ownership of a deed from a homeowner for any period of time whatsoever;

(h) simulating in any manner a law enforcement officer, or a representative of any governmental agency;

(i) disclosing or threatening to disclose information affecting the homeowner's reputation for credit worthiness with knowledge or reason to know that the information is false;

(j) communicating with the homeowner or any member of his family or household with such frequency or at such unusual hours or in such a manner as can reasonably be expected to abuse or harass the homeowner;

(k) claiming, attempting, or threatening to enforce a right with knowledge or reason to know that the right does not exist;

(l) using a communication which simulates in any manner legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency, or attorney at law when it is not; or

(m) encumbering the property with a lien without any contractual or legal basis.

If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, the invalidity thereof shall not affect other provisions or applications of this subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are severable.

§ 6. The opening paragraph of subdivision (b) of rule 6312 of the civil practice law and rules, as amended by chapter 24 of the laws of 1996, is amended to read as follows:

Except as provided in section 2512 and in actions brought under section two hundred sixty-five-a of the real property law, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including:

§ 7. The criminal procedure law is amended by adding a new section 420.45 to read as follows:

§ 420.45 Post-trial motion relating to certain instruments affecting residential real property.

1. When a defendant has been convicted after a trial or pled guilty to violating either section 175.30 or 175.35 of the penal law in connection to an instrument that is material to the transfer or purchase of residential real property, the district attorney may file a motion in the supreme court in the county where the property that is subject to the instrument is located on behalf of the victim to void the instrument that is the subject of such criminal information or indictment. Such motion must be in writing and provide reasonable notice to all persons who have an interest in the property affected by such instrument. The motion papers must state the county or borough, if in the city of New York, and block, lot, street address of such property, and a description of such property. The motion papers must state the grounds of the motion, must contain sworn allegations of fact supporting such grounds, and include a copy of the guilty disposition attached to the document.

2. Within ten days after filing a motion pursuant to subdivision one of this section, the district attorney shall record a copy of the notice of motion in the office of the clerk of the county in which the property is situated. The notice shall be indexed by the clerk in the manner prescribed by subdivision (c) of rule sixty-five hundred eleven of the civil practice law and rules for a notice of pendency of action and shall have the same effect as such notice.

3. The supreme court must conduct a hearing and make findings of fact essential to the determination whether to declare the instrument described in subdivision one of this section void ab initio. All persons providing factual information at such hearing must testify under oath. There will be a rebuttable presumption that where a party is convicted after a trial in criminal court or a guilty plea to either section 175.30 or section 175.35 of the penal law in connection with an instru-

ment that is material to the transfer or sale of residential real property, that such instrument is void ab initio.

4. Upon the defendant's conviction of or guilty plea to section 175.30 or section 175.35 of the penal law as described in subdivision one of this section, and after conducting a hearing pursuant to subdivision three of this section, a court shall make a determination and if appropriate shall order that the instrument described in subdivision one of this section be declared void ab initio or grant other appropriate relief to the victim. The order of the court shall describe the nature of the false statement or false information contained in such instrument. A copy of such instrument shall be attached to the order of the court.

5. If the order relates to an instrument that has been filed with, registered, or recorded in a public office, the district attorney shall record a certified copy of such order in the office of the recording officer of the county in which such property is situated, in the same manner as a conveyance duly acknowledged or proved and certified so as to entitle it to be recorded. Such recording officer shall record the same in his or her said office.

6. For purposes of this section, "all persons who have an interest in the property affected by such instrument" shall mean all parties who have recorded an instrument affecting the real property that is the subject of the instrument described in subdivision one of this section, including any party or entity that may have liens of interest on the property, and any current residents of the property, as of the date of the filing of the criminal information or indictment.

7. Nothing in this section shall be deemed to inhibit or prevent a party's right to appeal such order.

§ 8. This act shall take effect immediately.