

GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY
WINTER 2022

**NEW YORK DECLINES TO EXTEND THE COVID-19 EMERGENCY
EVICTION AND FORECLOSURE PREVENTION ACT OF 2020 (S.9114/A.11181)**

The foreclosure and eviction moratoriums in New York State officially ended on January 15, 2022. This means that previously stayed foreclosure and eviction cases will continue and new cases may be commenced. While the courts can expect an influx of new cases, it may take some time for new actions to be filed given the required statutory notice requirements. This may provide the courts some breathing room as they restart existing cases. With the moratoriums ending, one should expect to see an increase in defenses to foreclosure actions that implicate title issues and a corresponding increase in title claim litigation.

To assist borrowers facing foreclosure, a New York Homeowner Assistance Fund has been established for those that are more than 30 days in arrears on their mortgage, property taxes, condominium fees or cooperative fees. The program is by application only and those who receive benefits are provided with a five-year forgivable grant of up to \$50,000.00.

MERS ANNOUNCES PLAN TO MAINTAIN E-NOTARY RECORDS

MERSCORP HOLDINGS, Inc. (MERS) has announced that it will be introducing a service that will store remote online notarization videos for lenders, investors, and servicers. This expansion is expected to take place prior to the end of 2022 with additional features being added over time. MERS states that the service will be available via both user interface and an application program interface or API.

This facility may help allay some lenders' concerns as to the execution of notes and other mortgage documents via remote notarization, and may provide an easy source for obtaining critical information in the event a mortgage and/or note is challenged on the basis of forgery (either by providing evidence that there was no forgery or by showing on video who the fraudster(s) were). It is hoped MERS' storage of these videos will be effectuated with a sufficient level of security given the type of information the database will store, because a cybersecurity breach could result in borrowers' identifying information being wrongfully obtained and misused.

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 <http://www.ganfershore.com>

IMPORTANT NOTE: The material in this newsletter is provided for information purposes only and should not be construed as legal advice. Because the particular facts and circumstances of every situation differ, you should not act or refrain from acting on the basis of this information without consulting an attorney. This material may constitute Attorney Advertising as defined by the New York Court Rules.

GOVERNOR HOCHOL SIGNS NEW YORK REMOTE NOTARY LAW

On December 22, 2021, New York State Governor Hochul signed New York State Bill 1780C which sets forth the state's new remote notarization law. The law is to take effect on June 20, 2022. While the New York Secretary of State has not yet issued regulations governing remote notarizations, several key items are currently known. In order to perform remote notarizations, a notary will first need to register as providing electronic remote notarization services. After providing a remote notarization, the notary will be required to keep a record of the notarization for at least 10 years. That record cannot just be a journal entry, but must reflect the use of audio/video capabilities to verify the signor's identity. A copy of the new law can be found here: <https://www.nysenate.gov/legislation/bills/2021/S1780>.

COURT DISMISSES ACTION BASED ON LLC'S FAILURE TO PUBLISH NOTICE OF FORMATION

In any litigation, one should first seek to determine whether the entities involved have the capacity and/or authority to sue or be sued. In a recent case in which Mark A. Berman, Jason A. Ganfer, and Matthew N. Tobias of this firm represented the defendant, the court dismissed an action on the basis that the plaintiff LLC lacked the capacity to commence litigation due to its failure to comply fully with New York's LLC Law when it was being formed.

In *Queencap1 LLC v. LNV Corporation et al.*, Index No. 704460/2021 (Sup. Ct. N.Y. Co. Jan. 25, 2022), plaintiff sought to void a current property owner's title based on allegedly improper service by a foreclosing lender against a prior owner of the property. However, in reviewing the plaintiff LLC's formation documents, it was determined that the LLC had failed to properly publish notice of its formation as required by the LLC Law. Pursuant to NY LLC Law § 206, a limited liability company must publish notice of its formation in two newspapers for six consecutive weeks and thereafter file proof of such publication with the Secretary of State. The law, a link to which is below, specifies certain requirements for selecting the newspapers in which the notice is to be published, as well as the information that must be included. (<https://www.nysenate.gov/legislation/laws/LLC/206>). This publication requirement is one reason formation fees for an LLC in New York is more expensive than forming a corporation. The failure to comply with this statute results in the LLC's authority to transact business in New York State being suspended until compliance. In particular, an LLC whose authority to transact business has been suspended may not commence or maintain litigation in New York as a plaintiff (although it may still be sued as a defendant). While the LLC published its notice in two newspapers, those newspapers did not satisfy the statutory requirements because they were not published in the county where the LLC maintained its principal office. In addition, the notice as published did not include all required information. As a result, the case was dismissed. While an LLC might seek to cure such a deficiency, the process is expensive and it also may provide a party with a possible statute of limitations defense

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 <http://www.ganfershore.com>

IMPORTANT NOTE: The material in this newsletter is provided for information purposes only and should not be construed as legal advice. Because the particular facts and circumstances of every situation differ, you should not act or refrain from acting on the basis of this information without consulting an attorney. This material may constitute Attorney Advertising as defined by the New York Court Rules.