

# New York's Recently Enacted Standing Legislation Will Potentially Have A Wide Reaching Impact

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On December 23, 2019, Governor Andrew Cuomo signed 2019 NY SB 5160 into law, which creates Real Property Actions and Proceedings Law (RPAPL) Section 1302-a. The statute provides as follows:

*Notwithstanding the provisions of CPLR 3211(e), any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in RPAPL 1304(6)(a), shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon the defendant's default.*

The statute, effective immediately, carves out an exception to Rule 3211(e) of the New York Civil Practice Law and Rules (CPLR) and makes a defense based on a plaintiff's lack of standing immune to waiver in mortgage foreclosure actions involving "home loans" as defined in RPAPL 1304(6)(a).

A defense based on lack of standing has always been subject to waiver if not timely raised by a defendant. See CPLR 3211(e); *Matter of Fossella v. Dinkins*, 66 N.Y.2d 162 (1985). In 2007, the Appellate Division, Second Department, made it clear that this rule applied to mortgage foreclosure actions in *Wells Fargo Bank Minn. v. Mastropaolo*, 42 A.D.3d 239 (2d Dep't 2007), where the court held that "[A]n argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)." *Id.* at 242. Over the next twelve years, appellate courts across the state consistently held that if a defendant fails to timely raise an objection to standing, that defense is waived and the foreclosing plaintiff is relieved of its burden to prove standing.

With RPAPL 1302-a in effect, foreclosing plaintiffs must now be prepared to prove standing at every stage of the foreclosure, including after auction. The statute applies only to "home loans," which are loans involving, among other things, a natural person and property that "is or will be occupied by the borrower as the borrower's principal dwelling." RPAPL 1304(6)(a)(1). This restriction should preclude challenges by non-parties to the loan. Although the statute refers to "defendant" and this includes all named defendants, including those who merely have an interest in the property but no obligation under the loan, the legislative history indicates that RPAPL 1302-a was implemented to protect borrowers who have "no way of knowing who owns the loan."

Consequently, defendants who are not parties to the loan should not be able to avail themselves of RPAPL 1302-a.

The second sentence in RPAPL 1302-a could become the most problematic aspect of this statute because it allows a defendant to challenge standing even after auction where the judgment of foreclosure and sale was issued upon the defendant's default. The legislature likely intended "default" to mean the defendant's failure to answer or appear in the action, however judgments of foreclosure are routinely entered on default. Most of the litigation in foreclosure actions occurs at summary judgment, which is a pre-requisite to a final judgment of foreclosure and sale. If a lender prevails on summary judgment, there are no triable issues with respect to any defenses and most defendants do not oppose the motion for judgment of foreclosure; thus, in the absence of opposition, judgment may be viewed as being issued on default. This uncertainty arguably permits a defendant to mount successive challenges to standing. For example, a defendant could raise standing as an affirmative defense, lose on summary judgment, allow judgment of foreclosure to be entered on default without opposition, and then raise a different standing argument again after auction. However, the doctrine of the law of the case and principles of res judicata should apply to sustain the earlier determination of standing on summary judgment.

As written, RPAPL 1302-a could encourage a defendant to sit idly by and do nothing until after auction, at which time the property could have been sold to a third-party bidder. This, in turn, could have a chilling effect on the real estate market. Bidders at foreclosure auctions are likely to be cautious, resulting in lower bids. Title companies will possibly be hesitant to insure title flowing from a referee's deed where a borrower who has never appeared can show up years later and undo the foreclosure. There have already been circumstances where title insurers have declined to insure title.

RPAPL 1302-a does not contain a time limit, thus, even after the property is sold, servicers may be forced to retain records to prove standing years after a loan is liquidated through foreclosure. Servicers may also have a harder time selling bank-owned properties if their prospective purchasers cannot obtain title insurance. The increased inventory means more properties are subject to maintenance and property preservation fines from municipalities and an increase in exposure to premise liability claims. General court delays associated with motion practice also increase the carrying costs because taxes and insurance must be paid until the title is transferred.

One way to avoid these issues is for servicers to approach each foreclosure as though standing will be challenged and must be proven through possession of the original loan documents prior to commencement.

Because the statute allows for post-judgment challenges in certain instances, it appears to be retroactive and we expect an increase in motions being filed in actions that have already gone to judgment and sale. Even if a defendant ultimately loses, the motion will certainly delay resolution, allowing defendants to remain in the property pending a determination, which can take several months and even up to a year in certain counties, particular those within the five boroughs of New York City.

If you have questions, reach out to the author of this alert or another member of the firm's Consumer Financial Services team.

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