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New York Enacts Legislation to Combat "Zombie Foreclosures"

On June 23,2016, Governor Andrew Cuomo signed into law "The Abandoned Property Neighborhood Relief Act of 2016" (the "Act"), requiring certain mortgagees and their mortgage servicers to maintain upkeep of "vacant or abandoned" residential properties that are in default under the terms of the loan. The goal of the legislation is to reduce the number of "zombie foreclosures", *i.e.*, foreclosures that have been pending in the courts while the property's condition deteriorates, thus creating a blight on the community and negatively impacting neighborhood property values. The statute amends the Real Property Action and Proceedings Law ("RPAPL"), which sets forth the procedures for foreclosing against a residential property in New York to require mortgagees and their servicers to maintain abandoned properties once a foreclosure is commenced. Currently, the RPAPL requires mortgagees and servicers to maintain abandoned properties only after foreclosure judgment is entered. The Act also revises the "90-Day Notice" that must be given to borrowers prior to commencing a foreclosure action on a residential property, and provides an expedited process for foreclosing on abandoned properties. The Act comes into effect December 20, 2016.

Obligation to Maintain Abandoned and Vacant Properties: The new law requires the mortgage servicer to conduct exterior inspections of the property commencing no later than 90 days of the borrower's delinquency, and to continue such inspections every 25 to 35 days, at different times of the day. A property will be deemed "vacant and

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abandoned" if, after three consecutive such inspections, there was no evidence of occupancy, and the property was in violation of local and state codes or otherwise not maintained. The Act provides that the following may be considered evidence of lack of occupancy: overgrown/dead vegetation; turned off/unused utilities; accumulation of mail or trash; absence of window coverings; boarded or broken windows; property that is open to trespass; and/or structural hazards on the property. A property is also considered "vacant and abandoned" if a court or other government entity has formally determined, on notice to the borrower, that the property is vacant and abandoned, or each borrower or owner has issued a sworn statement expressing an intent to vacate and abandon and the servicer's inspection shows no sign of occupancy.

The statute clarifies that buildings actively under construction and in compliance with building codes, seasonal residences that are otherwise secure, secure residences that are the subject of probate or quiet title actions, and buildings damaged by natural disaster but which the owner intends to repair and reside therein are not considered "abandoned and vacant." Likewise, properties occupied by the mortgagor, a relative of the mortgagor, or a tenant lawfully in possession are not considered abandoned.

Once a servicer determines the property is vacant and abandoned, the servicer is required to post a notice thereat with the servicer's contact information. If the notice is not responded to within seven days, the servicer is required to secure and maintain the property in accordance with municipal and state codes and by taking such other actions as set forth in the Act: *e.g.*, by replacing or boarding up broken windows and doors; securing any features that could be an attractive nuisance, such as a pool; winterizing where appropriate; providing utilities required to ensure against potential property damage; and remediating against mold. The servicer is prohibited from removing personal property unless the property poses a health or safety risk or is ordered to do so by a governmental entity.

The Act also requires that the property be registered with the Department of Financial Services within 21 business days of learning that the property is vacant and abandoned. Any material changes to the registration must be reported within 30 days of the change. The Department of Financial Services is also directed to establish a toll-free hotline for the public's use in reporting abandoned and vacant properties. The mortgagee is subject to a potential $500.00 per day fine for failing to maintain the property, and the statute is enforceable by the Superintendent of Financial Services or the municipality in which the property is located. Further, while the statute grants the mortgagee/servicer the right to peaceably enter the property to conduct inspections, repairs

and maintenance, the statute explicitly makes it unlawful for a mortgagee or its agent from entering upon the property to harass or intimidate a lawful occupant to vacate the property.

The servicer's obligations to maintain the property cease if any of the following occur: the property becomes lawfully occupied; title is transferred; the lien is released; the servicer's agents are threatened with violence; the borrower files bankruptcy; or the HOA or co-op prevents access to the property.

Not all mortgagees and servicers are required to maintain vacant and abandoned properties. The obligation applies only to first lien mortgage holders. Also, mortgagees and servicers who do not meet the mortgage portfolio size threshold set forth in the statute are exempt. Generally, if the mortgagee/servicer originates, owns, services, or maintains at least 3/10 of 1% of the total loans in the state, the Act applies.

Amendments to 90-Day Pre-Foreclosure Notice: The Act also revises the statutorily mandated language in the 90-day notice prescribed by RPAPL 1304. Among other things, the revised notice must provide more detail about the availability of counseling, and must include a notice that the borrower has the right to remain in the property until the foreclosure is complete. In addition, if the borrower is known to have limited English proficiency, and the borrower's native language is one of the six most common non-English languages spoken in New York, the notice must be in the borrower's native language. The Department of Financial Services will post the notice in the languages on its website.

Expedited Foreclosure Process: The Act also creates an expedited process in RPAPL 1309 for foreclosing on vacant and abandoned properties where the defendants have not appeared nor exhibited an intent to contest the foreclosure. Under this procedure, rather than a two-step process of first filing a motion to appoint a referee to calculate the amount due, and then filing a second motion for final judgment, the plaintiff may file one joint application for entry of judgment of foreclosure and requesting that the court confirm the sums due and owing. The notice of motion must contain specific language setting forth the defendant's rights and possible consequences of not responding. The application must also include specific evidentiary proof, such as photographs showing the property is abandoned, and, if available, utility records. Also, the court may hold an evidentiary hearing as to the abandonment of the property.

Outsourcing Manufacturing May Not Trigger

the On-Sale Bar in Patent Cases

In a July 11, 2016 decision in *The Medicines Company v. Hospira, Inc.*, the Federal Circuit, *en banc*, held that a contract manufacturer's sale to the inventor of manufacturing services -- where neither title to the embodiments nor the right to market them passes to the supplier -- does not constitute a sale that invalidates a patent to the invention. This is a favorable decision for companies that outsource manufacturing services. vacated and remanded.

Under U.S. patent law, if a product is "on sale" more than one year before the filing of a patent application, the inventor loses his or her right to patent the product. This statutory provision, 35 U.S.C.§ 102(b), is commonly referred to as the "on-sale bar," and it dates back to the Patent Act of 1836. In 1839, Congress added a two-year "grace period" during which the product could be sold before filing a patent application. In 1939, the grace period was shortened to one year. In general, the policies underlying the on-sale bar are "to promote the early filing of patent applications--*i.e.*, to foster disclosure of patented inventions to the public; to prevent an inventor from profiting from the commercial use of an invention for a prolonged period before filing a patent application claiming that invention; to discourage the removal of inventions from the public domain; and to give inventors a reasonable time to discern the potential value of an invention."

The Federal Circuit has a long line of decisions interpreting § 102(b), including a 2001 decision holding that there is no "supplier exception" to the on-sale bar:

> [Defendant] now invites us to create an exception to the on-sale bar, one that would allow inventors to stockpile commercial embodiments of their patented invention via commercial contracts with suppliers more than a year before they file their patent application. Because neither the text of section 102(b) nor the precedent interpreting it permits this proposed exception, and because the primary purpose of the on-sale bar is to promote prompt patent filings, we decline [Defendant's] invitation . . .

SpecialDevices, Inc. v. OEA, Inc., 270 F.3d 1353 (Fed.Cir.2001).

In *Hospira*, however, the Federal Circuit considered the question of whether to overrule its decision in *Special Devices* that there is no supplier exception to the on-sale bar. The *Hospira* plaintiff hired a third-party supplier to produce three batches of the drug Angiomax, an anticoagulant, using an embodiment of the claimed process from its product-by-process patent. The market value of the

three batches in question was estimated to be greater than $20 million. These batches were held in quarantine until after the grace period began, after which they were released from quarantine and made available for commercial sale. The issue before the Court was whether the supply contract constituted a commercial sale sufficient to trigger the on-sale bar of § 102(b).

The District Court said no, holding that the three Angiomax batches were validation batches made for experimental purposes, not for commercial profit. Therefore, these batches did not trigger the on-sale bar. But a three-judge panel of the Federal Circuit reversed, holding that there was "commercial exploitation" before the grace period, and that "to hold otherwise would conflict with the 'no 'supplier' exception' under *Special Devices.*" The panel also found that the three batches did not fall under the experimental use exception, because the invention had already been reduced to practice.

The *en banc* Federal Circuit reversed again, holding that the supply contract was not a triggering sale because "a contract manufacturer's sale to the inventor of manufacturing services where neither the title to the embodiments nor the right to market the same passes to the supplier does not constitute an invalidating sale." The Federal Circuit further held that to be "on sale" under § 102(b), a product must be the subject of a commercial sale or offer for sale that "bears the general hallmarks of a sale pursuant to Section 2-106 of the Uniform Commercial Code ['UCC']."

In its ruling, the Federal Circuit made clear that "commercial benefit" without "commercial marketing" does not trigger the on-sale bar:

> [T]he mere sale of manufacturing services by a contract manufacturer to an inventor to create embodiments of a patented product for the inventor does not constitute a "commercial sale" of the invention. [Additionally],"stockpiling" by an inventor and . . . "stockpiling" by the purchaser of manufacturing services is not improper commercialization under § 102(b). . . . [C]ommercial benefit--even to both parties in a transaction-is not enough to trigger the on-sale bar of § 102(b); the transaction must be one in which the product is "on sale" in the sense that it is "commercially marketed."

The Federal Circuit predicated its decision in part on the fact that the supplier merely acted as a pair of "laboratory hands," using instructions and an active pharmaceutical ingredient supplied by The Medicines Company. Further, Section 2-106(1) of the UCC describes a sale as "the passing

of title from the buyer to the seller for a price," but here, there was no transfer of title. The Federal Circuit, however, was also quick to point out that neither title transfer nor the confidential nature of any transaction constitutes a bright line rule that the on-sale bar has not been triggered, because exceptions abound in the case law.

With respect to the holding in *Special Devices* that there is no supplier exception to the on-sale bar, the Federal Circuit clarified that decision was overruled, but with an important caveat:

> We still do not recognize a blanket "supplier exception" to what would otherwise constitute a commercial sale as we have characterized it today. ***While the fact that a transaction is between a supplier and inventor is an important indicator that the transaction is not a commercial sale, understood as such in the commercial marketplace, it is not alone determinative.*** Where the supplier has title to the patented product or process, the supplier receives blanket authority to market the product or disclose the process for manufacturing the product to others, or the transaction is a sale of product at full market value, even a transfer of product to the inventor may constitute a commercial sale under § 102(b). ***The focus must be on the commercial character of the transaction, not solely on the identity of the participants.*** (emphasis added)

The *Hospira* decision continues a recent Federal Circuit trend to avoid bright line rules, and to instead substitute more of a "totality of the circumstances" approach to deciding these cases.

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