

[New Jersey and New York Both Enact Restrictions on Foreclosures in Response to COVID-19](#)

On March 19, 2020, Governor Murphy signed Executive Order No. 106, which provides that a residential lessee, tenant or homeowner cannot be removed from a residence pursuant to an eviction or foreclosure proceeding. The moratorium established by Executive Order No. 106 will remain in place for up to two months following the end of the state of emergency declared by Governor Murphy. Notably, neither A-3859 (the law permitting the Governor to issue an Executive Order declaring such a moratorium) nor Executive Order No. 106 preclude lenders from initiating or continuing foreclosure proceedings, nor do they provide any restrictions as to commercial tenants or borrowers.

In New York, Governor Cuomo also announced a moratorium on evictions of any residential and commercial tenants or owners in the state for ninety days. On March 22, 2020, the Chief Administrative Judge also suspended the filing of all court papers for any “non-essential” matters until further notice. The list of “essential” matters identified by the Chief Administrative Judge is extremely limited and does not include, for instance, foreclosure actions.

[New Jersey Appellate Division Enforces “Hell-or-High Water” Provision in Third-Party Financing Agreement](#)

In *Highland Capital Corp. v. Sassan Kafayi, DDS, et al.*, A-1978-18T1 (N.J. App. Div. Feb. 26, 2020), the Appellate Division affirmed the trial court’s ruling that a borrower’s defenses and counterclaims were barred by the “hell-or-high-water” clause in the parties’ third-party financing agreement.

In October 2016, defendants Sassan Kafayi and Sassan Kafayi, DDS (together, “Defendants”) purchased two pieces of equipment from Henry Schein Dental. To finance the purchase of the equipment, Defendants and Highland Capital Corp. (“Highland”) executed an “Equipment Finance Agreement” whereby Defendants financed the purchase of, and Highland was granted a security interest in, the equipment. The Equipment Finance Agreement identified Henry Schein as the “equipment supplier” and required Defendants to pay 84 monthly installments of \$2,271.92.

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[Office Locations](#)

[New Jersey](#)

210 Park Avenue
2nd Floor
Florham Park NJ 07932
973.302.9700

[New York](#)

1185 Avenue of the Americas
3rd Floor
New York NY 10036
212.763.6464

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The Equipment Finance Agreement also contained a “hell-or-high-water” clause, which provided that “[c]ustomer’s obligation shall be absolute and unconditional without any abatement, set-off, defense or claim for any reason.”

Immediately after executing the Equipment Finance Agreement, Defendants began making untimely payments and ultimately stopped making payments altogether. In October 2017, Highland attempted to repossess the equipment, but Mr. Kafayi refused to cooperate. As a result, on December 18, 2017, Highland filed a three-count complaint against Defendants in the Law Division alleging (i) breach of the finance agreement, (ii) conversion and (iii) unjust enrichment. Defendants answered the complaint, asserting fourteen affirmative defenses and an eleven-count counterclaim. Defendants alleged, among other things, that Highland breached its implied warranties regarding the equipment and was the actual seller of the equipment. Defendants also claimed the parties had entered into a verbal forbearance agreement whereby Highland would forbear collecting past due amounts and, going forward, would accept payments twice a month from Defendants. (Highland certified no such agreement was made.) After the close of discovery, Highland moved for summary judgment.

The trial court granted summary judgment in Highland’s favor and dismissed Defendants’ counterclaims with prejudice and awarded Highland \$189,738.09 and immediate and permanent title to the equipment. The trial court found that the Equipment Finance Agreement was a three-party secured commercial transaction governed by Article 9 of the UCC and that Highland was a lender and not the seller of the equipment. Accordingly, any claims Defendants may have regarding the equipment itself should be brought against Henry Schein, not Highland. The trial court also found that Highland was afforded protections under the “hell-or-high-water” clause. In that regard, the trial court noted that the “hell-or-high-water” clause constitutes an “unconditional promise to make payment and not assert a defense to payment[,]” which are “essential to the equipment leasing industry.” The trial court further ruled that the purported verbal forbearance agreement was unenforceable under the New Jersey Statute of Frauds.

On appeal, Defendants argued that the trial court erred by failing to recognize the oral forbearance agreement and by enforcing the Equipment Finance Agreement and its “hell-or-high-water” provision, which Defendants claimed was the product of fraudulent inducement. The Appellate Division found Defendants’ contentions on appeal to be “entirely without merit.” The Appellate Division held that Defendants’ obligation to make payments under the Equipment Finance Agreement was unconditional and that there was no record of any evidence supporting Defendants’ claims that they were fraudulently induced into entering into the arrangement. Moreover, any claim of an oral forbearance agreement would necessarily fail because an oral agreement cannot vary the clear and unambiguous terms of the written Equipment Finance Agreement.

[New Jersey Trial Court Finds Buyer of Foreclosed Property Failed to Comply with Strict Notice Requirements of New Jersey’s Foreclosure Fairness Act](#)

In *UTS Bechman, LLC v. Woodard*, the Law Division, in a matter of first impression, considered a tenant’s rights under New Jersey’s Foreclosure Fairness Act, N.J.S.A. 2A:50-69 to -71.

Liza Woodard was involved in a contentious divorce proceeding. During and following the divorce, she leased the marital home from her husband and resided therein. The same home was also the subject of a foreclosure proceeding. Through a foreclosure sale, plaintiff UTS Bechman, LLC (“UTS”) acquired title to the property in 2019. After acquiring title, UTS posted a notice on the front door of the property identifying itself as the new owner and providing an address where rent should be paid. Following the foreclosure, Woodard failed to make several rent payments, and UTS sought to evict her in a summary action.

New Jersey's Foreclosure Fairness Act requires that a person who take titles to property as a result of a sheriff's sale provide certain notices to tenants at the subject property, including informing them of their rights under New Jersey law. Specifically, the new owner must serve a notice (with mandatory language, font size, paper size, and delivery requirements) that states the tenant does not have to move simply because the property has been foreclosed upon.

In the case before it, the Law Division determined that the notice provided by UTS did not comply with the Foreclosure Fairness Act's strict requirements. The notice merely informed the Woodard where to pay the rent. It did not include the statutory language and was not properly served. To the Law Division, "[a] tenant should not face eviction from his or her residence, under facts such as these, unless the landlord has strictly followed the statutory requirements of the New Jersey Foreclosure Fairness Act, N.J.S.A. 2A:50-69 to -71, and the New Jersey Anti-Eviction Act, N.J.S.A. 2A:18-61.1." Although non-compliance with the Foreclosure Fairness Act does not act as a defense to an eviction action in all circumstances, the Law Division held that "a landlord's failure to comply with N.J.S.A. 2A:50-70 . . . precludes the landlord's right to evict the tenant for non-payment of rent when the tenant's defense is that she unknowingly paid rent to the wrong landlord." That defense can be rebutted if the landlord proves the payment did not occur or if the landlord establishes the tenant's payments were made while fully aware of the rightful landlord. The Law Division determined that had not occurred in this case.

If you have any questions about this Alert:

Attorney Contact Information

Anthony J. Sylvester

Partner

973.302.9713

asylvester@shermanwells.com

Craig L. Steinfeld

Partner

973.302.9697

csteinfeld@shermanwells.com

Caitlin T. Shadek

Counsel

973.302.9672

cshadek@shermanwells.com

Anthony C. Valenziano

Counsel

973.302.9696

avalenziano@shermanwells.com

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