

To Our Clients and Friends

Memorandum

August 16, 2021

Supreme Court Finds Use of Hardship Declarations to Bar Residential Evictions Inconsistent with Landlords' Due Process Rights

On August 12, 2021, the United States Supreme Court issued an important ruling¹ in *Chrysaifis v. Marks*² regarding New York's COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFFPA"), which was enacted in December 2020 to address residential evictions and foreclosures. While the Supreme Court ruled on the constitutionality of certain procedures applicable to residential evictions, the decision potentially has broader applicability to residential foreclosures, as well as commercial evictions and foreclosures.

Pursuant to CEEFFPA, if a residential tenant self-certified financial hardship by submitting a hardship declaration, a landlord could not commence an eviction proceeding or evict said tenant until after August 31, 2021, and there was no means for the landlord to challenge the factual predicate underlying the tenant's hardship declaration. A majority of the Supreme Court found that CEEFFPA's statutory scheme regarding hardship declarations "violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause."³

Pursuant to CEEFFPA, a similar statutory scheme is in place in New York in connection with residential foreclosures. Additionally, the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (the "Small Businesses Act") implements the same procedures for commercial evictions and foreclosures. Both CEEFFPA and the Small Businesses Act are currently set to expire on August 31, 2021.⁴ However, shortly before the Supreme Court's ruling, a bill was introduced in the New York State Legislature to extend CEEFFPA and the Small Businesses Act until October 31, 2021. Politicians in New York, including

¹ The ruling occurred on the Court's "shadow docket," which is an often used catchall for "a range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity." See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1-5 (2015).

² *Chrysaifis v. Marks*, 594 U.S. ___, 2021 U.S. LEXIS 3635 (Aug. 12, 2021).

³ *Chrysaifis*, 594 U.S. ___, 2021 U.S. LEXIS 3635, at *1-2 (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)).

⁴ The eviction and foreclosure protections afforded by the hardship declarations were originally set to expire on May 1, 2021, and were subsequently extended until August 31, 2021. See 2021 N.Y. Laws ch. 104.

the incoming governor, have publicly stated that they intend to address the Supreme Court's ruling.⁵ Thus, we will continue to monitor how the Supreme Court's ruling will impact eviction and foreclosure proceedings moving forward.

New York's Hardship Declaration

A key component of New York's current foreclosure and eviction legislation in both the residential and commercial spheres is the statutory hardship declaration.⁶ Both CEEFPA and the Small Businesses Act provide that a landlord or lender is precluded from commencing eviction and/or foreclosure proceedings prior to August 31, 2021 in the event that the tenant or borrower submits the statutory hardship declaration. Generally, the legislation does not provide a method for the landlord or lender to challenge the accuracy of the hardship declaration, even if the landlord or lender knows or reasonably believes that the tenant or borrower does not meet the statutory criteria. Moreover, CEEFPA and the Small Businesses Act require both landlords and lenders to provide hardship declarations to tenants and borrowers in connection with notices that are prerequisites to foreclosure and eviction proceedings.

The *Chrysafis* Litigation

Shortly after the extension of CEEFPA through August 31, 2021, the *Chrysafis* plaintiffs commenced a lawsuit seeking an injunction against CEEFPA's enforcement on the grounds that CEEFPA violated the due process rights of landlords due to their "inability to file or enforce eviction proceedings until August 31, 2021" and "the procedural treatment of hardship declarations—both in terms of their inability to obtain substantive review of those declarations now and the rebuttable presumption adopted for subsequent proceedings."⁷ The plaintiffs also claimed that CEEFPA was impermissibly vague and violated a landlord's right to petition the court, and that CEEFPA's requirement that landlords provide the hardship declaration along with other information to tenants was compelled speech in violation of the First Amendment.⁸ The District Court found that the *Chrysafis* plaintiffs had failed to demonstrate a reasonable likelihood of success, and that in light of the public health emergency, the plaintiffs could not show that the balance of the equities were in their favor, or that "a preliminary injunction would serve the public's interest."⁹

Following the District Court's preliminary injunction ruling, the plaintiffs sought an injunction, pending appeal, regarding CEEFPA's hardship declaration procedure before both the District Court and the Court of Appeals for the Second Circuit. Both courts denied the requested injunction.

Following those denials, the *Chrysafis* plaintiffs sought to have the Supreme Court enjoin CEEFPA's hardship declaration scheme for tenants, pending the outcome of the appeal before the Court of Appeals

⁵ See Patrick Reilly, *Hochul Pledges to Address Supreme Court's Decision Against Eviction Moratorium*, N.Y. Post (Aug. 13, 2021).

⁶ We previously explained the contours of the hardship declaration in our discussion of the Small Businesses Act in our prior client memorandum titled *New Restrictions on Commercial Foreclosures and Evictions Imposed in New York State* (Mar. 12, 2021).

⁷ *Chrysafis v. Marks*, 2021 U.S. Dist. LEXIS, 110405, at *17 & *28 (E.D.N.Y. June 11, 2021).

⁸ *Id.* at *30-31, *31-33 & *33-35.

⁹ *Id.* at * 3, *35 & *36-39.

for the Second Circuit, and any petition for a writ of certiorari, and, if the writ of certiorari was granted, until the Supreme Court issued its judgment.¹⁰ A majority of the Supreme Court granted the injunction, pending appeal, over the public dissents of Justices Breyer, Sotomayor, and Kagan. The majority found that CEEFPA's statutory scheme regarding hardship declarations "violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause."¹¹ The majority made clear that its ruling did not affect the Tenant Safe Harbor Act, a separate New York law that provides a "COVID-related hardship defense in eviction proceedings...."¹²

Conclusion

The Supreme Court's ruling in *Chrysafis* will result in changes to how New York approaches any future legislation related to both residential and commercial evictions and foreclosures during COVID-19. At the time of the Supreme Court's ruling, the New York State Legislature had introduced a bill, which is currently pending, to extend the protections contained in CEEFPA and the Small Businesses Act until October 31, 2021.

Although not directly at issue in *Chrysafis*, the Small Businesses Act uses a statutory scheme similar to CEEFPA for hardship declarations that contains the same constitutional deficiency identified in *Chrysafis*. Moreover, commercial landlords and lenders may seek to commence foreclosure and eviction proceedings against commercial borrowers and tenants that have returned hardship declarations prior to the expiration of the Small Businesses Act in reliance on *Chrysafis*. We will continue to monitor developments and changes to New York's statutory scheme related to commercial foreclosures and evictions.

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¹⁰ *Chrysafis*, 594 U.S. ___, 2021 U.S. LEXIS 3635, at *1.

¹¹ *Id.* at *1-2 (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)).

¹² *Id.* at *2.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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