

2016 Foreclosure Law Amendments to Settlement Conference Law and Predicate Notice Requirements

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Two Major Prongs to Legislation

- Addressing “Zombie” Properties: Vacant and Abandoned Properties, covered in Part 1
- Substantial Amendments to NY Foreclosure Law Consumer Protections: Predicate Notices and Foreclosure Settlement Conferences, plus Consumer “Bill of Rights”

Settlement Conference Law Amendments: Scope

- CPLR 3408 (a): Not just loan modifications as subjects of settlement conferences: courts can no longer take it upon themselves to screen for loan modification eligibility and deprive homeowners of conference: other loss mitigation options, such as short sales and deeds in lieu are proper subjects of settlement conferences.

Settlement Conference Law Amendments: Authority

- CPLR 3408 (c): Stronger language mandating appearance at conferences with authority to settle: whether attorney or representative, must be fully authorized to resolve the case.
- Authorizes court to permit both defendant or plaintiff to appear by telephone or video (formerly this was specified as possibility only for plaintiff)

Settlement Conference Law Amendments: Information

- CPLR 3408 (e): Language is now mandatory (“shall” replaces “should”).
- More detailed specification of documents plaintiff must bring, including loss mitigation options; summary of status of any pending applications and specific list of outstanding items; expected date of completion of evaluation; and, if application has been denied, a denial letter or any other document explaining denial and data input fields and values used in net present value evaluation; if denied based on “investor restriction,” documentation of such restriction, such as pooling and servicing agreement.
- Defendants required to bring, if applicable, information on current income tax returns, expenses, property taxes and previously-submitted applications, proof of rental income.

Settlement Conference Law Amendments: Good Faith

- CPLR 3408(f): Good faith negotiation standard is measured by “totality of circumstances,” with multiple factors specified as possible indicia of failure to negotiate in good faith:
- Compliance with court rules and directives
- Compliance with mortgage servicing laws, rules, regulations, investor directives and loss mitigation standards
- Conduct consistent with efforts to reach a mutually agreeable resolution, avoiding unreasonable delay, appearing with authority to settle, avoiding “dual tracking” and providing accurate information to the court
- But, failure to make or accept a particular offer is not, in and of itself, sufficient to establish absence of good faith.

Settlement Conference Law Amendments: Good Faith (cont.)

- CPLR 3408 (i): Procedures for Determining Good Faith: Court may determine good faith negotiation and order remedies *either* on motion or *sua sponte*, on notice.
- Court of Office of Court Administration may establish procedures.
- Referee, judicial hearing officer or other court staff designated to oversee settlement conference process may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court concerning failure to negotiate in good faith.
- Note: evidentiary hearing (trial) is not mandated: “hear and report” means referee can hear oral argument, especially if conferences have been held before that referee.

Settlement Conference Law Amendments: Good Faith (cont.)

- CPLR 3408(J): Remedies upon finding of failure to negotiate in good faith:
- If plaintiff: at a minimum, tolling of interest, fees, costs during any period of undue delay plus, where appropriate: compelling production of documents; civil penalty up to \$25,000 to deter similar conduct; and any other relief court deems just and proper.
- If defendant, removal from settlement conference calendar, but in making such determination, court shall consider equitable factors, including whether defendant was represented by counsel: important recognition of disparities in resources and bargaining power.

Settlement Conference Law Amendments: Late Answers

- CPLR 3408 (l) First Settlement Conference: If D has not already answered or filed pre-answer motion to dismiss, court is required to:
 - Explain requirement to “answer” complaint
 - Explain what is required to “answer” complaint
 - Advise that if answer not filed, ability to contest/assert defenses can be lost
 - Provide information about available resources for help
- CPLR 3408 (m): Defendant who appears at settlement conference but who failed to answer complaint, pursuant to CPLR 320, “**shall be presumed to have a reasonable excuse for default**” and “**shall be permitted to serve and file an answer**, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference.”
- The default “**shall be deemed vacated**” upon service and filing of an answer. CPLR 3408 (m). Much of case law from Second Department on late answers in foreclosure cases effectively overruled.

Settlement Conference Law Amendments: Consumer Bill of Rights

- CPLR 3408(I): Consumer Bill of Rights (required by RPAPL 1303-3-a): to be provided to defendant at first settlement conference
- RPAPL 1303-3-a: NYS Department of Financial Services charged with publishing a Consumer Bill of Rights, in consultation with all stakeholders, “”which shall detail the rights and responsibilities of the plaintiff and defendant in a foreclosure proceeding.” To be updated on an annual basis as appropriate

Settlement Conference Law Amendments: Motions Held in Abeyance

- CPLR 3408 (n): Motions shall be held in abeyance “while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.” Codifies existing practice under Uniform Rule 202.12-a.
- “Good faith” motions, accordingly, are contemplated while cases remain in settlement conference part.

Settlement Conference Law Amendments: Notices of Discontinuance

- CPLR 3408(g): Plaintiff must file notice of discontinuance and vacatur of *lis pendens* within **90 days** after any settlement agreement of loan modification is executed.
- Formerly 150 days.
- CPLR 3408 (h): Remains unlawful to charge for any costs or attorneys' fees for appearance at or participation in settlement conference.

Predicate Notice Amendments

- 90 Day Notices—Pre-foreclosure Notices: RPAPL 1304
- Help for Homeowners in Foreclosure Notices: RPAPL 1303
- Both notices are conditions precedent which, if not strictly complied with, mandate dismissal: *See Aurora Loan Servs., LLC v. Weisblum*, 85 A.D. 3d 95 (2d Dep't 2011); *First Nat'l Bank of Chicago v. Silver*, 73 A.D. 3d 162 (2d Dep't 2010).

90-Day Notices Amendments

- RPAPL 1304: Updates to language of notice to better provide borrowers with notice of the amount required to bring loan current and to be consistent with CFPB mortgage servicing rules barring “dual tracking.”

Clarifies that requirement applied to borrower or borrowers, whether at the property address or any other address of record.

Language of notice updated to better communicate the amount required to bring loan current.

Language also revised to reflect prohibitions on dual tracking: now reads if “you have not taken any actions to resolve this matter” within 90 days, we may commence legal action. Previously stated that if “the matter is not resolved” within 90 days. This is because CFPB mortgage servicing rules would prohibit moving towards foreclosure if, in response to 90 Day Notice, borrower applied for loss mitigation.

90-Day Notices Amendments (cont.)

- New notice language explaining right to remain in home, addressing vacant and abandoned issues resulting from homeowner confusion about nature of notice:
 - Explains continued right to remain in home until receipt of court order
 - Explains continued right to remain in home even if foreclosure action commenced
 - Explains that homeowner legally remains owner of home and remains homeowner's responsibility until sale of property by owner or by court.
 - Explains that the 90-Day Notice is **not** an eviction notice and that foreclosure case has not yet been commenced.

90-Day Notices Amendments (cont.)

- Amended notice language updates information about housing counseling resources to reflect current information (RPAPL 1304(1) and requires provision of a current list of at least 5 housing counseling agencies serving the county where the property is located from a listing maintained by the Department of Financial Services (and requires DFS to maintain a list, by county, of housing counseling agencies.
- Purpose is to provide homeowners with basic information about consequences of possible foreclosure and to connect homeowners with foreclosure prevention services and encourage foreclosure-avoiding loss mitigation efforts.

90-Day Notices Amendments (cont.)

- Clarifications about applicability of 90-Day Notice requirement: **90 day waiting period before filing** foreclosure does not apply, or ceases to apply, if the borrower has filed for bankruptcy protection under federal law or if borrower no longer occupies residence as principal dwelling (previous reference was to “application for adjustment of debts or an order for relief from the payments of debts”). New amended language clarifies that this exception applies only to the 90 day waiting period, not to the obligation to serve notice: **“Nothing herein shall relieve the lender...of the obligation to send such notice, which notice shall be a condition precedent to commencing a foreclosure proceeding.”** RPAPL 1304(3)

90-Day Notices Amendments (cont.)

- Clarifications on when a new 90-Day Notice is required.

Notice and 90-Day period need only be provided once in a 12-month period to the same borrower in connection with the same loan and same delinquency. **“Should a borrower cure a delinquency but re-default in the same twelve month period, the lender shall provide a new notice pursuant to this section.”**

90-Day Notices Amendments (cont.)

- New Language Access Requirements for 90-Day Notices

RPAPL 1304(5): For any borrower “known to have limited English proficiency,” notice shall be in borrower’s native language or a language in which borrower is proficient, so long as it is one of the 6-most common non-English languages in NY based on U.S. census data. DFS shall post the notice on its website in the 6-most common non-English languages.

Help for Homeowners in Foreclosure Notice Amendments

- RPAPL 1303 Notice Accompanying Residential Foreclosure Complaints: Amended language clarifying homeowner's rights and obligations similar to added language in RPAPL 1304 Notice, making clear to homeowners that they are not required to vacate by virtue of commencement of foreclosure action, that they have right to remain in the home until the property is sold at auction after judgment of foreclosure and sale, and cautioning that borrowers in foreclosure remain responsible for maintenance of the property and payment of property taxes whether or not they vacate the home after commencement of foreclosure action.

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Questions?

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