2016 Amendments to New York Foreclosure Settlement Conference and Predicate Notice Laws

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As part of a package of legislation enacted in the waning hours of the 2016 session of the legislature, significant changes to New York's judicial residential foreclosure process will become effective on December 20, 2016.[1] While provisions addressing "zombie foreclosures"—vacant and abandoned properties left in limbo when foreclosing lenders fail to prosecute foreclosure actions to conclusion—have garnered much attention, the legislation also amends New York foreclosure laws enacted in 2008 and 2009 in the wake of the financial crisis. These much-needed amendments will clarify issues with which the courts have been grappling, address problems that have come to the fore as the foreclosure crisis has evolved, and should promote greater uniformity and efficiency in the handling of residential foreclosure cases.

[1] The legislation was signed into law on June 23, 2016, as part of an omnibus bill, Part Q of which contains the provisions applicable to residential foreclosures. The provisions which are the subject of this article become effective 180 days after enactment, i.e., on December 20, 2016 (A. 10741/S.8159, Chapter 73 of the Laws of New York, available at http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A10741&term=&Summary=Y&Text=Y .

The recent enactments include substantial amendments to CPLR 3408 (the residential foreclosure settlement conference law); changes to the RPAPL 1303 Help for Homeowners predicate notice required to be served with all residential foreclosure summonses and complaints; and amendments to RPAPL 1304 and the 90 Day Pre-Foreclosure Notice required before a foreclosure action can be commenced. The amendments and clarifications will put to rest much of the litigation with which the courts have contended since these provisions were enacted in 2008 and 2009 and will provide important protections for consumers necessitated by inconsistent judicial interpretations of New York's foreclosure laws.

Foreclosure Settlement Conference Law Amendments

CPLR 3408, New York's foreclosure settlement law, was enacted in 2008 and amended in 2009. Although it expresses a preference for home-saving loan modifications, and imposed an affirmative obligation to negotiate in good faith to achieve such loan modifications,[2] the law left "good faith negotiation" undefined, and prescribed no remedies when that standard is violated, leaving the courts to

[2] CPLR 3408(f).

devise their own, sometimes idiosyncratic, definitions of good faith and to craft remedies when parties did not fulfill the mandate to negotiate in good faith. The current amendments go a long way towards filling some of the gaps left by the original law.

First, although CPLR 3408 expresses a preference for home-saving loan modifications, for some homeowners other loss mitigation options such as "deeds in lieu of foreclosure" or "short sales" may be more viable. Some courts denied homeowners access to settlement conferences based on a determination that the homeowners were not qualified for a loan modification, thwarting the purpose of the conferences and depriving homeowners of the opportunity to avoid foreclosure with a negotiated settlement as the legislature intended. The amendments address this problem by clarifying that other loss mitigation options, not just loan modifications, are proper subjects of settlement conferences. [3]

CPLR 3408 (c) already requires parties appearing at settlement conferences to appear with authority to dispose of the case, but plaintiffs routinely appear at conferences through *per diem* or other counsel or representatives who lack required authority or information needed for meaningful negotiations. As a result,

[3] CPLR 3408 (a).

the settlement conference process is often needlessly protracted.[4] The amendments require that any party's representative at conferences be fully authorized to dispose of the case; while the original statute allowed only plaintiff's representative to appear telephonically or by video conference, the amendment permits *either* party's representative to appear by video or telephone. It was nonsensical to make this option available only for plaintiffs, who had commenced a proceeding in court and could reasonably expect to be required to attend a conference in court, but not for defendant homeowners, who often must miss work or arrange child care in order to appear for settlement conferences.

The amendments also add stronger language concerning the obligation to bring required information needed for meaningful settlement negotiations to conferences, for both defendants and plaintiffs.[5] The amendments impose an obligation on plaintiffs' representatives to appear with a summary of the status of the plaintiffs' evaluation of any pending loan modification or loss mitigation applications, including a list of outstanding items required for completion of the application; an expected date for completion of the review of the application;

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[4] *See Stalled Settlement Conferences: Banks Frustrate New York's Foreclosure Settlement Conferences*, April 29, 2014, available at http://nylawyer.nylj.com/adgifs/decisions14/050214report.pdf .

[5] CPLR 3408(e),

and, if the application was denied, a denial letter or other document explaining the basis for denial and documentation supporting denials. Plaintiffs' invocation of phantom investor restrictions, and refusals to seek waiver of such restrictions as is required by the federal Home Affordable Modification Program ("HAMP") governing most loan servicers, has been an impediment to settlements and has led to much litigation concerning failure to negotiate in good faith,[6] so the requirement that plaintiffs supply this back-up for modification denials provides greater transparency and should prevent litigation on these issues.

The amendments adopt a definition of good faith negotiation that has evolved from case law, stating that good faith negotiation "shall be measured by the totality of the circumstances," which include, but are not limited to, several factors. Courts determining good faith shall now consider: (1) compliance with the requirements of CPLR 3408 and applicable court rules, orders or directives of the court or its designees; (2) compliance with applicable mortgage servicing laws, rules or regulations and loss mitigation standards; and (3) conduct consistent with efforts to reach a mutually agreeable resolution, including avoiding unreasonable delay, appearing at conferences with authority to settle, avoiding prosecution of foreclosure proceedings while loss mitigation applications are proceeding (known

[6] *See, e.g., U.S. Bank N.A. v Smith,* 123 AD3d 914 (2d Dep't 2014).

as "dual tracking"), and providing accurate information to the court and parties.[7] The inclusion of a reference to dual tracking is significant, because it authorizes a remedy for conduct preceding the formal start of the settlement conference process itself.

Addressing judicial criticism of the statute's failure to specify a remedy when the settlement conference good faith negotiation standard is violated,[8] the amendments provide both a process for adjudicating disputes under the statute and enumerate appropriate remedies when parties are found to have violated the good faith negotiation standard. A new section, CPLR 3408 (i), now provides that the court may determine good faith negotiation and order remedies *either* on motion or *sua sponte*, on notice, and also provides that referees, judicial hearing officers or other court staff may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court. And new subsections (j) and (k) provide guidance on appropriate remedies when both plaintiffs and defendants are found to have failed to negotiate in good faith.

CPLR 3408 (j) mandates that when plaintiffs are found to have violated the good faith negotiation standard, the court shall, at a minimum, toll the

[7] CPLR 3408 (f). The amendments also make clear that the mere failure of a party to make or accept an offer made by the other party is not, alone, a failure to negotiate in good faith. *Id.*

[8] *See., e.g., Wells Fargo Bank, N.A. v Meyers ,* 108 AD3d 9 (2d Dep't 2013)

accumulation and collection of interest and fees during any undue delay caused by the plaintiff, codifying the most commonly-granted remedy under the case law construing CPLR 3408(f).[9] In addition to such tolling of interest and fees, the court may also compel production of documents requested during conferences, impose a civil penalty payable to the state sufficient to deter similar conduct, not to exceed $25,000.00, and award any other relief the court deems just and proper.[10] For defendants who fail to negotiate in good faith, CPLR 3408 (k) specifies that at a minimum the court shall remove the case from the conference calendar, but cautions that in making a lack of good faith finding with respect to defendant homeowners, the court shall take into account "equitable factors," including but not limited to whether the defendant was represented by counsel. This is important recognition of the disparity in bargaining power at settlement conferences, where foreclosing lenders are among the world's largest financial institutions and are always represented by counsel, while defendants are among the most vulnerable, and often are left to fend for themselves without access to counsel or understanding of the court proceedings in which they find themselves.

[9] *See, e.g., U.S. Bank N.A. v. Smith,* 123 AD3d 914 (2nd Dep't 2014); U.*S. Bank N.A. v. Williams*, 121 AD3d 1098 (2nd Dep't 2014); *Federal National Mortgage Assoc. v. Singer and Bank of America, N.A. v. Singer*, NYLJ 1202732561020 (New York Co. Index No. 850039/2011 July 15,2015).

[10] CPLR 3408 (j).

With the implementation of settlement conferences, what was formerly a proceeding that took place on default, without any participation by homeowner defendants, has been transformed into a process in which homeowners have become engaged with the process, as homeowners lacking access to counsel or the wherewithal to answer a summons and complaint are nonetheless able to—and do—appear in court for settlement conferences when they receive notice from the court of a scheduled conference date.[11] But homeowners who have participated in conferences and believed they had "answered" by attempting to negotiate a settlement in court and complying with onerous application processes and documentation requests from their mortgage servicers have, upon exhaustion of settlement conferences, been prevented by the courts from submitting answers and litigating their cases on the merits. [12]

CPLR 3408(l) now obligates the Court, at the first settlement conference, if the defendant has not filed an answer or a pre-answer motion to dismiss, to advise the defendant of the requirement to answer the complaint, to explain

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[11] *See 2015 Report of the Chief Administrator of the Courts,* State of New York Unified Court System Report Pursuant to Chapter 507 of The Laws of 2009 , December 17, 2015, available at http://pdfserver.amlaw.com/nylj/2015%20Foreclosure%20Report.pdf (reporting increasing percentages of borrower representation at settlement conferences).

[12] *See generally* Lynn Armentrout, *Foreclosed Homeowners Foreclosed From Telling Their Stories, 3/16/16, New York Law Journal, available at* http://www.newyorklawjournal.com/id=1202752251907?keywords=Foreclosed+Homeowners+Foreclosed+From+Telling+Their+Stories+&publication=New+York+Law+Journal

what "answering" a complaint in court entails, to advise the defendant that the ability to contest the foreclosure and assert defenses may be lost if an answer is not interposed, and to provide information about available resources for foreclosure prevention assistance.

A new subsection (m) of CPLR 3408 overrules much of the appellate case law effectively barring non-answering defendants who participated in settlement conferences from vacating defaults and interposing late answers, providing that a defendant who has defaulted in answering but appears at settlement conferences is presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed waived, within 30 days of the initial appearance at a settlement conference, and with the defendant's default being deemed vacated upon service of such late answer.[13] This will spare the courts the need to adjudicate motions for leave to vacate defaults and for leave to serve late answers, which currently flood the dockets of both the trial and intermediate appellate courts.

Subsection (m) of CPLR 3408 also codifies existing practice under the Uniform Court Rules,[14] specifying that motions submitted by plaintiff or

[13] CPLR 3408(m).
[14] Uniform Rules for the Supreme Court and the County Court § 202.12-a (c) (7).

defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with CPLR 3408 or its implementing rules. This subsection makes clear that parties participating in the settlement conference process have redress for violations of the settlement conference law even if other motion practice pertaining to the case is held in abeyance (and even if they have not answered the complaint).

Foreclosure Predicate Notice Amendments and Consumer Bill of Rights

A salient feature of New York's residential judicial foreclosure process is the predicate notices provided to homeowners both *before* a foreclosure action can be commenced (the 90 Day Notice required by RPAPL 1304) and the Help for Homeowners in Foreclosure Notice that must accompany the summons and complaint (mandated by RPAPL 1303), both of which are conditions precedent, which, if not strictly complied with, mandate dismissal of the foreclosure action.[15] Both of these notices, among other things, provide homeowners with basic information about the consequences of foreclosure and are meant to connect

[15] *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).

homeowners with foreclosure prevention services and to encourage foreclosure-avoiding loss mitigation efforts.

The amendments to RPAPL 1304 update the language of the 90 Day Notice to better provide delinquent borrowers with notice of the amount required to bring their loan current and to be consistent with Consumer Financial Protection Bureau mortgage servicing rules barring dual tracking.[16] The amended notice also updates the information provided about housing counseling resources to reflect changes in where such information can be found since RPAPL 1304 was first enacted.[17]

Some homeowners are confused by receipt of the 90-Day Notice, believing that it is a notice of foreclosure or an eviction notice. The amended notice makes clear that it is *not* an eviction notice and that the homeowner *remains* the owner of the home, that a foreclosure action has not yet started, and that the homeowner remains responsible for the property.[18] The notice need only be provided once in a 12-month period to the same borrower in connection with the same loan and the same delinquency, but it is now clarified that if a borrower

[16] RPAPL 1304 (1).
[17] *Id.* The statute also now requires that the notice provide a current list of at least five housing counseling agencies serving the county where the property is located from a listing maintained by the Department of Financial Services and requires the Department of Financial Services to maintain a list, by county, of housing counseling agencies. RPAPL 1304 (2).
[18] RPAPL 1304 (1).

cures a delinquency following a 90-Day Notice but then re-defaults within the 12 month period, the lender must provide a new notice.[19]

Finally, the amendments to RPAPL 1304 now impose an obligation to provide the 90-Day Notice in languages other than English for any borrower known to have limited English proficiency, provided that the borrower's native language is one of the six most common non-English languages spoken by individuals with limited English proficiency in New York State, based on United States census data. The amendments further require the Department of Financial Services to post the notice in such languages on its website, relieving foreclosing lenders of any burden to translate the notice.[20]

Amendments to the Help For Homeowners in Foreclosure required to be served with the foreclosure summons and complaint pursuant to RPAPL 1303 also aim to clarify the homeowners' rights and obligations while the foreclosure case is pending, making clear to borrowers that they are not required to vacate their home by virtue of the commencement of the foreclosure action, that they have the right to remain in their home until the property is sold at auction, and cautioning that borrowers in foreclosure remain responsible for the maintenance

[19] RPAPL 1304 (4).
[20] RPAPL 1304(5).

of their homes and for payment of property taxes while the foreclosure action is pending.[21]

A new Section 3-a of RPAPL 1303 directs the Department of Financial Services to publish a Consumer Bill of Rights detailing the rights and responsibilities of parties to foreclosure proceedings, and to update such bill of rights annually, as needed.[22] This bill of rights, furthermore, is now required to be provided to foreclosure defendants at the first settlement conference, pursuant to CPLR 3408(l).

Conclusion

Taken together, all these changes represent significant enhancements to the consumer protections already incorporated into New York's residential judicial foreclosure process. The improved predicate notices will provide better information to distressed homeowners and foster hope for earlier and more effective intervention to divert foreclosures from the courts altogether. Since their inception in 2009, settlement conferences have allowed thousands of New York homeowners to achieve settlements and loan modifications, thereby averting foreclosures and sparing New York's communities their adverse effects.

[21] RPAPL 1303 (3).
[22] RPAPL 1303 (3-a).

But many homes have been needlessly lost to foreclosure because of unproductive settlement conferences around the state, with erratic implementation of the law leading to dramatic variations in the efficacy of settlement conferences across the state.[23] These amendments fill many of the gaps that the original legislation left open, so there is now hope that the settlement conference law will be more rigorously implemented in all jurisdictions, with consequences when it is violated, and the legislature's intent to prevent avoidable foreclosures and encourage home-saving loan modification solutions more effectively implemented across New York State.

[23] *See Divergent Paths: The Need For More Uniform Standards and Practices in New York State's Residential Foreclosure Conference Process* (New Yorkers for Responsible Lending), available at http://www.legalservicesnyc.org/storage/PDFs/divergent%20paths.pdf