New York State Foreclosure Defense Bar

THE ONGOING FORECLOSURE CRISIS

OVERVIEW OF THE CRISIS AND THE JUDICIAL CLIMATE

5/1/2016

New York law states that foreclosures involving one- to four-family homes should be resolved whenever possible pursuant to CPLR 3408, as an alternative to litigation, motions practice, and foreclosure auctions, pursuant to the legislative mandate, intent, spirit and directive. The current judicial climate is leading to a different course and result for New York families and communities.

NEW YORK STATE LAW AND POLICY

The law states that foreclosures involving one- to four-family homes should be resolved whenever possible under CPLR 3408, as an alternative to litigation, motions for summary and default judgments, and foreclosure auctions pursuant to the legislative mandate, intent, spirit and directive. If this resolution option is not achievable by the parties, after good-faith effort, then the protections in the New York State Constitution, real property law, and the civil practice law and rules are applicable to protect homeowners from the taking of their properties without due process of law or by a person or entity that has not proven its right to enforce the mortgage note/debt..

The Ongoing Crisis

In the last decade there has been a persistent increase in foreclosure cases in New York. The foreclosure filing rate in some parts of the City was higher than the national rate. The foreclosure crisis followed a large increase in subprime mortgages. In New York State, the number of subprime mortgages grew by 83.8 percent from 2004 to 2006, and the subprime share of mortgages doubled to 28 percent.

The State's foreclosure filing rate more than doubled between 2006 and 2008, to 6.3 filings per 1,000 households. Between 2006 and 2009, the number of foreclosure filings in New York City rose by 31.7 percent to 22,886. The borough of Queens had the largest number of foreclosure filings (8,964), followed by Brooklyn (7,108), the Bronx (3,000), Staten Island (2,646), and Manhattan (1,168).

There are approximately to 12,000 properties in Brooklyn, New York (Kings County) that are in some stage of foreclosure proceedings. In March of 2016, the number of properties that received a foreclosure filing in Brooklyn, New York was 27% higher than the previous month and 9% higher than the same time last year. **There are approximately 4,000 properties in Bronx, New York (Bronx County) that are in some stage of foreclosure of foreclosure proceedings.** In March 2016, even though the number of properties that received a foreclosure filing in Bronx County was 12% lower than the previous month, the filings were 3% higher than the same time last year. **There are close to 5,000 properties in Staten Island, New York (Richmond County) that are in some stage of foreclosure proceedings .** In March of 2016, the number of properties that received a foreclosure filing in Richmond County was 75% higher than the previous month, even though the number was 24% lower than the same time last year. **There are approximately 1500 properties in Manhattan, New York (New York County) that are in some stage of foreclosure proceedings.** In March of 2016, the number of properties that received a foreclosure filing in New York County was 20% higher than the previous month, even though the number was 22% lower than the same time last year.

New York State, as a judicial foreclosure state, requires the foreclosing plaintiff to commence a mortgage foreclosure proceeding to collect on a promissory note, through sale of the related property. Under the federal law (the U.S. Consumer Financial Protection Act), servicing rules that went into effect January 10, 2014, the mortgage servicer must wait until the borrower is 120 days delinquent before commencing a foreclosure action, in order to give the borrower sufficient time to explore loss mitigation opportunities, if the borrower previously submitted a loan modification application, and prohibits dual tracking, among other guidelines and tools for to save homeownership. This federal rule is consistent with the spirit of RPAPL 1304, RPAPL 1303 and CPLR 3408, as adopted and expanded by the New York State Legislature in 2008 and 2009, respectively, to wit: to resolve foreclosure cases through a loan modification work out or other form of settlement, whenever possible, to save homeownership, and to curtail the destabilization of local, residential communities.

CURRENT MARKET AND JUDICIAL CLIMATE

The foreclosure crisis is ongoing for working families, with a disproportionate, adverse impact on communities of color. The recent report by the Office of the New York State Comptroller confirms that the crisis continues. Relatedly, working-family communities are experiencing the moral hazard of a foreclosure crisis that is exacerbated by the continuous submission of false or fraudulent pleadings and affidavits in foreclosure proceedings, lack of good-faith negotiations and low modification rates in foreclosure settlement conferences , and undue influence on the courts by foreclosing plaintiffs, and the lending and servicing institutions with decision-making over the home loans that are or were bundled into securitized mortgage trusts.

As reported by Sheila Blair, the former Federal Deposit Insurance Corporation (FDIC) Chairwoman, the Federal National Mortgage Association ("Fannie Mae") became the "*the biggest holder of the Triple-A subprime mortgage-backed securities,"* following the application of federal funds to bailout Wall Street Investment Banks at the onset of the financial and credit crisis is 2008. In other words, Fannie Mae, as a private, foreclosing party, has been the main decision maker on loan modification applications for millions of homeowners across the United States since 2009, while at the same time being what Judge Arthur Schack (deceased) found to be the Wizard Behind the Curtain in directing dual tracking of foreclosures and circumventing of New York state laws to secure foreclosure judgments..

More recently, Fannie Mae and Freddie Mac have attempted to and may have succeeded at influencing foreclosure and settlement conference proceedings and procedures between 2015 and 2016. Federal National Mortgage Association (Fannie Mae) is the named plaintiff in thousands of foreclosure cases across New York State. Where Fannie Mae is not named as plaintiff, it is the entity to which plaintiffs' attorneys refer as the "investor" with decision making over loan modification applications. Inexplicably, the current judicial climate accommodates Fannie Mae's positions in settlement conference and foreclosure proceedings across New York State (which is, to streamline the judicial process and move residential foreclosures to judgment and auction).

The experiences of NYSFDB attorneys practicing before State Courts: Despite the fact that the New York State Legislature has passed fair and stringent laws that clearly mandate enhanced due process and fairness for foreclosure proceedings, with the intent of preserving homeownership and prevent destabilization in local, residential communities, the following has evolved into the norm in court rooms across the state:

- New York State courts' inconsistency in applying the goals and tenets of CPLR 3408, imposition of a four-settlement-conference rule, and institution of special "foreclosure resolution parts" to streamline the CPLR 3408 and judicial foreclosure process (by instituting summary foreclosure proceedings), adds up to a court-initiated process that the New York State constitution or real property laws (the "court's autonomously legislated proceedings");

The 2016 Report by New Yorkers for Responsible Lending confirms that:

- New York State courts have not adopted strong, uniform, statewide rules to ensure that settlement conferences are administered efficiently and fairly across the state (through court-directed and managed mediation);
- courts must implement and enforce the settlement conference process more uniformly and consistently across the state; among other things.

Even though due process requires strict adherence by state courts with New York State Constitution, and the laws and rules promulgated by the legislature in foreclosure civil proceedings, the burden of its application has been shifted to homeowners, unconstitutionally (and without precedent).

- The courts' autonomously legislated ("quasi-summary") foreclosure proceedings are not merely in contravention to the New York State Constitution, and the due-process-notice and good-faith-participation-requirements enacted by the New York State Legislature, these quasi-summary foreclosure proceedings have encouraged and facilitated an overall climate that permits foreclosing plaintiffs to participate in a limited number of settlement conferences with obvious lack of good faith more often than not and with confidence that motion practice is being dual tracked and streamlined to achieve judgments and auctions on otherwise inadmissible evidence;

- the arena for foreclosure proceedings presently advanced by the courts are generally prejudicial to homeowners rights, and are hostile or otherwise unaccommodating proceedings to homeowners, especially to *pro se* litigants;

- the court's administration and personnel have opened themselves, court rooms and settlement conference proceedings to undue influence by the plaintiffs' bar and their private clients that are plaintiffs in foreclosure action (and in particular Fannie Mae and Freddie Mac), to the detriment of the statutory intent and the overall governmental policies to save homeownership whenever possible, to guard against community destabilization, and to reduce the volume of foreclosure judgments and auctions with CPLR 3408 settlement conferences;

- the fraud on the courts and homeowners that was orchestrated prior to October 2010, utilizing robo-signed assignments in mortgage foreclosure actions, has now morphed into fraud on the courts and homeowners utilizing fraudulent, inadmissible (hearsay) affidavits that are insufficient to prove the chain of ownership of the mortgage note from the loan originator to the foreclosing plaintiff; and, most significant;

- the courts have signaled, through various decisions, a court-adopted policy of moving cases to judgments and auctions on the basis of affidavits and papers that do not meet the constitutional requirements for proof of service of the Due Process Notices, proof of claim or ownership of the mortgage note; a court-adopted policy of shifting the burden of proof to homeowner defendants (in place of the historic burden of proof that plaintiff are plead and prove their claims) to be awarded judgment in any civil action.

* * *

On the date that a plaintiff initiates a foreclosure action by the filing of a summons and complaint, Section 1304 of the New York State Real Property Actions & Proceedings Law ("RPAPL"") requires that that foreclosing plaintiff must have served the notice required thereunder, at the time, in the form and manner required thereunder. Similarly, at the time of service of the summons and complaint on the homeowner defendant and any tenants residing in the property, Section 1303 and Section 1304(5) of the RPAPL require service of additional notices on the defendants. Historically, the note and mortgage that are the subject of the foreclosure require the

service of a default notice and intent-to-foreclose notice on the borrower in advance of commencement of the foreclosure action.

Each of these separate notices are integral parts of the due process protections afforded New York real property, homeowners, and are grounded in Article 4 of the New York State Constitution. In keeping with the legislative intent and mandate, New York courts have correctly held that these mandatory, pre-foreclosure notices are jurisdictional in nature that the burden of proof is on the foreclosing plaintiff, and that failure to prove service of any of these notices with admissible evidence, results in dismissal of the action (collectively "NY Due Process Notice Protections").

For all foreclosure actions involving owner-occupied properties, New York law requires the court to hold a mandatory settlement conference within 60 days of the filing of the proof of service with the court clerk (The "CPLR 3408 Due Process Protections").

CPLR 3408 Due Process Protections require that courts promptly send to the parties a notice scheduling a settlement conference to be held within 60 days after the date of the filing of the request for judicial intervention, in the form on a form prescribed by the Chief Administrator, setting forth, among other things, "the purpose of the conference, the requirements of CPLR Rule 3408, instructions to the parties on how to prepare for the conference, and what information and documents to bring to the conference."

The CPLR 3408 Due Process Protections require the court to send the plaintiff's request for judicial intervention to a housing counseling agency or agencies on the list compiled and published by the New York State Department of Financial Services (CPLR 3408(d)). This additional notice requirement is to ensure that the homeowner is aware of housing counseling and foreclosure prevention services and options available to him or her.

CPLR 3408 Due Process Protections also require that identification of the legal owner of the note and mortgage by the plaintiff, if the legal owner is not the plaintiff (CPLR 3408(e)).

CPLR 3408(e) requires that the defendants appear at the conference with proof of income and other supporting documents with respect to his or her application for a workout, and

CPLR 3408(f) requires good-faith participation by both sides (CPLR 3408(f)). The primary purpose of the conference (specified in CPLR 3408(b)), is to facilitate settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents. **This purpose is consistently ignored by the courts, the foreclosing plaintiffs, their loan servicers and their attorneys that appear and participate in settlement conferences without knowledge or authority to settle the action in the 3408 arena.**

The related purpose of the conference (specified in CPLR 3408(b)), is to determine whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to.

The Courts consistently have taken a hands-off approach to this requirement.

CPLR 3408(c) requires that if the parties appear by counsel, such counsel must be fully authorized to dispose of the case.

The Courts have consistently failed to impose this requirement.

CPLR 3408(b) requires that if the defendant appears at the conference without counsel, the court shall treat the defendant as having made a motion to proceed as a poor person and shall determine whether permission to so appear shall be granted pursuant to the standards set forth in CPLR 1101.

The Courts have failed to put any mechanism in place to attend to this requirement.

Even though CPLR 3408(f) requires that parties shall engage in settlement discussions in good faith to reach a mutually agreeable resolution, including a loan modification if possible and that "***the court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner***", this legislative mandate is consistently disregarded by the courts.

Even though CPLR 3408 requires the identification of the legal owner of the note, **the courts have held that this requirement is inapplicable where the homeowner has not served a timely answer at the commencement of the action (if served)**.

For *pro se* homeowners especially, the concept that appearances in settlement conferences and inquiries about the owner of the loan do not protect them as intended under CPLR 3408(f) or under the Due Process Notice Protections overall, was best summarized by Lynn Armentrout, the former director of the New York City Bar Justice Center's Foreclosure Prevention Network, in the recent article entitled "Foreclosed Homeowners Foreclosed From Telling Their Stories" (attached at TAB I). The article aptly explains the confusion and dilemma facing homeowners who do not understand the difference between appearing in the action and personally appearing in court; who do not answer the complaint within the relatively short statutory time limit. Courts consistently hold that homeowners are barred from exercising the right provided in CPLR 3408 for identity of the legal owner of the mortgage note in settlement conferences once an answer is not in the record):

> *"what do you mean by answer the complaint?" The story was almost always the same: the defendant had no idea how to prepare an answer, could not afford a lawyer, and did not have timely access to free legal assistance. The defendants' solutions were also consistent they usually called the plaintiff's lawyer or their mortgage servicer. The outcome of those calls was never a timely answer.*
>
> *Nationally, the vast majority of individual defendants sued for consumer debt, fail to answer the complaint. It is widely recognized that most individuals (and certainly individuals in economic distress) cannot afford to hire private lawyers and do not have free legal services available to them. When a response to the summons requires preparing and serving a pleading, as it does in a foreclosure action, the unrepresented defendant will almost certainly default.*
>
> *Notwithstanding this reality, recent decisions from the Appellate Division, Second Department, have imposed a strict standard for what constitutes a reasonable excuse sufficient to vacate a homeowner's default. Not only does the court routinely affirm lower court orders denying motions to vacate defaults, it routinely reverses orders granting the motions—13 to date. Research shows that the Second Department has found only one excuse for a homeowner's default reasonable—"law office failure"—and only in one instance.* Deutsche Bank Nat'l Trust Co. v. Luden, *91 A.D.3 701 (2d Dept. 2012).*
>
> *This is a troubling trend given that the Second Department oversees four of the counties that are hardest hit with foreclosures—Brooklyn, Nassau, Suffolk, and Rockland—and it by far decides the largest volume of foreclosure appeals.*
>
> *The trend is also at odds with the state's efforts to prevent foreclosures. When the foreclosure crisis hit in 2008, the default rate had historically been at 90 percent. Concerned about this high rate in light of the sharp increase in foreclosure filings that*

year, the Office of Court Administration implemented a pilot project in Queens providing for settlement conferences in foreclosure actions involving subprime loans; the conferences were designed to get homeowners to participate in the foreclosure case, with the goal of avoiding foreclosures where possible. As a result of legislative action, by 2009 these settlement conferences were mandated in all residential foreclosure actions.

The mandatory settlement conferences turned the default rate upside down: as of 2010, only 20 percent of homeowners failed to appear for their settlement conferences. Why do the vast majority of defendants default in answering the complaint but not in appearing at the settlement conference? The answer is obvious. The court sends the defendant a notice of the settlement conference, and the defendant has only to show up at the date, time and place given. Most people know how to show up for an appointment. No lay person has a clue as to how to prepare a legal pleading.

The disparity in the default rate between serving a written legal pleading (very high) and appearing at conferences (very low) reveals a systemic problem. Clearly, most defendants want to try to save their homes. Lack of access to justice is a recognized problem threatening the integrity of the legal system. The high rate, nationally, of consumer defendant defaults shows that the problem is not one of individual moral failing. But rather than recognize that defaults in foreclosure cases are part of a systemic problem, warranting the application of a liberal standard for vacating them, the Second Department so narrowly defines what constitutes a "reasonable excuse" sufficient to vacate the default that virtually no homeowner can satisfy the test.

An illustrative example of the court's approach is Chase Home Finance v. Minott, *115 A.D.3d 634 (2d Dep't 2014). There the court found unreasonable the homeowner's excuse that she did not know she needed to answer the complaint and relied on the advice of her real estate broker instead of consulting an attorney. "This was especially so," the court held, "in view of the fact that the summons … contained the specific language mandated by RPAPL 1320 warning her to 'speak to an attorney or go to court,' and that she 'must respond by serving a copy of her answer' or risk the loss of her home."*

Read more (attached hereto at Tab I and at):
http://www.newyorklawjournal.com/id=1202752251907/Foreclosed-Homeowners-Foreclosed-From-Telling-Their-Stories#ixzz48C6zzAEO.

CONCLUSION

Indeed, while the mortgage industry and foreclosing parties complain regularly to regulators, legislators and publicly about the length of New York State's judicial foreclosure process, these complaints fail to mention that the foreclosing plaintiffs – national banks as trustees for RMBS securitized trusts, regional banks, mortgage loan services, hedge-fund or private-market investors that purchased loans from Fannie Mae, Freddie Mac or HUD, and their attorneys -- are largely responsible for prolonging the process by disregarding and violating the requirements of CPLR 3408, the federal government's Make Home Affordable Modification Program (HAMP), and the due process pre-foreclosure notices required under New York law.

As a starting point in the 2016 New York State Legislative session, the proposals to further amend CPLR 3408 -- to address the problems identified by NYSFDB and New Yorkers for Responsible Lending -- are urgently needed to save homeownership in 2016, as intended by the Legislature in 2008 and 2009. Adoption of laws and proposals that achieve the tenets of the standing bills are of similar priority.

In addition, NYSFDB is sounding an alarm with its call for regulatory action and governmental oversight, in order to improve the Court's administration of settlement conferences; to curb the influence of Fannie Mae, Freddie Mac and other private-party investors on state courts and the judiciary; to preserve the due process protections afforded to New York homeowners by its Legislature; and to preserve New York state's judicial foreclosure process.

In the current climate, NYSFDB respectfully submits that these initiatives are priorities. The overall concern of the homeowner and legislative community is that a significant percentage of working families, and families of color especially, will be divested of properties and displaced from communities without due process of law, without the protections of CPLR 3408, and in spite of the statutory directive of the New York State Legislature.

NEW YORK STATE FORECLOSURE DEFENSE BAR

MAY 10, 2016