S T A T E O F N E W Y O R K

5636

2011-2012 Regular Sessions

I N S E N A T E

June 8, 2011

Introduced by Sen. KLEIN -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to residential foreclosure actions; and to amend the real property actions and proceedings law, in relation to standing to commence an action to foreclose a mortgage

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision (a) of rule 3212 of the civil practice law and rules, as amended by chapter 492 of the laws of 1996, is amended and a new subdivision (j) is added to read as follows:

(a) Time; kind of action. [Any] EXCEPT AS OTHERWISE PROVIDED IN THIS RULE, ANY party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown. IN ANY RESIDENTIAL FORECLOSURE ACTION INVOLVING A HOME LOAN, TO WHICH SECTION THIRTEEN HUNDRED FOUR OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW APPLIES, IN WHICH THE DEFENDANT IS A RESIDENT OF THE PROPERTY SUBJECT TO FORECLOSURE, A MOTION FOR SUMMARY JUDGMENT SHALL BE DENIED UNLESS AND UNTIL A MANDATORY SETTLEMENT CONFERENCE HAS BEEN HELD PURSUANT TO RULE 3408 OF THIS CHAPTER, AND THE COURT HAS CONCLUDED THAT NO FURTHER SUCH CONFERENCES SHOULD BE SCHEDULED IN AN ATTEMPT TO RESOLVE THE MATTER IN ACCORDANCE WITH SUCH RULE.

(J) STANDARDS FOR SUMMARY JUDGMENT IN CASES INVOLVING RESIDENTIAL FORECLOSURE. A MOTION FOR SUMMARY JUDGMENT IN AN ACTION INVOLVING A HOME LOAN, TO WHICH SECTION THIRTEEN HUNDRED FOUR OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW APPLIES, IN WHICH THE DEFENDANT IS A RESIDENT OF THE PROPERTY SUBJECT TO FORECLOSURE, SHALL NOT BE GRANTED TO A

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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PLAINTIFF SEEKING TO FORECLOSE UPON A MORTGAGE OR A NOTE, UNLESS THE PLAINTIFF HAS SET FORTH IN AN AFFIDAVIT BY A PERSON WITH KNOWLEDGE OF THE FACTS AS REQUIRED BY SUBDIVISION (B) OF THIS RULE:

1. THAT PLAINTIFF HAS DEMONSTRATED THAT IT HAS SATISFIED ITS OBLIGATION TO DEAL WITH DEFENDANT IN GOOD FAITH AS REQUIRED BY THE IMPLIED COVENANT OF FAIR DEALING AND GOOD FAITH CONTAINED WITHIN THE MORTGAGE, IN ITS DEALINGS WITH THE DEFENDANT BOTH PRIOR AND SUBSEQUENT TO DEFENDANT'S EXECUTION OF THE MORTGAGE AND NOTE, THROUGH COMMENCEMENT OF THE INSTANT ACTION, INCLUDING BUT NOT LIMITED TO ANY INDUCEMENTS TO EXECUTE SAME, AND ANY MODIFICATION SOUGHT BY DEFENDANT TO SAID MORTGAGE AND/OR NOTE;

2. THAT PLAINTIFF HOLDS, OWNS AND PHYSICALLY POSSESSES THE NOTE AND THE MORTGAGE;

3. THAT PLAINTIFF CAN DEMONSTRATE THE CHAIN OF CUSTODY OF BOTH THE NOTE AND THE MORTGAGE FROM THE TIME SAME WAS EXECUTED BY THE DEFENDANT, THROUGH TO THE TIME OF COMMENCEMENT OF THE INSTANT ACTION;

4. THAT PLAINTIFF HAS STANDING TO BRING THE INSTANT ACTION;

5. THAT PLAINTIFF POSSESSES CAPACITY TO BRING THE INSTANT ACTION; AND

6. THAT PLAINTIFF HAS ATTENDED A MANDATORY SETTLEMENT CONFERENCE AS REQUIRED BY RULE 3408 OF THIS CHAPTER, AND HAS NEGOTIATED IN GOOD FAITH, AT ALL TIMES, INCLUDING ANY ADJOURNED DATES, IN ATTEMPTING TO REACH A MUTUALLY AGREEABLE RESOLUTION AS REQUIRED BY SUBDIVISION (F) OF SUCH RULE.

S 2. Subdivision (f) of section 3215 of the civil practice law and rules, as amended by chapter 453 of the laws of 2006, is amended to read as follows:

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. IN AN ACTION ARISING OUT OF AN ACTION INVOLVING A HOME LOAN, TO WHICH SECTION THIRTEEN HUNDRED FOUR OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW APPLIES, IN WHICH THE DEFENDANT IS A RESIDENT OF THE PROPERTY SUBJECT TO FORECLOSURE, THE APPLICANT SHALL INCLUDE AN AFFIDAVIT FROM A PERSON WITH KNOWLEDGE OF THE FACTS:

1. THAT PLAINTIFF HAS DEMONSTRATED THAT IT HAS SATISFIED ITS OBLIGATION TO DEAL WITH DEFENDANT IN GOOD FAITH AS REQUIRED BY THE IMPLIED CONVENT OF FAIR DEALING AND GOOD FAITH CONTAINED WITHIN THE MORTGAGE, IN ITS DEALINGS WITH THE DEFENDANT BOTH PRIOR AND SUBSEQUENT TO DEFENDANT'S EXECUTION OF THE MORTGAGE AND NOTE, THROUGH COMMENCEMENT OF THE INSTANT ACTION, INCLUDING BUT NOT LIMITED TO ANY INDUCEMENTS TO EXECUTE SAME, AND ANY MODIFICATION SOUGHT BY DEFENDANT TO SAID MORTGAGE AND/OR NOTE;

2. THAT PLAINTIFF HOLDS, OWNS AND PHYSICALLY POSSESSES THE NOTE AND THE MORTGAGE;

3. THAT THE PLAINTIFF CAN DEMONSTRATE THE CHAIN OF CUSTODY OF BOTH THE NOTE AND THE MORTGAGE FROM THE TIME SAME WAS EXECUTED BY THE DEFENDANT, THROUGH TO THE TIME OF COMMENCEMENT OF THE INSTANT ACTION;

4. THAT PLAINTIFF HAS STANDING TO BRING THE INSTANT ACTION;

5. THAT PLAINTIFF POSSESSES CAPACITY TO BRING THE INSTANT ACTION; AND

6. THAT PLAINTIFF HAS ATTENDED A MANDATORY SETTLEMENT CONFERENCE AS REQUIRED BY RULE 3408 OF THIS CHAPTER, AND HAS NEGOTIATED IN GOOD FAITH, AT ALL TIMES, INCLUDING ANY ADJOURNED DATES, IN ATTEMPTING TO REACH A MUTUALLY AGREEABLE RESOLUTION AS REQUIRED BY SUBDIVISION (F) OF SUCH RULE.

When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property and state its value. Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

S 3. Subdivisions (a) and (f) of rule 3408 of the civil practice law and rules, subdivision (a) as amended and subdivision (f) as added by chapter 507 of the laws of 2009, are amended to read as follows:

(a) In any residential foreclosure action involving a home loan [as such term is defined in section], TO WHICH SECTION thirteen hundred four of the real property actions and proceedings law APPLIES, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining 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, and for whatever other purposes the court deems appropriate.

(f) Both the plaintiff and defendant shall negotiate in good faith, AS REQUIRED BY THE IMPLIED COVENANT OF FAIR DEALING CONTAINED WITHIN THE MORTGAGE, to reach a mutually agreeable resolution, including a loan modification, if possible. THE DUTY TO NEGOTIATE IN GOOD FAITH SHALL CONTINUE THROUGHOUT THE PENDENCY OF THE ACTION.

S 4. Subdivision 1 of section 1302 of the real property actions and proceedings law, as amended by chapter 472 of the laws of 2008, is amended to read as follows:

1. Any complaint served in a proceeding initiated pursuant to this article relating to a high-cost home loan or a subprime home loan, as such terms are defined in section six-l and six-m of the banking law, respectively, must contain an affirmative allegation that at the time the proceeding is commenced, the plaintiff[:

(a) is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note; and

(b)] has complied with all of the provisions of section five hundred ninety-five-a of the banking law and any rules and regulations promulgated thereunder, section six-l or six-m of the banking law, and SUBDIVISION TWO OF SECTION THIRTEEN HUNDRED TWO-A AND section thirteen hundred four of this article.

S 5. The real property actions and proceedings law is amended by adding a new section 1302-a to read as follows:

S 1302-A. STANDING TO COMMENCE AN ACTION. 1. NO PERSON SHALL HAVE STANDING TO COMMENCE AN ACTION PURSUANT TO THIS ARTICLE UNLESS IT IS THE OWNER AND HOLDER OF THE SUBJECT MORTGAGE AND NOTE, OR HAS BEEN DELEGATED THE AUTHORITY TO INSTITUTE A MORTGAGE FORECLOSURE ACTION BY THE OWNER AND HOLDER OF THE SUBJECT MORTGAGE AND NOTE. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION (E) OF RULE THIRTY-TWO HUNDRED ELEVEN OF THE

CIVIL PRACTICE LAW AND RULES, ANY DEFENSE BASED ON THE PLAINTIFF'S LACK OF STANDING IN A FORECLOSURE PROCEEDING SHALL NOT BE WAIVED IF A DEFENDANT FAILS TO RAISE THE DEFENSE IN A RESPONSIVE PLEADING OR PRE-ANSWER MOTION TO DISMISS.

2. EVERY SUMMONS AND COMPLAINT TO COMMENCE A FORECLOSURE ACTION SHALL INCLUDE AN AFFIRMATIVE ALLEGATION THAT AT THE TIME THE PROCEEDING IS COMMENCED, THE PLAINTIFF IS THE OWNER AND HOLDER OF THE SUBJECT MORTGAGE AND NOTE, OR HAS BEEN DELEGATED THE AUTHORITY TO INSTITUTE A MORTGAGE FORECLOSURE ACTION BY THE OWNER AND HOLDER OF THE SUBJECT MORTGAGE AND NOTE. IN ADDITION, THE PLAINTIFF SHALL PLEAD IN ITS COMPLAINT THAT THE ORIGINALS OF THE SUBJECT MORTGAGE AND NOTE ARE IN ITS POSSESSION AND CONTROL, AND THAT SUCH PLAINTIFF IS OTHERWISE ENTITLED TO ENFORCE THE SUBJECT MORTGAGE AND NOTE PURSUANT TO LAW.

3. THERE SHALL BE FILED WITH EVERY SUMMONS AND COMPLAINT TO COMMENCE A FORECLOSURE ACTION:

(A) A COPY OF THE ORIGINAL SUBJECT MORTGAGE AND NOTE, AND PROOF OF THE OWNERSHIP THEREOF INCLUDING ALL ORIGINAL ENDORSEMENTS, ASSIGNMENTS AND TRANSFERS OF SUCH MORTGAGE AND NOTE; AND

(B) IF APPLICABLE, PROOF OF DELEGATION OF AUTHORITY FROM THE OWNER AND HOLDER OF THE SUBJECT MORTGAGE AND NOTE TO INSTITUTE A MORTGAGE FORECLOSURE ACTION ON BEHALF OF SUCH OWNER AND HOLDER.

4. THE COURT SHALL MAKE AN AFFIRMATIVE FINDING OF STANDING WHICH SHALL BE INCLUDED IN THE JUDGMENT OF FORECLOSURE AND SALE.

S 6. This act shall take effect immediately, provided that the amendments to subdivision (a) of rule 3408 of the civil practice law and rules, made by section three of this act, shall not affect the expiration and reversion of such subdivision and shall expire therewith, and provided, further, that section four of this act and subdivisions 2 and 3 of section 1302-a of the real property actions and proceedings law, as added by section five of this act, shall take effect on the ninetieth day after it shall have become a law.