

1298

2015-2016 Regular Sessions

I N   A S S E M B L Y

January 9, 2015

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Introduced by M. of A. WEINSTEIN -- read once and referred to the  
Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to manda-  
tory settlement conferences in residential foreclosure actions

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

1     Section 1. Rule 3408 of the civil practice law and rules, as added by  
2 chapter 472 of the laws of 2008, subdivision (a) as amended by chapter  
3 306 of the laws of 2013, subdivisions (d), (e), (f), (g) and (h) as  
4 added by chapter 507 of the laws of 2009, is amended to read as follows:  
5     Rule 3408. Mandatory settlement conference in residential foreclosure  
6 actions. (a) In any residential foreclosure action involving a home  
7 loan as such term is defined in section thirteen hundred four of the  
8 real property actions and proceedings law, in which the defendant is a  
9 resident of the property subject to foreclosure, plaintiff shall file  
10 proof of service within twenty days of such service, however service is  
11 made, and the court shall hold a mandatory conference within sixty days  
12 after the date when proof of service upon such defendant is filed with  
13 the county clerk, or on such adjourned date as has been agreed to by the  
14 parties, for the purpose of holding settlement discussions pertaining to  
15 the relative rights and obligations of the parties under the mortgage  
16 loan documents, including, but not limited to determining whether the  
17 parties can reach a mutually agreeable resolution to help the defendant  
18 avoid losing his or her home, and evaluating the potential for a resol-  
19 ution in which payment schedules or amounts may be modified or other  
20 workout options may be agreed to INCLUDING, BUT NOT LIMITED TO, LOAN  
21 MODIFICATIONS, "SHORT SALES" AND "DEEDS IN LIEU OF FORECLOSURE", and for  
22 whatever other purposes the court deems appropriate.  
23     (b) At the initial conference held pursuant to this section, any  
24 defendant currently appearing pro se, shall be deemed to have made a  
25 motion to proceed as a poor person under section eleven hundred one of

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

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1 this chapter. The court shall determine whether such permission shall be  
2 granted pursuant to standards set forth in section eleven hundred one of  
3 this chapter. If the court appoints defendant counsel pursuant to subdivi-  
4 sion (a) of section eleven hundred two of this chapter, it shall  
5 adjourn the conference to a date certain for appearance of counsel and  
6 settlement discussions pursuant to subdivision (a) of this section, and  
7 otherwise shall proceed with the conference.

8 (c) At any conference held pursuant to this section, the plaintiff  
9 shall appear in person or by counsel, and [if appearing by counsel, such  
10 counsel] PLAINTIFF'S REPRESENTATIVE AT CONFERENCE shall be fully author-  
11 ized to dispose of the case. The defendant shall appear in person or by  
12 counsel. If the defendant is appearing pro se, the court shall advise  
13 the defendant of the nature of the action and his or her rights and  
14 responsibilities as a defendant. Where appropriate, the court may permit  
15 a representative of the plaintiff OR THE BORROWER DEFENDANT to attend  
16 the settlement conference telephonically or by video-conference.

17 (d) Upon the filing of a request for judicial intervention in any  
18 action pursuant to this section, the court shall send either a copy of  
19 such request or the defendant's name, address and telephone number (if  
20 available) to a housing counseling agency or agencies on a list desig-  
21 nated by the division of housing and community renewal for the judicial  
22 district in which the defendant resides. Such information shall be used  
23 by the designated housing counseling agency or agencies exclusively for  
24 the purpose of making the homeowner aware of housing counseling and  
25 foreclosure prevention services and options available to them.

26 (e) The court shall promptly send a notice to parties advising them of  
27 the time and place of the settlement conference, the purpose of the  
28 conference and the requirements of this section. The notice shall be in  
29 a form prescribed by the office of court administration, or, at the  
30 discretion of the office of court administration, the administrative  
31 judge of the judicial district in which the action is pending, and shall  
32 advise the parties of the documents that they [should] ARE REQUIRED TO  
33 bring to the conference. For the plaintiff, such documents [should]  
34 SHALL include, but are not limited to, the payment history, an itemiza-  
35 tion of the amounts needed to cure and pay off the loan, [and] the mort-  
36 gage and note, CONTACT INFORMATION FOR AN AUTHORIZED REPRESENTATIVE OF  
37 THE PLAINTIFF FULLY AUTHORIZED TO DISPOSE OF THE CASE IF NOT APPEARING  
38 IN PERSON, AND FORMS AND DOCUMENTATION REQUIREMENTS FOR LOSS MITIGATION  
39 APPLICATION OPTIONS INCLUDING, BUT NOT LIMITED TO, A LOAN MODIFICATION,  
40 "SHORT SALE", AND "DEED IN LIEU OF FORECLOSURE". If the plaintiff is not  
41 the owner of the mortgage and note, the plaintiff shall provide the  
42 name, address and telephone number of the legal owner of the mortgage  
43 and note. For the defendant, such [documents] INFORMATION should  
44 include, but [are] IS not limited to, [proof of] current income [such as  
45 the two most recent pay stubs, most recent tax return and most recent  
46 property tax statements], EXPENSES, PROPERTY TAXES AND PREVIOUSLY  
47 SUBMITTED LOSS MITIGATION APPLICATIONS.

48 (f) Both the plaintiff and defendant shall negotiate in good faith to  
49 reach a mutually agreeable resolution, including a loan modification OR  
50 OTHER WORKOUT OPTION INCLUDING, BUT NOT LIMITED TO, "SHORT SALES" AND  
51 "DEEDS IN LIEU OF FORECLOSURE", if possible. COMPLIANCE WITH THE OBLI-  
52 GATION TO NEGOTIATE IN GOOD FAITH PURSUANT TO THIS SECTION SHALL BE  
53 MEASURED BY THE TOTALITY OF THE CIRCUMSTANCES INCLUDING, BUT NOT LIMITED  
54 TO, SUCH FACTORS AS (1) COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION  
55 AND APPLICABLE COURT RULES, COURT ORDERS AND DIRECTIVES; (2) COMPLIANCE  
56 WITH MORTGAGE SERVICING STANDARDS APPLICABLE TO THE MORTGAGEE AND ITS

1 AGENTS, WHETHER ESTABLISHED BY STATUTE, REGULATION, SETTLEMENT OR OTHER-  
2 WISE; AND (3) CONDUCT NOT DEMONSTRATING CONSTRUCTIVE EFFORTS TO REACH A  
3 MUTUALLY AGREEABLE RESOLUTION PRIOR TO, DURING AND AFTER THE RELEASE OF  
4 THE CASE FROM THE SETTLEMENT CONFERENCE PROCESS INCLUDING, BUT NOT  
5 LIMITED TO, CAUSING UNREASONABLE DELAY, FAILING TO APPEAR AT THE SETTLE-  
6 MENT CONFERENCE WITH AUTHORITY TO DISPOSE OF THE PROCEEDING, PROSECUTION  
7 OF FORECLOSURE PROCEEDINGS WHILE LOSS MITIGATION APPLICATIONS ARE PEND-  
8 ING ("DUAL TRACKING"), OR PROVIDING INACCURATE INFORMATION.

9 (g) The plaintiff [must] SHALL file a notice of discontinuance and  
10 vacatur of the lis pendens within [one hundred fifty] THIRTY days after  
11 any settlement agreement or loan modification is fully executed.

12 (h) A party to a foreclosure action may not charge, impose, or other-  
13 wise require payment from the other party for any cost, including but  
14 not limited to attorneys' fees, for appearance at or participation in  
15 the settlement conference.

16 (I) A DEFENDANT WHO APPEARS AT A SETTLEMENT CONFERENCE PURSUANT TO  
17 THIS SECTION, BUT WHO FAILED TO FILE A TIMELY ANSWER OR PRE-ANSWER  
18 MOTION TO DISMISS OR TO ENTER A FORMAL APPEARANCE, SHALL BE PRESUMED TO  
19 HAVE A REASONABLE EXCUSE FOR THE DEFAULT AND SHALL BE PERMITTED TO SERVE  
20 AND FILE AN ANSWER, OR TO MAKE A PRE-ANSWER MOTION TO DISMISS WITHOUT  
21 ANY SUBSTANTIVE DEFENSES DEEMED TO HAVE BEEN WAIVED, WITHIN THIRTY DAYS  
22 FOLLOWING THE RELEASE OF THE CASE FROM SETTLEMENT CONFERENCES. ANY NON-  
23 ANSWERING DEFENDANT SHALL BE PERMITTED TO SEEK RELIEF FOR VIOLATIONS OF  
24 THIS SECTION, AND SHALL NOT BE BARRED FROM SEEKING SUCH RELIEF ON THE  
25 GROUNDS THAT SUCH DEFENDANT HAS NOT APPEARED OR HAS DEFAULTED IN THE  
26 ACTION.

27 (J) MOTIONS SHALL BE HELD IN ABEYANCE WHILE SETTLEMENT CONFERENCES ARE  
28 BEING HELD PURSUANT TO THIS SECTION, EXCEPT THAT MOTIONS FOR RELIEF FOR  
29 VIOLATIONS OF THIS SECTION, OR ANY IMPLEMENTING COURT RULES, MAY BE MADE  
30 WHILE SETTLEMENT CONFERENCES ARE ONGOING.

31 (K)(1) COURTS ARE AUTHORIZED TO ENSURE COMPLIANCE WITH THE REQUIRE-  
32 MENTS OF THIS SECTION, AND ARE AUTHORIZED TO GRANT APPROPRIATE RELIEF  
33 WHEN PARTIES VIOLATE THIS SECTION. PENALTIES FOR VIOLATIONS OF THIS  
34 SECTION MAY BE IMPOSED CONSISTENT WITH THE COURT'S EQUITY JURISDICTION  
35 IN FORECLOSURE ACTIONS AND WITH SUBDIVISION (E) OF SECTION THREE THOU-  
36 SAND TWELVE-B AND SUBDIVISION (A) OF SECTION FIVE THOUSAND ONE OF THIS  
37 CHAPTER. REMEDIES FOR VIOLATIONS OF THE REQUIREMENTS OF THIS SECTION  
38 MAY INCLUDE, WITHOUT LIMITATION, (I) COMPELLING IN-PERSON ATTENDANCE OF  
39 A PARTY REPRESENTATIVE WITH FULL AUTHORITY TO RESOLVE THE MATTER; (II)  
40 COMPELLING PRODUCTION OF DOCUMENTS INCLUDING BUT NOT LIMITED TO DOCU-  
41 MENTS SUBSTANTIATING DECISIONS ON LOAN MODIFICATIONS OR RESTRICTIONS ON  
42 MODIFICATION ASSERTED BY PLAINTIFFS AS GROUNDS FOR DENIAL; (III) TOLLING  
43 AND/OR BARRING COLLECTION OF INTEREST, COSTS AND FEES ACCRUED DURING OR  
44 PRIOR TO THE SETTLEMENT CONFERENCE PROCESS; (IV) AWARDING DEFENDANTS'  
45 COSTS, ATTORNEYS' FEES AND DAMAGES; (V) STAYING THE PROCEEDING PENDING  
46 COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION; (VI) DENYING PLAINTIFF  
47 JUDGMENT PENDING COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION; AND  
48 (VII) ANY OTHER RELIEF THE COURT DEEMS APPROPRIATE AND TAILORED TO THE  
49 HARM OCCASIONED BY VIOLATION OF THE REQUIREMENTS OF THIS SECTION.

50 (2) ANY REFEREE OR JUDICIAL HEARING OFFICER SHALL BE AUTHORIZED BY THE  
51 COURT REFERRING THE MATTER TO SUCH REFEREE OR JUDICIAL HEARING OFFICER  
52 TO (A) ENSURE COMPLIANCE WITH ALL PROVISIONS OF THIS SECTION; (B) MAKE  
53 APPROPRIATE FACT FINDINGS, INCLUDING BUT NOT LIMITED TO DETERMINING  
54 WHETHER A PARTY FAILED TO APPEAR WITH THE REQUIRED AUTHORITY, FAILED TO  
55 NEGOTIATE IN GOOD FAITH, OR OTHERWISE ENGAGED IN ACTIVITY IN VIOLATION  
56 OF THIS SECTION; AND (C) MAKE REPORTS AND/OR RECOMMENDATIONS FOR RELIEF,

1 SUBJECT TO CONFIRMATION PURSUANT TO ARTICLE FORTY-TWO OF THIS CHAPTER BY  
2 MOTION AND WITHOUT NEED FOR AN EVIDENTIARY HEARING BEFORE AN INDIVIDUAL  
3 ASSIGNMENT SYSTEM OR SUPERVISING JUDGE.

4 S 2. This act shall take effect immediately and shall apply to actions  
5 pending or filed after such date; provided that the amendments to subdi-  
6 vision (a) of rule 3408 of the civil practice law and rules, made by  
7 section one of this act, shall not affect the expiration and reversion  
8 of such subdivision, and shall expire therewith.