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

1298

2015-2016 Regular Sessions

I N A S S E M B L Y

January 9, 2015

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 mandatory settlement conferences in residential foreclosure actions

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

Section 1. Rule 3408 of the civil practice law and rules, as added by chapter 472 of the laws of 2008, subdivision (a) as amended by chapter 306 of the laws of 2013, subdivisions (d), (e), (f), (g) and (h) as added by chapter 507 of the laws of 2009, is amended to read as follows:

Rule 3408. Mandatory settlement conference in residential foreclosure actions. (a) In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant 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 INCLUDING, BUT NOT LIMITED TO, LOAN MODIFICATIONS, "SHORT SALES" AND "DEEDS IN LIEU OF FORECLOSURE", and for whatever other purposes the court deems appropriate.

(b) At the initial conference held pursuant to this section, any defendant currently appearing pro se, shall be deemed to have made a 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.

LBD00119-01-5

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

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

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

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

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

AGENTS, WHETHER ESTABLISHED BY STATUTE, REGULATION, SETTLEMENT OR OTHERWISE; AND (3) CONDUCT NOT DEMONSTRATING CONSTRUCTIVE EFFORTS TO REACH A MUTUALLY AGREEABLE RESOLUTION PRIOR TO, DURING AND AFTER THE RELEASE OF THE CASE FROM THE SETTLEMENT CONFERENCE PROCESS INCLUDING, BUT NOT LIMITED TO, CAUSING UNREASONABLE DELAY, FAILING TO APPEAR AT THE SETTLEMENT CONFERENCE WITH AUTHORITY TO DISPOSE OF THE PROCEEDING, PROSECUTION OF FORECLOSURE PROCEEDINGS WHILE LOSS MITIGATION APPLICATIONS ARE PENDING ("DUAL TRACKING"), OR PROVIDING INACCURATE INFORMATION.

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

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

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

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

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

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

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

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