

5242

2015-2016 Regular Sessions

I N S E N A T E

May 8, 2015

Introduced by Sen. SAVINO -- 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 mandatory settlement conferences in residential foreclosure actions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, 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 resolu-
19 tion 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.