STATE OF NEW YORK

6143

2021-2022 Regular Sessions

IN ASSEMBLY

March 10, 2021

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

AN ACT to amend the civil practice law and rules, in relation to mandatory settlement conference in cooperative apartment unit foreclosure actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil practice law and rules is amended by adding a new rule 3410 to read as follows:

Rule 3410. Mandatory settlement conference in cooperative apartment unit foreclosure actions. (a) For purposes of this section "a cooperative apartment unit loan" means a loan secured by rights to a cooperative apartment required to receive an additional pre-disposition notice pursuant to subsection (f) of section 9--611 of the uniform commercial code.

In addition to such other notifications as may be required pursuant to the uniform commercial code, in any foreclosure action involving a cooperative apartment unit loan, in which the borrower is a resident of the property subject to foreclosure, the lender shall file a petition with the supreme court of the county in which the cooperative apartment is located stating the loan is in default and the reason for the default.

The petition must be served on the borrower pursuant to section three hundred eight of this chapter. The lender shall file proof of service within twenty days of such service and the court shall hold a mandatory conference within sixty days after the date when proof of service upon the borrower 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 loan documents, including, but not limited to:

1. determining whether the parties can reach a mutually agreeable resolution to help the borrower avoid losing their home, and evaluating

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

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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, a loan modification or any other loss mitigation option; or

2. whatever other purposes the court deems appropriate.

(b) At the initial conference held pursuant to this section, any borrower currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person under section eleven hundred one of 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 rule, the lender and the borrower shall appear in person or by counsel, and each party's representative at the meeting shall be fully authorized to dispose of the matter. If the borrower is appearing without counsel, the court shall inform the borrower of the nature of the action and his or her rights and responsibilities. Where appropriate, the court may permit the borrower or a representative of the borrower or the defendant to attend the settlement conference telephonically or by video-conference.

(d) Upon the filing of a request for judicial intervention in any action brought pursuant to this section, the court shall send either a copy of such request or the borrower'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 borrower resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the borrower 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 meeting, the purpose of the meeting and the requirements of this rule. The notice shall be in a form prescribed by the court, and shall advise the parties of the documents that they shall bring to the conference.

1. For the lender, such documents shall include, but are not limited to: (i) the payment history; (ii) an itemization of the amounts needed to cure and pay off the loan; (iii) the mortgage and note or copies of the same; (iv) standard application forms and a description of loss mitigation options, if any, which may be available to the borrower; and (v) any other documentation required by the presiding judge. If the lender is not the owner of the mortgage and note, the lender shall provide the name, address and telephone number of the legal owner of the mortgage and note. For cases in which the lender or its servicing agent has evaluated or is evaluating eligibility for home loan modification programs or other loss mitigation options, in addition to the documents listed above, the lender shall bring a summary of the status of the lender's or servicing agent's evaluation for such modifications or other loss mitigation options, including, where applicable, a list of outstanding items required for the borrower to complete any modification application, an expected date of completion of the lender's or servicer agent's evaluation, and, if the modification or modifications were denied, a denial letter or any other document explaining the reason or reasons for denial and the data input fields and values used in the net

present value evaluation. If the modification was denied on the basis of an investor restriction, the plaintiff shall bring the documentary evidence which provides the basis for the denial, such as a pooling and servicing agreement.

2. For the borrower, such documents shall include, but are not limited to, if applicable, information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge.

(f) Both the lender and the borrower shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a re-payment agreement, or any other loss mitigation, if possible. Compliance with the obligation to negotiate in good faith pursuant to this rule shall be measured by the totality of the circumstances, including but not limited to the following factors:

1. compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;

2. compliance with applicable lending mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications; and

3. conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the matter, avoiding moving forward with a judicial or a non-judicial foreclosure proceeding while loss mitigation applications and attempts are pending, and providing accurate information to the court and parties.

Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

(g) The lender must file a notice of discontinuance within ninety days after any settlement agreement or loan modification has been fully executed or a determination by the court that the settlement foreclosure conference process has concluded if the lender elects to use the non-judicial foreclosure method.

(h) A party to a default 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 process.

(i) The court may determine whether either party fails to comply with the duty to negotiate in good faith pursuant to subdivision (f) of this section and order remedies pursuant to subdivisions (j) and (k) of this section, either on motion of any party or sua sponte on notice to the parties, in accordance with such procedures as may be established by the court or office of court administration. A referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to subdivision (f) of this section.

(j) Upon a finding by the lender failed to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to this subdivision and subdivision (k) of this section the court shall, at a minimum, toll the accumulation and collection of interest, costs,

and fees during any undue delay caused by the lender, and where appropriate, the court may also impose one or more of the following:

1. compel production of any documents requested by the court pursuant to subdivision (e) of this section or the court's designee during the settlement conference;

2. impose a civil penalty payable to the state that is sufficient to deter repetition of the conduct and in an amount not to exceed twenty-five thousand dollars;

3. the court may award actual damages, fees, including attorneys' fees and expenses to the borrower as a result of lender's failure to negotiate in good faith; or

4. award any other relief that the court deems just and proper.

(k) Upon a finding by the court that the borrower failed to negotiate in good faith pursuant to subdivision (f) of this section, the court shall, at a minimum, remove the case from the conference calendar. In considering such a finding, the court shall take into account equitable factors including, but not limited to, whether the borrower was represented by counsel.

(l) At the first settlement conference held pursuant to this section, if the borrower has not filed an answer or made a pre-answer motion to dismiss, the court shall:

1. advise the borrower of the requirement to answer the complaint;

2. explain what is required to answer a complaint in court;

3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and

4. provide information about available resources for foreclosure prevention assistance.

(m) A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule three hundred twenty of this chapter, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

(n) Any motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.

Nothing in this section shall impair a lender who has complied with this section from proceeding with a judicial or a non-judicial foreclosure pursuant to article nine of the uniform commercial code.

§ 2. This act shall take effect immediately.