NY CLS CPLR R 3408

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New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 34 Calendar Practice; Trial Preferences (§§ 3401 — 3410)

R 3408. Mandatory settlement conference in residential foreclosure actions.

(a)

1. Except as provided in paragraph two of this subdivision, 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: (i) 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, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2.

(i) Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless:

(A) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or

(B) the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower.

(ii) The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(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 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 and the defendant shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the case. 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 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 shall bring to the conference.

1. For the plaintiff, 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 defendant; and (v) any other documentation required by the presiding judge. 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 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 plaintiff 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(s) was denied, a denial letter or any other document explaining the reason(s) 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 defendant, 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 plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation, 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 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 mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; 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 case, avoiding prosecution of

foreclosure proceedings while loss mitigation applications 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 plaintiff must file a notice of discontinuance and vacatur of the lis pendens within ninety 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) 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 the 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 court that the plaintiff 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 plaintiff, 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 attorney fees and expenses to the defendant as a result of plaintiff'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 defendant 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 defendant was represented by counsel.

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

1. advise the defendant 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.

At the first conference held pursuant to this section, the court shall also provide the defendant with a copy of the Consumer Bill of Rights provided for in section thirteen hundred three of the real property actions and proceedings law.

(m) A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, 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.

History

Add, L 2008, ch 472, § 3, eff Aug 5, 2008; amd, L 2009, ch 507, § 9, eff Feb 13, 2010; L 2013, ch 306, § 2, eff Aug 30, 2013; L 2016, ch 73, §§ 2, 3 (Part Q), effective December 20, 2016; L 2017, ch 58, § 2 (Part FF), effective April 20, 2017; L 2018, ch 58, § 2 (Part HH), effective December 20, 2016.

Annotations

Notes

Editor's Notes

Laws 2008, ch 472, §§ 3-a and 28, sub g, eff Aug 5, 2008, provide as follows:

§ 3-a. For any foreclosure action on a residential mortgage loan, in which the action was initiated prior to September 1, 2008 but where the final order of judgment has not yet been issued, the court shall request each plaintiff to identify whether the loan in foreclosure is a subprime home loan as defined in section 1304 of the real property actions and proceedings law or is a high-cost home loan as defined in section 6-1 of the banking law.

If the loan is a subprime home loan or high-cost home loan, the court shall notify the defendant that if he or she is a resident of such property, he or she may request a settlement conference.

If the defendant requests a conference, the court shall hold such conference as soon as practicable for the purpose of holding settlement discussions pertaining to the 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.

At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel 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 to attend the settlement conference telephonically or by video-conference.

§ 28. This act shall take effect immediately; provided, however, that:

g. provided however, effective immediately the promulgation of any rules, regulations or actions necessary for timely implementation of the provisions of this act are hereby authorized.

Laws 2009, ch 507, § 25, sub e, eff Feb 13, 2010, provides as follows:

§ 25. This act shall take effect immediately; provided, however, that:

e. Section nine of this act shall take effect on the sixtieth day after this act shall have become a law and shall apply to legal actions filed on or after such date (Amd, L 2014, ch 29, § 1, eff June 19, 2014; L 2019, ch 55, § 1 (Part VV), eff April 12, 2019).

Laws 2013, ch 306, § 3, eff Aug 30, 2013, provides as follows:

§ 3. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to actions commenced on or after such effective date; provided, however that the amendments to subdivision (a) of rule 3408 of the civil practice law and rules made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2016, ch 73, § 11 (Part Q), eff December 20, 2016, provides:

§ 11. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that:

(a) The amendments to subdivision (a) of rule 3408 of the civil practice law and rules made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section three of this act shall take effect; and

(b) The amendments to subdivisions 1, 2, 5 and 6 of section 1304 of the real property actions and proceedings law made by section six of this act shall be subject to the expiration and reversion of such subdivisions pursuant to chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section seven of this act shall take effect.

Laws 2017, ch 58, § 4 (Part FF), eff April 20, 2017, provides:

§ 4. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2017.

Laws 2018, ch 58, § 6 (Part HH), eff April 12, 2018, provides:

§ 6. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 20, 2017; provided, however that sections three and four of this act shall take effect on the thirtieth day after it shall have become a law; provided, further, however that:

(a) the amendments to subdivision 6 of section 1304 of the real property actions and proceedings law, made by section one of this act, shall not affect the expiration and reversion of such subdivision pursuant to subdivision a of section 25 of chapter 507 of the laws of 2009, as amended, and shall be deemed repealed therewith;

(b) the amendments to subdivision (a) of rule 3408 of the civil practice law and rules, made by section two of this act, shall take effect on the same date and in the same manner as section 3 of part Q of chapter 73 of the laws of 2016 takes effect; and

(c) the amendments to subdivision 2 of section 1304 of the real property actions and proceedings law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision a of section 25 of chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section five of this act shall take effect.

2013 Recommendations of the Advisory Committee on Civil Practice:

The Committee proposes a new CPLR 3012-b to create a procedure whereby the plaintiff lender's attorney must take certain steps to ascertain that his or her client has standing to maintain the action. Specifically, before commencing such an action, he or she must be assured that the plaintiff he or she represents holds the instrument of indebtedness in the action. To evidence that the plaintiff's attorney has received such assurance, the complaint he or she files in the action must be accompanied by a certificate, executed by the plaintiff's attorney, declaring that the attorney has reviewed the merits of the action and that, based upon consultation with authorized representatives of the plaintiff or the attorney's review of pertinent documents, the attorney has concluded on the basis of that consultation or review that there is reasonable basis for the commencement of the action. Also, the plaintiff's attorney must attach to the complaint copies of the relevant instruments of indebtedness and any instruments of assignment. This measure would also amend CPLR 3408 to require a plaintiff to file proof of service within 20 days of service. This amendment will supply the necessary ingredient to ensure participation by the parties in the mandatory foreclosure conference with the court.

The Committee believes that, in addition to helping the bar by clarifying in statute the plaintiff's attorney's obligation to the court in a residential foreclosure action, this measure is an appropriate public policy response to the crisis in foreclosure cases. The Committee believes that statutory reform is needed to ensure the integrity of the mortgage foreclosure process and

eliminate the cases brought without standing or merit. This proposal seeks to prevent completely the problem of “shadow dockets” in the residential foreclosure cases which was unforeseen at the time the recent affirmations rule was promulgated by administrative order. The trial court would have reasonable assurance that all of the instruments of indebtedness underpinning these actions, including any UCC Article 9 document evidencing a security interest in the note, and all instruments of assignment, if any, are in place at the commencement of the action.

Amendment Notes

2013. Chapter 306, § 2 amended:

Sub (a) by adding the matter in italics.

2009. Chapter 507, § 9 amended:

By adding sub (d).

By adding sub (e).

By adding sub (f).

By adding sub (g).

By adding sub (h).

The 2016 amendment by ch 73, § 2 (Part Q) added the (a)1 (first setout), (a)2 (first setout), (e)1, and (e)2 designations; substituted “including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or” for “and for” in (a)1 (first setout); in (c), in the first sentence, added “and the defendant” and substituted “each party’s representative at the conference” for “if appearing by counsel, such counsel,” deleted the former second sentence, which read: “The defendant shall appear in person or by counsel,” and added “or the defendant” in the second sentence; rewrote (e)1, (e)2, and (f); substituted “ninety days” for “one hundred fifty days” in (g); and added (i) through (n).

The 2016 amendment by ch 73, § 3 (Part Q) added the (a)1 (second setout) and (a)2 (second setout) designations and substituted “including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or” for “and for” in (a)1 (second setout).

The 2017 amendment by ch 58, § 2 (Part FF), redesignated former (a) as (a)1; added “Except as provided in paragraph two of this subdivision” at the beginning of (a)1; redesignated former (a)1 and (a)2 as (a)1(i) and (a)1(ii); and added (a)2.

The 2018 amendment by ch 55, § 2 (Part HH), in (a), redesignated former (a) as (a)1 and added “Except as provided in paragraph two of this subdivision” at the beginning of the introductory paragraph of (a)1; added (a)2; and made stylistic changes.

Notes to Decisions

While a loan servicer violated N.Y. C.P.L.R. 3408(f) by failing to negotiate in good faith, the remedy employed by the trial court—compelling the loan servicer to modify its loan agreement based on the terms of a trial loan modification proposal—violated the loan servicer’s rights under the Contract and Due Process Clauses and could not stand. Wells Fargo Bank, N.A. v Meyers, 108 A.D.3d 9, 966 N.Y.S.2d 108, 2013 N.Y. App. Div. LEXIS 3022 (N.Y. App. Div. 2d Dep't 2013).

Because a lender’s conduct in a foreclosure settlement was over-reaching, shocking, willful, unconscionable, was wholly devoid of even so much as a scintilla of good faith, and could not be countenanced, the lender failed to act in the good faith required by N.Y. C.P.L.R. 3408; therefore, it was forever barred and prohibited from collecting any of the claimed interest accrued on a loan, from recovering any claimed legal fees, expenses, or advances and exemplary damages were imposed. Emigrant Mtge. Co. v Corcione, 900 N.Y.S.2d 608, 28 Misc. 3d 161, 2010 N.Y. Misc. LEXIS 777 (N.Y. Sup. Ct. 2010), vacated, 2010 N.Y. Misc. LEXIS 6933 (N.Y. Sup. Ct. Oct. 14, 2010).

Administrative Order 548-10 and N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12-a(f) were invalid as they exceeded the Chief Administrative Judge's rulemaking authority as the chief administrator of the courts since they were not administrative in nature under N.Y. Jud. Law §§ 211, 212(1) and N.Y. Comp. Codes R. & Regs. tit. 22, § 80.1(b), but were legislative in nature under N.Y. Const. art. VI, § 30 and § 212(2)(d) as they imposed additional, substantive requirements upon plaintiffs in foreclosure suits that were not contemplated by N.Y. Real Prop. Acts. Law art. 13, N.Y. C.P.L.R. 3408, and N.Y. Laws 507, §§ 1, 3, 5, 6, 9, 10, and 10-a. LaSalle Bank, NA v Pace, 919 N.Y.S.2d 794, 31 Misc. 3d 627, 2011 N.Y. Misc. LEXIS 762 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 970, 955 N.Y.S.2d 161, 2012 N.Y. App. Div. LEXIS 8045 (N.Y. App. Div. 2d Dep't 2012).

N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12-a(f) is invalid as it exceeds the Chief Administrative Judge's rulemaking authority as the chief administrator of the courts since it is not administrative in nature under N.Y. Jud. Law §§ 211, 212(1) and N.Y. Comp. Codes R. & Regs. tit. 22, § 80.1(b), but is legislative in nature under N.Y. Const. art. VI, § 30 and § 212(2)(d) as it imposes additional, substantive requirements upon plaintiffs in foreclosure suits that are not contemplated by N.Y. Real Prop. Acts. Law art. 13, N.Y. C.P.L.R. 3408 and N.Y. Laws 507, §§ 1, 3, 5, 6, 9, 10, and 10-a. LaSalle Bank, NA v Pace, 919 N.Y.S.2d 794, 31 Misc. 3d 627, 2011 N.Y. Misc. LEXIS 762 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 970, 955 N.Y.S.2d 161, 2012 N.Y. App. Div. LEXIS 8045 (N.Y. App. Div. 2d Dep't 2012).

When, in a foreclosure, homeowners brought third-party claims against brokers, the brokers were not entitled to participate in a N.Y. C.P.L.R. 3408 mandatory settlement conference because (1) the brokers stated no "rights or obligations" within the four corners of the subject mortgage documents that were the proper concern of the settlement conference, so the brokers were not "parties" within the meaning of N.Y. C.P.L.R. 3408(a), and (2) the brokers' adversarial position concerning the mortgagors' income could cause the brokers' participation in the conference to substantially inhibit a free discussion and disclosure of that income that would

frustrate necessary “good faith” loan-modification negotiations. Astoria Fed. Sav. & Loan Assn. v Rigano, 950 N.Y.S.2d 233, 36 Misc. 3d 630, 2012 N.Y. Misc. LEXIS 2953 (N.Y. Sup. Ct. 2012).

When, in a foreclosure, homeowners brought third-party claims against brokers, excluding the brokers from a mandatory settlement conference did not violate the brokers’ due process rights because (1) the brokers were not parties to the underlying foreclosure action and articulated no cognizable rights or duties under the mortgage loan documents, (2) to the extent the brokers had an interest in the pendency of a stay in the third-party action arising from the mandatory settlement conference, the brokers asserted no cognizable basis on which the brokers’ position was relevant to continuing or lifting such a stay, and if the brokers wished to proceed in that action despite such stay, the brokers had remedies other than participating in the conference, (3) the brokers articulated no cognizable prejudice in defending the third-party claims if the brokers did not participate in the conference, and, (4) if the brokers were entitled to evidence regarding the mortgagors’ income to defend the third-party claims, any such entitlement arose under N.Y. C.P.L.R. art. 31 disclosure motion practice, not in N.Y. C.P.L.R. 3408 settlement discussions. Astoria Fed. Sav. & Loan Assn. v Rigano, 950 N.Y.S.2d 233, 36 Misc. 3d 630, 2012 N.Y. Misc. LEXIS 2953 (N.Y. Sup. Ct. 2012).

Defendants were not entitled to a mandatory settlement conference in a residential foreclosure action, because when the action was commenced, the property was not occupied by either defendant as their principal dwelling within the meaning of N.Y. Real Prop. Acts. Law § 1304(5)(iii), and neither was a resident thereof within the meaning of N.Y. C.P.L.R. 3408(a). Ukranian Natl. Fed. Credit Union v Balko, 969 N.Y.S.2d 728, 40 Misc. 3d 505, 2013 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 2013).

Because a lender failure to submit evidentiary proof, pursuant to N.Y. C.P.L.R. 3408, 2309(b), that the loan in foreclosure was not a “high-cost home loan,” a “subprime home loan,” or “non-traditional home loan,” as defined in N.Y. Real Prop. Acts. Law § 1304(5)(c), (e), and N.Y. Banking Law § 6-l(d), or that it complied with the notice requirements of N.Y. Real Prop. Acts. Law §§ 1303(1),1304, 1320, it was not entitled to a default order of reference. Butler Capital

Corp. v Cannistra, 891 N.Y.S.2d 238, 26 Misc. 3d 598, 2009 N.Y. Misc. LEXIS 3102 (N.Y. Sup. Ct. 2009).

Bank's foreclosure action was dismissed because, inter alia, the bank acted in bad faith and contrary to N.Y. C.P.L.R. 3408 in refusing to offer a modification agreement with a fixed term, refusing to extend the term of the mortgage, resulting in a higher monthly payment, and including unspecified and unexplained charges totaling $9,270 in the arrearage amount. Wells Fargo Bank, N.A. v Hughes, 897 N.Y.S.2d 605, 27 Misc. 3d 628, 2010 N.Y. Misc. LEXIS 414 (N.Y. Sup. Ct. 2010).

Mortgagor's motion for leave to file a late answer, in a foreclosure case, two years after the case was commenced, was granted because (1) the mortgagor alleged valid affirmative defenses, including a possible defect in assignment, (2) the parties engaged in both private and court supervised negotiations, pursuant to N.Y. C.P.L.R. 3408 and N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12-a(b), (3) foreclosures were actions in equity, and (4) the mortgagee could not claim prejudice due to delay, since the mortgagee did not diligently prosecute the action. HSBC Bank USA, N.A. v Cayo, 934 N.Y.S.2d 792, 34 Misc. 3d 850, 2011 N.Y. Misc. LEXIS 5805 (N.Y. Sup. Ct. 2011).

While the note at issue was not technically eligible for the federal Home Affordable Modification Program (HAMP), staying the foreclosure pending reevaluation of the borrowers under the rubric of the HAMP mechanisms found in N.Y. C.P.L.R. 3408(a) as the marker for good faith in negotiations would enable the lender to abide by both state and federal regulations. Flagstar Bank, FSB v Walker, 946 N.Y.S.2d 850, 37 Misc. 3d 312, 2012 N.Y. Misc. LEXIS 2577 (N.Y. Sup. Ct. 2012), rev'd, 112 A.D.3d 885, 977 N.Y.S.2d 359, 2013 N.Y. App. Div. LEXIS 8543 (N.Y. App. Div. 2d Dep't 2013).

While a deceased borrower's son was entitled to a mortgage settlement conference and the parties were required to negotiate in good faith to see if an agreeable resolution could be reached, neither the Banking Law nor the National Housing Act required the lender to treat the son as if he had assumed the note obligation and mortgage or agree to an assumption, and if it

did not, the son was not entitled to a loan modification review. Generations Bank v Sciotti, 982 N.Y.S.2d 721, 43 Misc. 3d 578, 2014 N.Y. Misc. LEXIS 1195 (N.Y. Sup. Ct. 2014).

Plaintiff's refusal to even consider defendant's loan modification application during a foreclosure process violated plaintiff's obligation to negotiate in good faith, and the waiver of any interest or other accrued fees or costs dating back to first mandatory settlement conference in which good faith negotiations were mandated by the court constituted an appropriate remedy. Bank of Am., N.A. v Rausher, 981 N.Y.S.2d 269, 43 Misc. 3d 488, 2014 N.Y. Misc. LEXIS 421 (N.Y. Sup. Ct. 2014).

Court ordered a bank to process and decide defendant’s loan modification under the Home Affordable Modification Program (HAMP) and to toll accrual of interest and late fees because defendant’s allegations that the bank and its loan servicer failed to follow HAMP guidelines were sufficient to demonstrate a violation of N.Y. C.P.L.R. 3408(f)’s good faith requirement during mandatory settlement conferences. U.S. Bank, N.A. v Rodriguez, 972 N.Y.S.2d 451, 41 Misc. 3d 656, 2013 N.Y. Misc. LEXIS 3946 (N.Y. Sup. Ct. 2013).

Court enjoined further progress on mortgage foreclosure until lender proved compliance with requirements under N.Y. Real Prop. Acts. Law § 1304, because the lender's proof failed to establish regularity in mailing practice or a specific mailing sufficient to shift the burden of proof; since there was guidance on a penalty to be imposed from non-compliance with N.Y. Real Prop. Acts. Law § 1304, the scope of permissible penalties for violations of good faith negotiation requirement in N.Y. C.P.L.R. § 3408 would be equally compelling. Kearney v Kearney, 979 N.Y.S.2d 226, 42 Misc. 3d 360, 2013 N.Y. Misc. LEXIS 5183 (N.Y. Sup. Ct. 2013).

Borrowers had a statutory right to request a foreclosure settlement conference because granting the lender's motion to vacate the order of reference and the judgment of foreclosure and sale restored the case to a pre-final judgment status, the action was commenced prior to September 1, 2008, and a final judgment had not been entered in the action. JP Morgan Chase Bank, N.A. v Casanova, 980 N.Y.S.2d 746, 43 Misc. 3d 582, 2014 N.Y. Misc. LEXIS 561 (N.Y. Sup. Ct. 2014).

Mortgagors would be prejudiced if the mortgagee was permitted to discontinue a foreclosure action while it was still pending in the foreclosure settlement part because the interest had been accruing against the mortgagors; the mortgagors were entitled to a conclusion of the settlement negotiations before the action was discontinued, and the parties were required to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible. US Bank Natl. Assn. v Gioia, 982 N.Y.S.2d 699, 42 Misc. 3d 947, 2013 N.Y. Misc. LEXIS 6406 (N.Y. Sup. Ct. 2013).

Defendant in a diversity mortgage foreclosure action was not entitled to a mandatory settlement conference under N.Y. C.P.L.R. § 3408, as Fed. R. Civ. P. 16 governed pretrial conference procedure. Rule 16 is sufficiently broad to cover a conference for the purpose of facilitating settlement, and Rule 16 does not transgress the Constitution or the Rules Enabling Act. Kondaur Capital Corp. v Cajuste, 849 F. Supp. 2d 363, 2012 U.S. Dist. LEXIS 43257 (E.D.N.Y. 2012).

Trial court improvidently exercised its discretion in directing, upon finding that a bank failed to negotiate in good faith, a payment out of court to a borrower from the money held on deposit by the county clerk because there was insufficient evidence that the bank failed to negotiate in good faith during settlement conferences in the mortgage foreclosure action. JP Morgan Chase Bank, N.A. v Butler, 129 A.D.3d 777, 12 N.Y.S.3d 145, 2015 N.Y. App. Div. LEXIS 4717 (N.Y. App. Div. 2d Dep't 2015).

Trustee should have been barred from charging the mortgagor an attorney's fee and costs incurred between the date of the initial settlement conference and the date on which settlement negotiations recommenced as the trustee was obligated to negotiate in good faith, but did not do so as it repeatedly represented that it was considering the mortgagor for Home Affordable Modification Program modification and demanded additional documentation, even though the pooling and servicing agreement prohibited such a modification, and did not disclose the prohibition until about 13 months after negotiations began; barring a trustee from charging the mortgagor an attorney's fee and costs was an improper attempt to rewrite the mortgage note,

however. US Bank N.A. v Williams, 121 A.D.3d 1098, 995 N.Y.S.2d 172, 2014 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 2d Dep't 2014).

Trustee was properly directed to review a mortgagor for Home Affordable Modification Program (HAMP) modification since it had failed to negotiate in good faith as it repeatedly represented that it was considering the mortgagor for HAMP modification and demanded additional documentation, even though the pooling and servicing agreement prohibited such a modification, and did not disclose the prohibition until about 13 months after negotiations began. US Bank N.A. v Williams, 121 A.D.3d 1098, 995 N.Y.S.2d 172, 2014 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 2d Dep't 2014).

Borrowers' motion was granted insofar as a preliminary conference was required regarding disclosure and settlement, it made no sense to hold motions in abeyance pending the completion of settlement discussions, and the current holder of the note and mortgage should be substituted as the named plaintiff. Bank of Am., N.A. v Bosley, 990 N.Y.S.2d 784, 44 Misc. 3d 821, 2014 N.Y. Misc. LEXIS 3314 (N.Y. Sup. Ct. 2014).

Trial court properly granted a homeowner's motion to impose a sanction on a bank for its failure to negotiate in good faith because the bank made piecemeal document requests, provided contradictory information, and repeatedly requested documents that had already been provided. LaSalle Bank, N.A. v Dono, 135 A.D.3d 827, 24 N.Y.S.3d 144, 2016 N.Y. App. Div. LEXIS 336 (N.Y. App. Div. 2d Dep't 2016).

Stay provision was lifted and special referee's recommendation rejected because a bank did not negotiate in bad faith during the settlement conferences conducted where the bank's motion papers demonstrated that it made several offers to modify the terms of the subject note each of which were flatly rejected by the borrower, the bank was not obligated to consider the loan pursuant to HAMP guidelines. Flagstar Bank, FSB v Walker, 51 Misc. 3d 806, 29 N.Y.S.3d 752, 2016 N.Y. Misc. LEXIS 635 (N.Y. Sup. Ct. 2016).

Mortgagee did not negotiate in good faith at a settlement conference because the mortgagee (1) made piecemeal document requests, (2) gave contradictory information, (3) sought documents already provided, and (4) produced no documents required under CPLR 3408(e), as directed, or loan modification negotiations evidence, including a contract the mortgagee allegedly sent to a mortgagor. Aurora Loan Servs., LLC v Diakite, 148 A.D.3d 662, 48 N.Y.S.3d 490, 2017 N.Y. App. Div. LEXIS 1511 (N.Y. App. Div. 2d Dep't 2017).

When a mortgagee was found not to have negotiated in good faith at a foreclosure settlement conference, a sanction, in effect, tolling interest, costs, and attorneys' fees accruing during a certain period was proper because these sums accrued during the period when the mortgagee did not negotiate in good faith. Aurora Loan Servs., LLC v Diakite, 148 A.D.3d 662, 48 N.Y.S.3d 490, 2017 N.Y. App. Div. LEXIS 1511 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly granted an assignee's motion for summary judgment in its foreclosure action because the assignee had standing to pursue the action where there was extensive proof that it possessed the original note by the time the action was commenced, and the delay in filing a request for judicial intervention was nothing more than a non-prejudicial procedural error that could be disregarded. HSBC Bank USA, N.A. v Corazzini, 148 A.D.3d 1314, 49 N.Y.S.3d 202, 2017 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 3d Dep't 2017).

There was no basis in equity or law to grant a mortgagor's request to compel a first mortgagee to execute an agreement to subordinate its mortgage to the second mortgagee's (SM) consolidated mortgage lien so that a modification agreement with the SM could proceed, as the mandatory settlement conference provision was inapplicable and the court could not force an agreement between the parties. Ulster Sav. Bank v Freytes, 49 Misc. 3d 685, 16 N.Y.S.3d 110, 2015 N.Y. Misc. LEXIS 2712 (N.Y. Sup. Ct. 2015).

Requiring debtor to attend a N.Y. C.P.L.R. 3408 settlement conferences did not violate the discharge injunction where, even if debtor was somehow coerced into participating in those conferences, he would still have to prove that the mortgagee sought to collect the discharged debt from him personally through the settlement conferences. With regard to payoff and

reinstatement letters that the mortgagee sent to debtor, such communications were required by N.Y. C.P.L.R. 3408 and more, importantly, were demanded by debtor. In re Prisco, 2017 Bankr. LEXIS 2271 (Bankr. N.D.N.Y. Aug. 14, 2017).

In a foreclosure, it was no abuse of discretion to deny mortgagors a hearing to decide if a mortgagee met the mortgagee's duty to negotiate in good faith because the mortgagors did not sufficiently allege the totality of the circumstances showed the mortgagee's conduct was not a meaningful effort to reach a resolution. CitiMortgage, Inc. v Pugliese, 143 A.D.3d 659, 38 N.Y.S.3d 576, 2016 N.Y. App. Div. LEXIS 6357 (N.Y. App. Div. 2d Dep't 2016).

As this section's requirement that mortgage lenders and borrowers in residential foreclosure actions negotiate in good faith merely made explicit the duties of the parties established under 22 NYCRR 202.12-a(c)(4), the good faith negotiation requirement applies to actions filed before its effective date. Wells Fargo Bank, N.A. v Ronci, 50 Misc. 3d 531, 22 N.Y.S.3d 322, 2015 N.Y. Misc. LEXIS 4043 (N.Y. Sup. Ct. 2015), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017).

In a residential foreclosure action where plaintiff bank denied defendant and his daughter a Home Affordable Modification Plan review and a traditional loan modification, although they appeared to qualify, and the referee's report indicated that plaintiff violated several of the referee's directives, the court confirmed the report and found that plaintiff failed to negotiate in good faith to reach a mutually agreeable resolution; therefore, all interest accrued on the note and mortgage was tolled from the commencement of the mandatory conferencing until service of a copy of the order. Wells Fargo Bank, N.A. v Ronci, 50 Misc. 3d 531, 22 N.Y.S.3d 322, 2015 N.Y. Misc. LEXIS 4043 (N.Y. Sup. Ct. 2015), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017).

In an action to foreclose a mortgage, the supreme court properly denied defendants' motion for a hearing to determine whether plaintiff met its obligation to negotiate in good faith because they failed to sufficiently allege that plaintiff's conduct did not constitute a meaningful effort at

reaching a resolution. US Bank N.A. v Cohen, 156 A.D.3d 844, 67 N.Y.S.3d 643, 2017 N.Y. App. Div. LEXIS 9355 (N.Y. App. Div. 2d Dep't 2017).

Borrower raised a factual issue as to whether the loan servicer met its obligation to negotiate in good faith because there was no evidence that the servicer attempted to gain the loan holder's consent to offer a loan modification or offered the borrower another nonretention solution, such as a deed in lieu of foreclosure; in fact, there was no evidence that any effort was made to reach a resolution at the two foreclosure settlement conferences. Citimortgage, Inc. v Nimkoff, 159 A.D.3d 869, 73 N.Y.S.3d 577, 2018 N.Y. App. Div. LEXIS 1773 (N.Y. App. Div. 2d Dep't 2018).

Denying a mortgagor's cross summary judgment motion in a mortgagee's foreclosure action without a hearing was error because the mortgagor submitted evidence raising a factual issue as to whether the mortgagee had negotiated in good faith as required by the statute. U.S. Bank N.A. v Fisher, 169 A.D.3d 1089, 95 N.Y.S.3d 114, 2019 N.Y. App. Div. LEXIS 1389 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly granted summary judgment to a lender's successor by merger in its foreclosure action because, in addition to producing evidence of the mortgage, the unpaid note, and the borrower's default, the successor submitted an affidavit of one of its vice-presidents that established the successor's standing by showing that it held the note at the time of commencement of the action, which the borrower failed to rebut, and the successor's conduct constituted a meaningful effort at reaching a resolution where it was undisputed that the parties took part in at least eight settlement conferences and that, during the last settlement conference, the borrower was offered a trial loan modification. Wells Fargo Bank, N.A. v Pauley, 172 A.D.3d 1559, 99 N.Y.S.3d 781, 2019 N.Y. App. Div. LEXIS 3700 (N.Y. App. Div. 3d Dep't 2019).

Lender was not entitled to judgment interest because it would be unconscionable to hold the borrowers responsible for the lender's lengthy delay in obtaining the judgment of foreclosure and sale where it did not explain the discontinuance of its original foreclosure action or its commencement of a second action, and declined to follow the court's directive that the borrowers' accrued interest and penalties be reviewed in the Foreclosure Settlement Part for

possible settlement. One Westbank, FSB v Rodriguez, 57 Misc. 3d 756, 57 N.Y.S.3d 667, 2017 N.Y. Misc. LEXIS 2584 (N.Y. Sup. Ct. 2017).

Home owner's claims that a mortgagee had failed to negotiate in good faith were rejected because the borrower, who defaulted on her answer, did not reside at the property and the owner was not a borrower under the loan documents, so no settlement conference was required and the mortgagee was not obligated to modify the loan terms. M & T Bank v Improta, 61 Misc. 3d 746, 85 N.Y.S.3d 343, 2018 N.Y. Misc. LEXIS 3940 (N.Y. Sup. Ct. 2018).

Where counsel for mortgagee sought $7,500 for time spent in responding to and negotiating a resolution of debtor's objection to the proof of claim, the amount was disallowed because the claim was excessive, and the mortgagees could not reasonably impose upon debtor the legal cost of its defense. In re Bulger, 606 B.R. 526, 2019 Bankr. LEXIS 3115 (Bankr. W.D.N.Y. 2019).

Appellate court prior decision and order remitting the matter to the supreme court for a "bad faith" hearing did not reopen the settlement conference process such that all motions were automatically held in abeyance because following the hearing, if there was a finding that the mortgagor failed to negotiate in good faith, the mortgagee would be entitled to the imposition of appropriate sanctions against the mortgagor. Citimortgage, Inc. v Nimkoff, 189 A.D.3d 763, 138 N.Y.S.3d 190, 2020 N.Y. App. Div. LEXIS 7361 (N.Y. App. Div. 2d Dep't 2020).

Trial court erred by not holding a hearing to determine whether plaintiff met its obligation to negotiate in good faith because plaintiff failed to demonstrate that it followed the Home Affordable Modification Program's regulations and guidelines, and defendant's submissions raised a factual issue as to whether plaintiff deprived him of a meaningful opportunity to resolve the foreclosure action through loan modification or other potential workout options. Citimortgage, Inc. v Lofria, 191 A.D.3d 838, 143 N.Y.S.3d 68, 2021 N.Y. App. Div. LEXIS 1088 (N.Y. App. Div. 2d Dep't 2021).

Because defendants appeared at the June 2016 settlement conference without representation, each was deemed to have made a motion to proceed as a poor person and the supreme court failed to determine such motion; however, because the record did not contain adequate information to render such a determination, which had to be resolved before the appellate court could determine the merits of the appeal, the matter was remitted to the supreme court to render a determination as to defendants' eligibility for assigned counsel as of the June 2016 settlement conference. Carrington Mtge. Servs., LLC v Fiore, 198 A.D.3d 1106, 156 N.Y.S.3d 453, 2021 N.Y. App. Div. LEXIS 5804 (N.Y. App. Div. 3d Dep't 2021).

In a foreclosure action, the trial court properly denied defendants' cross motion seeking a hearing to determine whether plaintiff failed to negotiate in good faith because defendants failed to sufficiently allege that the totality of the circumstances demonstrated that plaintiff's conduct did not constitute a meaningful effort at reaching a resolution to warrant a hearing. Federal Natl. Mtge. Assn. v Gluck, 199 A.D.3d 654, 153 N.Y.S.3d 871, 2021 N.Y. App. Div. LEXIS 6019 (N.Y. App. Div. 2d Dep't 2021).

In an action to foreclose a mortgage, plaintiff failed to demonstrate, prima facie, that it complied with the provision in the mortgage agreement requiring plaintiff to send to defendant a notice of default containing certain advisements and setting forth a 30-day cure period; further, defendant's submissions in support of her cross motion raised a factual issue as to whether plaintiff failed to negotiate in good faith and deprived her of a meaningful opportunity to resolve the action through loan modification or other potential workout options. Citimortgage, Inc. v Rose, 209 A.D.3d 623, 176 N.Y.S.3d 271, 2022 N.Y. App. Div. LEXIS 5423 (N.Y. App. Div. 2d Dep't 2022).

Mortgagors' submissions raised a factual issue as to whether the mortgage assignee negotiated in good faith and deprived them of a meaningful opportunity to resolve the action through loan modification or other potential workout options per CPLR 3408(f). As a result, the court should have held a hearing to determine that issue before deciding those branches of the assignee's motion which were for summary judgment on the complaint insofar as asserted against the

mortgagors, to strike their answer, and for an order of reference. Investors Bank v Brooks, 211 A.D.3d 921, 181 N.Y.S.3d 294, 2022 N.Y. App. Div. LEXIS 7103 (N.Y. App. Div. 2d Dep't 2022).

Defendants were not entitled to have the action to the mortgage foreclosure settlement conference part calendar restored because defendants failed to submit any evidence to demonstrate plaintiff or its predecessor in interest failed to negotiate in good faith. Federal Natl. Mtge. Assn. v Vivenzio, 229 A.D.3d 510, 216 N.Y.S.3d 605, 2024 N.Y. App. Div. LEXIS 3791 (N.Y. App. Div. 2d Dep't 2024).

Supreme court should have granted defendant’s cross-motion to dismiss the complaint as abandoned; it did not appear the action was subject to a mandatory settlement conference as both defendants did not reside at the property when the action was commenced, but in any event, the bank did not proceed toward entry of a default judgment against defendant within one year and the bank’s assignee failed to show how opposing the other defendant’s motions to serve a late answer hindered the bank from doing so. Wilmington Sav. Fund Soc'y, FSB v Nifenecker, 236 A.D.3d 971, 231 N.Y.S.3d 507, 2025 N.Y. App. Div. LEXIS 1637 (N.Y. App. Div. 2d Dep't 2025).

Totality of the circumstances showed that lender failed to negotiate with a defaulting borrower in good faith by not evaluating the borrower’s complete loss mitigation application within the required 30 days, and the undue delay caused by failing to negotiate in good faith required tolling the accumulation of interest, costs, and fees during that period. U.S. Bank N.A. v Ecker, 237 A.D.3d 1584, 232 N.Y.S.3d 712, 2025 N.Y. App. Div. LEXIS 2409 (N.Y. App. Div. 4th Dep't), app. dismissed, 237 A.D.3d 1587, 230 N.Y.S.3d 513, 2025 N.Y. App. Div. LEXIS 2434 (N.Y. App. Div. 4th Dep't 2025).

Supreme court should have denied a nonparty’s cross-motion to dismiss the complaint and should not have directed dismissal of the complaint against the remaining defendants because a lender demonstrated that within one year after borrowers’ default, it filed a request for judicial intervention that sought a residential mortgage foreclosure settlement conference; thus, the lender was not required to proffer a reasonable excuse or demonstrate a potentially meritorious

cause of action. U.S. Bank Trust N.A. v Nieves, 2025 N.Y. App. Div. LEXIS 3875 (N.Y. App. Div. 2d Dep't 2025).

Research References & Practice Aids

Jurisprudences:

55 Am Jur 2d, Mortgages § 668.

125 Am Jur Trials 541, Litigation Concerning Mortgage Foreclosures.

Hierarchy Notes:

NY CLS CPLR, Art. 34

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