

NY CLS CPLR § 3012-b

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service >
Civil Practice Law And Rules (Arts. 1 — 100) >
Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3012-b. Certificate of merit in certain 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 which is subject to foreclosure, the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation, to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents. If not attached to the summons and complaint in the action, a copy of the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation shall be attached to the certificate.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action even if more than one defendant has been named in the complaint or is subsequently named.

(c) Where the documents required under subdivision (a) are not attached to the summons and complaint or to the certificate, the attorney for the plaintiff shall attach to the certificate supplemental affidavits by such attorney or representative of plaintiff attesting that such documents are lost whether by destruction, theft or otherwise. Nothing herein shall replace or abrogate plaintiff's obligations as set forth in the New York uniform commercial code.

(d) The provisions of subdivision (d) of rule 3015 of this article shall not be applicable to a defendant who is not represented by an attorney.

(e) If a plaintiff willfully fails to provide copies of the papers and documents as required by subdivision (a) of this section and the court finds, upon the motion of any party or on its own motion on notice to the parties, that such papers and documents ought to have been provided, the court may dismiss the complaint or make such final or conditional order with regard to such failure as is just including but not limited to denial of the accrual of any interest, costs, attorneys' fees and other fees, relating to the underlying mortgage debt. Any such dismissal shall be without prejudice and shall not be on the merits.

History

Add, L 2013, ch 306, § 1, eff Aug 30, 2013.

Annotations

Notes

Editor's Notes:

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.

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.

Notes to Decisions

In a mortgage foreclosure suit, it was error to relieve a mortgagee of the attorney affirmation requirement in Administrative Orders 548/10 and 431/11 (Orders) because (1) the Chief Administrative Judge did not act ultra vires in issuing the Orders but pursuant to legislative authority to adopt rules and orders regulating practice in the courts after consulting with the administrative board (N.Y. Const. art. VI, § 30, N.Y. Jud. Law § 212(2)(d)), and (2) the attorney affirmation was not substantive, so the requirement was within the Chief Administrative Judge's authority to promulgate rules of procedure, and (3) the legislature's application of the certificate of merit requirement in N.Y. C.P.L.R. 3012-b to suits filed on or after a certain date did not intend to relieve counsel that requirement in suits filed before that date. *Bank of New York Mellon v Arif Izmirligil*, 144 A.D.3d 1063, 42 N.Y.S.3d 270, 2016 N.Y. App. Div. LEXIS 7874 (N.Y. App. Div. 2d Dep't 2016).

Under the circumstances of this case, the technical infirmities with the language of the original certificate of merit caused no prejudice to any party and therefore were correctable; no willful violation of the statute was evidenced in the record by the homeowners against the lender. *Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 A.D.3d 79, 156 N.Y.S.3d 323, 2021 N.Y. App. Div. LEXIS 5774 (N.Y. App. Div. 2d Dep't 2021).

Affirmation requirements imposed on counsel for foreclosing plaintiffs by administrative orders and N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12-a(f) were invalid, as they imposed more stringent procedural burdens on foreclosing plaintiffs than those required by the statutory certification procedures and exceeded the court administrator's rule-making authority. *Bank of N.Y. Mellon v Izmirligil*, 980 N.Y.S.2d 733, 43 Misc. 3d 409, 2014 N.Y. Misc. LEXIS 318 (N.Y. Sup. Ct. 2014), rev'd, 144 A.D.3d 1063, 42 N.Y.S.3d 270, 2016 N.Y. App. Div. LEXIS 7874 (N.Y. App. Div. 2d Dep't 2016).

Creditor was not entitled to a vacatur of the dismissal of its residential foreclosure action because while the creditor properly provided the borrowers with the certificate of merit required

to accompany the complaint, the creditor was no longer the holder of the mortgage nor the note, and the creditor was no longer a proper plaintiff against the borrowers, nor was it a proper plaintiff on the date of the court's dismissal by its own admission of having assigned the note post-commencement. *HSBC Bank USA, N.A. v Aschmoneit*, 55 Misc. 3d 288, 44 N.Y.S.3d 710, 2016 N.Y. Misc. LEXIS 4702 (N.Y. Sup. Ct. 2016).

Lender was entitled to an expedited judgment of foreclosure and sale, for the appointment of a referee to conduct such sale, and to amend the caption to remove the “John Doe” because the lender's inspection reports established that the property was vacant and abandoned, and the lender met its proof of a prima facie case by annexing a copy of the note and mortgage to its certificate of merit, and established the sum due and owing to it upon the note and mortgage. *U.S. Bank Trust, N.A. v Rodriguez*, 58 Misc. 3d 560, 66 N.Y.S.3d 422, 2017 N.Y. Misc. LEXIS 4597 (N.Y. County Ct. 2017).

Plaintiff had standing to sue defendants for allegedly violating 15 U.S.C.S. §§ 1692e and 1692g of the FDCPA during foreclosure proceedings because his claims were based on defendants' alleged misidentification of the creditor in the foreclosure complaint, certificate of merit, and request for judicial intervention, which, if true, posed a risk of real harm insofar as it could have hindered the exercise of his right to defend the foreclosure action. *Cohen v Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 2018 U.S. App. LEXIS 20410 (2d Cir. N.Y. 2018).

Plaintiff's claim that defendants violated 15 U.S.C.S. § 1692g of the FDCPA during foreclosure proceedings by allegedly misidentifying the creditor in the foreclosure complaint, certificate of merit, and request for judicial intervention (RIJ) was properly dismissed under § 1692g(d)'s pleading exclusion; although the certificate of merit and RIJ were not pleadings, they formed part of the pleadings since New York law required them to be filed in all foreclosure actions, and the communication in those documents was thus not an “initial communication” for purposes of § 1692g. *Cohen v Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 2018 U.S. App. LEXIS 20410 (2d Cir. N.Y. 2018).

Research References & Practice Aids

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3012-b, Certificate of merit in certain residential foreclosure actions.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 15.02. The Individual Assignment System (IAS).

CPLR Manual § 19.09-c. Certificate of merit in certain foreclosure actions.

CPLR Manual § 22.05. Pretrial conferences.

Hierarchy Notes:

NY CLS CPLR, Art. 30

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