



STATE OF NEW YORK
UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. MCCONNELL
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MEMORANDUM

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed amendment of 22 NYCRR 202.12-a(b)(3), relating to special calendars for certain residential foreclosure actions

DATE: March 28, 2012

In 2008, the New York State Legislature enacted CPLR 3408 to mandate the scheduling of early settlement conferences in certain residential mortgage foreclosure actions. The Court System thereafter issued 22 NYCRR 202.12-a to set forth the schedule and procedures of those conferences. (Exhibit A). The scheduling of conferences under the rule is triggered by plaintiff's filing of an affidavit of service of the summons and complaint, which -- pursuant to section 306-b of the CPLR -- must occur within 120 days of the commencement of the action.

Starting in late 2010, many plaintiffs began filing foreclosure actions throughout the State without complying with the affidavit of service requirement set forth in Rule 306-b. As a result, a substantial backlog of thousands of foreclosure cases -- filed with county clerks but never processed further -- has built up over the last 15 months, leaving many homeowners in a legal limbo and defeating the Legislature's intent in mandating early settlement conferences in such matters. CPLR 306-b currently does not permit the court to dismiss inactive cases sua sponte when plaintiffs fail to file proof of service. Rather, dismissal may result only upon motion by the defendant. See, e.g., Roterling v. Satz, 71 AD3d 861 (2d Dept. 2010).

The proposed amendment of § 202.12-a(b)(3) (Exhibit B) would address the problem by creating special calendars identifying inactive foreclosure cases and authorizing courts to hold status conferences and direct further action in such cases, including settlement conferences where appropriate.

Persons wishing to comment on this proposal should send their submissions by email to OCARule202-12-acomments@nycourts.gov or by regular mail to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

Comments must be received no later than May 14, 2012.

EXHIBIT A

§202.12-a Residential Mortgage Foreclosure Actions; Settlement Conference

(a) **Applicability.** This section shall be applicable to residential mortgage foreclosure actions involving a home loan secured by a mortgage on a one- to four-family dwelling or condominium, in which the defendant is a resident of the property subject to foreclosure.

(b) **Request for judicial intervention.**

(1) At the time that proof of service of the summons and complaint is filed with the county clerk, plaintiff shall file with the county clerk a specialized request for judicial intervention (RJI), on a form prescribed by the Chief Administrator of the Courts, applicable to residential mortgage foreclosure actions covered by this section. The RJI shall contain the name, address, telephone number and e-mail address, if available, of the defendant in the action and shall request that a settlement conference be scheduled.

(2) Upon the filing of the RJI, the court shall send either a copy of the RJI, 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, for the purpose of that agency making the homeowner aware of housing counseling and foreclosure prevention services and options available to the parties.

(c) **Settlement conference.**

(1) The court shall promptly send to the parties a Notice scheduling a settlement conference to be held within 60 days after the date of the filing of the RJI. The Notice shall be mailed to all parties or their attorneys, which must include mailing to the address of the property subject to the mortgage. The Notice shall be on a form prescribed by the Chief Administrator, and it shall set forth the purpose of the conference, the requirements of CPLR Rule 3408, instructions to the parties on how to prepare for the conference, and what information and documents to bring to the conference. The Notice shall further provide that the defendant contact the court by telephone, no later than seven days before the conference is scheduled, to advise whether the defendant will be able to attend the scheduled conference.

(2) The conference shall include settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including 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. The court may also use the conference for whatever other purposes the court deems appropriate. Where appropriate, the court may permit a representative of the plaintiff to attend the conference telephonically or by video-conference.

(3) If the parties appear by counsel, such counsel must be

fully authorized to dispose of the case. If the defendant appears at the conference without counsel, the court shall treat the defendant as having made a motion to proceed as a poor person and shall determine whether permission to so appear shall be granted pursuant to the standards set forth in CPLR 1101. If the court appoints defendant counsel pursuant to CPLR 1102(a), it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions, and otherwise shall proceed with the conference.

(4) The parties shall engage in settlement discussions in good faith to reach a mutually agreeable resolution, including a loan modification if possible. The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner.

(5) Documents.

(i) Plaintiff should bring the following documents to the conference: current payoff and reinstatement documents; mortgage and note; payment history; workout forms or packet; copies of any recent paperwork regarding reinstatement, settlement offers or loan modification proposals; and an itemization of the amounts needed to cure and pay off the loan.

(ii) Defendants should bring the following documents to the conference: current income documentation, including pay stubs and benefits information; list of monthly expenses; recent mortgage statements, property tax statements, and income tax returns; loan resolution proposals; and any information from previous workout attempts.

(6) The court may schedule such other conferences as may be necessary to help resolve the action.

(7) Motions shall be held in abeyance while settlement conferences are being held pursuant to this section. A party 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.

(8) Plaintiff must file a notice of discontinuance and vacatur of the lis pendens within 150 days after any settlement agreement or loan modification is fully executed.

(d) Training. The Chief Administrator shall establish requirements for education and training of all judges and nonjudicial personnel assigned to conduct foreclosure conferences pursuant to this section.

(e) Reports. The Chief Administrator shall submit a report no later than the first day of November of each year to the Governor, and to the legislative leaders set forth in section 10-a(2) of chapter 507 of the Laws of 2009, on the adequacy and effectiveness of the settlement conferences, which shall include number of adjournments, defaults, discontinuances, dismissals, conferences held and the number of defendants appearing with and without counsel.

(f) The Chief Administrator of the Courts may continue to require counsel to file affidavits or affirmations confirming

the scope of inquiry and the accuracy of papers filed in residential mortgage foreclosure actions addressing both owner-occupied and (notwithstanding section [a] supra) non-owner-occupied residential properties.

Added 202.12a on Sept. 24, 2008

Amended 202.12a effective Feb. 13, 2010

Added (f) on Dec. 17, 2010 [previous version]

EXHIBIT B

**ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend the Uniform Civil Rules of the Supreme and County Courts by adding a new section 202.12-a(b)(3), relating to special calendars for certain residential foreclosure actions, effective immediately, to read as follows:

* * *

(b)(3) In such county or counties as the Chief Administrator shall direct, in the event that a plaintiff fails to file proof of service of the summons and complaint in a residential mortgage foreclosure action with the county clerk within one hundred twenty days after the commencement of the action, or fails to file the RJI at the time of the filing of proof of service, the county clerk shall provide the Chief Administrative Judge with the case name, index number, property address, and contact information of parties and counsel in the action. The Chief Administrator may take such further action as she deems fit with respect to such case or cases, including but not limited to (a) placing a case on a delinquency calendar; (b) providing case information to a housing counseling agency or agencies; and (c) ordering a status conference.

Chief Administrative Judge of the Courts

Dated:

AO/ /