

**Supreme Court-Westchester County
Rules for Residential Foreclosure Actions**

Presiding:

HON. DORIS M. GONZALEZ, JSC

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SECTION 1

GENERAL PROVISIONS

A. Purposes

This Section incorporates the rules previously promulgated by Order of the Honorable Anne E. Minihan, Administrative Judge of the Ninth Judicial District for foreclosure actions commenced in Supreme Court, Westchester County.

B. Equitable Powers

All parties are directed to proceed in good faith in all foreclosure actions. In view of the equitable nature of foreclosure actions, the Court will apply all applicable statutes, rules and regulations, and equitable principles of substantial justice consistent with law. All parties are guided to conduct themselves so as to avoid the appearance of unclean hands, bad faith, unreasonable delay and other potential grounds for equitable relief.

C. Mandatory Electronic Filing

As of January 17, 2012, residential foreclosure actions in Westchester County must be commenced utilizing the New York State Courts Electronic Filing (“NYSCEF”) system in accordance with the program established by the Chief Administrator of the Courts pursuant to Uniform Rules for the Supreme and County Courts (Uniform Rules) §§202.5-b and 202.5-bb, the Administrative Judge of the Ninth Judicial District and the Westchester County Clerk as Clerk of the Supreme and County Courts. Foreclosure actions are subject to mandatory e-filing.

Counsel and unrepresented or pro-se parties should refer to the statewide e-filing rules (Uniform Rule §§ 202.5-b and 202.5-bb – available at www.nycourts.gov/efile). Counsel and the parties may also access the Westchester County E-Filing Protocol available at <http://www.courts.state.ny.us/courts/9jd/efile/WestchesterCountyJointProtocols.pdf>. General questions about e-filing may be addressed to the E-Filing Resource Center at (646) 386-3033 or efile@nycourts.gov. Questions relating to local e-filing procedures may be addressed to the Civil Calendar Office at (914)824-5300. Unrepresented parties should note that they are not required to participate in the NYSCEF system.

D. Contents of Complaints

Each complaint in a residential foreclosure action should include the following:

1. that it involves a residential one-to-four family owner-occupied property;
2. whether the mortgage is considered subprime, high-cost or nontraditional;
3. whether plaintiff served each homeowner with a 90-day notice pursuant to RPAPL 1304 at such homeowner’s address of record, and whether such notice was served timely pursuant to such statute;

4. whether plaintiff registered such RPAPL 1304 notice with the Department of Financial Services pursuant to RPAPL 1306, and whether such registration was timely pursuant thereto;
5. that plaintiff is holder in due course of the note and mortgage as of the commencement date; and
6. whether plaintiff is the original holder or acts pursuant to a current and valid assignment of the note and mortgage.

Plaintiffs are encouraged to attach to residential foreclosure complaints true and complete copies of all papers allegedly supporting the complaint such as notes, mortgages, assignments, endorsements, filings thereof with the Office of the County Clerk, notices required by statute or the mortgage instrument, powers of attorney and attorney affirmations of regularity.

When applicable, upon filing the affidavit of service of the summons and complaint with the County Clerk, each plaintiff must file a Request for Judicial Intervention for a Settlement Conference in Residential Foreclosure Actions pursuant to CPLR 3408.

SECTION 2

FORECLOSURE SETTLEMENT CONFERENCE PART (“FSCP”)

A. Overview

The FSCP handles all mandatory settlement conferences pursuant to CPLR 3408 and related proceedings, including but not limited to “good faith” hearings whose basis arises while a case is pending in the FSCP.

All residential foreclosure actions pending in Westchester County for which the CPLR 3408 conference process is required but had not yet commenced as of April 4, 2022, will be referred to the FSCP. All residential foreclosure actions involving a home loan as defined by RPAPL 1304, in which a defendant is a resident of the underlying property, are subject to this settlement process (see generally CPLR 3408).

Defendant(s) are strongly encouraged to seek assistance from a housing counseling agency and/or legal representation prior to attending the settlement conference. To the extent possible, a housing counselor may be available at the conference for consultation.

B. Mandatory RJIs and Conference Scheduling

“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” (Uniform Rule 202.12-a[b]). Promptly thereafter, the Court will schedule an initial “settlement conference to be held within 60 days after the date of the filing of the RJI” (Uniform Rule 202.12-a[c][1]). When an action is assigned to the FSCP, the Court will upload to NYSCEF a notice advising all parties of the initial conference date. Unrepresented defendant borrowers who opted out of NYSCEF will receive a copy of the scheduling notice by first-class U.S. Mail.

The Court will make all determinations as to whether a residential foreclosure action is subject to the mandatory settlement conference process under CPLR 3408 and Uniform Rule 202.12-a. Absent the filing with the RJI of an affidavit from the defendant(s)/borrower(s) affirming that the property at issue is not owner-occupied or demonstrating that the action is not otherwise eligible, an initial FSCP conference will be scheduled.

Conferences will be conducted in person. The FSCP conference calendar will be called in the Westchester County Courthouse, courtroom 1803, on Monday, Tuesday, Thursday and Friday, at 9:00 a.m. Parties and/or their representatives must check in with the clerk in courtroom 1803, and cases are called for conference in the order in which both sides have advised the clerk of their appearance. Settlement conferences are conducted in person by the Court or by a Court Attorney Referee.

Parties or their attorney must appear in person for an initial conference. Attorneys who have not formally appeared consistent with these Rules may not be permitted to participate in the conference.

C. Motion Practice

Pursuant to CPLR 3408(n) and Uniform Rule 202.12-a(c)(7), no motions concerning the underlying residential foreclosure action may be filed with the RJI or while an action is pending in the FSCP.

If an issue arises during FSCP proceedings relating to compliance with CPLR 3408, Uniform Rule 202.12-a or these Rules – including an alleged lack of good faith – either party may apply to the Court or the assigned Court Attorney-Referee for further proceedings (see CPLR 3408[n]).

D. Answers, Defenses and “Poor Person” Relief

A defendant who fails to interpose an answer to the complaint as of the date of the initial FSCP conference “shall be presumed to have a reasonable excuse for such 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” (CPLR 3408[m]).

Defense motions for leave to serve a late answer, or to amend an answer, are subject to the general CPLR 3408(n) bar on motion practice and will not be in order until the action is released from the FSCP consistent therewith. In accordance with law, time during this statutory motion bar will not be considered on any such later-filed motion. Defendants wishing to interpose late answers are encouraged, however, to file any such motions promptly upon release from the FSCP.

A pro se defendant does not waive jurisdictional defenses by appearing in the FSCP.

CPLR 3408(b) requires the Court to determine if an unrepresented owner is entitled to “poor person” status. Every unrepresented owner will be provided with the requisite OCA-approved poor person affidavit form. Upon submission of the form, the Court will grant or deny the application for poor person status including assignment of counsel if requested.

E. Appearances and Substitutions

Except as the Court may otherwise authorize in writing, all counsel, housing counselors, parties and witnesses shall appear in person.

Represented parties must appear by counsel of record; no “co-counsel” appearances shall be recognized. Counsel must file a proper Notice of Appearance at least three (3) business days prior to a scheduled appearance. Substitutions of counsel must be executed by the client(s) if a natural person or otherwise by a duly authorized representative of the clients(s).

All parties must arrive on time for all proceedings. Defaulting or late arriving counsel, absent adequate excuse, may be subject to sanctions and/or costs. Counsel who repeatedly fail to appear or arrive late to proceedings may summarily be subject to sanctions and/or costs.

All appearing parties, counsel and housing counselors must be fully authorized to dispose of the case. Attorneys appearing per diem must have immediate telephone and electronic mail access to attorneys of record. Plaintiff attorneys must have immediate

telephone and electronic mail access to a representative of plaintiff or plaintiff's service fully authorized to bind plaintiff and respond to case-related questions from the Court. Violations hereof may result in a finding that such party is unready to proceed. Where a per diem attorney is not fully ready to proceed, the Court may enter an Order banning future per diem appearances.

The defendant shall appear in person or by counsel. If the defendant appears pro se, the Court shall advise the defendant generally of the nature of the action and his or her rights and duties but will not render legal advice to litigants.

F. No Ex Parte Communications

Neither the Court Attorney-Referee or the Court will entertain ex parte communications except as to purely ministerial matters.

G. Adjournments

Requests for adjournments of conferences scheduled in the FSCP may be made only by email, mail or fax to the attention of the clerk of the FSCP; the Court will not consider a request made by telephone. The request must be received by the Court no less than two (2) full business days prior to the date for which the conference is scheduled. The Court will not consider a request received in violation of this deadline. Any request must indicate the name of attorney/housing counselor/party by whom the request is submitted and must include: the title and index number of the action, that the request is on consent of all parties, a date to which the parties agree the conference may be adjourned, and that copies of the request have been sent to all parties.

There is no guarantee that a request for adjournment will be granted or that, if granted, the conference will be adjourned to the date requested. The Court will neither respond to a request for adjournment nor confirm whether an adjournment has been granted. Parties requesting an adjournment should check E-Courts, on the Unified Court System website, the day after making the request to confirm whether the adjournment has been granted.

H. Stays

The Court will not suspend or delay proceedings based on unsubstantiated representations relating to stay eligibility. Stays will proceed only in accordance herewith.

In the case of a defendant's death, competent proof of death must be filed, upon which the action will be stayed pending appointment of the decedent's administrator or executor, or another substitute party, pursuant to CPLR 1015 and CPLR 1021. Competent proof of death shall include a death certificate, Surrogate's Court filing or otherwise as the Court may direct.

Before the Court will mark a case stayed for reasons other than a death, the proponent of such stay must file written proof demonstrating its basis such as military status (50 USC §§ 3901 et seq.; Military Law §§ 300 et seq.), bankruptcy (11 USC § 362[a]) or other qualifying court order (CPLR 2201). In the event of a bankruptcy, counsel shall file on NYSCEF a proper case record from PACER (the U.S. District Court electronic filing system) or such alternative proof as the Court may direct. NYSCEF filings must properly redact confidential personal information (see Uniform Rule 202.5[e]).

During a stay, the Court may require the plaintiff to appear and report the status of proceedings to bring about substitution in accordance with law, or to take such other actions as necessary to bring about the lifting of such stay.

I. Settlement Proceedings

All statements made whether oral or written, and all information exchanged, at a FSCP conference shall be solely for the purposes of settlement and shall not be deemed admissions of any party with respect to the underlying action.

FSCP settlement discussions will include but are not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing the home; evaluating potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to; and other purposes the Court may deem appropriate.

Plaintiff should attend each FSCP conference prepared to discuss the servicer of the loan, loan amount, reinstatement amount, payoff amount, and any investor restrictions applicable to the loan. Plaintiff may be asked to provide evidence of the status of defendant's modification paperwork. Plaintiff should be aware that a case may be adjourned at the Court's discretion for plaintiff to demonstrate compliance herewith. Plaintiff also must provide the Court with the following information: whether an answer has been served and whether a previous action had been filed relating to this loan and, if so, the status and disposition of such action.

Defendant must appear at the settlement conference prepared to discuss the following: confirm that the subject property is residential, defendant's financial status, the cause of defendant's alleged mortgage default, whether the property is defendant's primary residence, and whether defendant desires to retain the property. Defendant shall be required to provide proof to the Court if requested, and to plaintiff in order to evaluate the possibility of a loan modification.

J. Settled and Non-Settled Actions

An action assigned to the FSCP is deemed “settled” when it is resolved by satisfaction, reinstatement or permanent modification of the subject loan, or by the closing of title following an agreed upon short sale or deed-in-lieu transaction. “A [residential foreclosure] plaintiff must file a notice of discontinuance [of the underlying action] and vacatur of the lis pendens within ninety days after any settlement agreement or loan modification is fully executed” (CPLR 3408[g]; see Uniform Rule 202.12-a[c][8]). Thus, a settled action cannot be marked “settled” until a notice of discontinuance or stipulation of discontinuance and vacatur of the lis pendens has been filed with – or a motion to discontinue and vacate has been granted by the Court – and all applicable fees remitted to, the Westchester County Clerk.

Whether by notice, stipulation or motion, the applications to discontinue and vacate must be accompanied by an affirmation attesting to the manner of settlement. If it is alleged that the action was settled by loan modification, the affirmation must also include an averment that the permanent modification documents have been fully executed – in other words, by both the borrower(s) and the Plaintiff.

At the conclusion of the conference at which an action is released from the FSCP as non-settled, the clerk of the FSCP will assign the underlying foreclosure action to an IAS Part. All parties who have served an answer are required to advise the Court Attorney-Referee whether discovery is outstanding or whether discovery shall be demanded upon release from the FSCP. Any party seeking discovery shall promptly file a Request For Preliminary Conference, and to the extent not previously served, serve discovery demands. Discovery which is not timely pursued may be deemed waived.

The Court actively encourages parties to settle foreclosure actions at all phases of proceedings. The FSCP and its implementing rules support active settlement negotiations. Parties should be aware, however, that upon release from the FSCP, non-settled actions will not be stayed for ongoing settlement negotiations. After release parties are encouraged to continue negotiating potential settlement possibilities but must be prepared to litigate the action in accordance with the law.

An increasingly common practice is for parties to conclude certain trial modification agreements or other conditional settlements after release from the FSCP. As noted above, while the Court actively encourages settlement, the pendency of a conditional settlement will not stay an action. While the Court encourages reasonable settlement efforts, the Court will not allow long delays merely because a trial modification or other conditional settlement is pending.