



NEW YORKERS FOR RESPONSIBLE LENDING

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BANKS CAUSE DELAYS IN NEW YORK'S SETTLEMENT CONFERENCES AND FORECLOSURE PROCESS, NOT HOMEOWNERS

For more than five years, New York's struggling homeowners have benefitted from New York's pioneering foreclosure settlement conference process, giving homeowners a chance to negotiate a settlement (typically a loan modification or other workout) that spares both homeowners and the surrounding communities from the adverse effects of avoidable foreclosures. Banks suggest that these important protections for homeowners cause unnecessary delays, but those complaints are disingenuous, as it is the *banks* that are responsible for delay in the vast majority of cases.

Plaintiffs Control the Pace of Foreclosure Actions in Court

To foreclose on a residential property involving a home loan, banks must file a law suit in New York State Supreme Court. As with any civil court case, the pace of foreclosure cases is largely set by the plaintiff, *i.e.*, the foreclosing lender. Since 2009 a mandatory settlement conference must be held within 60 days after plaintiff has filed proof of service of the summons and complaint and a "Request for Judicial Intervention" (RJI) with the county clerk.ⁱ If the plaintiff delays filing the proof of service or the RJI, the settlement conference process is not triggered, and the case sits in limbo. Beginning in 2010, Plaintiffs' widespread and systemic failure to file RJIs resulted in tens of thousands of cases statewide being trapped in foreclosure limbo known as the "shadow docket".

The foreclosure plaintiffs' creation of a "shadow docket" of stalled foreclosure cases across the state was well-documented and widely reported,ⁱⁱ leading to the passage of last year's Certificate of Merit legislation.ⁱⁱⁱ The shadow docket left tens of thousands of homeowners in limbo.^{iv} Foreclosure actions had been filed against them, but the cases did not move into settlement conferences early in the process as the legislature intended. As a result, these homeowners accrued substantial mortgage arrears and the loans became harder to modify. The courts are still struggling with the backlog the banks created.

Delays during the Settlement Conference Process

The most compelling data about the causes for delay in the foreclosure process can be found in the public record of judicial decisions by the judges overseeing the foreclosure process across New York State. A chart attached to this paper summarizes decisions from the last several years and presents a snapshot of typical fact patterns.^v Among other things, the cases show that the banks are failing to participate in the conference process in good faith as required by law. The banks continue to lose

paperwork, fail to communicate, and improperly deny homeowners modifications. Moreover, a report recently issued by legal services groups in New York City demonstrates the widespread failure of banks to comply with the requirement that they appear in settlement conferences with authority to settle the foreclosure action.^{vi} This conduct also causes delay.

Delays Following Release of Cases from Settlement Conferences

After the conferences have concluded, the plaintiff again controls the progress of the case, as it is plaintiff who decides when to make subsequent motions, including motions for summary judgment, for a default judgment and order of reference, and for a judgment of foreclosure and sale. The plaintiff also determines when an auction is scheduled.^{vii} When homeowners are represented, their attorneys continue to move the matter from settlement conference to conclusion. However, most homeowners are not represented in the post-settlement conference phase of the litigation and are basically bystanders who wait for the banks to move the legal action forward.

Legal services providers know from experience that there are thousands of foreclosure actions across the state that banks have failed to prosecute after the conclusion of settlement conferences. Attached are three typical examples of cases that idled for a year or more after settlement conferences had concluded, along with a compilation of homeowner experiences from Legal Assistance of Western New York, Inc. demonstrating statewide bank delays associated with all phases of the judicial foreclosure process. In Kings County (Brooklyn), the backlog of foreclosure cases that plaintiffs are not moving forward is so great that the Chief Administrative Judge has taken to reviewing languishing foreclosure actions himself and dismissing foreclosure actions based on failure to prosecute the case.

Bank Delay in the Foreclosure Process Is Harmful to Homeowners

These delays cause tangible harm to homeowners attempting to negotiate home-saving solutions.

Interest arrears, escrow arrears, and fees accrue while homes sit in the foreclosure process.

Homeowner advocates have encountered countless cases where a home-saving loan modification is now out of reach for a homeowner who, at the start of the process, was fully eligible for and capable of sustaining an affordable loan modification. Homeowners in foreclosure need to reach the conferences as quickly as possible and need those conferences to be effective and meaningful to ensure that home-saving solutions can be achieved whenever possible.

Conclusion

Despite bank delays in foreclosure actions and the resulting court backlogs, the conference process has been a powerful tool in New York's efforts to combat the foreclosure crisis. Thousands of homeowners have taken advantage of the opportunity they present for face-to-face negotiation of home-saving solutions. Moreover, the courts have developed significant expertise about loan modification and other loss mitigation options. NYRL believes that it is tremendously important that the settlement conferences remain available for all residential foreclosures involving home loans.

ⁱ CPLR 3408 requires the court to hold a mandatory settlement conference within 60 days after plaintiff has filed proof of service of the summons and complaint with the county clerk. Uniform Rule 202.12-a requires the plaintiff to file a specialized RJI when it files the proof of service, and the courts use the specialized RJI to trigger the need for a settlement conference.

ⁱⁱ See, e.g., *Advocates Seek to Eliminate Foreclosure ‘Shadow Docket’*, New York Law Journal, 3/27/12; *Casting Light on ‘Shadow Dockets’*, Albany Times Union, 8/1/13, available at <http://www.timesunion.com/local/article/Casting-light-on-shadow-dockets-4702153.php>. See also MFY Legal Services’ *Justice Deceived*, June 2011, and *Justice Unsettled*, May 2012, available at <http://www.mfy.org/projects/foreclosure-prevention-project/>.

ⁱⁱⁱ Codified at CPLR 3012-b. The primary purpose of the new law was to prevent the further growth of “shadow dockets” by compelling plaintiffs to file required documentation when they commence the case.

^{iv} See Office of Court Administration, 2012 Foreclosures Report, available at <http://www.nycourts.gov/publications/#Foreclosure> (indicating approximately 6,000 shadow docket cases in Kings and Queens counties alone).

^v Copies of the full decisions are available upon request.

^{vi} The report, *Stalled Settlement Conferences: Banks Frustrate New York’s Foreclosure Settlement Conferences*, was produced in April 2014 by Legal Services NYC, MFY Legal Services, and JASA/Legal Services for the Elderly in Queens. It can be found at <http://nylawyer.nylj.com/adgifs/decisions14/050214report.pdf>.

^{vii} A flow chart explaining the “Paths of a Foreclosure” in New York is attached.

^{viii} For more information, please contact Jacob Inwald at 646-442-3634 or Jennifer Sinton at 718-246-3268.