



LEGAL
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INCORPORATED

SUPPORT

Ensuring a Fair & Efficient Foreclosure Process

March 8, 2013

A. 5582 (Weinstein, Robinson, Colton, Perry, multi-sponsored by Clark, Galef, Gottfried, Jaffee, Lentol, Markey -- at request of the Office of Court Administration)

MFY Legal Services, Inc. (“MFY”) supports the Office of Court Administration’s program bill A.5582. This legislation will stop further growth of the “shadow docket” where thousands of New York residential foreclosure cases currently languish thereby denying homeowners the ability to modify their loans before it is too late. The legislation will also restore integrity to the judicial foreclosure process by requiring lenders’ attorneys to take steps at the outset of a foreclosure to ensure the accuracy of factual statements made in court papers. Filed foreclosure cases will more quickly enter the court’s docketing system and be scheduled for mandatory settlement conferences, ensuring that those homes that can be saved will be saved and contributing to New York State’s recovery from the lingering economic malaise.

- 1. New York’s foreclosure process has been impaired by delays caused by foreclosure law firms.** In New York State, the average time it takes to foreclose is 986 days, or almost three years. This long and protracted process is not good for anyone: homeowners, banks, and especially the court system, which has spent considerable time and money identifying cases mired in the “shadow docket,” a descriptive term for cases that sit idle between the time a foreclosure is filed and the time – often 2 to 3 years – the foreclosing lender files the document that enables the court system to assign a case to the settlement conference part.
- 2. Foreclosure law firms created the current shadow docket, where thousands of NYS foreclosure cases languish.** As MFY first documented in its July 2011 publication, *Justice Deceived: How Large Foreclosure Firms Subvert State Regulations Protecting Homeowners* and its May 2012 follow-up, *Justice Unsettled: How the Foreclosure Shadow Docket & Discontinuances Prevent New Yorkers from Saving their Homes* (both available at www.mfy.org), foreclosure law firms have routinely filed summonses and complaints but, starting in November 2010, ceased filing the Request for Judicial Intervention (RJI), the document that moves the case forward into the settlement conference part. Under court rules, in residential foreclosure cases, the foreclosure law firm is required to file the RJI simultaneously with the filing of the proof of service so that a settlement conference can be held within 60 days so that the homeowner can get relief

3. ***Justice Deceived* found that in 98% of cases, proofs of service were filed; however in 87%, RJIs have not been filed. *Justice Unsettled* found a similar pattern.** *Justice Unsettled*, published in May 2012, long after the shadow docket problem was first identified, found that foreclosure law firms are still failing to file the RJIs. In 73% of residential foreclosure cases, cases sit in the shadow docket more than six months after it is filed.
4. **The shadow docket emerged when foreclosure law firms were unable to attest to the accuracy of the facts in the foreclosure complaints they had already filed and continued to file.** In October 2010, to address the nationwide “robo-signing” scandal and guarantee that false pleadings were not being filed, the Office of Court Administration (“OCA”) required that all foreclosure law firms attest to the accuracy of every residential foreclosure complaint (the “Due Diligence Affirmation”). OCA mandated that the Due Diligence Affirmation be filed simultaneous with RJI. As the MFY studies document, starting in November 2010, foreclosure law firms stopped filing RJIs and never filed the Due Diligence Affirmation.
5. **Without access to the settlement conference, those homes that can be saved will not be saved, and those homes that should be foreclosed upon just sit in the shadow docket.** In establishing the settlement conference part at the very beginning of the residential foreclosure process, the New York State Legislature recognized the importance of early access to the courts. Delay in getting to the settlement conference causes a homeowner’s arrears to grow exponentially as legal fees, monthly late fees, delinquent interest and other foreclosure-related fees are charged to the outstanding balance. The longer the homeowner is forced to wait in the shadow docket the greater the risk that these arrears will grow so large that it will become mathematically impossible to create a mortgage modification with an affordable monthly payment. Those homes that could have been saved will now be lost. Those homes that should be pushed through the foreclosure process because the homeowner has abandoned the property or is otherwise unable to support the debt, will also languish, dragging down further our economy.
6. **By requiring that a certificate similar to the Due Diligence Affirmation be filed with the summons and complaint, this legislation guarantees that homeowners will again be granted early access to the settlement conference part, homes that should be saved will be saved, and our economy can get back on track.** This legislation requires that a certificate similar to the Due Diligence Affirmation be filed at the summons and complaint stage. As a result, the Due Diligence Affirmation will no longer need to be filed at the RJI stage and cases will no longer sit in a shadow docket.
7. **This legislation prevents the fraudulent filing of foreclosure complaints and allows judges to rely on the accuracy of the pleadings.** As evidenced by the MFY studies, foreclosure law firms were filing foreclosure actions the accuracy of which they were unable to attest. False pleadings not only harm homeowners but also call into question the integrity of the judicial process. Now, foreclosure law firms will be

required to attach the note, mortgage and any related assignments to the certification of accuracy. Judges no longer will be stuck with a case where midway through the proceeding the foreclosure law firm is unable to produce the note.

8. This legislation permits the courts to impose sanctions if foreclosure law firms continue to violate the law. As foreclosure law firms' prior behavior demonstrates, it is necessary that the courts be authorized to sanction the plaintiff and/or foreclosure law firm where it violates the law. In addition to authorizing a court to *sua sponte* dismiss the action without prejudice, the legislation also specifically permits courts to toll the late fees, delinquent interest and other fees that have accrued.

For these reasons, MFY supports this legislation.

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