

NEW YORK'S RESIDENTIAL MORTGAGE FORECLOSURE PROCESS

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Mortgage Foreclosure



In a mortgage foreclosure, the holder of the mortgage files a lawsuit against the homeowner/mortgagor, obtains a judgment, and sells the property at an auction.

The money received from the auction is used to pay the debt owned by the homeowner.

Chapter 73 of the Laws of New York 2016 (Zombie Foreclosure Legislation)

- Signed June 23, 2016
- Goes into effect December 20, 2016
- Changes key provisions of
 1. NYS Real Property Actions and Proceedings Law (RPAPL)
 2. CPLR Article 34 Rule 3408

90-Day Notice RPAPL § 1304

- Requires a lender, an assignee, or a mortgage loan servicer to provide a borrower notice at least 90 days before commencing a legal action against property improved by a 1-4 family dwelling.
- Must have specific language.
- Must have a list of at least 5 nonprofit housing counseling agencies located near the borrower.

Changes to 90-Day Notice

- Must be sent to “the property address and any other address of record” (not just the property address)
- Must be in “borrower's native language (or a language in which the borrower is proficient), provided that the language is one of the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York.”

Changes to 90-Day Notice

Notice to include language informing borrowers:

- They have the right to remain in the home until a court orders them to leave.
- They remain the legal owner of the property and are responsible for the property until the property is sold.
- They may call the NY Attorney General's Homeowner Protection Program (HOPP) consumer hotline

30-Day Notice (Mortgage Provision)

- Requires lender to send borrower notice 30 days before commencing foreclosure action

Commencement

Lender files:

- Notice of Pendency
- Summons & Complaint
- Certificate of Merit (Residential foreclosure actions filed on or after August 30, 2013) Pursuant to CPLR § 3012-b.
- “Help for Homeowners” Notice required at the time foreclosure is filed (RPAPL § 1303)
Typically warns homeowners about scams.

Changes to the “Help for Homeowners” Notice

- Now informs homeowners of their right to remain in their home until the foreclosure is complete

Service, Request for Judicial Intervention, (Attorney Affirmation)

Lender files:

- Affidavits of Service
(indicates how/ when each defendant was served)
- Request for Judicial Intervention (“RJI”)
- Attorney Affirmation (Pursuant to Administrative Order of the Chief Administrative Judge of the Courts AO/431/11 that went into effect on November 18, 2010) (seen on older files; now replaced by Certificate of Merit)

Answers/ Notices of Appearance

- Defendant(s) file answer to the summons and complaint with the court (done within 20 days of the date of receipt, if the summons and complaint were served in person, or within 30 days if they were sent by mail or delivered in another way.)
- Defendants may, instead of filing an answer, file a Notice of Appearance to be notified of future court actions/ appearances

Changes to filing Answers

- Borrowers who fail to file an answer within the 20 or 30 day time period, are permitted to file an answer to the complaint within 30 days after they appear at the first scheduled settlement conference.

Settlement Conference RPAPL§ 3408

- Applicable to owner-occupied homes
- Settlement conference required within sixty days after the date proof of service of the foreclosure is filed with the county clerk

Changes to CPLR 3408(a) Coverage

- Settlement conferences to include non-retention options such as short sales and deeds-in-lieu of foreclosure.

Changes to 3408(c) Appearance

- Court may allow a representative of the plaintiff or the defendant to attend the settlement conference by phone or by video-conference.

Changes to 3408(e) Documents-Lenders

Lenders must bring the following documents to conferences:

- Payment history
- Payoff and reinstatement amounts
- Copies of the mortgage and note
- Name, address and phone number of the owner of the mortgage and note, if Plaintiff is not the owner
- Loan modification application packet and description of loss mitigation options available to the borrower
- Any other documentation required

Changes to 3408(e) Documents-Lenders

If lender is evaluating borrower for loan modification programs, in addition to the above documents, the following should be provided:

- Status of the evaluation
- List of any missing documents
- Date when evaluation should be complete

If lender has denied the application, the following is required:

- Denial letter giving the data input fields and values used in the evaluation
- If the denial was based on investor restrictions, evidence such as a pooling and servicing agreement.

Changes to 3408(e) Documents- Borrowers

Borrowers must bring the following documents to conferences:

- Information on current tax returns; expenses; property taxes
- Previously submitted loss mitigation applications
- Benefits information
- Rental agreements or proof of rental income

3408(f) Good Faith

- Good faith standard is measured by the “totality of the circumstances”

Good faith factors:

- Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
- Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of fore- closure; and
- Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.

Changes to 3408(g) Discontinuance

- Plaintiff must file a notice of discontinuance and vacatur of the lis pendens within 90 days after any settlement agreement or loan modification is fully executed.
- Plaintiff currently have 150 days

3408(i) Good faith evaluation

- A referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process, may hear and report findings of fact and conclusions, and may make reports and recommendations for relief to the court
- Either party may file a motion to request a good faith evaluation
- The mediator may evaluate sua sponte, but with proper notice to all parties

3408(j) Failure to negotiate in good faith-Plaintiff

If Plaintiff fails to negotiate in good faith, the court can:

- Toll the accumulation and collection of interest, costs, and fees
- Where appropriate, impose one or more of the following:
 - Compel production of any documents
 - Impose a civil penalty payable to the state in an amount not to exceed twenty-five thousand dollars;
 - Award actual damages, fees, including attorney fees and expenses to the defendant ; or
 - Award any other relief that the court deems just and proper.

3408(k) Failure to negotiate in good faith-Defendant

- If borrower/homeowner fails to negotiate in good faith, the case will be removed from the settlement conference calendar

3408(l) Notice to Borrowers

At the first settlement conference, if an answer or pre-answer motion to dismiss is not filed, the court shall:

- Advise the defendant of the requirement to answer the complaint;
- Explain what is required to answer a complaint in court;
- Advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and provide information about available resources for foreclosure prevention assistance.
- Court shall also provide a copy of the Consumer Bill of Rights

Consumer Bill of Rights

- Pursuant to RPAPL § 1303 Effective December 20, 2016 (Amended by Chapter 73 of the Laws of New York 2016), “the department of financial services shall publish a Consumer Bill of Rights, in consultation with all stakeholders, which shall detail the rights and responsibilities of the plaintiff and defendant in a foreclosure proceeding. Such Bill of Rights shall be updated on an annual basis and as appropriate.”

Notice to Borrowers- Erie County

- 8th Judicial District is working with the Office of Policy & Planning on this.

3408(m) late answer

- Borrowers who fail to file an answer within the 20 or 30 day time period, are permitted to file an answer to the complaint within 30 days after they appear at the first scheduled settlement conference.

3408(n) Motions

- Motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.

Motion for Order of Reference/ Motion for Summary Judgment

- If an answer was not filed, lender files a motion for Order of Reference, asking the judge to appoint a referee to add up the total amount owed to the lender according to the terms of the mortgage, including principal, interest, late charges, and foreclosure fees and costs
- If an answer was filed, lender files a motion for Summary Judgment requesting that the judge strikes the answer, and appoints a referee.
- The defendant may file opposition to the lender's motion for summary judgment

Motion for Judgment of Foreclosure & Sale (JFS).

- After the appointed referee submits his/her report with the total amount owed, the lender files a motion for Judgment of Foreclosure and Sale

Changes to JFS

- New Law requires that the judgment shall direct that the property be sold within 90 days of the date of the judgment.

Sale

- After the judge signs the JFS, lender publishes notice of the auction in a newspaper before the auction date, and then schedules an auction

Changes to Sale

- If the purchaser is the plaintiff from the foreclosure action, property to be placed on the market for sale within 180 days, or if repairs are being made, within 90 days from the date the repairs are completed, whichever comes first.