NEW YORK STATE FORECLOSURE DEFENSE BAR (NYSFDB)

A STATE OF EMERGENCY AND CHAOS IN NEW YORK COURTS FOR HOMEOWNERS FACING FORECLOSURE AND IN THEIR EFFORTS TO ENGAGE IN LOSS MITIGATION

A CALL FOR REMEDIES AND ATTENTION

BY NYSFDB BOARD OF DIRECTORS
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A STATE OF EMERGENCY AND CHAOS IN NEW YORK COURTS

PROBLEM 1: UNETHICAL, EX PARTE COMMUNICATIONS IMPUGNS COURT INTEGRITY

The *ex parte* communications between court administrators and Federal National Mortgage Association ("Fannie Mae") and its sister entities in the past months, if not in the past years; they were improper; they most likely affected the due process and foreclosure prevention protections afforded homeowners under New York law; they obviously resulted in the "streamlining" of foreclosure proceedings and taking away of the possibility of diligent deliberations among a learned judiciary, advocates and parties.

PROBLEM 2: SURREPTITIOUS PARTICIPATION BY PLAINTIFF IN COURT ROOMS

Appearances and participation by Fannie Mae with senior personnel from the New York State Office of Court Administration ("OCA") during motion proceedings and settlement conferences in Kings County Supreme Court, and in other New York State counties, without the defendants' knowledge and under the guise of being part of the courts, were improper; these actions compromised the integrity and independence of the courts and created the appearance of undue influence on court proceedings and personnel for the benefit of Fannie Mae, their foreclosing plaintiffs and mortgage loan servicers.

PROBLEM 3: THWARTING OR OTHERWISE UNDERMINING CPLR 3408

The Courts disregard for the mandates of CPLR 3408 to save homeownership by implementing specific directives that limit foreclosure settlement conferences to four (4) conferences, directives that discourage the writing of detailed reports by sitting judicial hearing officers or referees, and that fail to create a good-faith arena for conferences with trained and dedicated judicial hearing officers or referees is in effect, a thwarting of the letter and intent of CPLR 3408; the courts' disregard for the tenets and purpose of CPLR 3408 has encouraged the dilatory and recalcitrant tactics of plaintiffs, their loan servicers and their attorneys; their tactics circumvent or delay loss mitigation efforts with eligible homeowners, which in turn has led to an increase in the loss of homeownership by families that are eligible for loan modifications and resolution of foreclosure actions under the federal governments' HAMP program or otherwise.

PROBLEM 4: SUBMISSION OF QUESTIONABLE/FRAUDULENT AFFIDAVITS BY LOAN SERVICERS; EROSION OF THE INTEGRITY OF THE JUDICAL PROCESS

The continued submission of fraudulent affidavits in plaintiffs' applications for default and summary judgments by loan servicers of mortgage loans, especially those securitized, guaranteed or held by the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), trustees or loan servicers of other securitization sponsors or entities, and their attorneys. The foreclosing plaintiffs, whether national banks or mortgage loan servicers, are engaging in the same level of misconduct that resulted in the implementation of administrative order by then Chief Judge Jonathan Lippman in 2010 to ferret out the submission of fraudulent filing in foreclosure proceedings (**Attachment I hereto).**

PROBLEM 5: NEWLY CREATED FORECLOSURE RESOLUTION PARTS

The newly-created Kings County Foreclosure Resolution Parts 1 and 2, with 6000+ residential foreclosure cases (15% of the entire court's docket) assigned to Part 1, and another 2000+ to Part II. The reassignment of foreclosure cases that were pending before the judges in the IAS system in Kings County Supreme Court was unauthorized and improper.

These Kings County Foreclosure Resolution Parts:

a) Do not qualify as a judicial proceeding part;

b) destroy all perceptions of the independent judiciary that was duly elected by the residents of Kings County;

c) have already resulted in in a diminution of the integrity of the courts and prejudice to litigants, especially *pro se* litigants;

d) do not permit for due, judicial deliberation and fair adjudication of foreclosure cases (with the stated intent being to "streamline" foreclosure proceedings);

e) violate the laws and rules of the independent assignment system applicable to supreme court cases; and

f) further the improper -- if not illegal -- removal of cases that were assigned to judges, in accordance with the IAS System, with experience and a level of expertise in foreclosure law and proceedings (judges who have presided over scores if not hundreds of cases in the past five to ten years; who have conducted hearings, heard and ruled on evidentiary matters and motions in foreclosure and other cases before the Supreme Courts; who have written decisions in foreclosure actions and otherwise have been involved with the jurisprudence of foreclosure (including, Hons. Baynes, Bailey-Schiffman, Bunyan, Jacobson, Kurtz, King, Martin, Rivera, Ruchelsman, Rothenberg, Saitta, Silber, Sherman, Solomon, Velasquez)).

In the Foreclosure Resolution Parts:

g) The plaintiffs' motions for judgments (to rush the foreclosure cases along) are dual tracked with settlement conferences, in violation of state and federal law, and the Uniform Court Rules, with a high volume of foreclosure judgements being summarily granted to plaintiffs on default by homeowner defendants who are unrepresented (*pro se* litigants) and who are unaware that they are required to answer the calendar or to submit opposition to plaintiffs' motions or request an adjournment if a loan modification application was submitted.

h) Settlement conferences are calendared and convened in the Part while motion papers are stacked on the conference table, waiting for immediate submission upon plaintiffs' counsels' presentation of surprising or incredible excuses for a denial (such an undisclosed or unsubstantiated investor restriction, an allegedly missing phone number or unchecked box on one of the numerous, improper, servicer specific forms, an complete application that has gone "stale" even if the homeowners have proof that all documents were submitted in on time, or a simple failure to have review the loan modification applications that was submitted).

i) The resulting disservice to all parties will impugn the overall integrity of the courts and the law.

j) This [improper judicial-directed] foreclosure resolution [approach] increases the likelihood of increased illegal taking of a significant percentage of real property in Kings County, without due process of law; it results in an exponential loss of homeownership despite the directives and tenets of the Chapter 472 of the Laws of 2008, as amended in 2009 (the Homeowner Prevention and Protection Action), including 3408.

k) Part I of the Foreclosure Resolution Part -- 6,000 pending foreclosure cases -- are now being presided over by a newly-appointed supreme court justice, whose prior experience on the bench as a civil court judge may not have provided him with the expertise and judicial seasoning to deliberate over this large volume of cases in a short period of time; foreclosure cases that require heightened protections for all homeowners; foreclosure cases before the court [that] are at different stages of the docket and civil procedure. Foreclosure cases are not summary in nature; in a large percentage of these, the court has a charge to treat the *pro se* litigants as poor persons for CPLR 3408 purposes; all of these cases require that the Court attend to due process protections, and the CPLR standards for judgments that are grounded in the New York State Constitution.

PROBLEM 6: FORECLOSURE CRISIS CONTINUES TO GROW

The foreclosure crisis is ever-mounting in Kings County, New York in particular, and is endemic of the conditions in other counties facing foreclosures. In March of 2016, the number of properties that received a foreclosure filing in Brooklyn, New York was 27% higher than the previous month, and 9% higher than the same time last year.

PROBLEM 7: VIOLATING DUE PROCESS

The trial and appellate courts' setting aside of the due process protections afforded homeowners, as real property owners in New York State, on an agenda to clear the courts' dockets of foreclosure actions, is having adverse, unintended consequences that are in contravention to the Homeowner Prevention and Protection Act: that is, the effect is widespread loss of homeownership, and a drastic change of the ethnic, social and economic demographics of residential, homeowner communities statewide, among others.

"Lack of access to justice is a recognized problem threatening the integrity of the legal system", Lynn Armentrout - "Foreclosed Homeowners Foreclosed From Telling Their Stories", New York Law Journal, March 16, 2016 (Ms. Armentrout is the former director of the New York City Bar Justice Center's Foreclosure Prevention Network)

AN IMMEDIATE MORATORIUM IS NECESSARY TO BRING ORDER AND INTEGRITY BACK TO THE FORECLOSURE JUDICIAL PROCESS, TO ENCOURAGE FORECLOSING PLAINTIFFS, FANNIE MAE, FREDDIE MAC AND THEIR LOAN SERVICERS TO NEGOTIATE THE LEGALLY MANDATED ALTERNATIVES TO FORECLOSURE IN GOOD FAITH; AND TO ENSURE THAT FRAUD IS NOT PERPRETRATED ON THE COURTS AND NEW YORK PROPERTY OWNERS.

INTERIM SOLUTION 1
– INSTITUTE A MORATORIUM ON FORECLOSURE PROCEEDINGS

The institution of a moratorioum by the Chief Justice of the Courts to address the magnitude of the problems identified above; a time-out for the courts to remedy the present state of chaos, fraud, unethical communications, and lack of due process; a mechanism for the adoption of rules and procedures that will bring foreclosure proceedings back to an even playing field and to achieve the New York State Legislature's intent to save homeownership and keep communities stabilized. Precedent: Moratorioum by Administrative Orders of the Chief Justices of the Courts of New Jersey and South Carolina (2011).

INTERIM SOLUTION 2

Return (reassign) all pending foreclosure matters to the judges to which they were originally assigned on the dates of the purchases of the requests for judicial intervention in each of the actions, as required by laws and rules of New York State that provide for the continuous supervision of each action and proceeding by a single judge for the life of the action (pursuant to the individual assignment system).

INTERIM SOLUTION 3

Immediate cessation of all *ex parte* communications between the OCA and Fannie Mae, Freddie Mac and its related entities. OCA shall make a full and complete disclosure of all communications, conversations and meetings held with respect to foreclosure proceedings in New York State, and any proposals provided to OCA by Fannie Mae with respect to CPLR 3408 conferencing or foreclosure case handling.

LONG-TERM SOLUTION 1

OCA to develop a budget and plan for funding each and every mandate of CPLR 3408, beginning with the mandate that *pro se* litigants must be treated as poor persons. The courts has an obligation to train court personnel overseeing CPLR 3408 settlement conferences

Courts shall abolish the limits on the number of CPLR 3408 settlement conferences, as such limits are not prescribed within the statute (the restricted time limit facilitates recalcitrant conduct by plaintiffs and mortgage loan servicers). Codification of sanctions that were imposed by trial courts and affirmed by Appellate Jurisdictions for parties' failure to negotiate in "good faith." Require that court appointed referees or judicial hearing officers prepare detailed reports and recommendations at the conclusion of CPLR 3408 conferences, or otherwise provide for court reporters to attend all settlement conferences.

RELATED SOLUTION: Adopt the recommendations of New Yorkers for Responsible Lending in the Report entitled "Divergent Paths: The Need for More Uniform Standards and Practices in New York State's Residential Foreclosure Conferences," Spring 2016.

LONG-TERM SOLUTION 2

Require that all affidavits submitted by or on behalf of lenders or servicers be made "under the penalty of perjury" and contain detailed descriptions of how the note and the mortgage was transferred or negotiated from the originating lender to the plaintiff, meet the standards for admissibility as evidence of plaintiff's ownership of the note and mortgage at the commencement of the action, and otherwise adhere to the other tenets of New York law. Plaintiffs, their loan servicers and their attorneys must face sanctions for submission of fraudulent affidavits. Assign court attorneys to examine plaintiffs' filing and ensure compliance with the due process protections of the foreclosure prevention laws of New York State.