26 Court Street,
Suite 603
Brooklyn, NY 11242
Tel.: (855) 4 NYSFDB
info@nysfdb.org

February 19, 2013

Hon. Lawrence S. Knipel
Administrative Judge for Civil Matters, Second Judicial District
Kings County Supreme Court
360 Adams Street
Brooklyn, New York 11201

Dear Judge Knipel:

We hope our letter finds you well. We write on behalf of the New York State Foreclosure Defense Bar ("NYSFDB"). NYSFDB is an association of New York attorneys who are committed to protecting the legal rights of homeowners facing foreclosure, by ensuring that they are afforded the due process rights and protections of New York law and the New York State Constitution. Many of our members practice foreclosure defense in Kings County.

This past week, clerks and referees in the Kings County Foreclosure Settlement Conference Part (the "FSC Part") advised parties and their counsel that new court rules were implemented, and that those rules were given retroactive effective. In addition, we were verbally advised that CPLR 3408 conferencing is now limited to four (4) conferences, irrespective of the facts and circumstances of each case and the record of prior conferences.

Inasmuch as these rules have already been put in place and settlement conferences are being governed by their provisions, and for the reasons set forth below, we are respectfully requesting a prompt meeting with your Honor and the Foreclosure Committee of the Court. NYSFDB is concerned that members of the plaintiffs' bar were privy to, and may have actually requested, the rules two weeks ago. In fact, they have openly insisted on the application of new procedural rules and have requested premature referrals to the IAS Parts last week, instead of providing the homeowner defendants with decisions on their long-standing applications for loan modifications or other forms of 3408 workouts.

More important is our concern that this Court has retroactively promulgated and put new rules into effect without providing prior notice to defense attorneys who regularly represent homeowners in the Kings County Court. In a similar vein, unrepresented homeowners who have been attending conferences in the past two years would also be prejudiced by the implementation, unexpectedly, of a four-conference and other unpublished rules.

In 2009, the New York State Legislature reemphasized CPLR 3408's mandate by adding the good-faith standard to the statute: to encourage plaintiffs and their authorized loan servicers to renegotiate mortgages so that families can remain in their homes. In sponsoring the 2009 amendments, both the New York State Assembly and Senate found that "***[a]s the mortgage crisis has worsened ... it has become evident that more must be accomplished to protect New Yorkers in these difficult times and beyond.***" (See Senate Memorandum in Support, Bill Jacket, L 2009, ch 507, 2009 McKinney's Session Laws of NY, at 1842; Assembly Mem in Support, Bill Jacket, L 2009, ch 507.)

To date, the Uniform Court System has been unable to reach its goal of enforcing meaningful participation in foreclosure settlement conferences by plaintiffs and their mortgage servicer representatives. Indeed, in our vast experience, the named plaintiff almost never appears or participates in CPLR 3408 conferencing. Homeowners continuously engage in settlement negotiations across the table from *per diem* attorneys who come to court unprepared and disinterested more often than not, without authority to modify loans or otherwise settle the case. Homeowners' efforts, in this climate, are met with robotic responses from plaintiffs' (or servicers') counsel.

The effect is that working families continue to be strung along for years in the FSC Part by requests to provide the same documentation repeatedly, especially in periods between conferences, only to be informed at the subsequent conference that a new submission of documents is required — a process that is now known amongst homeowners' attorneys and housing counselor representatives as the "document treadmill." Plaintiffs' dilatory tactics amount to an inevitable series of colossal failures to achieve meaningful (or any) settlements. Finally, the Court may be unaware that delays actually benefit the plaintiffs and their mortgage servicers.

Now, instead of assisting homeowners or enhancing the structure of the FSC Part to achieve the intent of the statute, we fear that this Court has implemented rules with an aim towards "streamlining" the foreclosure process. This will undoubtedly have the effect of foreclosure cases moving towards judgment and auction in an expedited fashion (despite the fact that a homeowner qualifies for a 3408 workout). This direction contravenes the expressed statutory intent of CPLR 3408.

Seemingly, it is this Court's impression that rules implemented in Queens County for its FSC Part in 2012 work beautifully, despite the fact that it is common knowledge that Queens County and other New York courts do not enforce CPLR 3408 in settlement conferences. Indeed, in our experience, the opposite is the case. Although Queens County has been the launching pad for many foreclosure settlement pilot programs, the good faith standard is seldom enforced in that venue, and the vast majority of foreclosure cases are prematurely referred to the IAS Part (or to its Centralized Motion Part), where they enter a procedural path, clearly established for personal injury cases. This system has not simply created an additional backlog on the IAS judges and Court's docket in Queens County; in a climate with rules like Queens County, the New York State Legislature's intent of averting high foreclosure sales of one- to four-family homes through meaningful mandatory settlement conferences is being thwarted.

"Experts" and lobbyists have been disseminating the myth that the main reason for the slow pace of the real estate market's rebound in New York and other judicial foreclosure states is that the courts' process is lengthy. What is important to highlight in this vein is that numerous decisions in this and other jurisdictions (including decisions in non-judicial foreclosure states like Massachusetts) reveal that it is the foreclosing parties that clog the courts' foreclosure process with the likes of inauthentic promissory notes (or notes that fail to meet the UCC standards), fraudulent or inaccurate pleadings, questionable assignments of mortgages, and, in New York State in particular, delays in filing the required Lippman Affirmation and bad faith participation in settlement conferences in New York courts.

The guiding principle for the Unified Court System is embodied in Chief Judge Lippman's October 2010 statement when it became

evident that the plaintiffs in foreclosure actions were blindsiding the courts with robo-signed documentation. Chief Judge Lippman said:

> *We cannot allow the courts in New York State to stand by idly and be party to what we now know is a deeply flawed process, especially when that process involves basic human needs—such as a family home—during this period of economic crisis.*

Chief Judge Lippman also recognized and stated on February 14, 2012: "*There will be no more excuses, no more delays. Real negotiations [must] take place, and homeowners [must] leave the table with the best available offer*". The Appellate Division, Second Department, in *Bank of New York v. Silverberg*, reminded the courts and practitioners in this area in 2011:

> *…the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.*

The Court may be correct in thinking that some level of rulemaking is required to ensure that it achieves the edict of CPLR 3408; however, it is unclear to us how limiting the conferences to four conferences, and implementing unpublished part rules, achieve that end. Without an effort by the Court to address the bad faith participation by plaintiffs and their representatives in the FSC Part, an outcome similar to that which is now being reported on the foreclosure fraud settlement between major banks and the U.S. Justice Department is inevitable: "***little meaningful relief to families***"; in other words, a win for financial industry (see "***Wall Street wins again***," by David Dayen, published February 13, 2013).

Aside from the importance of the CPLR 3408, a four-conference rule will encourage plaintiffs to make unfounded requests for release of foreclosure matters from FSC Part prematurely, which will in turn cause extreme and unnecessary increase (if not chaos) in each IAS Part. Applying past practices as a guide, solely because of plaintiffs' actions, every judge of this Court will be inundated with an additional 50-60

foreclosure actions per week (as they are released from the FSC Part) added to their respective calendars.

To compound this issue, as Your Honor is aware, most of the cases that will be released are unrepresented Brooklyn homeowners who may be totally lost, who may be forced to make pro se motions while asking Judges to mediate between them and the banks, while these cases flood judicial calendars. This will not only tremendously increase time for all foreclosure actions and also create a backlog in all other matters that are pending before Judges of this Court; the entire 3408 conference process will hang in a post-conference shadow docket, as a number of cases now do.

We are thus respectfully requesting that this Court suspend the new court rules (and their seemingly retroactive implementation), as a matter of law and equity; consider adopting Part rules with an aim towards enforcing the standards specified in CPLR 3408; disseminate any proposed rules to all interested and affected counsel, organizations and parties; provide an opportunity to the bar at large to review and have input if any new rules are to be implemented. In sum, our request is that that any new rule promote the letter and spirit of CPLR 3408 and its amendments, as expressed and adopted by the New York State Legislature in 2008 and 2009; to wit:

> *The mortgage crisis of the past several years has uprooted families, devastated neighborhoods, and contributed to the collapse of our financial markets.*
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> * * *
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> *This [law] would build upon reforms . . . [that would] allow a larger population of distressed homeowners to benefit from consumer protection laws and foreclosure prevention opportunities currently available only to borrowers of high cost, subprime and nontraditional home loans."*

Any new rule that does not achieve more involvement by the real parties in interests, actual holders of the notes at issue, and good faith, meaningful participation by plaintiffs and their representatives, can only be viewed as an erosion of CPLR 3408, and contradicts the

objectives voiced by the Office of Court Administration. Thus, Judge Judy Harris Kluger, the chief of policy and planning for the New York courts said it best, "***Everybody is in agreement that something has to change that gets the players to the table.***"

We are respectfully submitting that if rules are to be adopted by the Court for the FSC Part, such rules should properly embrace the letter and spirit of CPLR 3408. Equity dictates that the course of settlement negotiations are premised on the decisions of this Court in 2012 that define the good-faith standard, and the tremendous experience of Referees and JHOs who have been presiding over tens of thousands of settlement conferences since 2009.

In our view, a significant decrease in the settlement conferences will be achieved, and workouts between the parties will be accomplished, by strict implementation of enforceable deadlines and the standards that are already in place in controlling state law, federal HAMP guidelines, and this Court's precedents in this area (the precedents are attached hereto by way of example) [1].

1) Strict compliance with CPLR 3408(e), which requires production of documents evidencing ownership of the note and mortgage, to ensure that the proper parties with a real interest in the action are engaging in meaningful negations as contemplated under CPLR § 3408.

2) Meaningful appearances and participation by named plaintiff, including personal and meaningful participation by their servicing underwriters and plaintiffs', with authority to settle foreclosure matters, in accordance with the appearance and good-faith standards of CPLR 3408(c), (e) and (f).

3) Mandatory filing of the "Lippman Affirmation" in: (a) all cases pending in what is now styled the pre-conference "Shadow Docket" of the Court and being referred by the

[1] *See* *HSBC Bank USA National Association, as Trustee for Mortgageit Securities Corp. Mortgage Loan Trust Series 2007-1 Mortgage Pass Through Certificate vs. John T. McKenna*, 952 N.Y.S.2d 746, 37 Misc.3d 885 (2012); and *HSBC Bank USA, as Trustee of behalf of ACE Securities Corp. Home Equity Loan Trust And for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2007-HE4, Asset Backed Pass-Through Certificates v. Marie Sen*e, 2012 NY Slip Op 50352(U) [34 Misc 3d 1232(A)]

FSC Part; (b) for cases pending in the FSC Part; and (c) upon plaintiffs' request for the release of a foreclosure matter to IAS Part of the Court.

4) Timely review of, and decision making on, applications for medications or other method of workout proposed by borrowers, including missing documents and approvals/denials, in accordance with the good-faith standard of CPLR 3408.

5) In the event that a modification is denied, a requirement of specific written denials and a provision to accommodate a borrower's right to contest a denial and/or the bases therefor.

6) In the event that a modification is approved, plaintiff must show reasonable cause as to why final modification papers are delayed if beyond required three (3) months trial period.

Our guiding tenet at NYSFDB is that the dignity of those who are facing foreclosure must be preserved in a manner that the New York State Legislature intended when it adopted CPLR 3408. NYSFDB fears that families' rights are being undermined by any rule that create a shorter path to a foreclosing plaintiff's summary judgment motion than the Legislature intended. As Professor Arthur Miller aptly noted, in his inaugural university lecture on March 19, 2012, "***Are they closing the court house doors***":

> *Frankly, I don't think a focus on gatekeeping, early termination, and erecting procedural stop signs befits the aspirations of the American civil justice system. To me this is a myopic field of vision. At a time when the complexities of American life and the need for that metaphoric level litigation field seem to be increasing constantly, our courts should focus on how to make civil justice available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged. Our judges should concentrate on effectuating the vision of the rulemakers of the 1930's—citizen access and resolution of cases on their* merits.

NYSFDB shares Professor Miller's concern. For the foregoing reasons, we respectfully request a meeting with Your Honor and the justices that are members of the Foreclosure Committee of the Court in the coming week. We also bring to your attention that we have copied our colleagues in the nonprofit legal service bar as a professional courtesy.

Respectfully submitted,

Executive Committee, NYSFDB

/S/

Yolande I. Nicholson, Esq. President
Serge Petroff, Esq. Exec. Vice President
Catherine Isobe, Esq. Corporate Secretary
Paula Heaven, Esq. Treasurer

Enclosures

cc: The Foreclosure Committee of the Kings County Supreme Court
Non-Profit Legal Service Providers