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From: M Clinton <mike.clinton33@gmail.com>
Sent: Thursday, November 29, 2018 8:39 PM
To: Comments Mailbox
Subject: Comments RE: Amendments Proposed by the Special Committee on Residential Foreclosure

TO:

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Foreclosure Rule Amendments

Rule 4:64-1B. Mediation of Eligible Residential Foreclosure Cases [new]

(d)(4) Eligibility
The mortgaged premises subject to foreclosure must be a one. two or three family dwelling.

COMMENT: For homeowners with a FHA, government-backed loan, eligibility should include FOUR family dwellings. These loans are a normal part of the FHA program and since they are government-insured, the homeowner should have the opportunity to employ mediation to save their home. The lender will not suffer any additional loss by giving the homeowner this opportunity since losses are covered under the FHA.

(e) Initial Conference

If the parties are not ready to proceed to Residential Foreclosure Mediation at the conclusion of a Second Conference due to a failure of the lender to review the homeowner' s financial documentation or to attend the scheduled session(s), the case shall be deemed a contested foreclosure and shall be referred to a Superior Court judge for review.

COMMENT: Assuming that a contested action can also be subject to mediation, the latter part of this section should read, "the case shall be deemed a contested foreclosure, if not already a contested action, and shall be referred to a Superior Court judge for review."

Rule 4:64-2 Proof; Affidavit
I am confused. The recommended changes in Appendix B of the Report of the Special Committee on Residential Foreclosures dated August 2018 made no mention of revising proof such that it be by Affidavit **OR** Certification. In fact, "no change" was indicated for 4:64-2(a)
However, in the Request for Comments, the proposed change was indicated as:
Rule 4:64-2. Proof; Certification **or Affidavit**

(a) Supporting Instruments. Proof required by R. 4:64-1 may be submitted by Affidavit or Certification, unless the court otherwise requires. . . . . .

It seems unfair and out of order to include new changes in the Request for Comments. Many of those who may have initially read the proposed changes and did not see this new "Certification" language may not comment since this change was not included in the Report. Is the court intending to put changes into effect that were never included in the Report? If yes, then I ask the court to fully consider my suggested changes herein.

Rule 4:64-8. Dismissal of Foreclosure Actions for Lack of Prosecution

....."**Reinstatement of the matter after dismissal may be permitted only two times on motion for good cause shown before a new complaint shall be required in order to proceed. The court may issue the written notice herein prescribed in any matter pending on the effective date of this rule amendment, and this rule shall then apply.**"

COMMENT: Giving a lender TWO opportunities to have an action reinstated after dismissal effectively gives the lender THREE bites at the apple. Meanwhile, the homeowner is stuck in a seemingly never-ending prosecution, possibly incurring more and more costs and legal fees if the action is contested. Unlike federal court (Rule 41(b)), where a "defendant" may move to dismiss an action for plaintiff's failure to prosecute, in state court, a defendant becomes a pawn, stuck in the hands of a foreclosing plaintiff who is given an almost endless amount of time to prosecute its case. With this in mind, the Court Rules should provide that a defendant may move to dismiss the action w/o prejudice after the first 12 month period has passed with no activity and where the motion to reinstate has either been denied or not filed at all.

It's important to take note that **as it currently reads**, the language in the amended Court Rule appears to allow two "**actual**" reinstatements after dismissal. In other words, does a motion to reinstate that is denied (though rare) NOT count as one of the two opportunities? The Court Rule should instead be phrased to allow a foreclosing plaintiff to file a maximum of two "motions to reinstate" - whether granted or denied. If not phrased like the latter, then, in effect, the Rule would allow a plaintiff unlimited opportunities to have a reinstatement "denied." Following these unlimited denials of reinstatement, a plaintiff will still have two more opportunities to have a reinstatement granted, thus giving a plaintiff UNLIMITED bites at the apple - with the defendant (in a contested action) paying fees and costs the entire time. This is a bad outcome.

Though not included in the Amendments, revisions to the Rules should likewise include a limit as to how long a case can remain in a dismissed w/o prejudice state following a failure to prosecute. One must wonder about the useful purpose of allowing a case to linger indefinitely until the plaintiff finally decides it wants to prosecute, however long that might be. A case needs to conclude and if the plaintiff fails to prosecute and/or a case is not reinstated within a specified period of time, say 2 years, then the Court should, sua sponte, dismiss the action w/prejudice. "Balancing the institutional needs of the judiciary against the principle that a just result should not be forfeited at the hands of an attorney's lack of diligence," should also be balanced against the rights of a defendant to not be held over in civil court in perpetuity with a lis pendens on the property.

It makes sense to eliminate the "exceptional circumstance" scenario given that a plaintiff has already had a full 12 months since dismissal to resolve these "circumstances." Oftentimes, the assertion of exceptional circumstances is disingenuous, but always accepted as true by the court.

As to future amendments, following any dismissal w/o prejudice for failure to prosecute, regardless whether initiated by the court or the defendant, "similar" to federal court (Rule 41(d)), the state court should add a rule that would read:

> COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who had a foreclosure action (twice) dismissed for failure to prosecute files a new action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

If the real intent of such court rules is to keep the docket moving, then such rules would not be unfair to foreclosing plaintiffs. In fact, such rules would be fair to everyone as it would severely cut back on the nonsensical delays and behavior of plaintiffs and their counsel when they engage in such inordinate delays ONLY because such behavior is fully countenanced by the courts.

Overall, Rule **4:64-8** should be made more clear.

I appreciate the opportunity to comment.

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