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NEW JERSEY STATE BAR ASSOCIATION

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December 14, 2018

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Foreclosure Rule Amendments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Report of the Special Committee on Residential Foreclosures

Dear Judge Grant:

Thank you for the opportunity to review the Report of the Special Committee on Residential Foreclosures. The New Jersey State Bar Association (NJSBA) extends its appreciation to the members of that committee for developing thoughtful, comprehensive recommendations aimed at providing opportunities for the parties to a foreclosure action to resolve their differences in a manner that avoids foreclosure, and ensures a fair and reasonable process if foreclosure is the only available option.

The NJSBA offers comments on the proposed new Rule 4:64-1B, which seeks to establish a mediation process aimed at finding alternative resolutions to foreclosure. The NJSBA supports that process, and offers these comments to improve the proposal:

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

(a) Purpose

The proposed language in this section prohibiting the mediation from focusing on the reasons underlying the default is unnecessary and could be problematic for the lender. Indeed, it is often the case that the underlying reasons for a homeowner's hardship leading to default are highly relevant and material to their eligibility for a loan modification. Likewise, the language requiring the mediation to explore whether an alternative resolution is available, such as a loan modification agreement or a deed in lieu of foreclosure, is very limiting and should be broadened to reflect that there are multiple types of home retention and non-retention options.

To address these concerns, the NJSBA proposes the following language changes:

(a) Purpose. Residential Foreclosure Mediation differs from other types of court-sponsored mediation. Foreclosures are contractual disputes that arise from a homeowner's default of mortgage obligations. ~~Because there is typically no dispute between the parties~~

~~that the homeowner has defaulted on the note, the mediation shall not focus on the reasons underlying the default, but rather shall explore whether an alternative resolution is available to the parties, including but not limited to a loan modification agreement or a deed in lieu of foreclosure. Residential foreclosure mediation shall explore whether an alternative resolution is available to the parties, including but not limited to a loan modification agreement, repayment plan, reinstatement, or other acceptable form of home retention resolution, or a non-retention option such as a deed in lieu of foreclosure, cash for keys, short sale or market sale.~~ Although the parties are not required to accept a ~~loan modification or other~~ alternative resolution, mediation may provide an opportunity for the homeowner to continue to reside in the mortgaged premises and may afford the lender an opportunity to avoid foreclosure costs and carrying charges and to reduce the number of non-performing loans in their portfolio.

(d) Eligibility

Requiring a court order to allow mediation unless each borrower is willing to participate is potentially troublesome for all parties in the foreclosure process. For example, there are sometimes borrowers on the note who are uncooperative or unavailable, and a simple quitclaim deed can remedy the problem, without the need for a court order.

The NJSBA recommends adding language as noted below to allow the lender or servicer to agree to participate in the mediation without all of the borrowers on the note.

(5) All borrowers who execute the note must agree to participate in the mediation. Absent a court order or an agreement by the lender or servicer that provides otherwise, Residential Foreclosure Mediation is not available unless each borrower is willing to participate.

(e) Initial Conference

The outright prohibition against a third conference contained in paragraph (3) of this section may have an unintentional consequence of impeding a process that is heading to a successful conclusion, as some cases are complex or have exceptional circumstances that might require an additional meeting. Therefore, the NJSBA suggests the language be changed, as noted below to allow a third conference in appropriate circumstances, as deemed by the clerk:

~~(3) No Third Conference shall be scheduled.~~ A Third Conference shall only be scheduled if deemed necessary by the Superior Court Clerk's Office.

The NJSBA suggests that language be added to paragraph (4) of this section to account for the common situations in which homeowners believe they have submitted a full package only to learn later information is missing due to an inadvertent mistake or for reasons beyond their control. Some examples could include: homeowners may have missed signing a page or checking a box; they may have been unaware of required additional documentation; or they were

unable to timely obtain a document from a third party such as the Social Security Administration or their pension provider. In these instances, homeowners should not be penalized so long as they have made their “best efforts” to provide a full package with all required documentation. The NJSBA suggests the following language be added to allow for these types of scenarios, but still provides the lender/servicer with the ability to remove the case from mediation if the borrower supplies a wholly inferior package, fails to submit anything, or fails to appear.

(4) 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 homeowner to exercise best efforts to provide complete financial documentation or to attend the scheduled session(s), the case shall be removed from the Residential Foreclosure Mediation Program.

The NJSBA suggests that the language in paragraph (5) of this section, automatically deeming a case a contested foreclosure, be reconsidered. It unnecessarily penalizes borrowers who want to resolve the matter through mediation by forcing them to pursue contested actions against the lender instead, while imposing an inadequate penalty to a lender for its failure to review or appear. The NJSBA suggests the following language be included to ensure the lender has made a good faith effort to participate in the process before being allowed to proceed to foreclosure.

(5) ~~”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~~ lender shall not be permitted to proceed with the foreclosure until it submits proof to the Office of Foreclosure that it has reviewed the homeowner’s financial documents, made a decision as to a loan modification or other resolution, and communicated that to the homeowner in writing.

(f) Residential Foreclosure Mediation

Consistent with the comments above, the NJSBA suggest the following changes in this section:

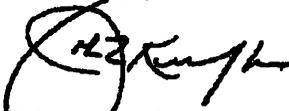
(2) The purpose of the mediation is to explore whether an alternative resolution is available to the parties, including but not limited to a loan modification agreement, repayment plan, reinstatement, or other acceptable form of home retention resolution, or a non-retention option such as a deed in lieu of foreclosure, cash for keys, short sale or market sale. ~~provide the parties with a forum to explore whether an alternative to foreclosure litigation is available, including but not limited to a loan modification agreement or a deed in lieu of foreclosure.~~ The mediation shall be attended by a representative of the lender and by each homeowner who executed the note, unless otherwise agreed to by the lender or servicer or ordered by the court.

...

(4) If the parties are unable to reach a mediated resolution at the conclusion of a second mediation session due to a failure of the lender to timely review the homeowner's financial documentation, ~~the case shall be deemed a contested foreclosure and shall be referred to a Superior Court judge for review~~ lender shall not be permitted to proceed with the foreclosure until it submits proof to the Office of Foreclosure that it has reviewed the homeowner's financial documents, made a decision as to a loan modification or other resolution, and communicated that to the homeowner in writing.

The New Jersey State Bar Association thanks the Supreme Court and the members of the Committee for publishing this report and allowing the association to submit comments and recommendations. I hope that the NJSBA's comments help in the effort to offer meaningful, fair and reasonable opportunities for resolution of foreclosure situations without individuals having to lose their homes.

Very truly yours,



John E. Keefe Jr., Esq.
President

/sab

cc: Evelyn Padin, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director