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December 14, 2018

VIA EMAIL: Comments.mailbox@njcourts.gov
Hon. 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. New Jersey 08625-0037

Re: Comments as to Proposed Court Rules Regarding Foreclosure issued November 14, 2018 Pursuant to Notice to the Bar

Dear Judge Grant:

Our office represents mortgage lenders and servicers in connection with mortgage foreclosures. We submit our comments and proposed revisions to the Court's proposed Rule Amendments governing foreclosure that were issued in the Court's Notice to the Bar on November 14, 2018. In particular we offer our comments as to the following proposed Rule changes and New Rules:

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

Proposed Rule 4:64-1B(g) currently provides:

"(g) Stay of Proceedings. Absent a court order to the contrary the commencement of Residential Foreclosure Mediation proceedings shall not stay the underlying foreclosure litigation."

As the Court is aware, the Federal Consumer Financial Protection Bureau ("CFPB") has issued extensive regulations and guidance regarding mortgage loan servicing including loss mitigation activity. One of the core principles of the CFPB's rules and rule scheme is the prohibition

against the practice commonly known as "dual tracking", i.e. proceeding with foreclosure while there is an active loss mitigation request by a borrower. The CFPB's rules against dual tracking prohibit the lender from advancing the foreclosure action towards entry of Judgment while there is an active loss mitigation request pending in which a completed financial package has been received from the borrower(s). Accordingly, once the matter is in mediation and a completed financial information package completed, in most cases the lender is prohibited from proceeding with the foreclosure until the loss mitigation request is resolved.

The existence of a state requirement to proceed when there is a federal prohibition against doing so has proven problematic because in many litigated cases the parties are still expected to move forward with resolving the litigation. As a result, plaintiffs are put in the position of being required to file dispositive motions before trial, prepare for a trial or otherwise advance the case even though the receipt of the completed loss mitigation package bars the plaintiff from doing so under federal regulations.

2. **Rule 4:64-3: Surplus Monies**

Rule 4:64-3(c)(1)(b) requires:

"(b) proof that the applicant is the party named in the foreclosure complaint"

This rule in our opinion is problematic in several ways. Most individuals are readily able to provide identification to the Court as to their identity. But such documentation often includes personal identifiers which must be redacted, rendering the proffer of evidence meaningless.

Additionally, the rule is unclear as to what documentation the Court considers "proof that the applicant is the party named in the foreclosure," with respect to partnerships or corporations.

In cases where an applicant is represented by counsel, the attorney has a duty (pursuant to the Court Rules) to ensure that the client confirms his/her identity.

The intent of the rule appears to require proof that a person or entity making an application under a different name than that set forth in the Complaint is the complainant. But the Rule is not clear on this point.

Further, the proposed Rule as written could be interpreted to preclude assignees and successors of the party named in the foreclosure complaint from filing an application for surplus monies.

We recommend that except in cases where a lien or claim has been transferred subsequent to the foreclosure Complaint and such transfer is not reflected therein, that the requirement to provide "proof that the applicant is the party named in the foreclosure Complaint" be applicable to only those applications where the applicant is not represented by counsel. In those cases where the lien or claim was transferred subsequent to the Complaint, proof of the transfer or assignment of the interest would be required, or proof that the claimant is otherwise the holder of or entitled to enforce the interest.

Accordingly, we propose the following revision to the Rule:

"(b) in matters where the applicant is not represented by counsel, proof that the applicant is the party named in the foreclosure complaint shall be provided; and in all matters where the applicant is asserting that it is the successor, assignee or holder of the lien or claim, or is entitled to enforce the claim on the part of another, proof as to same shall be provided."

Rule 4:64-3(c)(1)(e) as currently proposed requires:

"A recital of the property's ownership at the time of the sheriff's sale and if the owners are different from the party or parties who executed the mortgage, the documents showing how the ownership interest was created."

A foreclosure Complaint necessarily recites any post-mortgage conveyances of the property and names the parties who subsequently take title to the property, so that their ownership interest of record may be foreclosed. This does not occur if the interest was acquired subsequent to the recording of the Lis Pendens, which by statute precludes the need to join after-acquired interests and treats the interests as if named in the action and bound thereby. The Lis Pendens serves to "cut off" interests in the property acquired after its recordation.

Additionally, in connection with application for judgment, proof of the post-mortgage conveyances showing the transfer of title are submitted to the Court as part of the supporting documentation.

Thus, the ownership interests are already set forth in the Complaint in which the Surplus Monies application is being filed. Junior lienholders who are named in foreclosures, whether mortgagees or judgment creditors, usually do not obtain a title search when their lien is in junior position at the time they are served with the foreclosure Complaint, so as to minimize expenses.

Accordingly, we propose the elimination of this provision of the proposed rules.

Rule 4:64-3(c)(5) as currently proposed provides:

"If the applicant is a business entity, an affidavit by the chief executive officer or the governing board's resolution, under the seal of the business entity, should be attached, stating that the representative making the application is a duly authorized representative of the business entity."

This provision requires proof that is not ordinarily required of business entities when submitting certifications in other matters. To comply with the business records provisions of the New Jersey Rules of Evidence, the person providing the affidavit or certification must: set forth their identity; their position within the business; the manner in which they have knowledge of the records maintained by the business in the ordinary course; and that such records have been reviewed. They must also attest to their authorization to make the Affidavit or Certification. Such statements are made under penalty of perjury.

Additionally, applying for surplus monies and executing affidavits and certifications in support of same are part of the ordinary course of business for many enterprises, including mortgage lenders, servicers, and judgment creditors who pursue collection of amounts owed to them. In a large business, there may be hundreds of representatives with authority to execute such affidavits and certifications, and the identity of those representatives will change as the personnel of the business changes.

The requirement that a copy of the resolution setting forth the identity of the representatives is not only burdensome, but is unnecessary given the existing requirements for the making of affidavits and certifications.

Accordingly, we propose the following revision to the proposed rule:

"(5) Should the applicant be a business entity, the Affidavit or Certification in support of the application for surplus funds shall set forth the name, title and job responsibilities of the person giving the Affidavit or Certification, shall set forth the basis of their knowledge of the facts set forth therein, and shall expressly set forth their authorization to make and execute the Affidavit or Certification."

Rule 4:6-8 Dismissals for Lack of Prosecution:

The proposed **Rule 4:6-8** currently provides:

"Except as otherwise provided by rule or court order, when a foreclosure matter has been pending for twelve months without any required action having been taken therein, the Clerk of the Superior Court shall issue written notice to the parties advising that the matter as to any or all defendants will be dismissed without prejudice 30 days following the date of the notice unless, within said period, [proof of service of process has been filed, or] an answer, motion for default. or motion for judgment [or other response by way of motion or acknowledgement has been filed, or an affidavit or certification has been filed with the Clerk of the Superior Court asserting that the failure of filing or taking the next required action is due to exceptional circumstances] or a motion setting time and place for redemption has been filed. If the plaintiff fails to respond as herein prescribed, the court shall enter an order of dismissal without prejudice as to any named party defendant who has not been served or has not answered and shall furnish the plaintiff with a copy thereof. An application to reinstate the matter shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer State of New Jersey," if the motion to reinstate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. 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."

This rule is problematic because it does not consider steps that must be taken in a foreclosure, for example: a title curative action to reform the mortgage or property description, including motion practice which must be undertaken prior to submission of an application for entry of judgment.

The pursuit of these motions demonstrates that the Plaintiff is proceeding with its action and seeks to move it forward. These additional motions should also be considered actions that are deemed sufficient to avoid dismissal for lack of prosecution.

More importantly, the proposed Rule does not recognize that actions can be stayed as a matter of law, particularly by bankruptcy filings and by active loss mitigation requests, both of which mandate that the foreclosure be "held" while the stay is in effect. Likewise, stays against proceeding pursuant to the Servicemembers Civil Relief Act may bar proceeding with a foreclosure during the life of the action. In many cases, multiple stays are imposed during the course of the pursuit of the foreclosure.

Under the current proposed Rule, a plaintiff whose foreclosure is stayed by a party in bankruptcy, a party in active military service, or a party making an active loss mitigation request is placed in the untenable position of being legally barred from proceeding but being required to proceed to avoid dismissal of its action. Under the current rule, such instances result in additional motion practice to reinstate the action after the stay has been lifted, but such instances do not carry the potentially harsh consequences reinstatement limitations set forth in the proposed Rule. In most cases where a case is dismissed (because the Plaintiff cannot legally proceed because it is stayed), the Plaintiff will not be able to seek reinstatement within thirty days, and will be penalized with a $300.00 restoration fee. Even the lesser charge of $100.00 in such circumstances would be manifestly unjust given that the Plaintiff's failure to proceed is due to the legal requirement that it hold its action in abeyance.

Additionally, the two reinstatement limitation is problematic, because a case may be plagued by multiple stays resulting from bankruptcies and loss mitigation requests. The proposed Rule eliminates the Plaintiff's ability to avoid dismissal for lack of prosecution by filing a Certification of Exceptional Circumstances, rendering it even more onerous.

The dismissal of an action and subsequent reinstatement does not prejudice either the borrowers or junior lienholders. In fact, so long as the foreclosure does not proceed, the borrowers/homeowners are able to remain in possession of the mortgaged property without payment of the mortgage, property taxes or insurance. In essence, the proposed rule punishes lenders for abiding by legal stay requirements and for attempting to work with homeowners to save their homes from foreclosure.

While the Court must ensure that cases are prosecuted and that the Court's docket is not cluttered with stale cases, the proposed Rule's limitations on avoidance of dismissal for lack of prosecution and the concurrent penalties imposed in connection with reinstatement will result in a manifest injustice to lenders.

Accordingly, we propose that the Rule expressly provide that a case will not be dismissed if motions that advance the matter are filed, e.g.: title curative motions, motions to change names of parties, and motions to amend pleadings. Additionally, we propose that a matter should not be dismissed: in the event of a bankruptcy stay, a stay pursuant to the Servicemembers Relief Act, a stay pursuant to the CFPB's prohibition against "dual tracking," or any circumstance by which the Plaintiff is legally stayed from proceeding with its action. Alternatively, we propose that dismissals resulting from the Plaintiff's inability to proceed due to stay, not be subject to the payment of restoration fees, nor count towards the number of reinstatements allowed.

Thus, we propose the following revision to the proposed Rule:

"Except as otherwise provided by rule or court order, when a foreclosure matter has been pending for twelve months without any required action having been taken therein, the Clerk of the Superior Court shall issue written notice to the parties advising that the matter as to any or all defendants will be dismissed without prejudice 30 days following the date of the notice unless, within said period, [proof of service of process has been filed, or] an answer, motion for default, motion to reform the mortgage or correct title error, correct clerical error in pleadings, motion to change the name of or substitute parties, motion for judgment or other motion or response or acknowledgement has been filed, or an affidavit or certification has been filed with the Clerk of the Superior Court asserting that the failure of filing or taking the next required action is due to exceptional circumstances or that the failure to take action is the result of the imposition of a legal stay or prohibition against proceeding, including but not limited to, the automatic stay imposed by Federal Bankruptcy Law, a stay against proceeding pursuant to the Federal or State Servicemember Civil Relief Acts, a stay against proceeding imposed by regulations or rules issued by the Federal Consumer Financial Protection Bureau or by any other Federal or State law, regulation, rule, or order, a motion to determine eligibility for the optional foreclosure procedure under the New Jersey Fair Foreclosure Act, or a motion setting time and place for redemption has been filed. If the plaintiff fails to respond as herein prescribed, the court shall enter an order of dismissal without prejudice as to any named party defendant who has not been served or has not answered and shall furnish the plaintiff with a copy thereof. An application to reinstate the matter shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer State of New Jersey," if the motion to reinstate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. 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 aforesaid limitations on reinstatement of actions and the requirement to pay restoration fees shall not apply to actions in which Plaintiff was unable to proceed due to the imposition of a legal stay or prohibition against proceeding, including but not limited to, the automatic stay imposed by Federal Bankruptcy Law, a stay against proceeding pursuant to the Federal or State Servicemember Civil Relief Acts, a stay against proceeding imposed by regulations or rules issued by the Federal Consumer Financial Protection Bureau or by any other Federal or State law, regulation, rule, or order. 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. The Court may also waive any of these provisions or grant plaintiff relief from same as the interests of justice require."

We welcome any questions that the Court may have as to our comments and recommendations regarding the proposed Rule changes.

Thank you for your courtesies.

Respectfully Yours,

RAS CITRON, LLC

By: _____
Richard M. Citron, Esq.