August 5, 2013

New Law Seeks to Expedite Commencement of Settlement Conferences in New York Residential Foreclosure Actions

On July 31, Governor Andrew Cuomo signed into law a bill requiring that, at the commencement of every new foreclosure action on owner-occupied residential property, the foreclosure plaintiff's attorney file a "certificate of merit" attesting to his or her knowledge, information and belief that the foreclosure plaintiff is the "creditor entitled to enforce rights" under the subject loan documents, and that the foreclosure suit has a "reasonable basis." The law, to be codified in a new Section 3012-b to the New York Civil Practice Law and Rules, also requires the foreclosure attorney to attach to his or her certificate a copy of the note or bond, mortgage, and all assignments of mortgage, modifications, or extension and/or consolidation agreements, if not already attached to the complaint. If such documents have been lost or destroyed, the law requires the foreclosure attorney to attach to his or her certificate a supplemental affidavit from the attorney or a representative of the foreclosure plaintiff "attesting that such documents are lost whether by destruction, theft or otherwise."

The certificates of merit are designed to replace the so-called Lippman Affirmations required by court rule, pursuant to which the foreclosure plaintiff's attorney was required to state that, to the best of his or her knowledge, the foreclosure plaintiff had legal standing to foreclose.

The law also amends Rule 3408 of the Civil Practice Law and Rules to require the foreclosure plaintiff to file with the court proof of service of its papers (including its attorney's certificate of merit) on the borrower within 20 days of such service, however service is made.?

The law is designed to address the "shadow" foreclosure dockets of foreclosure cases that have been commenced but which the foreclosure plaintiffs have not yet pursued. In such cases, there could be a lengthy delay in the scheduling and commencement of settlement conferences required by Rule 3408. That delay results in the continued accrual of interest and fees during a time that the borrower cannot take advantage of the court-ordered and court-supervised mediation procedure. The requirements that the certificate of merit be filed at the commencement of the action and that proof of service be filed within 20 days of service, when combined with the existing requirement that the first mandatory settlement conference be held within 60 days of filing of proof of such service, mean the new law ensures that, once a foreclosure action is brought, the settlement conference phase begins quickly.

The law applies to those foreclosure actions commenced on or after the law's effective date of August 30, 2013.

In response to the law, mortgage lenders and servicers should take care to ensure that all required documents are made available to their attorneys prior to the commencement of any foreclosure action and that any foreclosure action is otherwise ready to be fully pursued before it is commenced.

Authors



Alfred W. J. Marks

Partner

New York, NY | (212) 297-2445

awjmarks@daypitney.com