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New York State Law Requires Certificate of Merit Filing with the Summons and Complaint in Residential Foreclosure Cases

By Kirsten Keefe

Governor Andrew M. Cuomo signed into law Chapter 306 of the Laws of New York, 2013 amending New York's Civil Practice Law and Rules on July 31, 2013.¹ The law addresses the "robo-signing" problem in residential foreclosure cases in which cases are filed based on false affidavits, lacking personal review to ensure the homeowner is in default and that plaintiff is the proper owner and holder of the mortgage and note and possesses standing to sue. The new law went into effect on August 30, 2013.

The law amends CPLR 3012-B to require lawyers to file a Certificate of Merit with the summons and complaint in foreclosure actions on "home loans."² The lawyer must certify that based on their review of the case and documents, and in consultation with their client, that to the best of their knowledge, information and belief, "there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents."³ The law lists documents that the attorney must review including the mortgage, note, bond and all instruments of assignment, as well as any other instrument of indebtedness such as a loan modification, extension or consolidation. A copy of these documents must be attached to the Certificate of Merit if they are not otherwise attached to the complaint. Only one Certificate of Merit need be filed per action, regardless of the number of defendants named. No form for the Certificate of Merit is set forth in the law though the NYS Office of Court Administration (OCA) has developed a model form that may be used.⁴

The law was intended to replace Administrative Order of the Chief Administrative Judge of the Courts AO/431/11, that went into effect on November 18, 2010.⁵ That Administrative Order prescribed an Attorney Affirmation for creditors to file in residential mortgage cases at the time of filing the Request for Judicial Intervention (RJI) which is supposed to be filed with the Affidavit of Service.⁶ A widespread problem had

¹ A.5582-A(Assemblymember Helene E. Weinstein)/S.4530-A(Senator Jeffrey D. Klein), available at <http://open.nysenate.gov/legislation/bill/A5582-2013>.

² RPAPL sec. 1304(5)(a) defines "home loan" as "a loan, including an open-end credit plan, other than a reverse mortgage transaction, in which: (i) The borrower is a natural person; (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes; (iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and (iv) The property is located in this state."

³ CPLR 3012-B(A).

⁴ Available at <http://www.nycourts.gov/ATTORNEYS/foreclosures/CertificateOfMerit.pdf>.

⁵ Available at http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf.

⁶ CPLR 3408(a) requires the court "to hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties. . ."; Uniform Civil Rules For

developed after this Administrative Order from creditors filing cases but not following up with filing the RJJ and Attorney Affirmation. The filing of the RJJ triggers the scheduling of the mandatory settlement conferences in all residential “home loan” foreclosure cases and moves the case forward.⁷ As a result, thousands of foreclosure cases in New York State were sitting in what had become known as the “Shadow Docket” or “Shadow Inventory.”⁸ By 2013, some cases had been sitting in the shadow docket for more than two years with no action.

By Administrative Order AO/208/13 issued on August 1, 2013, the Chief Administrative Judge of the Courts ordered that AO/43/11 shall not apply to residential mortgage foreclosure actions commenced on or after August 30, 2013. The Administrative Order also allows lawyers to file either the Attorney Affirmation from AO/431/11 or the new Certificate of Merit pursuant to amended CPLR 3012-B with the RJJ in actions filed prior to August 30, 2013 but in which no Attorney Affirmation has yet been filed.

Where the mortgage or note is lost, whether by destruction, theft or otherwise, CPLR 3012-B provides that the lawyer must attach to the Certificate of Merit affidavits attesting to the facts of the lost note or mortgage. Creditors must follow New York’s Uniform Commercial Code regarding lost notes, as well.⁹

If a case is filed but the Certificate of Merit and accompanying documents are “willfully” not filed, the court may dismiss the complaint without prejudice, “or make such final or conditional order with regard to such failure as is just including but not limited to denial of the accrual of any interest, costs, attorneys’ fees and other fees, relating to the underlying mortgage debt.”¹⁰ This relief is important because once loans default and enter foreclosure lenders refuse to accept additional payments. Each month a case sits in the Shadow Docket, interest and fees continue to accrue on the loan making ultimate resolution of the case for the homeowner, either by loan modification or other settlement, less likely as time goes by. Such relief may be based on a motion of any party or upon the court’s own motion and notice to the parties.

Chapter 306 alters two additional sections of the CPLR, as well. CPLR 3408(a) is amended to require the affidavit of service be filed within twenty (20) days of service on each defendant in foreclosure actions involving home loans. Chapter 306 also exempts pleadings by a defendant not represented by an attorney from the requirement of CPLR 3015(d) which states, “(d) Signatures. Unless specifically denied in the pleadings each signature on a negotiable instrument is admitted.”

The law should alleviate New York’s long foreclosure timeline as no cases filed after August 30, 2013 should get stuck in the Shadow Docket. Creditors must file the Certificate of Merit with the Summons and Complaint, serve the homeowner and promptly file the Affidavit of Service within twenty days of service, thereby triggering the filing of the specialized RJJ. Conferences must be scheduled within sixty days of the filing of the proof of service. These measures should ensure that conferences are held within the first few months of every residential foreclosure case as intended by the NYS Legislature when it passed CPLR 3408 in 2009, and set foreclosure cases on track toward settlement, or litigation where settlement is not feasible, much sooner.

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The Supreme Court And The County Court sec. 202.12-a (b)(1) requires plaintiff to file specialized RJJ for residential foreclosure cases at time proof of service of summons and complaint is filed with county clerk.

⁷ See fn 6.

⁸ See State of NY Unified Court System 2012 *REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS Pursuant to Chapter 507 of The Laws of 2009*, available at <http://www.nylj.com/nylawyer/adgifs/decisions/112812report.pdf>.

⁹ N.Y. UCC § 3-804, requiring owner of lost note to prove ownership and provide security in order to maintain action and recover from party liable under note.

¹⁰ CPLR 3012-B(E).