



WORKSHOP L.

Moving Towards Civil Gideon

*2014 Legal Assistance
Partnership Conference*

Hosted by:

The New York State Bar Association
and The Committee on Legal Aid



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NEW YORK STATE BAR ASSOCIATION 2014 PARTNERSHIP CONFERENCE

L. UNDERSTANDING THE BASICS OF THE NEW YORK STATE FORECLOSURE PROCESS – A GENERAL OVERVIEW FOR NON- FORECLOSURE DEFENSE ATTORNEYS

AGENDA

September 11, 2014
10:00 a.m. – 11:30 a.m.

1.5 Transitional CLE Credits in Professional Practice.

*Under New York's MCLE rule, this program has been approved for all attorneys,
including newly admitted.*

Panelists:

- Rebecca Caico, Esq.**, Senior Attorney/Regional Coordinator, Western/Central NY, HOPP Anchor
Partner Program, Empire Justice Center
Rose Marie Cantanno, Esq., Supervising Attorney, Foreclosure Prevention Project, New York Legal
Assistance Group
Jacob Inwald, Esq., Director of Foreclosure Prevention, Legal Services NYC

- | | |
|--|----------------------------|
| I. Overview of the Foreclosure Crisis & Responses to the Crisis | 10:00 am – 10:10 am |
| II. Overview of the NYS Foreclosure Process | 10:10 am – 10:45 am |
| a. Pre-foreclosure Events | |
| b. Foreclosure Filing & Request for Judicial Intervention (“RJ”) | |
| c. The Settlement Conference – Guiding Your Client | |
| III. The Legal Action: Background - Presumption of No Homeowner Participation | 10:45 am – 10:55 am |
| IV. Legal Claims and Defenses to Foreclosure: A Selective Overview | 10:55 am – 11:10 am |
| V. Equitable Defenses Related to Requirements of Federal Programs & Concluding Thoughts | 11:10 am – 11:30 am |

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Substantive Outline

**L. UNDERSTANDING THE BASICS OF THE NEW YORK STATE FORECLOSURE
PROCESS – A GENERAL OVERVIEW FOR NON-FORECLOSURE DEFENSE
ATTORNEYS**

OUTLINE

I. OVERVIEW OF THE FORECLOSURE CRISIS & RESPONSES TO THE CRISIS

A. Overview of Responses to Foreclosure Crisis

1. Federal: HAMP: Home Affordable Modification Program: Loan modifications to help struggling homeowners obtain affordable loan modifications
2. Federal: Dodd-Frank Financial Reform Act created Consumer Financial Protection Bureau (CFPB), with jurisdiction over mortgage servicers, promulgated mortgage servicing standards
3. New York State: pre-foreclosure notices, court process protections, mandatory settlement conferences
4. National and federal: attorneys general mortgage servicing settlements with largest national mortgage servicers: servicing standards and funding for direct services providers (in NY). Investigations and settlements prompted by fraudulent foreclosure practices (robo-signing).

B. NY Legislative Response to Foreclosure Crisis

1. NY legislature has responded to abusive lending and foreclosure crisis in NY, incl.:
2. Pre-foreclosure notices-RPAPL 1304.
 - a. Mandatory settlement conferences-CPLR 3408.
3. Brokers must act in borrower's interest, act with reasonable skill, care, diligence. Banking Law 590-b
4. Court rules: attorney affirmation requirement in response to robo-signing; supplanted by Certificate of Merit as of 8/30/13

C. Legislative Responses to Crisis

1. Distressed property consultants: up-front payments prohibited; written contracts required. RPL 265-b: Addresses pervasive problem of loan mod scammers.
2. Criminalization of residential mortgage fraud. Penal Law 187.
3. Reciprocal Attorneys' fees for borrowers. RPL 282.
4. Foreclosing plaintiff who obtains judgment of foreclosure and sale required to maintain property. RPAPL 1307.

D. Other Responses to Crisis

1. New York State Department of Financial Services (f/k/a Banking Department)
2. Regulations relating to loan servicing require greater accountability to borrowers-Part 419
3. Court Process: greater scrutiny than in the past. Settlement conferences provide a venue for litigating servicer's failure to negotiate in good faith as required by NY law
4. Home Affordable Modification Program (HAMP): federal program promoting affordable loan modifications

5. National Mortgage Servicing Settlement (5 major servicers): detailed requirements for loan modification process
6. Consumer Financial Protection Bureau (CFPB): created by Dodd Frank: mortgage servicing regulations effective January 2014

II. OVERVIEW OF NYS FORECLOSURE PROCESS

A. Judicial Foreclosure State

1. Homeowner must be taken to court
2. Cases brought in NY Supreme Court in county where property is found
3. Cases commenced by filing lis pendens, summons and complaint

B. Pre-Foreclosure Events

1. Lender must provide homeowner with notice of default and list of local housing counseling agencies at least 90 days before commencing suit. "90-day Notice." This is a condition precedent, absent which foreclosure is subject to dismissal. *Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95 (2d Dep't 2011)
 - a. Applies to "home loans" as defined in RPAPL 1304 (2008 law; amended 2009)
2. RPAPL 1304 definition of "home loans":
 - a. Owner occupied
 - b. One to four family or condominium
 - c. Debt incurred for personal, family, household purpose
3. Note: coops are not real property and foreclosure on mortgages secured by coop shares is a non-judicial UCC lien foreclosure
4. Notice of default and acceleration if required by mortgage agreement:
 - a. Information about default and amount owed
 - b. 30 days to cure
5. Debt collection notice sent by attorney as per FDCPA (Fair Debt Collection Practices Act generally applies to foreclosure plaintiffs' law firms)

C. Foreclosure Typically Filed When Homeowner Is About 4 Months Behind In Payments

1. Filing Requirements
 - a. Summons and Complaint
 - i. Heightened pleading requirements for subprime and high cost loans. RPAPL 1302.
 - b. "Help for Homeowners in Foreclosure" notice served with summons and complaint for residential foreclosures; colored paper, bold, large font. RPAPL 1303. This is condition precedent which can be asserted at any time, and is grounds for dismissal. *First Nat'l Bank of Chicago v. Silver*, 73 A.D. 3d 162, 899 N.Y.S.2d 256 (2nd Dep't 2010)
 - c. Request for Judicial Intervention ("RJI") with special foreclosure addendum for "home loans" (RPAPL 1304 definition)
 - i. Filed together with affidavits of service for summons and complaint. Uniform Rule 202.12-a.

OUTLINE:
Understanding the Basics of the NYS Foreclosure Process

- ii. Court's internal mechanism to assign a case to a judge and, in cases of residential foreclosure, to direct case to settlement conference

D. Foreclosure RJI triggers:

- 1. Mandatory settlement conference (2008; amended 2009)
- 2. "Attorney Affirmation" (A0-431-11) (effective 10/20/10) required with RJI: certifying communication with plaintiff representative; personal knowledge and confirmed factual accuracy of allegations and notarizations contained in supporting documents
- 3. "Shadow Docket" Problem
- 4. Supplanted by Certificate of Merit (RPAPL 3012-B) (filed with summons and complaint, not with RJI) for actions commenced after 8/30/13

E. Mandatory Settlement Conference

- 1. Court sends notice scheduling settlement conference within 60 days of RJI filing.
 - a. NY CPLR 3408; Uniform Rule 202.12-a.
- 2. Motions are supposed to be held in abeyance until completion of settlement conferences.
 - a. Uniform Rule 202.12-a(c)(7).

F. Mandatory Settlement Conference

- 1. If conferences successfully end with modification or other resolution, foreclosure action is discontinued.
- 2. CPLR 3408 requires vacatur of lis pendens and discontinuance of foreclosure action within 150 days of modification or settlement.

G. Settlement Conferences in Real Life

- 1. Affirmative Duty to Negotiate in Good Faith spelled out in CPLR 3408(f)
- 2. Expressed preference for averting foreclosures, with a loan modification if possible
- 3. Legal Obligation to appear with representative with settlement authority
- 4. Statute contemplates a real settlement conference: consideration of the rights of the parties under the governing loan documents
- 5. Good faith standard rarely met: prevailing delays for lost packages, shifting demands, phantom investor restrictions: delay causes tangible harm to homeowners
- 6. Settlement conferences have become venue for attempting to negotiate HAMP and other loan modifications, short sales, or other resolutions
- 7. Refusal to discuss merits issues; appearance by per diem attorneys with neither knowledge nor authority

H. Settlement Conference Motion Practice Ensues

- 1. Procedures Vary
- 2. Relief: compel appearance by rep with authority; compel production of claimed investor
- 3. Restriction; toll/bar interest and fees; discontinue or stay case until compliance with good faith obligation
- 4. Problems: relief available only to those with counsel; enormous drain on resources

I. A Sampling of Decisions on Settlement Conference Issues

1. *Deutsche Bank Nat/. Trust Co. v. Izrae/ov*, 2013 NY Slip Op 51482(U) (Kings Cty. September 10, 2013 (confirming referee R & Rand tolling interest as remedy for plaintiff's failure to negotiate in good faith)
2. *Wells Fargo Bank, N.A. v. Meyers/ 108 AD3d 9* (2d Dep't 2013) (affirming finding of violation of duty to negotiate in good faith where plaintiff commenced foreclosure action in violation of loan modification offer promising not to do so, and, during settlement conference process, delayed process and offered unaffordable loan modification, but remanding for new remedy, holding that court improperly directed parties to execute final loan modification based on terms of original modification proposal, holding that CPLR 3408 did not authorize court to impose terms of a modification on the parties)
3. *Wells Fargo Bank/ N.A. v. Van Dyke/ 101 AD3d 638* (1st Dep't 2012) (lender did not fail to negotiate in good faith by insisting on documentation of rental income where defendant had no written lease and supplied bank statements for only three months, but rejecting argument that compliance with good faith requirement is established merely by proving the absence of fraud or malice, holding that determination of good faith must be based on the totality of the circumstances and that CPLR 3408 is a remedial statute)•
4. *Bank of Am./ N.A. v. Lucido/ 2014 NY Slip Op 00956, 114 AD3d 714* (2d Dep't 2014) (Reversing judgment barring plaintiff, following CPLR 3408 conferences, from collecting interest and fees, fixing the amount of the indebtedness and awarding exemplary damages of \$200,000 to be applied as principal reduction. Although court had authority to impose a sanction or remedy if it determined after a hearing that plaintiff failed to negotiate in good faith, it lacked authority to include such a provision in the judgment
5. In the absence of any application for that relief. Moreover, 2d Department disapproved of court's utilization of exemplary damages to in effect award reduction of principal balance without notice to plaintiff that court was considering such a remedy, which effectively deprived plaintiff of its right to due process. Moreover, 2d Department held that record here showed that plaintiffs conduct was not so egregious as to merit imposition of sanctions--plaintiffs refusal to consider principal reduction and its delay in producing pooling and servicing agreement did not evidence failure to negotiate in
6. Good faith where plaintiffs' counsel consistently represented unlikelihood of plaintiffs agreement to principal reduction, and any "misstatement" by plaintiffs' counsel concerning the import of the pooling and servicing agreement did nothing to change plaintiffs stance with respect to defendant's proposal

J. Dual Tracks: Settlement Conferences and The Underlying Legal Action

1. Homeowner must answer or move to dismiss within 20-30 days of service of summons
2. And complaint
3. Referral to conference part

III. THE LEGAL ACTION: BACKGROUND- PRESUMPTION OF NO HOMEOWNER PARTICIPATION

A. If homeowner does not answer:

1. Plaintiff files *ex parte* application for order of reference
2. Referee appointed to compute amount owed
3. Referee issues report
4. Plaintiff moves for "judgment of foreclosure and sale"

B. Auction

1. At least 30 days after court enters judgment of foreclosure and sale
2. Right of redemption ends
3. Surplus/deficiency: RPAPL 1371: Deadlines can *cut-off* right to deficiency judgment
4. Third-party buyer or lender takes title ("REO" property)
5. Eviction proceeding in housing court

C. If homeowner timely responds to complaint...

1. Answer or motion to dismiss
2. Discovery
3. Motion(s) for summary judgment
4. If plaintiff's motion granted: order of reference, motion for JFS, etc.
5. Borrower can seek dismissal based on various defenses
6. Trial

D. Common Borrower Motions

1. OSC to file a late answer or motion to dismiss. CPLR 3012(d) requires reasonable excuse for delay or default
2. OSC to vacate default judgment. CPLR 5015 requires excusable default and meritorious defenses.
3. Motion to amend answer
4. OSC to restore or refer case to conferences
5. Motion/OSC to bar interest, for sanctions, dismissal, and/or other relief for plaintiff's failure to negotiate in good faith in settlement conferences. CPLR 3408(f).

E. Motions: when made and heard

1. Motions and OSCS related to legal action and filed while conferences are pending governed by Uniform Rule 202.12-a(b)(1): supposed to be stayed pending conferences
2. Motions related to settlement conferences: practices vary from county to county, ranging from informal applications to formal motion practice to mini-trials

F. Attorneys' Fees

1. Parties cannot charge the other side for costs or fees related to settlement conference appearances (CPLR 3408(h)), but mysterious fees for law firms typically appear on pay-off statements
2. Access to Justice in Lending Act: Reciprocal right of borrower to recover attorneys' fees. RPL 282

IV. LEGAL CLAIMS AND DEFENSES: A SELECTIVE OVERVIEW

A. Common Defenses and Counterclaims to Foreclosure (Not an exhaustive list)

1. Conditions precedent to suit: statutory notices and acceleration notices
2. Statute of Limitations
3. Standing and capacity to sue
4. Banking Law 6-L and 6-M
5. Truth in Lending Act & HOEPA
6. Equitable defenses: HAMP, FHA, unclean hands
7. Service of process
8. Fraud
9. Real Estate Settlement Procedures Act (RESPA)
10. General Business Law 349 (Deceptive Practices Act)
11. Unconscionability
12. Failure to Negotiate in Good Faith at Mandatory Settlement Conferences

B. Conditions Precedent

1. RPAPL 1303 notice "Help for homeowners in foreclosure" is a condition precedent to suit.
 - a. *First National Bank of Chicago v. Silver*, 899 NYS2d 256 (2d Dep't 2010)
2. Similarly, RPAPL 1304 90-Day notice is a condition precedent to suit.
 - a. *Bank of America NA Successor by merger to lasalle Bank NA as Trustee for Washington*
 - b. *Mutual Mortgage Pass-Through Certificates Wmalt Series 2006-3 Trust v. Guzman*, 892
 - c. NYS2d 846 (Sup. Ct. Queens Cty. 2009)
3. 30-day notice of default and acceleration required by most mortgages and is a
4. Condition precedent to suit.
5. Failure to send notice warrants dismissal.

C. Standing and Capacity to Sue

1. Standing: Does this party have the right to foreclose?
2. Why is this even an issue? Mortgage Securitization and Use of Mortgage Electronic
3. Registration System ("MERS") to avoid multiple recording of securitized mortgages
4. Distinction between the Note and the Mortgage
5. Capacity to Sue: Does this plaintiff have the ability to prosecute a lawsuit in court (e.g., is it a minor, a trust, a foreign corporation that has not filed to do business in NY, a corporation that no longer exists?)
6. Standing: assesses *this* Plaintiff's connection to *this* claim: in a foreclosure case, a plaintiff who was not the holder or assignee of the note *prior* to commencement of the action lacks standing. In many cases plaintiffs are incapable of establishing this requirement because typically they assigned mortgages (a nullity) but not notes, which actually represent ownership of the debt
7. Procedural Issues: failure to assert can lead to waiver of these defenses

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D. Standing in a Foreclosure Case

1. Foreclosing plaintiff must own the note and the mortgage at the inception of the action.
 - a. *Deutsche Bank National Trust Co. v. Barnett*, 88, A.D. 3d 636, 931N.Y.S. 2d 630, (2d Dep't 2011);
 - b. *Kluge v. Fugazy*, 145 A.D. 2d 537, 536 N.Y. S. 2d 92 (2d Dep't 1988)
2. Note and Mortgage: assignment of the mortgage without assignment of the debt, i.e. the note, is a nullity.
3. Note: represents contractual debt obligation
4. Mortgage: represents collateral security for debt

E. Assignment Must Be Complete Before Foreclosure Action Commenced

1. Assignment can be by written assignment or by physical delivery of note and mortgage (if it is a negotiable instrument, i.e. made out to bearer).
2. Difficult for plaintiff to prove physical delivery prior to commencement. Evidentiary standards on summary judgment usually cannot be met.
3. If written assignment involved, execution date generally controls and conclusory affidavits of prior physical delivery are highly suspect.
4. Back dated assignment ineffective absent proof of prior physical delivery. *Wells Fargo v. Marchione*, 69 A.D. 3d 204, 887 N.Y. S. 2d 615 (2d Dep't 2009); *see also New Century Mtge. Corp. v. Kogan* 2013 NY Slip Op 50047(U) (Kings Cty. Jan. 14, 2013 (no Standing where plaintiff commenced foreclosure action twelve days *after* it assigned mortgage and note to another party and therefore did not own note and mortgage when it commenced the action.)

F. Particular Standing Issues Implicated in Foreclosure Cases

1. Assignments and Chain of Title, including timing, suspicious endorsements and allonges, assignments from MERS as nominee, lack of documented authority of parties signing assignments, assignees signing on behalf of assignors and robo-signing of assignment documents
2. Mortgage-Backed Securities Investment Vehicles: Pooling and Servicing Agreements and non-compliance with trust closing dates and other terms

G. MERS and Standing

1. Assignment from MERS when MERS is designated merely as nominee of lender, and never owned note, is ineffective to confer standing on its assignee. *Bank of New York v. Silverberg*, 86 A.D. 3d 274, 926 N.Y.S. 2d 532 (2d Dep't 2011).

H. MERS, Standing, Summary Judgment

1. *Homecomings Financial, LLC v. Guidi*, 108 A.D.3d 506, 969 N.Y.S.2d 470 (2d Dep't 2013) (reversing grant of summary judgment to plaintiff; Upon search of Record, awarding summary judgment to defendant dismissing foreclosure complaint because plaintiff failed to prove that MERS was the lawful holder of mortgage and note when action was commenced.

- a. Mortgage language identifying MERS as nominee and purporting to authorize it to foreclose insufficient to overcome requirement that foreclosing party be both holder
- b. Or assignee of subject mortgage *and* holder of the underlying note *when the action is commenced*.
- c. Note specifically identified lender as a different party and plaintiff failed to submit any evidence demonstrating that note was physically delivered to MERS prior to action's commencement.
- d. Evidence that MERS assigned the *mortgage* instrument to plaintiff during the course of the action was ineffectual, because such an assignment would not render plaintiff the holder of the note because "MERS could not transfer that which it did not hold."
- e. Plaintiff's servicing agent's affidavit stating that the note was delivered to custodian
- f. Of records of plaintiff during the course of the action was also insufficient, and, in any event, provided no factual details of the physical delivery of the note).

I. Summary Judgment and Issues of Proof

- 1. *U.S. Bank Nat/. Assn. v. Guy*, 2013 NY Slip Op 51532 (U) (Kings Cty., Schmidt, J. August 22, 2013) (granting defendant's motion to dismiss for lack of standing: Plaintiff failed to prove delivery of note prior to commencement where "possession affidavit" offered by document custodian was not based on personal knowledge and asserted physical delivery on a date that was inconsistent with complaint's allegations. Plaintiff's reliance on undated allonge was misplaced where the note had room for further endorsements and the allonge was not firmly affixed to the note as required by the UCC. Court also rejected Plaintiff's assertion that Defendant's acceptance of a HAMP modification was a ratification of plaintiff's ownership of the note, which was unsupported by any legal authority).
- 2. *Bank of N.Y. Mellon v. Dean*, 2013 NY Slip Op 23224 (Kings Cty., Battaglia, J. July 11, 2013) (plaintiff failed to establish *prima facie* entitlement to judgment of foreclosure: Assignment of mortgage from MERS to plaintiff, which did not purport to assign note, was insufficient to confer standing; unauthenticated Pooling and Servicing Agreement excerpts did not suffice to establish plaintiffs standing; affidavit in support of summary judgment motion of physical delivery was neither based on personal knowledge nor adequately specific and failed to establish that assignor to plaintiff ever had possession of the note).

V. EQUITABLE DEFENSES RELATING TO REQUIREMENTS OF FEDERAL PROGRAMS

A. *Federal National Mortgage Association v. Ricks*, 372 NYS2d 485 (Sup. Ct. Kings Cty. 1975): Mortgagee noncompliance with HUD handbook guidelines could make a party ineligible for equitable relief.

1. Equitable Defenses: FHA loans

Understanding the Basics of the NYS Foreclosure Process

a. Regulatory noncompliance with rules for loans insured by the Federal Housing Administration can be defense to foreclosure.

i. *See Wells Fargo Home Mortgage Inc. V. Neal*, 398 Md. 705 (Md. 2007)

2. Equitable Defenses: HAMP

a. HAMP: Home Affordable Modification Program promotes affordable loan modifications in order to stem the foreclosure crisis. Most major mortgage servicers signed up and obligated themselves to a loan modification process governed by detailed federal loan modification regime. Handbook section entitled "Protections Against Unnecessary Foreclosure," prohibits a referral to foreclosure until either:

- i. Borrower has been evaluated and determined ineligible for HAMP;
- ii. Reasonable solicitation *efforts* have failed.

a) MHA Handbook Version 3.2, Section 3. Dual Tracking Issues

3. HAMP Decision in 2d Dept

a. *Aames Funding Corp. V. Houston*, 2011 NY Slip Op 05642 (2d Dep't 2011): Trial court should have granted borrower's OSC to stay sale where borrower's HAMP application was still under review.

b. Settlement Conferences: typically involve applications for HAMP modifications and courts routinely cite violations of HAMP requirements as indicia of plaintiffs' failure to comply with settlement conference law

B. Counterclaims: RESPA

- 1. For example: Failure to respond to a Qualified Written Request, 12 USC 2605(e);
- 2. Actual damages, costs and attorneys' fees; plus \$1000 per violation if pattern and practice of noncompliance

C. Counterclaims: GBL 349

- 1. Prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state..."
- 2. Can apply to loan servicing and loan origination issues.
- 3. Must show:
 - a. Deceptive acts were directed at consumers;
 - b. Acts are misleading in a material way; and
 - c. Plaintiff has been injured as a result.
- 4. Unlike fraud, does not require showing of intent. Broadly construed.
- 5. Remedies include:
 - a. Injunctive relief against deceptive acts and practices;
 - b. Actual damages;
 - c. Treble damages up to \$1000 if violation was willful or knowing; and
 - d. Attorneys' fees

D. Affirmative Litigations by Homeowners

- 1. Deed Thefts and Property Flipping Scams

2. Fair Lending Claims-No Income No Asset and Other Equity Stripping Predatory Loan
3. Products primarily marketed in low income minority communities
4. FDCPA/RESPA/NY GBL 349 and Contract Claims Arising from Breaches of Loan Modification Agreements and Abusive Servicing, Failure to Convert HAMP Trial Payment Plans to Permanent Modifications

VI. CONCLUDING THOUGHTS

A. Foreclosure is Litigation: NY is a judicial foreclosure state, and a debt obligation (a mortgage loan) cannot be enforced by way of foreclosing on the security for the debt (a home) by way of foreclosure unless plaintiff is able to prove its case.

B. Just because there has been a default on a mortgage loan does not entitle a plaintiff to a judgment without establishing its case. A default neither suspends operation of rules of civil procedure or the rules of evidence.

**An Overview of the Foreclosure
Prevention Practices at Legal Services
NYC and the Foreclosure Process in New
York State**

An Overview of the Foreclosure Prevention Practices at LSNYC and the Foreclosure Process in New York State

Jacob Inwald
Director of Foreclosure Prevention
Legal Services NYC

September 2014



1

OVERVIEW OF RESPONSES TO FORECLOSURE CRISIS

- FEDERAL: HAMP: HOME AFFORDABLE MODIFICATION PROGRAM: LOAN MODIFICATIONS TO HELP STRUGGLING HOMEOWNERS OBTAIN AFFORDABLE LOAN MODIFICATIONS
- FEDERAL: DODD-FRANK FINANCIAL REFORM ACT CREATED CONSUMER FINANCIAL PROTECTION BUREAU (CFPB), WITH JURISDICTION OVER MORTGAGE SERVICERS, PROMULGATED MORTGAGE SERVICING STANDARDS
- NEW YORK STATE: PRE-FORECLOSURE NOTICES, COURT PROCESS PROTECTIONS, MANDATORY SETTLEMENT CONFERENCES
- NATIONAL AND FEDERAL: ATTORNEYS GENERAL MORTGAGE SERVICING SETTLEMENTS WITH LARGEST NATIONAL MORTGAGE SERVICERS: SERVICING STANDARDS AND FUNDING FOR DIRECT SERVICES PROVIDERS (IN NY). INVESTIGATIONS AND SETTLEMENTS PROMPTED BY FRAUDULENT FORECLOSURE PRACTICES (ROBO-SIGNING).

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NY Legislative Response to Foreclosure Crisis

- NY legislature has responded to abusive lending and foreclosure crisis in NY, incl.:
 - Pre-foreclosure notices—RPAPL 1304.
 - Mandatory settlement conferences—CPLR 3408.
 - Brokers must act in borrower's interest, act with reasonable skill, care, diligence. Banking Law 590-b
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Legislative Responses to Crisis

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Other Responses to Crisis

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- Court Process: greater scrutiny than in the past. Settlement conferences provide a venue for litigating servicer's failure to negotiate in good faith as required by NY law
- Home Affordable Modification Program (HAMP): federal program promoting affordable loan modifications
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Overview of NYS Foreclosure Process



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Foreclosure RJI Triggers:

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Settlement Conference Motion Practice Ensues

- Procedures Vary
- Relief: compel appearance by rep with authority; compel production of claimed investor restriction; toll/bar interest and fees; discontinue or stay case until compliance with good faith obligation
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A Sampling of Decisions on Settlement Conference Issues

- *Deutsche Bank Natl. Trust Co. v. Izraelov*, 2013 NY Slip Op 51482(U) (Kings Cty, September 10, 2013) (confirming referee R & R and tolling interest as remedy for plaintiff's failure to negotiate in good faith)
- *Wells Fargo Bank, N.A. v. Meyers*, 108 AD3d 9 (2d Dep't 2013) (affirming finding of violation of duty to negotiate in good faith where plaintiff commenced foreclosure action in violation of loan modification offer promising not to do so, and, during settlement conference process, delayed process and offered unaffordable loan modification, but remanding for new remedy, holding that court improperly directed parties to execute final loan modification based on terms of original modification proposal, holding that CPLR 3408 did not authorize court to impose terms of a modification on the parties)
- *Wells Fargo Bank, N.A. v. Van Dyke*, 101 AD3d 638 (1st Dep't 2012) (lender did not fail to negotiate in good faith by insisting on documentation of rental income where defendant had no written lease and supplied bank statements for only three months, but rejecting argument that compliance with good faith requirement is established merely by proving the absence of fraud or malice, holding that determination of good faith must be based on the totality of the circumstances and that CPLR 3408 is a remedial statute)

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More Settlement Conference Decisions

- *Bank of Am., N.A. v Lucido*, 2014 NY Slip Op 00956, 114 AD3d 714 (2d Dep't 2014)
(Reversing judgment barring plaintiff, following CPLR 3408 conferences, from collecting interest and fees, fixing the amount of the indebtedness and awarding exemplary damages of \$200,000 to be applied as principal reduction. Although court had authority to impose a sanction or remedy if it determined after a hearing that plaintiff failed to negotiate in good faith, it lacked authority to include such a provision in the judgment in the absence of any application for that relief. Moreover, 2d Department disapproved of court's utilization of exemplary damages to in effect award reduction of principal balance without notice to plaintiff that court was considering such a remedy, which effectively deprived plaintiff of its right to due process. Moreover, 2d Department held that record here showed that plaintiff's conduct was not so egregious as to merit imposition of sanctions—plaintiff's refusal to consider principal reduction and its delay in producing pooling and servicing agreement did not evidence failure to negotiate in good faith where plaintiff's counsel consistently represented unlikelihood of plaintiff's agreement to principal reduction, and any "misstatement" by plaintiff's counsel concerning the import of the pooling and servicing agreement did nothing to change plaintiff's stance with respect to defendant's proposal)

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Dual Tracks: Settlement Conferences and the Underlying Legal Action

- Homeowner must answer or move to dismiss within 20-30 days of service of summons and complaint
- Referral to conference part




The Legal Action

BACKGROUND: PRESUMPTION OF NO HOMEOWNER PARTICIPATION




If homeowner does not answer:

- Plaintiff files *ex parte* application for order of reference
- Referee appointed to compute amount owed
- Referee issues report
- Plaintiff moves for “judgment of foreclosure and sale”



Auction

- At least 30 days after court enters judgment of foreclosure and sale
- Right of redemption ends
- Surplus/deficiency: RPAPL 1371: Deadlines can cut-off right to deficiency judgment
- Third-party buyer or lender takes title (“REO” property)
- Eviction proceeding in housing court



If homeowner timely responds to complaint...

- Answer or motion to dismiss
- Discovery
- Motion(s) for summary judgment
- If plaintiff's motion granted: order of reference, motion for JFS, etc.
- Borrower can seek dismissal based on various defenses
- Trial



Common Borrower Motions

- OSC to file a late answer or motion to dismiss. CPLR 3012(d) requires reasonable excuse for delay or default
- OSC to vacate default judgment. CPLR 5015 requires excusable default and meritorious defenses.
- Motion to amend answer



Common Borrower Motions

- OSC to restore or refer case to conferences
- Motion/OSC to bar interest, for sanctions, dismissal, and/or other relief for plaintiff's failure to negotiate in good faith in settlement conferences. CPLR 3408(f).



Motions: when made and heard

- Motions and OSCs related to legal action and filed while conferences are pending governed by Uniform Rule 202.12-a(b)(7): supposed to be stayed pending conferences
- Motions related to settlement conferences: practices vary from county to county, ranging from informal applications to formal motion practice to mini-trials



Attorneys' Fees

- Parties cannot charge the other side for costs or fees related to settlement conference appearances (CPLR 3408(h)), but mysterious fees for law firms typically appear on pay-off statements
- Access to Justice in Lending Act: Reciprocal right of borrower to recover attorneys' fees. RPL 282



Legal Claims and Defenses

A Selective Overview



Common Defenses and Counterclaims to Foreclosure

1. Conditions precedent to suit: statutory notices and acceleration notices
2. Statute of Limitations
3. Standing and capacity to sue
4. Banking Law 6-L and 6-M
5. Truth in Lending Act & HOEPA
6. Equitable defenses: HAMP, FHA, unclean hands
7. Service of process
8. Fraud



Common Defenses and Counterclaims (cont'd.)

7. Real Estate Settlement Procedures Act (RESPA)
 8. General Business Law 349 (Deceptive Practices Act)
 9. Unconscionability
 10. Failure to Negotiate in Good Faith at Mandatory Settlement Conferences
- Not an exhaustive list*



Conditions Precedent

RPAPL 1303 notice "Help for homeowners in foreclosure" is a condition precedent to suit.


First National Bank of Chicago v. Silver, 899 NYS2d 256 (2d Dep't 2010)



Conditions Precedent


Similarly, RPAPL 1304 90-Day notice is a condition precedent to suit.

Bank of America NA Successor by merger to LaSalle Bank NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates Wmalt Series 2006-3 Trust v. Guzman, 892 NYS2d 846 (Sup. Ct. Queens Cty. 2009)




Conditions Precedent

- 30-day notice of default and acceleration required by most mortgages and is a condition precedent to suit.
- Failure to send notice warrants dismissal.



Standing and Capacity to Sue

- Standing: Does this party have the right to foreclose?
- Why is this even an issue? Mortgage Securitization and Use of Mortgage Electronic Registration System ("MERS") to avoid multiple recording of securitized mortgages
- Distinction between the Note and the Mortgage



Standing and Capacity to Sue (continued)

- Capacity to Sue: Does this plaintiff have the ability to prosecute a lawsuit in court (e.g., is it a minor, a trust, a foreign corporation that has not filed to do business in NY, a corporation that no longer exists?)
- Standing: assesses *this* Plaintiff's connection to *this* claim: in a foreclosure case, a plaintiff who was not the holder or assignee of the note *prior* to commencement of the action lacks standing. In many cases plaintiffs are incapable of establishing this requirement because typically they assigned mortgages (a nullity) but not notes, which actually represent ownership of the debt
- Procedural Issues: failure to assert can lead to waiver of these defenses

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Standing in a Foreclosure Case

- Foreclosing plaintiff must own the note and the mortgage at the inception of the action. *Deutsche Bank National Trust Co. v. Barnett*, 88 A.D. 3d 636, 931 N.Y.S. 2d 630, (2d Dep't 2011); *Kluge v. Fugazy*, 145 A.D. 2d 537, 536 N.Y. S. 2d 92 (2d Dep't 1988)
- Note and Mortgage: assignment of the mortgage without assignment of the debt, i.e. the note, is a nullity.
- Note: represents contractual debt obligation
Mortgage: represents collateral security for debt



Assignment Must Be Complete **Before** Foreclosure Action Commenced

- Assignment can be by written assignment or by physical delivery of note and mortgage (if it is a negotiable instrument, i.e. made out to bearer).
- Difficult for plaintiff to prove physical delivery prior to commencement. Evidentiary standards on summary judgment usually cannot be met.
- If written assignment involved, execution date generally controls and conclusory affidavits of prior physical delivery are highly suspect.
- Back dated assignment ineffective absent proof of prior physical delivery. *Wells Fargo v. Marchione*, 69 A.D. 3d 204, 887 N.Y. S. 2d 615 (2d Dep't 2009); see also *New Century Mtge. Corp. v. Kogan*, 2013 NY Slip Op 50047(U) (Kings Cty. Jan. 14, 2013 (no standing where plaintiff commenced foreclosure action twelve days *after* it assigned mortgage and note to another party and therefore did not own note and mortgage when it commenced the action.))



Particular Standing Issues Implicated in Foreclosure Cases

- Assignments and Chain of Title, including timing, suspicious endorsements and allonges, assignments from MERS as nominee, lack of documented authority of parties signing assignments, assignees signing on behalf of assignors
- Robo-signing of assignment documents
- Mortgage-Backed Securities Investment Vehicles: Pooling and Servicing Agreements and non-compliance with trust closing dates and other terms



MERS and Standing

- Assignment from MERS when MERS is designated merely as nominee of lender, and never owned note, is ineffective to confer standing on its assignee. *Bank of New York v. Silverberg*, 86 A.D. 3d 274, 926 N.Y.S. 2d 532 (2d Dep't 2011).



MERS, STANDING, SUMMARY JUDGMENT

- *Homecomings Financial, LLC v. Guldi*, 108 A.D.3d 506, 969 N.Y.S.2d 470 (2d Dep't 2013) (reversing grant of summary judgment to plaintiff; Upon search of Record, awarding summary judgment to defendant dismissing foreclosure complaint because plaintiff failed to prove that MERS was the lawful holder of mortgage and note when action was commenced.
 - Mortgage language identifying MERS as nominee and purporting to authorize it to foreclose insufficient to overcome requirement that foreclosing party be both holder or assignee of subject mortgage and holder of the underlying note when the action is commenced.
 - Note specifically identified lender as a different party and plaintiff failed to submit any evidence demonstrating that note was physically delivered to MERS prior to action's commencement.
 - Evidence that MERS assigned the mortgage instrument to plaintiff during the course of the action was ineffectual, because such an assignment would not render plaintiff the holder of the note because "MERS could not transfer that which it did not hold."
 - Plaintiff's servicing agent's affidavit stating that the note was delivered to custodian of records of plaintiff during the course of the action was also insufficient, and, in any event, provided no factual details of the physical delivery of the note).



Summary Judgment and Issues of Proof –continued

- *U.S. Bank Natl. Assn. v. Guy*, 2013 NY Slip Op 51532 (U) (Kings Cty., Schmidt, J. August 22, 2013) (granting defendant’s motion to dismiss for lack of standing: Plaintiff failed to prove delivery of note prior to commencement where “possession affidavit” offered by document custodian was not based on personal knowledge and asserted physical delivery on a date that was inconsistent with complaint’s allegations. Plaintiff’s reliance on undated allonge was misplaced where the note had room for further endorsements and the allonge was not firmly affixed to the note as required by the UCC. Court also rejected Plaintiff’s assertion that Defendant’s acceptance of a HAMP modification was a ratification of plaintiff’s ownership of the note, which was unsupported by any legal authority).



Summary Judgment and Issues of Proof –(cont.)

- *Bank of N.Y. Mellon v. Dean*, 2013 NY Slip Op 23224 (Kings Cty., Battaglia, J. July 11, 2013) (plaintiff failed to establish *prima facie* entitlement to judgment of foreclosure: Assignment of mortgage from MERS to plaintiff, which did not purport to assign note, was insufficient to confer standing; unauthenticated Pooling and Servicing Agreement excerpts did not suffice to establish plaintiff’s standing; affidavit in support of summary judgment motion of physical delivery was neither based on personal knowledge nor adequately specific and failed to establish that assignor to plaintiff ever had possession of the note).



Equitable Defenses Relating to Requirements of Federal Programs

Federal National Mortgage Association v. Ricks, 372 NYS2d 485 (Sup. Ct. Kings Cty. 1975): Mortgagee noncompliance with HUD handbook guidelines could make a party ineligible for equitable relief.



Equitable Defenses: FHA Loans

Regulatory noncompliance with rules for loans insured by the Federal Housing Administration can be defense to foreclosure.

See *Wells Fargo Home Mortgage Inc. v. Neal*, 398 Md. 705 (Md. 2007)



Equitable Defenses: HAMP

HAMP: Home Affordable Modification Program promotes affordable loan modifications in order to stem the foreclosure crisis. Most major mortgage servicers signed up and obligated themselves to a loan modification process governed by detailed federal loan modification regime. Handbook section entitled "Protections Against Unnecessary Foreclosure," prohibits a referral to foreclosure until either:

- Borrower has been evaluated and determined ineligible for HAMP;
- Reasonable solicitation efforts have failed.

--- MHA Handbook Version 3.2, Section 3.

Dual Tracking Issues



HAMP Decision in 2d Dept

Aames Funding Corp. v. Houston, 2011 NY Slip Op 05642 (2d Dep't 2011): Trial court should have granted borrower's OSC to stay sale where borrower's HAMP application was still under review.

Settlement Conferences: typically involve applications for HAMP modifications and courts routinely cite violations of HAMP requirements as indicia of plaintiffs' failure to comply with settlement conference law



Counterclaims: RESPA

For example: Failure to respond to a Qualified Written Request, 12 USC 2605(e):

Actual damages, costs and attorneys' fees; plus \$1000 per violation if pattern and practice of noncompliance



Counterclaims: GBL 349

Prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state..."

Can apply to loan servicing and loan origination issues.



GBL 349

Must show (1) deceptive acts were directed at consumers, (2) acts are misleading in a material way, and (3) plaintiff has been injured as a result.

Unlike fraud, does not require showing of intent.

Broadly construed.



GBL 349

Remedies include:

1. Injunctive relief against deceptive acts and practices
2. Actual damages
3. Treble damages up to \$1000 if violation was willful or knowing, and
4. Attorneys' fees.



AFFIRMATIVE LITIGATIONS BY HOMEOWNERS

- Deed Thefts and Property Flipping Scams
- Fair Lending Claims—No Income No Asset and Other Equity Stripping Predatory Loan Products primarily marketed in low income minority communities
- FDCPA/RESPA/NY GBL 349 and Contract Claims Arising from Breaches of Loan Modification Agreements and Abusive Servicing, Failure to Convert HAMP Trial Payment Plans to Permanent Modifications

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CONCLUDING THOUGHTS

- Foreclosure is Litigation: NY is a judicial foreclosure state, and a debt obligation (a mortgage loan) cannot be enforced by way of foreclosing on the security for the debt (a home) by way of foreclosure unless plaintiff is able to prove its case.
- Just because there has been a default on a mortgage loan does not entitle a plaintiff to a judgment without establishing its case. A default neither suspends operation of rules of civil procedure or the rules of evidence.

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Standing and Capacity to Sue in New York Foreclosure Actions



STANDING AND CAPACITY TO SUE IN NEW YORK FORECLOSURE ACTIONS

With Annual Supplements for 2014 and 2013

Jacob Inwald, Director of Foreclosure Prevention

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STANDING AND CAPACITY TO SUE IN FORECLOSURE ACTIONS ¹

1) **General Standing Requirements in Foreclosure Cases**

To bring a foreclosure action in NY, plaintiff must own both the mortgage and note at the inception of the action; Deutsche Bank National Trust Company v. Barnett, 88 A.D.3d 636, 931 N.Y.S.2d 630, 2011 WL 4600619 (2d Dep't 2011) ("plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced). Kluge v. Fugazy, 145 A.D.2d 537, 536 N.Y.S.2d 92 (2d Dep't. 1988) (absent the transfer of the debt (the note), assignment of the mortgage is a nullity); Katz v. Eastville Realty Co., 249 A.D.2d 243, 672 N.Y.S.2d 308 (1st Dep't. 1998) (legal or equitable interest in mortgage is required to foreclose); see also Federal National Mortgage Association v. Youkelsone, 303 A.D.2d 546, 755 N.Y.S.2d 730 (2d Dep't. 2003) (mortgage is merely incident to and collateral security for the debt; assignment of mortgage alone does not pass the debt itself); U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 890 N.Y.S.2d 578 (2d Dep't 2009) (incomplete and conflicting evidence insufficient to establish that MERS effectively transferred the note to plaintiff prior to the commencement of the action). The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." Carpenter v. Longan, 83 U.S. 271 (1872).

2) **Assignment Must Be Complete at the Time of Commencement of Foreclosure; Retroactive Assignments Insufficient**

For an assignee of a mortgage loan to have standing to foreclose, the assignment must be complete *when the action is commenced*. Ownership of the note and

¹ Standing and capacity to sue are related, but distinguishable legal concepts. Capacity requires an inquiry into the litigant's "power to appear and bring its grievance before the court," Community Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 184, 155 (1994), whereas standing requires an inquiry into whether the litigant has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request," Caprer v. Nussbaum, 36 A.D.3d 176, 182 (2006).

mortgage may be established by the lending documents themselves, or by assignment. An assignment can be made in writing or by physical delivery of the mortgage and note. Deutsche Bank Nat. Trust Co. v. McRae, 27 Misc.3d 247, 894 N.Y.S.2d 729 (N.Y.Sup. 2010). As long as plaintiff can establish its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint, the *recording* of a written assignment after the commencement of the action does not defeat standing. Aurora Services, LLC v. Weisblum, 85 A.D.3d 95, 923 N.Y.S.2d 609, 2011 N.Y. Slip Op. 04184, N.Y.A.D. 2 Dept. 2011). Moreover, assignment can be effected by means of an indorsement in blank. Mortgage Electronic Registration Systems, Inc. v. Coakley, Inc., 41 A.D.3d 674, 838 N.Y.S.2d 622 (2d Dep't 2007) (promissory note was negotiable instrument within meaning of U.C.C.); HSBC Bank USA v. Schwartz, 10707/09, NYLJ 1202476022937 *1 (Sup., RO, November 22, 2010).

If an assignment is in writing, “the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated.” LaSalle Bank N.A. at Trustee v. Ahearn, 59 A.D.3d 911 (3d Dep't 2009) (retroactive assignment ineffective to confer standing upon assignee in foreclosure action commenced prior to execution of assignment). Accord, Countrywide Home Loans, Inc. v. Gress, 68 A.D.3d 709, 888 N.Y.S.2d 914 (2d Dep't 2009) (retroactive assignment executed after commencement of action ineffective to confer standing on assignee in foreclosure action commenced before execution of assignment); Wells Fargo Bank N.A. v. Marchione, 69 A.D.3d 204, 887 N.Y.S.2d 615 (2d Dep't 2009) (affirming dismissal where assignment was executed after filing of action but before service of summons and complaint; commencement of action measured by filing, not by service; execution date of assignment is controlling; retroactive assignment ineffective); Bank of New York v. Andrade, (Sup. Ct. Queens Co, Index No. 9700/2007 June 3, 2010) (granting motion to vacate judgment of foreclosure and sale and dismissing action without prejudice for lack of standing where assignment was executed after action's commencement and backdated, even though court had previously signed

an order of reference and a judgment of foreclosure and sale); U.S. Bank N.A. v. Dellarmo, 294 A.D.3d 746, 942 N.Y.S.2d 122 (2d Dept. 2012) (reversing trial court's denial of motion to dismiss for lack of standing, finding no standing where corrective assignment relied upon by plaintiff had no retroactive effect and where there was no evidence of prior physical delivery, and where both the unrecorded initial assignment and the recorded corrective assignment reflected assignment of only the mortgage, and not the note).

3) **MERS and Standing**

Mortgage Electronic Registration Systems, Inc. (MERS) is a clearing house created by the lending industry to register and track assignments of mortgages and servicing rights (thereby avoiding the costs associated with having to record each transfer of a mortgage). In mortgage instruments the originating lender frequently names MERS as the nominee of the mortgagee.

Whether MERS has standing to bring a foreclosure action, or whether MERS has the legal capacity to assign the note and the mortgage to a foreclosing plaintiff, has been the subject of much litigation, but the Second Department held in Bank of New York v. Silverberg, 89 A.D. 3rd 887, 926 N.Y.S.2d 532 2d Dep't 2011) that MERS only has standing to assign the right to foreclose when it holds or is assignee of the *note* and the mortgage at the commencement of the action. When MERS is designated merely as a nominee on the mortgage, an assignment from MERS is insufficient to confer standing on its assignee. *Id.* As “nominee,” MERS' authority was limited to those powers specifically conferred and authorized by the lender. Although a loan consolidation agreement gave MERS the right to assign the mortgages, it did not specifically authorize MERS to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender. *Id.* The court also distinguished In Mortgage Electronic Registration Systems, Inc. v. Coakley, 41 AD3d 674, 838 NYS2d 622 (2d Dep't. 2007), noting that in Coakley the lender had transferred the *note* to MERS *before* the commencement of the action. *See also* In re Lippold, 457 B.R.

293, 2011 WL 3890540 (Bkrtcy S.D.N.Y, September 6, 2011) (purported assignment of mortgage note by recording company that only had rights in mortgage itself, not in mortgage note, as nominee for original mortgage lender, was nullity and did not give alleged assignee standing to move for relief from stay); In re Agard, 444 B.R. 231 (Bkrtcy.E.D.N.Y. 2011) (mortgage, by naming MERS as “nominee” and/or “mortgagee of record” and acknowledging MERS’ rights to exercise certain of lender's rights under state law, did not authorize MERS to make valid assignment of mortgage); Citi Group/Consumer Fin., Inc. v. Platt, 2011 NY Slip Op 52185(U), 33 Misc.3d 1231(A) (Sup. Ct. Queens Co.) (assignment by MERS ineffective because the assignment to MERS did not specifically give MERS the right to assign the underlying note); Citigroup Global Markets Realty Corp. v. Smith, 2011 NY Slip Op 52236(U), 33 Misc.3d 1234(A) (Sup. Ct. Kings Co.) (assignment by MERS was nullity because MERS had no interest in the underlying note); Onewest Bank, FSB v. Galli, 2012 NY Slip Op 30762(U) (Sup. Ct. Richmond Co.) (assignment by MERS was ineffective because MERS was merely ‘nominee’ for recording purposes; mere physical possession of the note was not sufficient); U.S. Bank, N.A. v. Dunkley, Index No. 29446/10 (Sup. Ct. Queens Co. 2012) (granting motion to dismiss the foreclosure action because plaintiff failed to submit any evidence that MERS had possession of the note at the time of assignment); (dismissing foreclosure action with prejudice for lack of standing because MERS lacked specific authority as nominee to assign the note, nor did it ever have title or possession of the note); U.S. Bank, N.A. v. Bressler, 2011 NY Slip Op 52183, 33 Misc.3d 1231(A) (Sup. Ct. Kings Co.) (denying motion for summary judgment and order of reference and granting cross motion to dismiss for lack of standing, where assignment from MERS as nominee was ineffective, where MERS purported to assign on behalf of Fremont, which no longer existed, where evidence of physical delivery was insufficient, and where purported assignment was signed by attorney from Steven J. Baum's office, a practice prohibited by its settlement agreement with U.S. Attorney's office).

In Bank of New York v. Alderazi, 31 Misc.3d 1209(A), WL 1364466 (Sup. Ct.

Kings Co. 2011), the court dismissed Plaintiff's renewal of its motion for appointment of referee, holding that, while MERS had authorized the original lender's officers to act on its behalf, it was not evidence of the converse. Plaintiff also produced an endorsed yet undated note in support of its motion, whereas the note accompanying the original complaint in July 2008 bore no endorsement. Note: Second Department reversed this decision, not based on substance, but on ostensible impropriety of *sua sponte* consideration of plaintiff's standing where standing defense deemed waived, at 99 AD 3d 837, 951 NYS2d 900 (2d Dep't 2012). In LLP Mortgage LTD v. Sabine Properties et al., 2010 NY Slip Op 32367U, 2010 N.Y. Misc. LEXIS 4216 (N.Y. Cty. September 1, 2010), the Court dismissed for lack of standing because the assignment to plaintiff from MERS, which did not own the note and was merely a nominee, was ineffective to confer standing. *See also* HSBC Bank v. Squitieri, 2010 N.Y. Slip Op 52000U (Sup Ct. Kings Co., 2010) (denying order of reference/default judgment/summary judgment for lack of standing because plaintiff failed to establish that MERS, as nominee, was authorized to assign mortgage, and thus failed to make out *prima facie* case that it was entitled to foreclose).

In LaSalle Bank National Association v. Lamy, 12 Misc.3d 1191(A), 824 N.Y.S.2d 769 (Sup. Ct. Nassau Cty 2006), the court held that because MERS had no ownership interest in the note and the mortgage, an assignment from MERS was ineffective to pass title to the foreclosing lender. *See also* U.S. Bank, N.A. v. Collymore, 68 A.D. 2d 752, 890 N.Y.S.2d 578 (2d Dep't 2009) (incomplete and conflicting evidence insufficient to establish that MERS effectively assigned the note to plaintiff prior to the action); Bank of New York v. Trezza, 14 Misc.3d 1201(A), 831 N.Y.S.2d 358 (Sup.Ct. Suffolk Cty. 2006) (BNY lacked standing due to ineffective assignment from MERS). In Onewest Bank, F.S.B. v. Drayton, 29 Misc.3d 1021, 910 N.Y.S.2d 857 (Sup. Ct. Kings Co. 2010), the court granted plaintiff's application to withdraw its motion for an order of reference supported by "robo-signer" affidavit, and further dismissed the action and vacated the notice of pendency, granting plaintiff leave to renew its application for an order of

reference within 60 days upon submission of proof of authority of MERS, as nominee of originator, to assign mortgage, and an affidavit from "robo-signer" explaining her employment history and why no conflict of interest was presented by her acting as VP for MERS as assignor and as VP for assignee/assignor to plaintiff.

But, if plaintiff can prove that MERS held the note, a standing challenge will fail. In Mortgage Electronic Registration Systems, Inc. v. Coakley, 41 AD3d 674, 838 NYS2d 622 (2d Dep't. 2007), the court found that MERS had standing where note was indorsed in blank and had been transferred to MERS, and where the mortgage instrument executed by the borrower gave MERS the power to foreclose. See also U.S. Bank, N.A. v. Flynn, 2010 NY Slip Op 2009 (Sup. Ct. Suffolk County March 12, 2010) (disagreeing with Lamy). In Bank of N.Y. Mellon Trust Co. NA v. Sachar, 95 A.D.3d 695, 943 N.Y.S.2d 893 (1st Dep't. 2012), the court affirmed grant of summary judgment in favor of plaintiff, holding that it had proved its standing to commence the foreclosure action by demonstrating that it was the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced. The court acknowledged that MERS had not been given any interest in the underlying note by the lender, but cryptically held, without any analysis, that the "complaint and the documents annexed to plaintiff's motion establish that an assignment of the note had been effectuated by physical delivery of the note before this action was commenced."

Note: MERS on its website asserts that it has standing to foreclose as the holder of the mortgage so long as a MERS officer is in the possession of the original note endorsed in blank. See generally MERSCORP. V. Romaine, 8 N.Y.3d 90, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (Suffolk County Clerk had ministerial duty to record and index mortgages, assignments and discharges filed by MERS).

4) Plaintiff Must Plead Ownership of Note and Mortgage for High-Cost Loans

New pleading requirement for loans subject to Banking Law 6-l and 6-m (high cost and subprime loans): plaintiff must plead that it is the owner of the mortgage and note or has been delegated the authority to institute a foreclosure action by the owner of the mortgage and note. RPAPL § 1302.

5) Lack of Standing Waived if Not Raised in the Answer or Pre-answer Motion/Opposition to Summary Judgment Motions Based on Standing Challenges

Lack of standing and capacity to sue, though they are distinct defenses (only lack of capacity to sue is enumerated in CPLR 3211(e) as a defense that is waived if not asserted in an answer or pre-answer motion to dismiss), have been conflated by some courts which have deemed standing as non-jurisdictional. Accordingly, if both of these defenses are not asserted in the answer or pre-answer motion, they may be deemed waived. . See Security Pacific National Bank v. Evans, 31 AD2d 278, 820 NYS2d 2 (1st Dep't. 2006)(plaintiff lender commenced action after having merged with another bank and was thus no longer legally cognizable entity; note: this was really a capacity to sue issue that the court conflated with standing); Wells Fargo Bank, Minnesota, a National Association v. Mastropaolo, 42 A.D.3d 239, 837 N.Y.S. 2d 247 (2d Dep't 2007) (defense of lack of standing and capacity to sue were waived because not raised in the answer, where Wells Fargo took title to mortgage by assignment three days after commencing the action). See also Wells Fargo Bank Minnesota, N.A. v. Perez, 70 A.D.2d 817, 894 N.Y.S.2d 509 (2d Dep't 2010)(standing defense waived by failing to raise defense in answer or pre-answer motion to dismiss). Accord, Deutsche Bank National Trust Co. v. Jackson, 68 A.D.3d 805, 889 N.Y.S.2d 477 (2d Dep't 2009); Countrywide Home Loans, Inc. v. Delphonse, 64 A.D.3d 624, 625, 883 N.Y.S. 2d 135 (2d Dep't 2009); U.S. Bank Nat. Ass'n v. Eaddy, 79 A.D.3d 1022, 914 N.Y.S.2d 901 (2d Dep't 2010). See also Deutsche Bank Nat. Trust Co. v. Hussain, 78 A.D.3d 989, 912 N.Y.S.2d 595 N.Y.A.D. (2d Dep't. 2010) (defendant failed to interpose an answer or file a timely pre-answer motion asserting the defense of lack of standing and failed to demonstrate any other potentially meritorious defense to the foreclosure action or a reasonable excuse

for her failure to answer.); Bank of America, N.A. v. Gowrie, (Sup. Ct. Queens Co., Index No. 6216/2003, Dec. 14, 2010) (denying application to vacate judgment of foreclosure and sale and for leave to file late answer made after case was released from settlement conferences, in which homeowner participated with counsel. Court held that defendant failed to offer reasonable excuse for his failure to answer).

Although ownership of the note and mortgage are also elements of plaintiff's prima facie case, e.g. Campaign v. Barba, 23 A.D.3d 327, 805 N.Y.S.2d 86 (2d Dep't 2005), suggesting that lack of ownership of the note (i.e., standing) could be asserted in opposition to motions for summary judgment/default judgment and applications for orders of reference for lack of proof of an element of plaintiff's prima facie case, the Second Department has rejected such challenges, deeming the issue waived if not raised in the answer or pre-answer motion. Citibank N.A. v. Herrera, 64 A.D. 3d 536, 881 N.Y.S. 2d 334 (2d Dep't 2009) (affirming grant of summary judgment to plaintiff on grounds that defense of standing was waived without considering whether plaintiff established elements of prima facie case of foreclosure). See also Countrywide Home Loans v. Delphonse, 64 A.D.3d 624, 883 N.Y.S.2d 135 (2d Dep't 2009) (trial court incorrectly found triable issue of fact concerning standing in denying plaintiff's summary judgment motion where defense was waived by failure to assert it in an answer or motion to dismiss).

Of course if standing has been timely asserted, disputed issues of fact concerning plaintiff's status as holder or assignee of the note are grounds for denial of summary judgment. See Deutsche Bank National Trust Company v. Barnett, 88 A.D.3d 636, 931 N.Y.S.2d 630, 2011 WL 4600619 (2d Dep't 2011) (copies of two different versions of undated allonge purportedly affixed to note pursuant to UCC 3-202(2), which in turn conflicted with copy of note and undated endorsements on note, and absence of evidence of physical delivery prior to commencement of action, demonstrated genuine issue of material fact concerning plaintiff's standing); HSBC Bank USA v. Hernandez, 92 A.D.3d 843, 939 N.Y.S.2d 120 (2d Dep't 2012) (affirming denial of motion for summary judgment

because the plaintiff's evidence failed to show note was physically delivered to the plaintiff prior to the commencement of the action, but reversing dismissal with prejudice because the defendants failed to establish, as a matter of law, that the plaintiff lacked standing); U.S. Bank N.A. v. Sarmiento, Index No. 11124/09 (Sup.Ct. Kings Co. 2012) (denying plaintiff's motion for summary judgment where plaintiff did not produce the required affirmation, where it was not established that MERS had the authority to assign the underlying note, and where even if MERS had authority, there was no evidence that MERS held the note); Citimortgage, Inc. v. Orichello, 2011 NY Slip Op 52166(U) (2d Dep't 2011) (reversing a grant of summary judgment for the plaintiff because the plaintiff failed to demonstrate standing by failing to establish how or when it became the lawful holder of the note either by delivery or valid assignment of the note to it).

Trial courts, moreover, have applied Mastropaolo and its progeny inconsistently, and some have distinguished or limited those rulings in order to allow assertion of a standing defense even when the defense was not timely asserted in a pre-answer motion to dismiss or answer. In Deutsche Bank Trust Company Americas v. Eisenberg, 24 Misc.3d 1205A, 890 N.Y.S.2d 368 (Sup. Ct. Suffolk Co. 2009), the court denied plaintiff's application for an order of reference for reasons which included a failure of proof that plaintiff owned the note and mortgage, even though defendant had not appeared and thus not preserved the standing defense. The court acknowledged that a defendant who fails to appear waives the defense that an assignment executed after the commencement of the action fails to confer standing, but nonetheless went on to state that "it remains settled that foreclosure of a mortgage may not be brought by one who has no title to it...." Id. The court, in effect, concluded that plaintiff failed to make out its *prima facie* case, stating that "Plaintiff's failure to submit proper proof, including an affidavit from one with personal knowledge, that the plaintiff is the holder of the note and mortgage, requires denial of the plaintiff's application for an order of reference." See also Financial Freedom SFC v. Slinkosky, N.Y.L.J. July 28, 2010 at p. 29 (Sup. Ct. Suffolk Co. Index. No. 118789/2009 June 24, 2010) (denying summary judgment

without prejudice to renewal to plaintiff seeking to recover loan proceeds on a reverse mortgage because plaintiff failed to submit copies of the note and Home Equity Conversion Mortgage and failed to demonstrate standing or explain its relationship to the originator, without discussing waiver of standing defense, but listed affirmative defenses asserted by defendants with no mention of standing); IndyMac Bank v. Garcia, 28 Misc. 3d 1202(A), 2010 WL 2606498 (Sup. Ct. Suffolk Co. June 22, 2010) (denying order of reference on grounds of standing without discussion of whether standing defense had been waived, stating that a “plaintiff has no foundation in law or fact to foreclose upon a mortgage, unless the plaintiff has shown it has legal or equitable title in such mortgage” (citations omitted); Bayview Loan Servicing, LLC v Bozymowski, 2011 NY Slip Op 50240(U) [30 Misc. 3d 1228(A)] (Sup. Ct. Suffolk Co. 2011) (denying order of reference for insufficient allegation of compliance with 90-day notice requirement, insufficiently-sworn affidavit in support of the application, conflicting factual assertions undermining standing to foreclose and for inadequate attorney's affirmation confirming accuracy of foreclosure papers, and ordering hearing to consider sanctions.) See also Emigrant Mtge. Co. v. Patton, 2012 NY Slip Op 31760(U) (Sup. Ct. New York Co.) (although standing defense is ordinarily waived if not asserted in pre-answer motion to dismiss or in answer, plaintiff's filing of affirmation acknowledging error in pleadings and requesting correction was tantamount to a request for leave to amend the complaint, in response to which defendant was entitled to an opportunity to assert new defense of standing).

6) Standing as a “Meritorious Defense” For Purposes of Motions to Vacate Default Judgments and Motions for Leave to File Late Answers

The Second Department has declined to consider lack of standing as a meritorious defense raised by defendant for the first time in a motion to vacate a default judgment under CPLR 5015(a)(1), deeming the defense waived for failure to raise it in an answer or pre-answer motion to dismiss. HSBC Bank, USA v. Dammond, 59 A.D.3d 679, 875 N.Y.S.2d 490 (2d Dep't 2009). Although in Dammond an attorney had filed a notice of appearance on behalf of the homeowner (a fact not

reported in the decision), the Second Department came to the same conclusion in a case in which the homeowners had not appeared at all. Deutsche Bank National Trust Co. v. Young, 66 A.D.3d 819, 886 N.Y.S.2d 619 (2d Dep't 2009) (homeowners waived the issue of standing by failing to timely appear or answer). See also Washington Mutual Bank N.A. v. Payne, 24 Misc.3d 1203A, 889 N.Y.S.2d 884 (Sup. Ct. Suffolk Co. 2009) (denying motion to vacate foreclosure judgment on grounds that standing was waived, but case was distinguishable because standing was only asserted in second motion to dismiss made only after prior motion to dismiss challenging process service was denied); Onewest Bank v. Berry, 2009 N.Y. Slip Op. 52171U (Sup. Ct. Suffolk Co. 2009) (citing Dammond, reciting that "it is now well established that an affirmative defense that has been waived by a failure to assert it in an answer or pre-answer motion to dismiss may not be relied upon to establish the meritorious defense that is required to support an application to vacate a default....")

On applications for leave to file late answers, standing defenses have fared better in some cases, and the Second Department has generally recognized that a reasonable excuse for failing to answer coupled with a meritorious defense are grounds for granting an extension to file an answer. Maspeth Federal Sav. And Loan Ass'n v. McGown, 77 A.D.3d 890, 909 N.Y.S.2d 642, 2010 WL 4244350, 2010 N.Y. Slip Op 07722 (2nd Dep't 2010) (whether to grant application for leave to file late answer is committed to trial court's sound discretion, but affirming denial of such application in the case before it). The Supreme Court of Putnam County held that reliance on a statement in the plaintiff's verified complaint averring standing as "holder" of the note constituted a reasonable excuse for defaulting on the answer, and permitted the defendant to raise a defense of standing in Wells Fargo v. Williams, Index No. 311/2008 (Sup. Ct. Putnam Co. 2011). In HSBC Bank USA v. Cayo, 34 Misc.3d 850, 934 N.Y.S.2d 792 (Sup. Ct. Kings Co. 2011), the Court permitted the defendant leave to file a late answer two years after commencement of the suit based on evidence of private or mandated settlement negotiations where defendants were pro se for most of the suit's life, and a viable defense of standing was asserted. Additionally, in Emigrant Mtge.

Co. v. Patton, 2012 WL 2871809 ,2012 NY Slip Op 31760(U) (Sup. Ct. New York Co. June 25, 2012), the court permitted the defendant to raise a standing defense, 8 months after the court entered a partial summary judgment for the plaintiff, because conflicting statements between an affidavit and an affirmation which led plaintiff to acknowledge error in the pleadings and request correction which is “tantamount” for a leave to amend the complaint. On a motion pursuant to CPLR § 3012 for an order extending the defendant’s time to appear, a judge in Queens County concluded that a standing defense based on an assignment to plaintiff after commencement of the action satisfied the meritorious defense criteria for extending a defendant’s time to appear without discussing the issue of waiver of the defense. Deutsche Bank National Trust Co. v. Ibiayo (Queens County Index No. 20910-08, April 23, 2009).

Notwithstanding Mastropaolo and Dammond, several judges have denied orders of reference for lack of standing even though the defense was technically waived, in cases where the homeowners had not appeared and thus had not preserved the defense. In Citigroup Global Markets Realty v. Bowling, 225 Misc.3d 1244(A), 906 N.Y.S.2d 778, (Sup. Ct. Kings Co. 2009), the court, after dismissing for failure to properly effect personal service, *sua sponte* determined that plaintiff lacked standing, distinguishing Mastropaolo and Delphonse because the homeowners in those cases had appeared, answered and asserted counterclaims, tacitly acknowledging that the plaintiffs were the proper parties to prosecute the foreclosures. It also distinguished Dammond because there the homeowner was personally served and only asserted the standing defense immediately prior to the sale in a last-ditch effort to avoid the sale.

The Second Department has also weighed in on *sua sponte* determinations of standing. In U.S. Bank v. Emmanuel, 83 A.D.3d 1047, 921 N.Y.S.2d 320 (2d Dep’t 2011), the court held that a party’s lack of standing does not constitute a jurisdictional defect and does not warrant a *sua sponte* dismissal of the complaint by the court (reversing dismissal where plaintiff had made ex parte motion to direct service upon the defendant by publication, but the Supreme Court, *sua*

sponte, directed dismissal of the complaint with prejudice and cancelled the notice of pendency, finding that the plaintiff lacked standing).

In Option One Mortgage Corp. v. Duke, 2024 Misc.3d 1237(A), 901 N.Y.S.2d 901(Sup. Ct. Kings Co. 2009), Justice Schack held that standing is jurisdictional and may be raised by the court *sua sponte*, citing Axelrod v. New York State Teachers' Retirement System, 154 A.D.2d 827 (3d Dep't 1989) and ignoring Mastropaolo. The Court in Mastropaolo, however, had specifically rejected the holding in Axelrod as not consistent with a line of cases to the contrary from the Court of Appeals and intermediate appellate courts. Among the numerous decisions rendered by Judge Schack finding no standing on *sue sponte* review of the record are: Bank of New York v. Mulligan, 28 Misc. 3d 1226(A), 2010 WL 3339452 (Sup. Ct. Kings Cty. Aug. 25, 2010) (denying order of reference *sua sponte* on finding that plaintiff lacked standing because, *inter alia*, assignment was executed after foreclosure action was commenced and because MERS, as nominee, lacked authority to assign mortgage); EMC Mortg. Corp. v. Batista, 15 Misc.3d 1143(A) (Sup. Ct. 2007); Ameriquest Mortg. Co. v. Basevich, 16 Misc.3d 1104(A) (Sup.Ct. 2007); Deutsche Bank Nat. Trust Co. v. Castellanos, 15 Misc.3d 1123(A) (Sup.Ct. 2007); Aurora v. Sattar, 17 Misc.3d 1109(A) (Sup. Ct. 2007).

In Downey Savings & Loan Assoc. FA v. 162 Grand Newburgh, 27 Misc.3d 674, 897 N.Y.S.2d 835, 2010 N.Y. Slip Op. 20076 (Sup. Ct. Kings Co. 2010), Judge Kramer, following Mastropaolo, held that standing was not jurisdictional, and the defense was waived when it was not raised in an answer or pre-answer motion to dismiss.

In Richmond County, Judge Maltese, who authored the opinion in Mastropaolo that the Second Department reversed, blamed the entire holding on his mistake in dismissing the complaint with prejudice when such dismissal should have been without prejudice, and ruled in Deutsche Bank National Trust Co. v. Abbate, 25 Misc. 3d 1216A, 901 N.Y.S.2d 905, N.Y. Slip Op. 52154U (Sup. Ct. Richmond

Co. 2009), that Mastropaolo's ruling on standing was dicta, and further stated that Mastropaolo failed to address the issue of subject matter jurisdiction, which cannot be waived. He held that having title is a "condition precedent" to the right to sue on the mortgage and dismissed without prejudice, analyzing the issue in terms of justiciable controversy and jurisdiction. This decision cannot be reconciled with Mastropaolo, which is unequivocally based on the determination that standing is not a matter of subject matter jurisdiction, but it suggests that at least some courts will be reluctant to grant judgments of foreclosure to plaintiffs who have not proved their ownership of the note and mortgage.

In Deutsche Bank National Trust Company v. McRae, 27 Misc.3d 247, 894 N.Y.S.2d 720 (Sup. Ct. Allegany Co. 2010), the court distinguished Mastropaolo and Delphonse because in both of those cases the defendants had acknowledged that plaintiffs were the proper parties by filing answers containing affirmative defenses or counterclaims, whereas in the case before it, defendants' failure to appear altogether was not deemed a waiver of the standing defense. The court explicitly noted the prevalence of multiple and often unrecorded assignments and stated that homeowners could not be deemed to have waived, much less understood, any standing defenses when they failed to answer or move.

7) Amendment to Add Standing Defense is not Governed by Waiver Principle

The Second Department has held that where the defendant has answered but not asserted a standing defense, a motion for leave to amend to assert a standing defense should be granted if such amendment causes no prejudice to plaintiff. U.S. Bank Natl. Assn. v. Sharif, 89 A.D.3d 723, 933 N.Y.S.2d 293, 2011 N.Y. Slip Op. 07835 (2d Dep't Nov. 1, 2011) (motions for leave to amend should be freely granted absent prejudice or surprise from the delay in seeking leave; reversing denial of leave and holding that trial court should have dismissed for lack of standing upon plaintiff's failure to submit either written assignment of note or evidence of physical delivery). In Aurora Loan Services, LLC v. Thomas,

70 A.D. 3d 986, 897 N.Y.S. 2d 140, 2010 WL 654482 (2d Dep't 2010), the Second Department affirmed a Suffolk County judge's grant of a motion for leave to amend defendant's answer to assert defenses of standing and lack of capacity to sue, stating, without explanation, that the defenses had not been waived, but further holding that leave to amend was appropriate because the documents relied upon to support the motion for leave to amend were obtained from the plaintiff during discovery. See also HSBC v. Enobakhare, 2010 Slip Op 31925(U) (Sup. Ct. Richmond Co., 2011), (granting defendant's motion for leave to amend its answer, and, without specifying what additional defenses not asserted in the initial pro se answer were added in the amended answer, the Court held that the defendant could amend even to add defenses that were arguably waived by failure to assert them in the initial answer or pre-answer motion pursuant to CPLR 3211). In Deutsche Bank National Trust Company v. Ramotar, 30 Misc.3d 1208(A), 2011 WL 66041 (Sup. Ct. Kings Co. 2011) the court denied plaintiff's motion for summary judgment, to strike answer and for an order of reference, and, *sua sponte*, granted defendant who previously served *pro se* answer leave to file amended answer now that defendant had secured counsel in order to assert defenses concerning standing and robo-signing. See also Emigrant Mtge. Co. v. Patton, 2012 NY Slip Op 31760(U), 2012 WL 2871809 (Sup. Ct. New York Co. 2012) (although standing defense is ordinarily waived if not asserted in pre-answer motion to dismiss or in answer, plaintiff's filing of affirmation acknowledging error in pleadings and requesting correction was tantamount to a request for leave to amend the complaint, in response to which defendant was entitled to an opportunity to assert new defense of standing).

8) Capacity to Sue of Foreign Banks and Non-Bank Lending Institutions

Notwithstanding the prohibition in BCL §1312 against lawsuits by foreign corporations not authorized to do business in the state, a duly organized foreign banking corporation may make loans in the state and enforce them by bringing foreclosure actions even if it is not licensed to do business in the state. BCL § 103(a); Banking Law §200(4). A corporation seeking to foreclose a mortgage

must either be authorized to do business in the state or qualify as a “duly organized foreign banking corporation,” and the complaint must “demonstrate that the plaintiffs meet with these requirements.” Sutton Funding LLC v. Parris, 24 Misc. 3d 889, 878 N.Y.S.2d 610, 2009 NY Slip Op 29209 (Sup. Ct. Kings Co. 2009) (plaintiff foreign banking corporations’ foreclosure actions dismissed absent any allegations that they were authorized to do business in N.Y. or otherwise qualified as “foreign banks”).

9) New Court Rule: Attorney Affirmation in Foreclosure Cases.

As of October 20, 2010 New York State Unified Court System has instituted a new filing requirement for residential foreclosure cases to “protect the integrity of the foreclosure process and prevent wrongful foreclosures.” (press release at http://www.courts.state.ny.us/press/pr2010_12.shtml). The rule promotes courts’ ability to essentially consider standing and the *prima facie* case contemporaneously in determining the merits of a foreclosure action. It is also viewed as means to avoid wasting of court time and resources. Per the requirements, counsel must affirm that counsel has taken “reasonable steps – including inquiry to banks and lenders and careful review of the papers filed in the case – to verify the accuracy of the documents filed in support...”

In Wells Fargo Bank, N.A. v. Zelouf, 30 Misc.3d 1226(A), 926 N.Y.S.2d 347 (Sup. Ct. Kings Co. 2011), Justice Schack emphasized counsel’s requirement to affirm that s/he communicated on a specific date with a named representative of the plaintiff who confirmed the accuracy of supporting documents as well as notarizations. Justice Schack also reminded counsel that the new rule falls under the penumbra of the New York Rules of Professional Conduct dealing with disciplinary standards and sanctions for frivolous conduct. See Deutsche Bank Nat. Trust Co. v. Francis 30 Misc.3d 1241(A), 926 N.Y.S.2d 343 (Sup. Ct. Kings Co. 2011), in which Justice Schack dismissed with prejudice an action in which according to ACRIS, plaintiff was not the holder of the note and mortgage on the day the foreclosure action commenced; CitiMortgage, Inc. v. Nunez, 2010 NY

Slip Op 52142(U), (920 N.Y.S.2d 240 (Sup. Ct. Kings Co. 2010) (dismissing without prejudice when on adjourned date plaintiff's counsel advised the court that plaintiff did not have procedures in place in order to comply with the order for affirmation); Washington Mutual Bank v. Phillip, 229 Misc.3d 1227(A), 920 N.Y.S.2d 245, 2010 WL 4813782 (Sup. Ct. Kings Co.) (denying order of reference, finding attorney's affirmation inadequate where it referenced conversation with plaintiff's "house counsel" at time of commencement of action rather than prior to application for order of reference and giving counsel 45 days to correct deficiencies); Emigrant Mortgage Co. v. Thevenin, 14290/2009, NYLJ 1202543622813 (Sup. Ct. Richmond Co.) (dismissing order of reference without prejudice because attorney affirmation did not verify that the plaintiff was the current holder of the mortgage and note). See also U.S. Bank N.A. v. Guichardo, 90 A.D.3d 1032, 935 N.Y.S.2d 335, 2011 NY Slip Op 09630 (2d Dep't 2011) (reversing a dismissal with prejudice because the lower court exceeded discretion in dismissing the case after a one day delay in filing of attorney affirmation); U.S. Bank N.A. v. Ramjit, 33 Misc.3d 1232(A), 946 N.Y.S.2d 69 (Sup. Ct. Kings Co. 2011) (dismissing with prejudice a foreclosure after 418 days passed since an administrative judge ordered the affirmation and 137 days after an order from the Supreme Court) .

Counsel must submit affirmation with all applications made at any stage of the foreclosure case. See Citimortgage v. McGee, 30 Misc.3d 199, 915 N.Y.S.2d 436 (Sup. Ct. Suffolk Co. 2010); Citibank, N.A. v. Murillo, 30 Misc.3d 934, 915 N.Y.S.2d 461, 2011 NY Slip Op 21004 (Sup. Ct. Kings Co. 2011) (dismissing foreclosure action with prejudice, and cancelling Notice of Pendency, where plaintiff failed to timely file attorney's affirmation confirming accuracy of foreclosure filings after being ordered by Court to do so);

The new requirements have not been followed by all courts. In LaSalle Bank, NA v. Pace, 31 Misc.3d 627, 919 N.Y.S.2d 794 (Sup. Ct. Kings Co. 2011), the court granted plaintiff summary judgment and order of reference, rejecting standing

defense and challenge to out-of-state notarizations of assignment and affidavits in support of motion. Court also held that attorney's affirmation of accuracy of filing was not required for motion for summary judgment and order of reference, and further proceeded to hold that such rule is void as an impermissible invasion of the province of the legislature. Note: See 2013 Update for Second Department's affirmance of this case without addressing holding concerning "constitutionality" of the attorney affirmation requirement.

STANDING AND CAPACITY TO SUE IN NEW YORK FORECLOSURE ACTIONS

JULY 2014 UPDATE

1st Department

Meyerson Capital V. LLC v. Anderson, 110 A.D.3d 468, 973 N.Y.S. 2d 113 (1st Dep't 2013) (reversing grant of defendant's motion to vacate a judgment of foreclosure and sale, holding that motion seeking vacatur of the judgment lacked a basis in law because the judgment was not entered on default, and defendant did not establish any other grounds for vacating the judgment. Court went on to state that defendant's sole stated defense was lack of standing, but defendant, who appeared by counsel in the foreclosure action, never raised that argument, even though it was based on documents submitted in the action. Court further stated that, in any event, plaintiff's showing of standing was adequate, because the record reflects the assignment of the mortgage and note, the actual delivery of the note to plaintiff, and the recordation of the assignment.)

71 Clinton St. Apts. LLC v. 71 Clinton Inc., 114 A.D.3d 583, 982 N.Y.S.2d 6, 2014 (1st Dep't 2013) (reversing denial of plaintiff's motion for summary judgment, finding that plaintiff had standing as the assignee of the mortgage and note when the action was commenced and that plaintiff established its prima facie right to foreclose by producing the note, mortgage and guarantee, and affidavits establishing non-payment.)

New York Cty.

Wells Fargo Bank, N.A. v Walters, 2013 N.Y. Slip Op. 32824 (U), 2013 WL 5974395 (NY Cty., Madden, J. Oct. 22, 2013) (rejecting CPLR 5015(a)(2) challenge based on lack of subject matter jurisdiction premised on defective standing, holding that by its express terms CPLR 5015(a)(2) applies only to provide relief from judgment after trial and that, in any event, a party's lack of standing is not a jurisdictional defect.)

Bronx Cty.

Citibank N.A. v. McCray, 41 Misc.3d 1229(A), 983 N.Y.S.2d 201 (Bronx Cty., Gonzalez, J., Nov. 22 2013) (granting pro se defendant's motion to dismiss for lack of standing, where original Note, signed by the defendant and "endorsed in blank," was allegedly delivered to and held by Citibank prior to the commencement of this action, but plaintiff failed to submit corroborating affidavit based on personal knowledge.)

Freedom Mtge. Corp. v. Burgos, Index No. 381292/2012 (Bronx Cty., I.A.S. Part 19, Suarez, J., Feb. 28, 2014) (decision denying plaintiff's motion for summary judgment, holding that "laconic" affidavit submitted by employee of plaintiff's attorney-in-fact acting under a limited power of attorney was insufficient to establish delivery of the note prior to commencement of the action, and further noting that MERS mortgage assignment could not sustain plaintiff's standing because MERS did not acquire any interest in the note. But decision also states that allonge, even though on a paper separate from the note, contained sufficient identifying information referable to the note.)

2d Department

Bank of New York Mellon Trust Co. v. Ungar Family Realty Corp., 111 A.D. 3d 657, 974 N.Y.S.2d 584 (2d Dep't 2013) (affirming denial of defendant's motion to vacate judgment of foreclosure and sale, holding that the motion was properly denied because the standing defense was waived by failure to challenge standing in the answer or pre-answer motion to dismiss.)

America's Residential Properties, LLC v. Lema, 118 A.D.3d 735, 987 N.Y.S.2d 169 (2d Dep't 2014) (reversing Kings County order (Solomon, J.) denying plaintiff's motion for leave to discontinue without prejudice and granting defendant's cross motion to dismiss with prejudice and for attorneys' fees. Court below had dismissed because plaintiff had failed to file Attorney's Affirmation pursuant to Administrative Order 431/11, and Second Department held that court should not have dismissed with prejudice on a ground that was not litigated or raised by the parties, and, in any event, there was no basis for dismissing with prejudice inasmuch as there was no evidence of prejudice to defendant. Although defendant had argued below that dismissal with prejudice was called for due to plaintiff's lack of standing, it did not raise that issue on appeal.)

Emigrant Mtge. Co., Inc. v. Persad, ___ N.Y.S.2d ___, 2014 N.Y. Slip Op. 05151, 2014 WL 3229670 (2d Dep't 2014) (reversing denial of plaintiff's motion for summary judgment, finding that defendant failed to defeat plaintiff's prima facie showing that it was both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note when the action was commenced, which plaintiff here established by showing that it was the originator of the loan and still the holder of the note and mortgage when it commenced the action. The assignment of the note and mortgage several months later was irrelevant to plaintiff's standing at commencement of the action.)

Aurora Loan Services, LLC v. Taylor, 114 A.D.3d 627, 980 N.Y.S.2d 475 (2d Dep't 2014) (affirming grant of summary judgment for plaintiff and denial of defendants' motion for summary judgment, holding that plaintiff's affidavit was sufficiently detailed and established that it obtained physical possession of the original note on a particular date, which preceded filing of the action. Interesting dissent by Judge Hinds-Radix, who concluded that plaintiff had inadequately established physical delivery of the note prior to commencement because affidavit gave no details of the physical delivery of the note.)

Bank of N.Y. Mellon v. Gales, 116 A.D.3d 723, 982 N.Y.S.2d 911 (2d Dep't 2014) (reversing grant of summary judgment to plaintiff, where evidence submitted by plaintiff in support of its motion did not demonstrate that the note was physically delivered to it prior to commencement of the action and where plaintiff similarly failed to submit a written assignment of the note. But court held that defendant's cross motion to dismiss was properly denied, as defendant "did not have standing to assert noncompliance with the subject lender's pooling and servicing agreement" (citing, Rajamin v. Deutsche Bank National Trust Co., 2013 WL 1285160 [S.D.N.Y. 2013].)

HSBC Bank USA, N.A. v. Calderon, 115 A.D.3d 708, 981 N.Y.S.2d 598 (2d Dep't 2014) (affirming denial of defendant's motion for summary judgment and to vacate assignment of mortgage, rejecting standing defense based on argument that mortgage assignment was invalid, stating that unspecified "evidence in the record...established that the assignment, which took place before the action was commenced, was valid." Court also rejected argument that plaintiff

lacked standing because it was not the holder of the note when the action was commenced because this contention was raised for the first time on appeal.)

HSBC Bank v. Picarelli, 110 A.D.3d 1031 (2d Dep't 2013), 974 N.Y.S.2d 90 (2d Dep't 2013) (affirming order granting defendant's cross motion seeking leave to serve and file amended answer to assert standing defense, noting that decision whether to allow amendment is committed almost entirely to the motion court's discretion and reiterating well-established principle that "waived" defense of standing can be interposed by leave of court pursuant to CPLR 3025(b) so long as amendment does not cause the other party prejudice or surprise resulting directly from the delay.)

JP Morgan Mtge. Acquisition Corp. v. Hayles, 113 A.D.3d 821, 979 N.Y.S.2d 620, (2d Dep't 2014) (affirming denial of motion to vacate judgment of foreclosure and sale and denial of motion to dismiss for lack of standing, holding standing defense was waived by failure to assert in answer or motion to dismiss, and holding that vacatur pursuant to CPLR 5015(a) (1) was properly denied for lack of both a reasonable excuse for default and a meritorious defense. Court also upheld denial of vacatur pursuant to CPLR 5015(a) (3) and (4) because record contained no evidence of fraud or misrepresentation, and stating the alleged lack of standing is not a jurisdictional defect.)

Kondaur Capital Corp. v. McCary, 115 A.D.3d 649, 981 N.Y.S.2d 547 (2d Dep't 2014) (affirming grant of summary judgment and judgment of foreclosure and sale to plaintiff, and denying cross motion to dismiss for lack of standing, reciting without analysis that plaintiff established that it had standing as the holder of the note and mortgage "by submitting the written mortgage assignments and the affidavit of plaintiff's president, which established that it had physical possession of the note prior to commencement of this action.")

Midland Mtge. Co. v. Imitaz, 110 A.D.3d 773, 973 N.Y.S.2d 257 (2d Dep't 2013) (reversing denial of motion to dismiss for lack of standing in a declaratory judgment action seeking a declaration that plaintiff was the holder of a valid first mortgage lien on the subject property. Court applied standing principles of foreclosure actions to determine that plaintiff, which was merely the servicer, lacked standing to foreclose, and denied application to substitute new plaintiff where proposed new plaintiff purported to derive standing from a MERS assignment, and where copy of note submitted only on reply papers failed to establish delivery of the note prior to commencement of the action.)

New Century Mtge. Corp. v. Corriette, 117 A.D.3d 1011, 986 N.Y.S.2d 560 (2d Dep't 2014) (affirming denial of motion to vacate judgment of foreclosure and sale and referee's deed pursuant to CPLR 5015(a)(3) and for leave to serve late answer pursuant to CPLR 3012(d). Court rejected assertion that judgment was obtained by means of fraudulent allegations about its legal existence and standing to foreclose, holding that to obtain vacatur pursuant to CPLR 5015(a)(3) based on intrinsic fraud, defendant must establish both a reasonable excuse for default and potentially meritorious defense, and defendant here proffered no excuse for his default.)

OneWest Bank, FSB v. Fernandez, 112 A.D.3d 681, 976 N.Y.S.2d 405 (2d Dep't 2013) (denying appeal from denial of ex parte motion for order of reference, because no appeal lies from ex parte applications, but reversing trial court's *sua sponte* dismissal of foreclosure action with prejudice

for lack of standing, repeating mantra that standing defense was waived and is not a jurisdictional defense warranting dismissal.)

W & H Equities LLC v Odums, 113 A.D.3d 840, 978 N.Y.S.2d 910 (2d Dep't 2014) (affirming grant of plaintiff's summary judgment motion, holding without analysis of evidence offered in support of the motion that original plaintiff had standing to commence the action because it was the holder of the mortgage and underlying note when it commenced the action, and that original plaintiff subsequently assigned the mortgage and note to current plaintiff, which was properly substituted as plaintiff. Court also held defendant failed to demonstrate entitlement to vacatur pursuant to CPLR 5015(a).)

MLCFC 2007 - 9 Mixed Astoria, LLC v 36 - 02 35th Ave. Dev., LLC, 116 A.D.3d 745, 983 N.Y.S.2d 604 (2d Dep't 2014) (affirming denial of plaintiff's motion for summary judgment because plaintiff did not establish that it had standing as the lawful holder or assignee of the subject note on the date it commenced the action. Court also affirmed denial of non-party motion to substitute as plaintiff because documents it submitted did not establish that the subject note and mortgage were validly assigned to it after the commencement of the action and that it was the real party in interest. Court also held, however, that defendant's cross-motion for summary judgment on grounds of standing was properly denied, because there were issues of fact regarding plaintiff's standing as the lawful holder or assignee of the subject note on the date it commenced the action.)

Deutsche Bank Trust Co. Americas v. Cox, 110 A.D.3d 760, 973 N.Y.S.2d 662 (2d Dep't 2013) (reversing grant of summary judgment to plaintiff in equitable mortgage action and denial of defendant's cross motion for leave to amend its answer to assert lack of personal jurisdiction, standing, capacity to sue and statute of limitations defenses, holding that waived defenses can be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as amendment does not cause prejudice or surprise resulting directly from the delay and is not palpably insufficient. Here, plaintiff failed to demonstrate any prejudice and trial court improvidently exercised its discretion in denying leave to amend. Because defendant was entitled to discovery with respect to the amended answer asserting such defenses, court held that summary judgment for plaintiff should properly be denied with leave to renew upon completion of discovery.)

Freedom Mtge. Corp. v. Toro, 113 A.D.3d 815, 979 N.Y.S.2d 622, (2d Dep't 2014) (affirming denial of unopposed motion for order of reference, holding that it was not improvident abuse of discretion to deny the motion where the affidavit attesting to defendant's default that was notarized by an out-of-state notary without the certificate of conformity in violation of CPLR 2309(c) (but also stating that standing defense was waived by defendant's failure to appear in the action, so that defective notarization of affidavit concerning note assignment was not grounds for denial of order of reference).)

Cadlerock Join Venture, L.P. v. Evans-Tracey, 115 A.D.3d 692, 981 N.Y.S.2d 572 (2d Dep't 2014) (reversing grant of summary judgment to plaintiff in action on a second mortgage note, holding that, while plaintiff established its prima facie entitlement to judgment as a matter of law by submission of the note signed by the defendant along with an account officer's affidavit with a business record attached reflecting the amounts due and defendant's non-payment, defendant raised a triable issue of fact as to whether a signature of a vice president of the originator on an

undated endorsement appearing on the note, where the mortgage and note had also been assigned to MERS, was a forgery.)

Engel v. Deutsche Bank Natl. Trust Co., 116 A.D.3d 915, 983 N.Y.S.2d 630 (2d Dep't 2014) (affirming grant of defendant's motion to dismiss plaintiff homeowner's action for fraud, negligent misrepresentation and for rescission of loan modification agreement, holding that general release executed when prior foreclosure action was settled barred plaintiff claims in this action premised on Deutsche Bank's allegedly false allegations that it owned plaintiff's mortgage because the assignment to Deutsche Bank was invalid because it was issued two days after the assignor filed for bankruptcy protection. Court held these allegations of fraud predated the release and therefore could not be asserted.)

Peak Financial Partners, Inc. v. Brook, 987 N.Y.S.2d 916 (2d Dep't 2014) (affirming grant of summary judgment to plaintiff and denying defendant's cross motion for summary judgment, holding that 'plaintiff demonstrated that it had standing by offering proof that the note and mortgage were assigned to it prior to the commencement of this action.' What the proof of such assignment was, or whether it satisfied evidentiary standards, was not addressed by the Second Department.)

Citimortgage, Inc. v. Brown, 111 A.D.3d 593, 974 N.Y.S.2d 272 (2d Dep't 2013) (affirming denial of defendant's motion pursuant to CPLR 5015(a)(3) to vacate a judgment of foreclosure and sale entered upon default, where defendant argued that the instrument assigning the mortgage to plaintiff was fraudulently executed and filed so that plaintiff could commence the action. Court held defendant did not demonstrate that plaintiff "engaged in the type of fraud or misconduct that would warrant vacatur of the judgment of foreclosure and sale pursuant to CPLR 5015(a) (3)." The court also held that defendant failed to demonstrate that invocation of a court's inherent power to vacate a judgment in the interest of substantial justice was warranted, articulating no reasoned basis for reaching either of those conclusions.)

Plaza Equities, LLC v. Lamberti, 118 A.D.3d 688, 986 N.Y.S.2d 843 (2d Dep't 2014) (affirming grant of summary judgment to foreclosure plaintiff, holding that original plaintiff in the action was the holder and owner of the note and mortgage when the action was commenced and had proper standing when it commenced the action, regardless of subsequent assignments of the mortgage and note after commencement of the action.)

Emigrant Mgte. Co., Inc. v. Gosdin, ___ N.Y.S.2d ___, 2014 N.Y. Slip Op. 05151 (2d Dep't 2014) (reversing denial of plaintiff's motion for summary judgment, finding that defendant failed to defeat plaintiff's prima facie showing that it was both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note when the action was commenced, which plaintiff here established by showing that it was the originator of the loan and still the holder of the note and mortgage when it commenced the action. The assignment of the note and mortgage several months later was irrelevant to plaintiff's standing at commencement of the action.)

Bank of New York Mellon Trust Co. v. McCall, 116 A.D.3d 993, 985 N.Y.S.2d 255(2d Dep't 2014) (Affirmed Queens County decision that defendant waived her right to challenge plaintiff's standing by failing to raise it in timely answer or in pre-answer motion to dismiss.)

National City Home Loan Services, Inc. v. Arango, 116 A.D.3d 1013, 985 N.Y.S.2d 119 (2d Dep't 2014) (Reversing Queens Supreme Court decision, finding that defendant could not have filed timely pre-answer motion to dismiss or timely answer because plaintiff PNC Bank National Association was then nonparty and had been subsequently assigned mortgage. PNC Bank failed to establish it was the holder or assignee of the subject mortgage and underlying note either at time the action was commenced or by virtue of a subsequent assignment.)

Kings Cty.

FTBK Investor II LLC v. Mercy Holding LLC, 43 Misc.3d 1215(A), 988 N.Y.S.2d 522 (Kings Cty., Demarest, J., Apr. 22, 2014) (finding standing where plaintiff was found to be proper holder of note and mortgage. Court found attorney-in-fact to have personal knowledge after transferring note from FDIC to Chase with WaMu as receiver, as well as assignment of mortgage. Defendant's motion for summary judgment for lack of standing denied.)

US Bank National Association v. Young, Index No. 28686/2009 (Kings Cty., IAS Part 21, Jacobson, J., July 7, 2014) (finding failure to negotiate in good faith at settlement conferences pursuant to CPLR 3408 following evidentiary hearing based on plaintiff's violation of HAMP requirements and non-compliance with special referee directives, tolling interest from December 2009, when defendant submitted first loan modification, "until there is a final determination of this matter," and holding that any costs and fees sought by plaintiff are waived. Additionally, finding that issue of standing was properly raised by defendant, court directed a hearing at which "the assignment of this mortgage to the plaintiff by MERS shall be heard," at which plaintiff was directed to bring any witness, with proper written authority, to give sworn testimony concerning the assignment of this note and mortgage to the plaintiff.")

Citimortgage, Inc. v. Williamson, NYLJ 1202635577540 (Kings Cty., Wade, J., December 9, 2013) (denying plaintiff's motion for summary judgment and order of reference without prejudice for failure to establish standing, where plaintiff submitted no documentation substantiating assertion that named plaintiff was successor by merger of the assignee named in the assignment of mortgage document, where plaintiff failed to establish that it was the holder of the note and mortgage by way of physical delivery, and where plaintiff relied on undated along that was not firmly affixed to the note. Although court rejected challenge to the validity of the assignment based on robo-signing and fraudulent assignments, finding absence of evidence thereof in admissible form, court refused to consider plaintiff's out-of-state affidavits which lacked the required certificates of conformity.)

U.S. Bank National Association v. Steinberg, 42 Misc.3d 1201(A), 984 N.Y.S.2d 635 (Kings Cty., Schmidt, J., November 29, 2013) (denying plaintiff's motion for summary judgment and order of reference, where plaintiff failed to establish its standing to foreclose, finding triable issues of fact concerning delivery of the note from the originating lender to the plaintiff trust, rejecting conclusory affidavit asserting continuous possession of the note as sufficient to equate with proof of delivery required by UCC, and holding that affidavit supporting motion was insufficiently detailed to satisfy summary judgment evidentiary requirements (and also noting that employee swearing affidavit in support of summary judgment motion was apparently employed by servicer but was the same individual who had purported to execute an ineffective MERS assignment.)

Deutsche Bank Natl. Trust Co. v. Johnson, Index. No. 24867/2011, NYLJ 1202644227759 (Kings Cty., Martin, J., January 16, 2014) (Decision denying plaintiff's motion for summary judgment and granting defendant's cross motion for summary judgment dismissing complaint, holding that plaintiff failed to prove wither a written assignment of the note or any evidence of physical delivery of the note, where plaintiff relied on MERS assignment.)

US Bank Natl. Assn. v. Guy, 40 Misc.3d 1242(A), 977 N.Y.S.2d 670 (Kings Cty, Schmidt, J., August 22, 2013) (granting motion to dismiss for lack of standing, after prior decision conditionally granting defendant's motion to dismiss for lack of standing, because plaintiff failed to submit any probative documentary or testimonial evidence from someone with personal knowledge of the note's delivery to Plaintiff, and because Plaintiff's opposition papers seemingly conflict with the complaint's allegations concerning delivery of the note. Court allowed Plaintiff to make further submission to substantiate its assertion of standing. Plaintiff's subsequent submissions failed to satisfy Plaintiff's burden of proving that the note was duly delivered to Plaintiff prior to the commencement of the foreclosure action, where possession affidavit offered by document custodian was not based on personal knowledge, and asserted physical delivery on a date that was inconsistent with complaint's allegations. Plaintiff's reliance on undated allonge was misplaced where the note had room for further endorsements and the allonge was not firmly affixed to the note as required by the UCC. Court also rejected Plaintiff's assertion that Defendant's acceptance of a HAMP modification was a ratification of plaintiff's ownership of the note, which was unsupported by any legal authority.)

Bank of New York Mellon v. Edme, Index. No. 12205/10 (Kings Cty., IAS Part 66, Velasquez, J., December 18, 2013) (denying plaintiff's motion for default judgment and order of reference and dismissing plaintiff's action for failure to prosecute. Court held that dismissal pursuant to CPLR 3215(c) was warranted because plaintiff failed to move for a default judgment for nearly two years after defendants' default, finding that plaintiff's ostensible efforts to comply with Administrative Order 548/10 (attorney affirmation) did not excuse failure to timely move for default judgment. Court also held that plaintiff was not entitled to motion for default judgment on the merits, where plaintiff relied on servicer vice president's affidavit that was supported by insufficient evidence of servicer's authority to act on behalf of trust and where plaintiff attempted to cure deficiency by relying on an additional affidavit submitted only with reply papers (which affidavit, in any event, was signed and notarized outside of New York State and lacked required certificate of conformity and which was factually inconsistent with facts in plaintiff's initial submission in support of the motion). Finally, plaintiff's submission contained no evidentiary proof of compliance with RPAPL 1303 notice requirement.)

OneWest Bank FSB v. Toom, Index No. 25665/09 (Kings Cty., IAS Part 38, Solomon, J., May 12, 2014) (granting motion to confirm referee report and recommendation finding failure to negotiate in good faith at settlement conferences both before referee and then before IAS part, following good faith hearing, holding that "plaintiff's continually shifting documentation requirements, excessively long failure to set up procedures to handle documents in a proper and adequate fashion, and ...disregard of court orders and deadlines, shows a most serious failure to meet its obligation under CPLR 3408. " Court also explicitly considered *Wells Fargo v. Meyers*, stating that the Second Department noted cases tolling interest with apparent approval,

and held that the waiver of interest was the most appropriate remedy under *Myers*, because the "potential waiver of interest provides plaintiffs with an incentive to adopt procedures that are reasonably calculated to produce a determination without undue delay. Waiving interest prevents a plaintiff from benefitting from the failure to commit sufficient resources to the process." Interest was therefore waived from October 2011 to April 2014. Defendant's motion for leave to file a late answer was also granted, and plaintiff's motion for an order of reference was denied without prejudice, because the supporting affidavit of merit purported to be sworn in Texas but lacked a certificate of conformity and because the assignment was not in recordable form and could not be used as evidence, defeating plaintiff's prima facie foreclosure case.)

First Cent. Savings Bank v. 1467 Bedford Ave., LLC, 42 Misc.3d 1205(A), 984 N.Y.S.2d 631 (Kings Cty., Schmidt, J., Nov. 29, 2013) (Denying defendant's claim that plaintiff lacked standing to bring action because the record showed that transfer of note was properly recorded and plaintiff was therefore holder of note and mortgage.)

Citibank, N.A. v. Sang Chol Lee, 42 Misc.3d 1210(A), 984 N.Y.S.2d 631 (Kings Cty., Lewis, J., Jan. 13, 2014) (denying reconsideration of order dismissing foreclosure complaint with prejudice *sua sponte* for plaintiff's failure to provide affirmation within 60-day time limit pursuant to Administrative Order 431/11 and failure to provide any reason for the failure to do so. Court ordered cessation of interest accrued on outstanding amount starting from sixty days after the date of the last order.)

Queens Cty.

Bank of America, N.A. v. Cordova, 2014 N.Y. Slip Op. 30400(U), 2014 WL 694980 (Queens Cty., Weiss, J., Feb. 18, 2014) (holding that Defendant's opposition and cross motion were insufficient to raise a triable issue of fact, where such opposition consisted of an attorney's affirmation containing conclusory allegations that plaintiff failed to establish its standing, service of 90 day notice, and challenges to plaintiff's servicing agent's affidavit. Court seemed to accept CPLR 2105, allowing attorney's affirmation to substitute for certified copy of document as a substitute for admissible evidence in support of a motion for summary judgment.

HSBC Bank USA Natl. Ass'n v. Ortega, 42 Misc.3d 1228(A), 986 N.Y.S.2d 866 (Queens Cty., McDonald, J., Feb. 24, 2014) granting plaintiff's motion for summary judgment, finding no triable issues of fact, stating that pro se defendant failed to submit sufficient proof of predatory lending practices and that defense of standing was waived, and denying defendant's motion to dismiss.)

Wells Fargo Bank, N.A. v. Reid, 42 Misc.3d 1228(A) (Queens Cty., McDonald, J., Feb. 25, 2014) (dismissing defendant's standing defense because of failure to raise the defense in timely pre-answer motion. Court nonetheless found that plaintiff had satisfied its burden by submitting documentary evidence demonstrating it was the holder of the note and the mortgage.)

US Bank Natl. Assoc. v Mosquera, 2013 N.Y. Slip Op. 31720(U), 2013 WL 3961676 (Queens Cty., Weiss, J., July 29, 2013) (granting plaintiff's motion to dismiss defendant's affirmative defenses and counterclaims and for summary judgment holding that plaintiff established its standing by submitting a copy of the note with a special endorsement and a written assignment of

both the mortgage and the note, ostensibly demonstrating that when the action was commenced plaintiff owned the note and mortgage. Court held that plaintiff's servicing agent's affidavit was sufficient to establish delivery of the note and to establish that plaintiff was the holder of the note with standing to foreclose, and rejected defendant's argument that plaintiff should be estopped from alleging ownership of the note and mortgage because the note was conveyed in violation of the governing pooling and servicing agreement, holding that defendants were neither parties nor third party beneficiaries of the pooling and servicing agreement and therefore, ironically, lacked standing to challenge plaintiff's standing.)

HSBC Bank USA, N.A. v Magee, Index No. 13892/11 (Queens Cty. IA Part 9, Flug, J., Aug. 19, 2013) (denying plaintiff's motion for summary judgment, holding that plaintiff's submissions were insufficient to demonstrate plaintiff's standing as a matter of law where, aside from attorney's affirmation, the only evidence submitted to demonstrate plaintiff's physical possession of the note at time of commencement of the action was a client representative's affidavit that provided no details regarding the physical delivery.)

US Bank Nat'l Assn. v. Davis-Clarke, Index. No. 18617/2009 (Queens Cty., IA Part 6, Lane, J., Oct. 8, 2013) (granting pro se defendant's motion to vacate default in answering and leave to serve late answer, finding reasonable excuse for default where defendant relied on mortgage counseling companies and loan mod scammers whom he believed were assisting him, but who failed to answer on his behalf, and finding potentially meritorious defense of standing, where plaintiff relied on a note with a separate, undated allonge, and submitted an affidavit from a person with no personal knowledge of the facts concerning when and how the note came into the trustee's possession. Additionally, court noted that plaintiff relied on a MERS assignment signed by Elpiniki Bechakas from Steven Baum's office, a practice barred by the U.S. Attorneys' Office settlement with the Baum firm.)

Aurora Loan Services, LLC v. Henry, Index No. 9219/09 (Queens Cty., IAS Part 15, Taylor, J., Oct. 11, 2013) (granting defendant's motion for summary judgment dismissing plaintiff's foreclosure claim for lack of standing, where, in previous (denied) motion to discontinue action, plaintiff conceded that it lacked standing in light of *Bank of New York v. Silverberg*, because plaintiff could not prove that MERS was the holder of the note when it purported to assign the note to plaintiff. Court denied defendant's motion for summary judgment on TILA claim, however, concluding that because plaintiff was not the proper assignee of the originating lender, claims for TILA violations could not be asserted against plaintiff. Court denied as moot plaintiff's cross motion seeking to discontinue and cancel the notice of pendency, and denied plaintiff's cross motion seeking summary judgment and dismissal of defendant's answer and counterclaims, finding that defendant had stated defenses and causes of action against plaintiff for violation of the implied covenant of good faith and fair dealing and failure to state a claim, among others, and also stating that plaintiff had failed to eliminate any material issues of fact with respect to defendant's counterclaims.)

HSBC Bank USA v. Saldana, 42 Misc.3d 1218(A), 984 N.Y.S.2d 632 (Queens Cty., McDonald, J., Jan. 23, 2014) (decision granting plaintiff's motion for summary judgment and order of reference application, holding that plaintiff presented sufficient proof that plaintiff was the holder of the note and mortgage when the action was commenced, and that defendant failed to raise triable issues of fact.)

US Bank Natl. Assn. v. Lawson, Index No. 25577/10 (Queens Cty., IAS Part 10, Kerrigan, J., March 18, 2014) (granting plaintiff's motion for summary judgment and to strike defendant's defenses, holding that plaintiff adequately established standing to foreclose, stating without elaboration that loan servicer's vice president adequately laid foundation for admission of relevant loan documents as business records and further stating that "an endorsement on the instrument in blank constitutes proof of a valid transfer by physical delivery." Court denied cross motion to dismiss for failure to serve RPAPL 1304 90-day notice, holding that defendant was not entitled to 90-day notice because she had applied for a loan modification (based on exception to 90-day notice requirement "if the borrower has filed an application for the adjustment of debts of the borrower.")

US Bank Natl. Assn. v. Simon, Index No. 5218/2009 (Queens Cty., IAS Part 4, Grays, J., April 23, 2014) (denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment dismissing foreclosure action against defendant homeowner because defendant demonstrated that plaintiff was neither the holder of the note nor the assignee of the note at the time the action was commenced, where the note was not assigned to the plaintiff by written assignment and undated allonge was undated and indorsed in blank and thereby failed to demonstrate that the note was endorsed to plaintiff prior to filing of the summons and complaint. Wells Fargo VP for Loan Documentation affidavit in support of plaintiff's summary judgment which merely averred that plaintiff was in possession of the note prior to the commencement of the action was inadmissible because it was executed outside New York and lacked a certificate of conformity and, in any event, was insufficient to establish physical delivery because it was devoid of any factual details concerning physical delivery. But court rejected prong of motion for summary judgment based on evidence that allonge was not attached to the note, as revealed by physical inspection of the note based on photographs of note taken at inspection, stating that photograph did not conclusively demonstrate that the allonge was not firmly affixed to the note prior to inspection by counsel or at the time of indorsement.)

US Bank Natl. Assn. v. Khan, Index No. 23398/09 (Queens Cty., IAS Part 2, Weiss, J., May 13, 2014) (granting plaintiff summary judgment to extent of dismissing RPAPL 1304 (90 Day Notice) defense, reciting conclusory that plaintiff established that it fully complied with RPAPL 1304, but denying plaintiff summary judgment on its foreclosure claim for failure to submit sufficient evidence to establish its prima facie standing by demonstrating that it is the lawful holder or assignee of the note on the date the action was commenced. Court stated that note bore no endorsement other than to the original lender, and thus mere delivery to plaintiff as alleged in plaintiff's affidavit was insufficient to make plaintiff a holder, and the mere assignment of the mortgage without assignment of the underlying note was a nullity.)

JPMorgan Chase Bank Natl. Assn. v. Abreu, 42 Misc.3d 1203(A), 983 N.Y.S.2d 203 (Queens Cty., McDonald J., Dec. 11, 2013) (Rejecting standing defense where plaintiff presented sufficient proof that it had standing to commence the action as both holder and assignee of the mortgage and the underlying note as well as an affidavit of the Vice President of JP Morgan Chase having personal knowledge of Chase as holder of the note and mortgage.)

Suffolk Co.

OneWest Bank, FSB v. Navarro, 41 Misc.3d 1238(A), 983 N.Y.S.2d 204 (Suffolk Cty., Whalen, J., Nov. 11, 2013) (finding defendant homeowner's claimed limited English proficiency was not a reasonable excuse for failure to timely answer. Standing defense, reasoning it is not jurisdictional in nature or an element in the plaintiff's case, was waived. Court continued that even if standing defense had not been waived, record established that plaintiff had proper standing to bring claim as it was the holder of the note and the mortgage.)

Aurora Loan Servs. LLC v. Scheller, 43 Misc.3d 1226(A) (Suffolk Cty., Spinner, J., May 22, 2014) (granting defendant's motion for leave to serve a second amended answer and counterclaims asserting challenges to standing and real party in interest, noting genuine issues as to who the proper plaintiff might be, in light of assignment from Aurora to Nationstar that on its face conveyed only the mortgage but not the underlying debt obligation, and challenges to plaintiff's standing based on violations of the REMIC pooling and servicing agreement based on ultra vires theories. Court also rejected plaintiff's argument that defendant lacked "standing" to challenge the assignment to plaintiff, stating that defendants were attempting to challenge the validity of the initial assignment which caused them to incur damages with respect to the marketability of title to their property, which challenge was only to the particular transactions concerning the mortgage for which foreclosure was claimed, distinguishing Second Department's decision in Bank of New York Mellon v. Gales, 116 AD3d 723 (2d Dep't 2014).)

OneWest Bank v. Patrick, 43 Misc.3d 1225(A) (Suffolk Cty., Tarantino, J., May 19, 2014) (denying motion to vacate order of reference following traverse hearing, holding that service was proper and holding that plaintiff failed to establish reasonable excuse for defaulting, where defendant relied on a failed challenge to service of process and unsubstantiated loan modification negotiations. Defendant also failed to explain three year delay after retention of counsel in making motion to vacate order of reference, Court also went on to state, in dicta, that defendant failed to demonstrate potentially meritorious defense, where defendants argued that plaintiff lacked standing to foreclose, because they "failed to demonstrate that they in fact have made their monthly payments, or that their monthly payments were deposited in a trust account until such time that it could be determined to whom the payments should be made." Court went so far as to opine, "Why enter into settlement negotiations with one you claim has no standing or right to commence the action against you?")

Citimortgage, Inc. v. Vatash, 41 Misc.3d 1236(A), 983 N.Y.S.2d 202 (Suffolk Cty., Whalen, J., Nov. 4, 2013) (granting plaintiff's motion for summary judgment, rejecting all defenses asserted by defendant, finding that standing defense was waived by failure to assert in timely answer or pre-motion to dismiss, stating that standing is not jurisdictional and plaintiff is not required to prove standing as part of its claim, rejecting argument that plaintiff was not entitled to summary judgment because discovery had not taken place, rejecting 90-day notice defense as based on nothing more than bald, conclusory allegations of non-receipt, and rejecting argument that on-going discussions regarding possible modification preclude a grant of summary judgment, reciting that mortgagees are under no obligation to modify a mortgage loan prior to or after a default.)

M & T Bank v. Romero, 40 Misc.3d 1210(A), 977 N.Y.S.2d 667 (Suffolk Cty., Whelan, J., July 11, 2013) Rejecting assertion that court was without subject matter jurisdiction due to plaintiff's lack of standing, relying on Second Department's *Taher* decision for proposition that lack of standing does not constitute a jurisdictional defect. Court specifically rejected standing defense as defeated by special indorsement on face of the note and the plaintiff's proof of delivery to its predecessor-in-interest (though what that proof was not specified by the decision). Court also held that standing challenge was not an independent ground for dismissal of the action because standing defense was waived. Court also held that even though 90 day notice is a condition precedent, which is not waived by failure to answer, such defense must be asserted during the pendency of the action prior to judgment.)

Columbia Capital v. Cuervo, NYLJ 1202626338555 (Suffolk Cty., Mayer, J., Nov. 6, 2103) (granting plaintiff's motion for summary judgment in foreclosure action, summarily finding no disputed issue of material fact because standing defense, asserted only in counsel's affirmation, was waived by failure to assert in an answer and thus failed to raise any questions of fact to rebut plaintiff's prima facie showing of entitlement to summary judgment as a matter of law.)

Residential Credit Solutions, Inc. v. Jeckel, 2014 N.Y. Slip Op. 31825(U), 2014 WL 3543644 (Suffolk Cty., Santorelli, J., July 10, 2014) (granting plaintiff's motion for summary judgment and dismissing defendant's affirmative defenses (including standing, predicate notices, fraud and servicing claims, among others) as "unmeritorious" and lacking sufficient detail. Court denied plaintiff's motion to substitute post-commencement assignee as plaintiff, without prejudice, for lack of admissible proof of assignee's consent to substitution and submission to court's jurisdiction. Motion for default judgment against non-appearing defendant denied for failure to move within one year of defendant's default in answering.)

US Bank Natl. Assn. v. Ciccarelli, 42 Misc.3d 1203(A), 984 N.Y.S.2d 635 (Suffolk Cty., Pastorella, J., Dec. 2, 2013) (Finding Intervenor defendant's right to assert standing defense to be not waived and there was no prejudice on plaintiff by the intervention and by service of the answer. Court held plaintiff did not establish the validity of the assignment by submitting evidence showing the note was either physically delivered by MERS or assigned to MERS by prior holder of note, MortgageIt, Inc., who was the original mortgagee and original plaintiff in foreclosure action.)

Bank of New York Mellon v. Izmirligil, 43 Misc.3d 409, 980 N.Y.S.2d 733, (Suffolk Cty., Whalen, J., Jan. 28, 2014) (dismissing defendant's claim that plaintiff lacked standing for failure to follow Administrative Orders 548/10 and 431/11 because the orders are unconstitutional on the grounds that the affirmation violates the attorney-client privilege. Affirmation requirements were also held to be invalid because they were promulgated outside of their authority and therefore invalid as *ultra vires*, where Legislature did not confer authority to Administrators for such rules.)

Richmond Cty.

Chase Home Finance LLC v. Concepcion, Index. No 130401/09 (Richmond Cty., DCM Part 4, Fusco, J., Nov. 19, 2013) (denying plaintiff's summary judgment and granting cross motion for leave to amend answer to assert standing defenses and, upon amendment, granting cross motion to dismiss for failure to prove standing to commence the foreclosure action.)

Sutton Funding, LLC v. Wong, Index No. 103520/08 (Richmond Cty., DCM Part 4, Fusco, J., Dec. 17, 2013) (denying defendant's motion for leave to amend pro se answer and granting plaintiff's cross-motion to discontinue foreclosure action, where a subsequent foreclosure action relating to the same property had been commenced after this case by plaintiff's alleged predecessor in interest, in which, following settlement conferences, a motion for summary judgment remained pending (with a trial solely on the issue of standing scheduled pursuant to CPLR 3212(c)). Court exercised its discretion to grant plaintiff's motion to voluntarily discontinue the first foreclosure action pursuant to CPLR 3217(b), finding that defendant had not demonstrated that he would be prejudiced by the discontinuance, because his standing defense was being litigated in the second foreclosure action. Court also held that defendant had not offered a reasonable excuse for the delay in seeking leave to amend his answer in the present action.)

Wells Fargo, N.A. v. Mascara, 2014 N.Y. Slip Op. 31538(U), 2014 WL 2860457 (Richmond Cty., Aliotta, J., June 17, 2014) (granting plaintiff's motion for summary judgment and denying defendant's cross-motion to dismiss, finding adequate showing of standing, even though plaintiff's servicing agent's affidavit was lacking in sufficient detail to establish standing where accompanying documents supporting the motion included note with undated endorsements as well as a written assignment of the mortgage by the originator to plaintiff's predecessor prior to commencement of the action.)

Dutchess Cty.

Emigrant Mtge. Co., Inc. v. Beneway, 42 Misc.3d 1228(A), 986 N.Y.S.2d 865 (Dutchess Cty, Pagonis, J., Feb. 26, 2014) (granting plaintiff's motion to compel referee to conduct sale pursuant to judgment, following referee's request to court to approve Attorney Affirmation submitted in response to Attorney Affirmation Rule and denying defendant's motion to vacate default judgment and for leave to serve late answer asserting standing defense. Court held that even if the defense of standing were not waived, the affirmation did not raise any issues regarding plaintiff's standing to bring the foreclosure action, and fact that original plaintiff subsequently assigned its interest in the mortgage to another entity did not prevent the action from proceeding. Court rejected defendant's assertion of fraud pursuant to CPLR 5015(a)(3) as grounds for relief from the judgment, where defendant waited more than three years, until the eve of the sale and only after referee raised concerns about standing in connection with the attorney affirmation. Court also held that even if vacatur of default judgment was granted, leave to file a late answer would be improper for lack of reasonable excuse for default and meritorious defense (and waived standing defense provided no meritorious defense.)

Westchester Cty.

US Bank Natl. Assn. v. Zeidman, 43 Misc.3d 1228(A) (Westchester Cty., Connolly, J., May 27, 2014) (granting plaintiff's motion for summary judgment, rejecting defendant's argument that plaintiff's servicing agent's affidavit should be disregarded because it lacked a CPLR 2309(c) certificate of conformity, holding that RPL 299-a does not require a certificate of conformity if the acknowledgment was taken out of state in the manner prescribed by New York law and

concluding that the acknowledgment here satisfied the requirements for a valid acknowledgment under RPL 292, 303 and 306. Court also held that to the extent that defendant raised the issue of standing, plaintiff established its standing by virtue of its physical possession of the original note prior to commencement of the action.)

3rd Department

Marcon Affiliates v. Ventura, 112 A.D.3d 1095, 977 N.Y.S.2d 438 (3d Dep't 2013) (holding "Defendant's claims regarding plaintiff's alleged lack of authority raise issues of standing and were thus waived by defendant's failure to assert them as affirmative defenses in the answer or in a timely pre-answer motion," and had no grounds for vacatur under CPLR 5015 where plaintiff established that it was the assignee of the note and the mortgage when the action was commenced.)

EMC Mtge. Corp. v. Gass, 114 A.D.3d 1074, 981 N.Y.S.2d 814 (3d Dep't 2014) (reversing grant of defendant's motion, on renewal, to dismiss complaint, finding that in 11 years following service of plaintiff's original summons and complaint plaintiff neither served an answer or sought an extension of time in which to answer, and holding that, although court has discretion to permit service of a late answer upon a showing of reasonable excuse for delay and a meritorious defense, here defendant sought no such relief and merely made two untimely motions to dismiss based on plaintiff's alleged lack of standing, a defense that defendant waived by failing to assert in an answer or a timely pre-answer motion to dismiss).

HSBC Bank USA, N.A. v. Sage, 112 A.D.3d 1126, 977 N.Y.S.2d 446 (3d Dep't 2013) (affirming grant of summary judgment in favor of plaintiff and denying defendant's cross motion for leave to amend answer to assert standing and to dismiss, simplistically holding that plaintiff adequately established its standing even though affidavit in support of motion was not based on personal knowledge. Court held that motion for leave to amend was properly denied because defense of standing was waived, and stating, in any event, that plaintiff's physical possession of the note and mortgage, through its custodian, for over two years prior to commencement of the action is sufficient to confer standing regardless of whether a later written assignment of the mortgage may be a falsified document.)

HSBC Bank USA v. Pacyna, 112 A.D.3d 1246, 978 N.Y.S.2d 392 (3d Dep't 2013) (dispensing with defendant's standing challenge with repetition of mantra that defense was waived by failure to assert in a timely answer or pre-answer motion to dismiss, followed by the inexplicable statement that, in any event, defendants did not deny signing the note obligating them to make payments or that they failed to make payments under the note.)

Nationstar Mtge., LLC v. Davidson, 116 A.D.3d 1294, 983 N.Y.S.2d 705 (3d Dep't 2014) (affirming determination following non-jury trial on issue of standing and granting judgment of foreclosure and order of reference to plaintiff. Court independently reviewed weight of evidence and found no basis to disturb court's acceptance of testimony of Aurora employee that both note with indorsement in blank and mortgage were in Aurora's physical possession prior to commencement of the action, and held that court's failure to admit into evidence prior affidavits of former Aurora employee was not error because defendant was able to cross examine Aurora employee regarding the contents of the affidavits and there was no indication that the proffered evidence would have had a substantial influence of the outcome of the case.)

Albany Cty.

OneWest Bank, FSB v. Mazzone, 2013 N.Y. Slip Op. 32247(U), 2013 WL 5402436 (Albany Cty., Teresi, J., Sep. 25, 2013) (granting plaintiff summary judgment, holding that, even though Plaintiff failed to establish its standing by operation of a MERS assignment, by way of undated indorsements, or by conclusory affidavits asserting "possession" prior to commencement, Plaintiff nonetheless established its standing by showing its acquisition of the note by means of a Bill of Sale, dated prior to action's commencement, by which Indy Mac's assets were transferred from FDIC to One West, where the note in question was scheduled on exhibit A to the Bill of Sale and the Loan Sale Agreement's terms transferred the mortgage.)

Saratoga Cty.

Wells Fargo Bank, N.A. v. Boller, 43 Misc.3d 1206(A) (Saratoga Cty., Nolan, J., March 25, 2014) (Denying defendants motion for further discovery and granting plaintiff's motion for summary judgment where plaintiff's "affidavit of missing assignment" by a bank officer that mortgagee was assignee of the underlying mortgage was held to be sufficient *prima facie* evidence. Court refused to take judicial notice of document prepared by U.S. Department of Housing and Urban Development titled, "Memorandum of Review: Wells Fargo Bank Foreclosure and Claims Process Review," which recorded alleged inadequate documentation and procedures.)

Ulster Cty.

Bank of America, N.A. v. Rausher, 43 Misc.3d 488, 981 N.Y.S.2d 269 (Ulster Cty., Gilpatric, J., Jan. 22, 2014) (denying defendant's motion to dismiss alleging plaintiff lacked standing. However, Court found repeated failures by plaintiff to provide proof of mortgage ownership and failure to provide *any* loan modification offer at settlement conferences resulted in undue delay and therefore barred plaintiff from collecting any interest accrued from the date of the first settlement conference. Court also found plaintiff's refusal to even consider the defendant's loan modification has violated its obligation to negotiate in good faith pursuant to CPLR 3408(f).

Fourth Department

Chautagua Cty.

Bank of America, N.A. v. Mason, Index No. K1-2012-1602 (Chautagua Cty., IAS Part 30, Chimes, J., April 21, 2014) (denying defendant's motion to dismiss for lack of standing and for failure to comply with FHA loan loss mitigation requirement condition precedent to foreclosure. Court denied motion to dismiss on standing because defendant submitted "unsigned" mortgage in inadmissible form, and denied motion on FHA requirements prong because allegation that plaintiff failed to comply with face-to-face meeting requirements of 24 CFR 203.604(b) was supported only by an attorney affidavit lacking first-hand knowledge. But court granted motion for relief for failure to negotiate in good faith at settlement conferences, directing the parties to appear for settlement conference, tolling interest from first date of settlement conferences until the case is released from conferences, directing waiver of any unpaid late fees from date of first conference until the case is released from conferences, and prohibiting imposition of any attorney fees and bank fees until release of the case from settlement conferences.)

STANDING AND CAPACITY TO SUE IN NEW YORK FORECLOSURE ACTIONS

Case Updates: 2012-2014

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Second Department: Incoherence continues, with decisions going any which way, depending on the appellate panel or IAS judge.

Second Department Decisions finding no standing:

Homecomings Financial, LLC v. Guldi, 108 A.D.3d 506, 969 N.Y.S.2d 470 (2d Dep't 2013) (reversing grant of summary judgment to plaintiff and, upon search of the record, awarding summary judgment to defendant dismissing foreclosure complaint without prejudice, holding that plaintiff failed to make a prima facie showing that MERS was the lawful holder of the mortgage and note when the action was commenced. Language in the mortgage instrument identifying MERS as nominee and purporting to grant MERS authority to foreclose was insufficient to overcome the requirement that the foreclosing party be both the holder or assignee of the subject mortgage and the holder of the underlying note when the action is commenced. The note specifically identified the lender as a different party and plaintiff failed to submit any evidence demonstrating that the note was physically delivered to MERS prior to action's commencement. Evidence that MERS assigned the mortgage instrument to plaintiff during the course of the action was ineffectual, because such an assignment would not render plaintiff the holder of the note because "MERS could not transfer that which it did not hold." Plaintiff's servicing agent's affidavit stating that the note was delivered to custodian of records of plaintiff during the course of the action was also insufficient, and, in any event, provided no factual details of the physical delivery of the note).

Deutsche Bank Natl. Trust Co. v. Spanos, 102 A.D.3d 909, 961 N.Y.S.2d 200 (2d Dep't 2013) (reversing grant of plaintiff's motion for summary judgment and dismissal of defendant's affirmative defenses based on failure to serve 90 day notice and standing, while affirming trial court's denial of defendant's cross motion for summary judgment on those defenses. Court noted that compliance with RPAPL 1304 notice requirement was condition precedent, and plaintiff failed to meet its prima facie burden to establish entitlement to judgment as a matter of law, but that defendant was not entitled to summary judgment on 90-day notice defense because it failed to submit evidence disproving plaintiff's allegation of service of 90 day notice. Similarly, plaintiff failed to establish its prima facie standing to commence the action, as its evidence did not demonstrate physical delivery of the note prior to commencement of the action or that it was the assignee by virtue of a written assignment prior to commencement. Because of fact issues concerning standing issue, however, trial court properly denied defendant's cross motion for summary judgment for lack of standing).

Deutsche Bank Natl. Trust v. Haller, 100 A.D.3d 680, 954 N.Y.S.2d 551 (2d Dep't 2012) (reversing grant of summary judgment to plaintiff, finding that plaintiff failed to demonstrate prima facie entitlement to judgment as a matter of law because it did not submit sufficient evidence to demonstrate its standing, because: (a) there was no evidence demonstrating physical delivery of the note prior to commencement of the action where servicer's affidavit gave no factual

details of physical delivery; and (b) plaintiff failed to demonstrate it was holder of note and mortgage by virtue of endorsement or written assignment where endorsement was undated and was not annexed to copy of note annexed to plaintiff's complaint and where written assignment presented by plaintiff lacked any evidence of authority of party who purported to execute assignment to assign on behalf of putative assignor. Court also held summary judgment should not have been granted to plaintiff because there were questions of fact concerning whether escrow for payment of taxes was properly set up and whether proper notice of default concerning failure to pay taxes was provided. But court affirmed denial of defendant's cross motion to dismiss for lack of standing, holding that questions of fact existed concerning standing. Court also held that defendant's second motion seeking summary judgment on grounds that plaintiff fabricated documents on which it based its showing of standing was properly denied because defendant failed to demonstrate entitlement to judgment as a matter of law).

Second Department Decisions Finding Standing:

Redrock Kings, LLC v. Kings Hotel, Inc., 109 A.D.3d 602, __N.Y.S.2d__, 2013 WL 4437252 (2d Dep't August 21, 2013) (reversing denial of motion for summary judgment and order of reference, holding that plaintiff established its *prima facie* entitlement to judgment as a matter of law by providing the subject note and mortgage and proof of default, and reciting without any analysis that defendant failed to raise a triable issue of fact concerning plaintiff's standing, validity of extension agreement or plaintiff's contractual right to foreclose).

Citimortgage, Inc. v. Friedman, 109 A.D.3d 573, __N.Y.S.2d __, 2013 WL 4437086 (2d Dep't August 21, 2013) (affirming denial of defendant's motion for summary judgment, holding that court below properly determined that defendant waived standing defense by failing to raise it in its answer or a pre-answer motion to dismiss, and further holding that, in any event, defense failed on the merits because plaintiff demonstrated that when it commenced the foreclosure action it was the holder of the mortgage and two slightly different versions of the note, both of which were indorsed in blank, and because plaintiff agreed to proceed on the version of the note that defendant conceded was validly signed and was not altered).

Deutsche Bank Nat. Trust Co. v. Whalen, 107 A.D. 3d 931, 969 N.Y.S.2d 82 (2d Dep't 2013) (affirming grant of summary judgment in favor of plaintiff and dismissing defendant's affirmative defenses and counterclaims, holding that plaintiff established *prima facie* entitlement to summary judgment as a matter of law by producing the mortgage, the unpaid note and evidence of default, and that plaintiff established its standing as the holder of the note and mortgage by physical delivery prior to commencement of the action with evidence that its custodian received the original note in October 2005 and received the original mortgage in February 2006 and safeguarded those original documents in a secure location. Court did not discuss nature of the evidence provided of such physical

delivery, and also held that because plaintiff had established physical delivery, it did not need to address the validity of a subsequently executed document assigning the mortgage and note. Court also held that defendant failed to raise a triable issue of fact on its standing challenge or on its assertion of unclean hands in plaintiff's obtaining the note and mortgage).

HSBC Bank USA, N.A. v. Taher, 104 A.D.3d 815, 962 N.Y.S.2d 301 (2d Dep't 2013) (reversing *sua sponte* dismissal with prejudice and denial of order of reference based on Judge Schack's independent research establishing absence of standing and prosecution of foreclosure based on robo-signed documents, and reversing subsequent sanctions ordered against HSBC and foreclosure mill firm resulting therefrom. Court repeated that standing had been waived by failure to answer and was not proper basis for *sua sponte* dismissal, and reprimanded Judge Schack for doing so following its decision in *U.S. Bank v. Emmanuel*, 83 AD3d 1047 (2d Dep't 2011), also stating that evidence on which Judge Schack relied was not properly the subject of judicial notice. Court held that directing hearing on sanctions was an abuse of discretion and remitted case to Supreme Court for further proceedings before a different judge).

U.S. Bank Natl. Assn. v. Allen, 102 A.D. 3d 955, 958 N.Y.S.2d 737 (2d Dep't 2013) (affirming denial of defendant's motion pursuant to CPLR 5015(a)(3) to vacate an order of reference and to dismiss the complaint, premised on plaintiff's lack of standing due to an alleged fraudulent assignment. Court held that defendant failed to make a showing that plaintiff engaged in the type of fraud or misconduct that would warrant vacatur of the order of reference pursuant to CPLR 5015(a)(3)).

Deutsche Bank National Trust Co. v. Hunter, 100 A.D.3d 810, 954 N.Y.S.2d 181 (2d Dep't 2013) (affirming denial of motion to vacate default judgment of foreclosure and sale pursuant to CPLR 5015(a)(3) and (4) asserting standing defense, holding that record contained no evidence of fraud or misrepresentation, and stating that alleged lack of standing is not a jurisdictional defect).

LaSalle v. Pace, 2012 NY Slip Op 08101 (2d Dep't 2012) (affirming Judge Whelan's decision granting plaintiff's summary judgment motion, which motion had been pending when the attorney affirmation rule went into effect. Defendant had opposed summary judgment on grounds that affirmation had been filed, but plaintiff submitted attorney affirmation in sur-reply. Second Department held that plaintiff's submission of affirmation in sur-reply on its motion was timely, because rule required submission of the affirmation for already-pending cases at time of filing of either proposed order of reference or the judgment of foreclosure. Second Department held that the attorney affirmation is not itself substantive evidence or a new argument supporting summary judgment and thus defendants were not prejudiced by lack of opportunity to challenge counsel's representations therein. Defendant's remaining contentions, per the Second Department, involved dicta (Judge Whelan's holding that attorney affirmation rule was unconstitutional)

and thus was not addressed.

Bank of N.Y. v. Alderazi, 99 AD3d 837, 951 NYS2d 900 (2d Dep't 2012) (reversing order dismissing for lack of standing and denying order of reference (reported at 31 Misc. 2d 1209(a) (p. 5 of outline), holding that court improperly exercised its discretion in denying order of reference and *sua sponte* directing dismissal of the complaint. Court repeated by rote the mantra that "Since the defendants failed to answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing." Second Department further recited without analysis that "a party's lack of standing does not constitute a jurisdictional defect and does not warrant a *sua sponte* dismissal of the complaint by the court."

Trial Court Decisions From Within Second Department

Brooklyn (Kings County)

Bank of N.Y. Mellon v. Dean, 2013 NY Slip Op 23224 (Kings Cty., Battaglia, J. July 11, 2013) (denying unopposed summary judgment motion and order of reference application, in which standing defense was nonetheless preserved in defendants' answer, finding that plaintiff failed to establish prima facie entitlement to judgment of foreclosure. Court engaged in lengthy analysis of case law on standing and UCC provisions governing transfers of negotiable instruments, noting that Second Department case law is not entirely consistent with New York's version of UCC, and held that: assignment of mortgage from MERS to plaintiff, which did not purport to assign note, was insufficient to confer standing; unauthenticated Pooling and Servicing Agreement excerpts did not suffice to establish plaintiff's standing; affidavit in support of summary judgment motion of physical delivery was neither based on personal knowledge nor adequately specific and failed to establish that assignor to plaintiff ever had possession of the note. Court reiterated that where a plaintiff is not a holder of the note, but establishes standing pursuant to a transfer, either by assignment or delivery, plaintiff must establish that its transferor had the right to enforce the note before the transfer. Court also held that plaintiff had failed to prove service of the contractual default notice, and that the default notice was given by an entity that was not the lender nor shown to have been authorized to act on behalf of the lender, and also found deficiencies with respect to notices and service of process with respect to non-homeowner defendants).

JP Morgan Chase Bank, Natl. Assn. v. Butler, 2013 NY Slip Op 51050(U) (Kings Cty., Schack, J. July 9, 2013) (deciding post-sale application for release of proceeds on deposit with Kings County Clerk, claimed by both plaintiff JP Morgan Chase as purchaser from WAMU, and defendant, holding that, notwithstanding representations by plaintiff that it owned the subject mortgage and note, plaintiff in fact only purchased the servicing rights to the subject mortgage and note from the FDIC, following seizure by FDIC in 2008, and that

Fannie Mae in fact owned the note and mortgage. Court further held that plaintiff never had any right to foreclose and its assertion, and that of its counsel, that it owned the note and mortgage during CPLR 3408 settlement conferences demonstrated bad faith. Court stated that Fannie Mae Servicing Guide providing for servicers to be "holder" of note in order to satisfy state law requirements for foreclosure amounted to "deceptive practices to fool courts" that does not supersede New York law, amounting to a fraud upon the court, because Fannie Mae should have been the plaintiff. Court ordered release of \$55,617.11 of the \$490,000 proceeds on deposit with county clerk to defendant on account of plaintiff's lack of good faith, barred collection of interest and fees since May 2010, declared the note satisfied, directed a hearing to determine whether plaintiff or Fannie Mae was entitled to the balance on deposit with county clerk, and directed plaintiff and its counsel to a hearing to determine whether plaintiff and its counsel engaged in sanctionable frivolous conduct pursuant to Rule 130).

HSBC Bank USA N.A. v. Roumiantseva, 39 Misc. 3d 1239(A), 2013 WL 2500829 (Kings Cty., Saitta, J. June 11, 2013) (granting defendant's motion for summary judgment dismissing foreclosure action based on plaintiff's failure to establish that it was owner or holder of the note. Court held that defense was preserved by denial of allegation in complaint that plaintiff was an the owner and holder of the note and mortgage, and was not an issue of standing but rather was an element of plaintiff's foreclosure claim, which plaintiff is required to prove. Court also analyzed distinction between capacity to sue and standing. On the substance of the claim, court held that supplemental affidavit of plaintiff's servicing agent stating that plaintiff became the owner of the note and mortgage by having possession of the original "negotiable promissory note" and mortgage was not based on personal knowledge and did not identify which books and records it was based upon. Moreover, court noted that the note was not properly endorsed, so it could not be negotiated by mere delivery to Plaintiff, because the note itself contained no endorsement, and the purported allonge annexed to the plaintiff's moving papers was not affixed to the note and was, instead, merely a separate sheet of paper clipped to the note by a paper clip, which was insufficient to make the note into a negotiable instrument, and ownership could therefore not be transferred by mere physical delivery. The court also noted that the assignment executed by MERS was insufficient to transfer the note, because on its face it purported only to transfer the mortgage, and because no evidence was submitted establishing MERS' authority to assign the mortgage or the note).

Bank of N.Y. v. Cepeda, 2013 NY Slip Op 50686(U) (Kings Cty., Schack, J. May 2, 2013) (sua sponte dismissing foreclosure action and vacating prior order of reference, which plaintiff had sought to vacate for inability to comply with attorney affirmation requirement, concluding, after a review of the papers, that plaintiff cannot prove that it owns the subject mortgage and note. Prior order of reference had been obtained with submission of affidavit of known robo-signer Keri Selman on behalf of MERS, and on renewed application for order of reference with new papers, court held that MERS had no authority to assign the

subject note and mortgage and that affidavit of merit offered in support was not executed by plaintiff but by an officer of Bank of America as successor to BAC Home Loans Servicing, without any power of attorney documenting its status as servicing agent for plaintiff. Because plaintiff was unable to prove that it owned the mortgage and note, court dismissed the foreclosure action without prejudice and cancelled the notice of pendency).

Wells Fargo Bank, N.A. v. Erobobo, 2013 NY Slip Op 50675 (Kings Cty., Saitta, J. April 29, 2013) (denying plaintiff's motion for summary judgment, holding that because plaintiff's ownership of note and mortgage is an element of plaintiff's prima facie claim for foreclosure, a general denial was sufficient to preserve such defense, which court distinguished from a conventional standing or capacity to sue affirmative defense which is deemed waived if not timely asserted in pre-answer motion to dismiss or answer. Moreover, on merits of the defense, court held that plaintiff had not established its ownership of the note and mortgage because the note was acquired after the closing date of the trust in violation of the terms of the Pooling and Servicing Agreement, and was thus a void transfer under New York EPTL 7-2.4, and was also improper because the trustee violated the terms of the trust by acquiring the note directly from the sponsor's successor in interest rather than from the Depositor, as was required by the Pooling and Servicing Agreement).

Citimortgage, Inc. v. Forbes, 2013 NY Slip Op 50577(U) (Kings Cty., Rivera, J. April 16, 2013) (denying plaintiff's motion to extend deadline to comply with court's prior order directing compliance with Administrative Order 548/10 attorney affirmation requirement. Court held that plaintiff's attorney's affirmation in support of the motion, which recited that plaintiff Citibank had transferred the mortgage to new plaintiff Selene Finance LLP after the action was commenced (and presumably sought additional time to comply with attorney affirmation requirement for that reason), was insufficient because it referred only to the assignment of the mortgage and not the underlying note and because the attorney lacked personal knowledge concerning the assignments).

Bank of N.Y. v. Waters, 2013 NY Slip Op 50585(U) (Kings Cty., Saitta, J. April 15, 2013) (denying plaintiff's ex parte application for order of reference, finding that plaintiff failed to submit proof that originator of loan authorized MERS to assign. Court noted two different versions of the note, one of which appeared to be altered to include an allonge, and also noted that purported MERS assignment appeared to be an assignment to a different entity than the plaintiff. Court acknowledged that standing is an affirmative defense that is waived if not raised in an answer, but also noted that ownership of the note is part of Plaintiff's prima facie case and its burden of proof, and concluded that it "is proper for the court to deny an application for a default judgment and order of reference where the underlying papers presented to the court are defective on their face and do not contain sworn or affirmed allegations demonstrating the merit of the claims." Court also held that plaintiff's conclusory statements that it became owner of the

note prior to commencement of the action were insufficient and concluded by noting that the "court cannot turn a blind eye to the alteration of documents submitted or documents which on their face indicate another entity may own the mortgage, simply because the application is on default").

U.S. Bank N.A. v. Bressler, 2013 NY Slip Op 50498(U) (Kings Cty., Silber, J. April 3, 2013) (denying motion to reargue prior denial of plaintiff's summary judgment motion and grant of defendant's cross motion to dismiss for lack of standing, where plaintiff relied on defective MERS assignment where MERS never owned the note, had no authority to assign the mortgage or note, and the assignment had been executed by Elpiniki Bechakas in Baum's office. On reargument, court rejected plaintiff's argument that note was transferred through the PSA and by transfer of physical possession, finding allonge submitted in opposition to cross motion to dismiss insufficient and affidavit alleging physical delivery prior to commencement of action insufficiently specific. Court also held that the PSA did not effectuate the transfer of the note, but merely anticipated future transfer of the note).

New Century Mtge. Corp. v. Kogan, 2013 NY Slip Op 50047(U) (Kings Cty., Rivera, J. Jan. 14, 2013) (denying motion for order vacating prior dismissal of foreclosure complaint for failure to comply with order directing filing of attorney affirmation by date certain and denying motion for leave to reargue prior denial of motion for order of reference. Court denied motion for reargument because plaintiff's reargument motion papers failed to annex copies of the original motion papers and also because motion was untimely and failed to state law or facts that court supposedly misapprehended or overlooked. Court denied motion to vacate the dismissal for failure to comply with order directing attorney affirmation filing pursuant to CPLR 5015(a), because it was not made by order to show cause and, regardless, finding no reasonable excuse where new counsel could not explain prior counsel's failure to comply. Court further held, based on plaintiff's submissions in support of order of reference application, that plaintiff lacked standing because plaintiff commenced the foreclosure action twelve days after it had assigned the mortgage and note to another party and therefore did not own note and mortgage when it commenced the action).

Saxon Mortgage Services v. Jackman, 2012 NY Slip Op 52369(U) (Kings Cty., Jacobson, J. Dec. 20, 2012) (denying order of reference, dismissing action and vacating Notice of Pendency for lack of standing, where plaintiff acknowledged at court conference that it does not own the note, but did not disclose in complaint that plaintiff purported to maintain the foreclosure action as servicer for the owner of the note).

Queens

Onewest Bank, FSB v. Bernstein, 2013 NY Slip Op 51274 (U) (Queens Cty., Siegal, J. August 5, 2013 (denying defendant's motion to dismiss and to cancel notice of pendency for lack of standing because defendant failed to timely move to dismiss or assert standing defense in the answer and because defendant signed an enforceable stipulation whereby it agreed not to interpose an answer, but nonetheless denying plaintiff's application for an order of reference based on finding that plaintiff failed to submit evidence establishing that the note was assigned to plaintiff prior to commencement of the action, and that it therefore failed to make out its prima facie case).

U.S. Bank Natl. Assoc. v. Mosquera, 2013 NY Slip Op 31720(U) (granting plaintiff's motion to dismiss defendant's affirmative defenses and counterclaims and for summary judgment, holding simplistically that plaintiff established its standing by submitting a copy of the note with a special endorsement and a written assignment of both the mortgage and the note, ostensibly demonstrating that when the action was commenced plaintiff owned the note and mortgage. Court held that plaintiff's servicing agent's affidavit was sufficient to establish delivery of the note and to establish that plaintiff was the holder of the note with standing to foreclose, and rejected defendant's argument that plaintiff should be estopped from alleging ownership of the note and mortgage because the note was conveyed in violation of the governing pooling and servicing agreement, holding that defendants were neither parties nor third party beneficiaries of the pooling and servicing agreement and therefore, ironically, lacked standing to challenge plaintiff's standing).

Freedom Mtge. Corp. v. Akther, 2013 NY Slip Op 51015 (U) (Queens Cty., McDonald, J. June 27, 2013) (granting plaintiff's summary judgment motion and motion to strike, finding that plaintiff established its prima facie entitlement to judgment by submitting mortgage, unpaid note and affidavit of employee, and further finding that defendant failed to raise triable issues of fact and that it waived standing defense by failing to assert in the answer or pre-answer motion).

U.S. Bank Natl. Assoc. v. Sakizada, 2013 NY Slip Op 31029 (U) (Queens Cty., Siegal, J. May 13, 2013) (denying plaintiff's motion for summary judgment and to strike defendant's answer and denying defendant's cross motion for summary judgment and attorney's fees or to dismiss plaintiff's complaint for failure to comply with discovery demands or for an order referring action to residential foreclosure part. Plaintiff's summary judgment motion was denied because plaintiff failed to submit sufficient evidence of its standing as the lawful holder or assignee of the note on the date it commenced the action, where plaintiff relied on servicing agent's affidavit which provided no factual details concerning when plaintiff or its agents received physical possession of the note, and where plaintiff failed to demonstrate that MERS ever physically possessed the note or had authority to assign the note. Plaintiff also failed to establish that it was the holder

of the note and mortgage by virtue of the endorsement of the note because the endorsement was undated and it was therefore not clear whether the endorsement was effectuated prior to commencement of the action. But defendant's cross motion for summary judgment based on standing defense was denied because court found disputed issues of fact concerning plaintiff's standing. Defendant's motion for dismissal pursuant to CPLR 3126 for failure to comply with discovery demands was denied because defendant submitted no proof of any efforts to follow up, and defendant failed to establish that plaintiff engaged in willful and contumacious pattern of noncompliance with discovery requests. Court denied motion to refer the case to the residential mortgage foreclosure part for settlement conference because settlement conference was previously held and defendant's default on that date was undisputed and no excuse for such default was offered).

Deutsche Bank Trust Co. Ams. V. Vitellas, 2013 NY Slip Op 50698 (U) (Queens Cty., Siegal, J. May 2, 2013) (granting motion to reargue prior grant of motion to dismiss foreclosure action for lack of standing, and, on reargument, denying motion to dismiss, finding that plaintiff's affidavit submitted in opposition to motion to dismiss for lack of standing adequately established physical delivery of note prior to commencement of the action where affidavit of authorized officer of GMAC Mortgages attested to such delivery based upon a "review of the records").

Chase Home Fin. LLC v. Tripp, 2013 NY Slip Op 30358(U) (Queens Cty., Weiss, J. February 19, 2013) (granting plaintiff's motion for substitution of plaintiff and for default judgment, and denying defendant's motion to dismiss or in the alternative for vacatur of default and leave to file a late answer, finding no meritorious defenses, holding that standing was waived and, in any event, adequately established and rejecting plaintiff's lack of good faith at settlement conferences as a defense to foreclosure as merely a conclusory allegation lacking factual allegations in support.)

HSBC Bank USA, N.A. v. Carchi, 2013 NY Slip Op 30552(U) (Queens Cty., Agate, J. February 4, 2013) (granting partial summary judgment dismissing foreclosure action against defendant for lack of standing, where plaintiff served deficient response to notice to admit and thereby was deemed to have admitted the genuineness of the original note and mortgage and assignment of mortgage, and where in response to defendant's motion, plaintiff failed to establish that the note was endorsed in blank and in plaintiff's physical possession at time action was commenced or endorsed to plaintiff prior to commencement, and otherwise failed to present any evidence that it was the holder of the note when the action was commenced).

U.S. National Assoc. v. Said, 38 Misc. 3d 1214, 2013 NY Slip Op 50101(U) (Queens Cty., Segal, J. January 7, 2013) (denying plaintiff's motion for summary judgment and to strike defendant's answer, and granting defendant's cross motion for summary judgment dismissing for lack of standing, where plaintiff relied on a

series of assignments from MERS that court found to be defective. Court reached this result apparently without perceiving the distinction between an assignment of a mortgage and assignment of a note, and without citation to Silverberg concerning MERS assignments).

Wells Fargo Bank, N.A. v. Velazquez, 2012 NY Slip Op 52300 (Queens Cty., McDonald, J. December 10, 2012) (granting plaintiff's motion for summary judgment and order of reference and denying defendant's cross motion to dismiss for lack of standing, finding that plaintiff's summary judgment submission established prima facie case and that defendant failed to submit adequate evidence to raise material disputed issue of fact on its standing defense. Although defendant's counsel made several allegations concerning the invalidity of the assignment to plaintiff, including that the assignment post-dated the closing of the plaintiff trust, counsel failed to provide any supporting documentation to support its contentions. Defendant's invocation of robo signing was also not supported by any evidence, and its complaint of a lack of a MERS assignment failed because MERS was not involved in the loan).

Richmond (Staten Island)

Aurora Bank FSB v. Paoli, 2013 NY Slip Op 51224(U) (Richmond Cty., Aliotta, J. July 30, 2013) (denying motion to reargue prior grant of summary judgment in favor of plaintiff and reiterating underlying determination by court, while articulating no reasoning, that "this Court duly considered all of the documents submitted in support of the prior motions and found them to be satisfactory to demonstrate plaintiff's standing. In particular, the documents tendered were deemed to establish the chain of ownership of the note and mortgage, as well as plaintiff's authority to act on behalf of the trustee")

Assets Recovery 26, LLC v. Rivera, 2013 NY Slip Op 50962 (U) (Richmond Cty., Minardo, J. June 17, 2013) (denying plaintiff's motion for summary judgment, and granting defendant's cross motion for leave to amend answer to assert standing defense and, upon amendment, dismissing action for lack of standing. Plaintiff failed to demonstrate any prejudice, and even defenses such as standing which are waived by failure to timely assert can be asserted in an amended answer if there is no prejudice. Upon reaching standing issue, court concluded that plaintiff's employee's affidavit failed to establish delivery of the original note because it lacked any factual details concerning alleged physical delivery prior to commencement of the action. Attorney's affidavit based on his review of file that the note was assigned by an allonge in blank prior to commencement of action was also insufficient, as copy of note originally offered on motion had no allonge, and the undated allonge appeared for the first time in plaintiff's reply papers. Court also held that MERS assignment of mortgage was insufficient to establish plaintiff's standing. Absent evidence of a written assignment of the note or physical delivery prior to commencement of the action, court granted defendant's cross motion to dismiss for lack of standing).

Citimortgage Inc. v. Modica, 2013 NY Slip Op 50827(U) (Richmond Cty., Alliota, J. April 17, 2013 (granting plaintiff's motion for summary judgment and order of reference, holding that plaintiff's moving papers were sufficient to demonstrate its standing, with the submission of an affidavit "from its document control officer detailing the mechanics of the physical delivery of the note and mortgage prior to the commencement of this action" without addressing whether such "document control officer's" affidavit was based on personal knowledge or otherwise satisfied evidentiary standard for supporting summary judgment motion).

Arch Bay Holdings, LLC-Series 2010B v. Alam, 2013 NY Slip Op 3054(U) (Richmond Cty., Maltese, J. March 18, 2013) (denying plaintiff's motion for summary judgment, finding disputed issues of fact concerning plaintiff's standing in light of different versions of note with different endorsements and granting defendant's cross motion to lift discovery stay).

TD Bank, N.A. v. Mandia, 2013 NY Slip Op 30337 (Richmond Cty., Maltese, J. February 11, 2013) (Decision, on motion to reargue, granting plaintiff summary judgment and denying defendant's cross motion for summary judgment. Summary judgment had initially been denied based on ostensible absence of affidavit of plaintiff providing sufficient proof of the alleged default or of plaintiff's possession of the note and mortgage at the time the action was commenced, but on reargument court acknowledged that it had overlooked a second affidavit concerning plaintiff's possession of the note at commencement. In opposition, court held, defendants failed to satisfy their evidentiary burden to challenge plaintiff's standing, and rejected defendant's challenge based on fact that plaintiff did not have the note when the default notice was given, holding that possession of note needed to precede commencement of the action but not issuance of the 90-day notice).

Wells Fargo Bank, N.A. v. Sposato, 2013 NY Slip Op 30034(U) (Richmond Cty., Maltese, J. January 7, 2013) (granting motion to vacate judgment of foreclosure and ensuing sale pursuant to CPLR 5015(a)(2) and (3) and vacating defendant's default to allow service of late answer, where defendant challenged standing based on: assignment to trust after commencement of action; assignment executed by robo-signer employed by LPS who lacked capacity to act on behalf of loan originator; and plaintiff's failure to demonstrate the mortgage and note were acquired in accordance with terms of pooling and servicing agreement. Court concluded that defendant's standing challenges may well have merit inasmuch as there was some evidence of fraud or misrepresentation, particularly with respect to robo-signed signature on assignment purportedly notarized in a state where the assignor had no offices).

Citimortgage, Inc. v. Finocchiaro, 2013 NY Slip Op 30003(U) (Richmond Cty., Maltese, J. January 4, 2013) (granting order to show cause seeking vacatur of

order of reference entered on default and dismissal for lack of standing. Court determined that defendant possessed meritorious standing defense where plaintiff's chain of title derived from MERS and where MERS never held any interest in the note. Court expressly considered Mastropaolo and nonetheless held that standing defense could not be waived, dismissing the action for lack of standing. In rejecting Mastropaolo, the Court stated that "it has become evident in the realm of foreclosure litigation that it would be a miscarriage of justice to continue to treat standing as a defense that can be waived").

Selene Finance, LP v. Wong, Richmond Cty. Index No. 130683/2009 (Fusco, J. December 21, 2012)(denying plaintiff's motion for judgment of foreclosure and dismissing for lack of standing, finding that plaintiff failed to produce evidence sufficient to demonstrate that it had standing at commencement of the action where it relied upon undated allonge with an unnamed recipient).

Westchester

BAC Home Loans v. Martinez, Westchester Cty. Index No. 15352/2009 (Giacomo, J. December 3, 2012) (granting plaintiff's motion for summary judgment and denying cross motion to dismiss for lack of standing, distinguishing Silverberg, holding that here MERS had valid interest sufficient to assign note and mortgage and had done so to plaintiff prior to commencement of action).

Suffolk: Whalen Decisions

Citimortgage, Inc. v. Ivey, 2013 NY Slip Op 31953 (U) (Suffolk Cty., Whalen, J. August 23, 2013) (granting plaintiff's motion for summary judgment, finding that defendant failed to raise any question of fact regarding his pleaded defense of lack of standing, but denying without prejudice plaintiff's motion to substitute assignee of plaintiff because assignment effected only an assignment of the mortgage, and not the note).

Deutsche Bank Natl. Trust Co. v. Espinoza, 2013 NY Slip Op 50926(U) (Suffolk Cty., Whalen, J. June 5, 2013) (granting motion to confirm referee report and judgment of foreclosure and sale and denying cross motion to vacate order of reference and for leave to file late answer, finding no reasonable excuse for default or meritorious defenses. Court also held that defendant's failure to succeed on application to vacate default warranted denial of motion to dismiss on grounds of standing, and stating that, in any event, standing is not a jurisdictional defect nor an element of plaintiff's claim for foreclosure, and that it was thus waived. Court also rejected challenge to attorney affirmation, invoking Second Department's decision in LaSalle V. Pace for the proposition that the attorney affirmation is not substantive evidence and therefore cannot be relied upon by defendant to avoid foreclosure).

Wells Fargo Bank, N.A. v. Concepcion, 2013 NY Slip Op 50271(U) (Suffolk

Cty., Whalen, J. Feb. 22, 2013) (granting motion for entry of judgment of foreclosure and sale and confirming report of referee to compute but denying plaintiff's unopposed motion for leave to file an updated affidavit of merit nunc pro tunc, in effect declining to do so because doing so might have suggested that such nunc pro tunc filing was necessary to comply with attorney affirmation requirement of AO 548-10 and AO 431-11, anathema to Judge Whelan. Court also denied unopposed request by plaintiff for an order substituting named plaintiff for its purported assignee, asserting that action may be prosecuted by the original plaintiff, and refusing to substitute plaintiff in the absence of evidence of proposed substituted party's declared willingness to be substituted).

Onewest Bank, FSB v. Davies, 2013 NY Slip Op 50341(U) (Suffolk Cty., Whalen, J. February 22, 2013) (granting motion for summary judgment and order of reference, reciting without reference to any specific facts, that plaintiff established that it took possession of the note prior to its commencement of the action, possibly because a copy of the note was attached to the complaint. Court also held plaintiff had standing by virtue of FDIC receivership and its receipt of assets of originating lender, which were acquired by plaintiff. Court rejected defendant's "nuanced allegations" relating to questions concerning plaintiff's standing in light of its application to substitute as plaintiff its assignee, holding that post-commencement assignments did not defeat standing. Court also rejected defenses of unclean hands, bad faith and estoppel based on events that took place after defendant's default on the loan, including failure to convert a trial payment plan into a permanent loan modification, holding that plaintiff was under no obligation to grant defendant a loan modification. But court denied plaintiff's application to substitute its recent assignee as plaintiff without prejudice to submission of proper papers, holding that CPLR 1001(a) required proof of proposed new plaintiff's willingness to prosecute action as plaintiff and of its retention of plaintiff's counsel).

Suffolk: Other Judges

Citibank, N.A. v. Herman, 2013 NY Slip Op 30920(U) (Suffolk Cty., Pastoressa, J. April 23, 2013) (denying defendant's motion for summary judgment for lack of standing, finding disputed issue of fact concerning plaintiff's standing to foreclose, where plaintiff, in opposition to defendant's motion, proffered a copy of the note indorsed in blank, which was undated and unaccompanied by any evidence of physical delivery to plaintiff prior to commencement of foreclosure action. Court also denied defendant's motion to strike plaintiff's complaint for failure to comply with discovery demands, accepting excuse that transition from office of Steven J. Baum to successor counsel amounted to law office failure deemed to be a reasonable excuse, finding no evidence of willful, contumacious or bad faith conduct justifying striking of plaintiff's pleading, in light of policy favoring disposition of cases on the merits)

Deutsche Bank Natl. Trust Co. v. Maio, 2013 NY Slip Op 30858(U) (Suffolk Cty., Molia, J. April 18, 2013) (denying plaintiff's motion for summary judgment and order of reference without prejudice, finding that plaintiff failed to establish, prima facie, that it had standing, where its evidence in support of the motion did not demonstrate physical delivery or assignment prior to commencement of the action, and where affidavit from plaintiff's employee failed to provide any factual details of physical delivery or assignment of the note).

PNC Bank Natl. Assoc. v. Giovanni, 2013 NY Slip Op 30891 (U) (Suffolk Cty., Rebolini, J. April 18, 2013) (denying plaintiff's motion for summary judgment and order of reference without prejudice, finding that plaintiff failed to establish, prima facie, that it had standing, where its evidence in support of the motion did not demonstrate physical delivery or assignment prior to commencement of the action, and where affidavit from plaintiff's employee failed to provide any factual details of physical delivery or assignment of the note).

Deutsche Bank National Trust Co. v. Hossain, 2013 WL 31636 (Suffolk Cty., Asher, J. January 11, 2013) (denying plaintiff's motion for summary judgment, finding insufficient evidence of plaintiff's standing to grant summary judgment where plaintiff belatedly submitted indorsement without any explanation as to why it was not affixed on the actual note, where plaintiff was unable to provide any factual details concerning physical delivery of the note, and where plaintiff's affidavits failed to address issues of robo-signing. Court rejected defendant's challenge to adequacy of plaintiff's attorney affirmation, however, and rejected claimed need for further discovery pursuant to CPLR 3212(f) as insufficiently supported with specifics and granted summary judgment dismissing defendant's other affirmative defenses and counterclaims based on contractual default notice, unclean hands and unconscionability, NY Banking Law 6-1, improper service, fraud, statute of limitations, entitlement to a loan modification, Truth in Lending Act, RESPA and FDCPA).

First Department: Decisions graced with little analysis, tend to merely affirm findings of standing without probing analysis of courts below or evidence on which based.

Bank of Smithtown v. 264 W. 124 LLC, 105 A.D.3d 468, 963 N.Y.S.2d 176 (1st Dep't 2013) (reversing denial of plaintiff's summary judgment motion, holding that plaintiff produced note and mortgage and uncontested proof of default and that defendant failed to raise a triable issue of fact on any defense to foreclosure, also rejecting other defenses, holding that uncorroborated affidavit concerning oral agreement to modify loan was insufficient, because note and mortgage prohibited oral modifications, and defendants failed to establish equitable estoppel or partial performance because they did not materially alter their position based on alleged oral modification. Court also rejected assertion of unclean hands as grounds for denying summary judgment, holding that plaintiff was under no obligation to modify the loan or comply with alleged oral agreement, and decision

to proceed with foreclosure was not unconscionable or immoral).

One West Bank FSB v. Carey, 104 A.D. 32 44, 960 N.Y.S.2d 306 (1st Dep't 2013) (affirming denial of motion to dismiss challenging plaintiff's standing, holding that evidence submitted in opposition to motion, including affidavit from plaintiff's employee, established that assignment of note had been effectuated by physical delivery prior to commencement of action).

JP Morgan Chase Bank v. Shapiro, 104 A.D.3d 411, 959 N.Y.S.2d 918 (1st Dep't 2013) (affirming grant of summary judgment, holding that plaintiff's employee's affidavit claiming personal knowledge of plaintiff's status as successor in interest to WAMU was sufficient to establish plaintiff's standing, and holding that First Department's prior decision in *JP Morgan Chase Bank N.A. v. Miodownik*, 91 AD3d 546 (1st Dep't 2012) recognized plaintiff's status as successor to WAMU with standing to foreclose on all loans formerly held by WAMU).

Wells Fargo v. Levin, 101 A.D.3d 1519, 958 N.Y.S.2d 227 (1st Dep't), *app. den.* 21 N.Y.3d 887, 988 N.E.2d 516, 965 N.Y.S.2d 780 (2012) (affirming grant of summary judgment to plaintiff and denial of defendant's motion to reargue or renew. Insofar as defendant's motion was based on evidence of plaintiff's law firm's foreclosure misconduct in other actions, decisions reporting such misconduct predated underlying summary judgment motion and therefore could have been raised in opposition and, in any event, such misconduct in other cases did not establish fraudulent or deceptive conduct in this case. Defendant's motion to vacate based on CPLR 5015 based on same allegations also failed, and to the extent that defendant sought vacatur of judgment for lack of subject matter jurisdiction based on plaintiff's lack of standing, court stated that lack of standing was not jurisdictional, without any discussion concerning why standing challenge, which was properly preserved in defendant's answer, did not preclude grant of summary judgment to plaintiff).

New York County

FTBK Inv. II LLC v. Joshua Mgt. LLC, 2013 NY Slip Op 30333(U) (NY Cty., Wooten, J. February 14, 2013) (denying without prejudice plaintiff's motion for summary judgment in foreclosure action, rejecting standing challenge based on WaMu loan that was transferred to Chase in bulk by FDIC, but holding that plaintiff, which had acquired loan after it was already in default, failed to provide sufficient evidence of the default because the affidavit of plaintiff's representative was not sufficiently based on personal knowledge with either the facts of the default or the books and records of the assignor of the loan. Court also denied appointment of receiver because plaintiff had not yet demonstrated default).

Third Department: Standing defenses have little traction up here:

HSBC Bank USA, N.A. v. Ashley, 104 A.D.3d 975, 961 N.Y.S.2d 337 (3d Dep't), *app. den.* 21 N.Y.3d 956, 991 N.E.2d 213, 969 N.Y.S.2d 439 (2013) (affirming denial of defendant's motion to vacate judgment of foreclosure and sale, to dismiss action or to permit filing of late answer. Court rejected defendant's motion to vacate judgment of foreclosure and sale premised on assertion that plaintiff engaged in fraud by falsifying assignment documents to make it appear as if it had standing to foreclose when it did not, because defendants had waived standing defense by failing to raise it in either an answer or pre-answer motion to dismiss. Court also found no reasonable excuse for delay, given that defendants were aware of foreclosure action; having appeared therein since 2009, and given defendants' unexplained failure to exercise reasonable diligence in discovery of documentation purportedly demonstrating the fraud. Absence of reasonable excuse for delay also supported denial of motion for leave to file late answer).

Chase Home Finance LLC v. Miciotta, 101 A.D.3d 1307, 956 N.Y.S.2d 271 (3d Dep't 2012) (affirming denial of motion to dismiss for lack of standing, holding that language in governing assignments of mortgage was broad enough to effect assignment of note where it referenced "all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest," and "all indebtedness secured thereby," reciting that no special language is necessary to effect an assignment so long as language shows the intention of the owner of a right to transfer it).

Albany County

Flagstar Bank FSB v. Brennan, 2013 NY Slip Op 30945(U) (Albany Cty., Teresi, J. May 3, 2013) (granting plaintiff motion for summary judgment and order of reference, rejecting defendant's standing challenge, finding that plaintiff adequately demonstrated assignment of note prior to commencement of action).

Intersection Between Standing Issues and Settlement Conferences

Deutsche Bank Natl. Trust Co. v. Izraelov, 2013 NY Slip Op 51482(U) (Kings Cty., Battaglia, J. Sept. 10, 2013) (confirming report and recommendation from Referee Goldstein finding failure to negotiate in good faith, noting that while court could not dismiss foreclosure action for lack of standing where defense was waived by failure to assert in answer or motion, "[i]t does not follow...from a waiver of the defense of lack of standing that the question of standing has no place in the mandatory settlement conference process, or that the referee may not investigate or make findings on the question," and concluding that "[i]t is difficult to see any fair reading of the governing statute, rules, and order of reference that does not permit, if not require, a determination that the person(s) participating in the settlement conference process are 'fully authorized to dispose of the case' (see CPLR 3408[e]). Nothing would be more useless, if not harmful to the statutory purpose 'to help the defendant avoid losing his or her home,' than settlement

discussions with a person who does not have the legal right to make the modifications 'or other workout options' envisioned by the statute (see CPLR 3408[a]); see also CPLR 3408[f]), or at least is authorized to do so by the person with that right, i.e., a person with standing to enforce the note and mortgage." While acknowledging that communications between servicer and mortgagors after their initial default but before appearances in the Settlement Conference Part could not be the basis of a CPLR 3408(f) violation, court noted that such communications provide context to the settlement conference proceedings. Court upheld finding of failure to negotiate in good faith based on invocation of investor restriction, where plaintiff actually possessed letter from investor authorizing modification of defendant's loan which stated that restriction was not waived for other borrowers, but maintained at conferences that such letter actually reflected unsuccessful attempt to obtain waiver. Court tolled interest, except for period when foreclosure action and conferences were stayed by defendant's bankruptcy filing).

Deutsche Bank National Trust v. Hinds, 500398/12, NYLJ 1202622170047 (Kings Cty., Demarest, J. Sept. 19, 2013) (granting motion for relief for failure to negotiate in good faith at settlement conferences pursuant to CPLR 3408(f), confirming referee report and recommendation, following plaintiff's failure to obtain original loan documents and prove its standing to foreclose. Court stated that referee's findings are entitled to deference where credibility is at issue, and noted that foreclosure actions are equitable in nature, in which recovery of interest is within the court's discretion. Court granted motion to dismiss, given plaintiff's failure to produce evidence of its standing despite having had an opportunity to seek and obtain the original loan documents, where plaintiff failed to oppose the motion. Court also ordered that all interest, late fees and attorney's fees "be cancelled from the date of default to the date of this order; and that the foreclosure action be dismissed with prejudice.")

Certificate of Merit

Effective August 30, 2013, Chapter 306 of the Laws of New York ,A.5582-A(Weinstein)/S.4530-A(Klein), available at <http://open.nysenate.gov/legislation/bill/A5582-2013>) amended **CPLR 3012-B** to require plaintiff's counsel commencing foreclosure actions with respect to "home loans" (as defined by RPAPL 1304(5)(a)) to file, with the summons and complaint, a Certificate of Merit certifying, based on review of the case and documents, and in consultation with the 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." Attorneys must review the mortgage, note, bond and all instruments of assignment, as well as any other instrument of indebtedness such as loan modifications, extensions or consolidations, and ***copies of those documents must be attached to the Certificate of Merit if they are not otherwise attached to the complaint.*** For cases commenced after its effective date, the

Certificate of Merit supplants the Attorney Affirmation required by Administrative Order of the Chief Administrative Judge of the Courts AO/431/11 (http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf), which required that the affidavit be filed for cases commenced after its effective date at the time of filing of the Request for Judicial Intervention (RJI), which was supposed to be filed with the Affidavit of Service. Pursuant to Administrative Order AO/208/13 issued on August 1, 2013, the AO/43/11 Attorney Affirmation requirement does not apply to residential mortgage foreclosure actions commenced on or after August 30, 2013, and for cases commenced prior to the effective date plaintiffs may file *either* the new Certificate of Merit pursuant to amended CPLR 3012-B JI or the old Attorney Affirmation with the RJI. Newly amended CPLR 3012-B provides, in cases where notes or other ownership documents are not attached to complaint or Certificate of Merit, counsel must attach a supplemental affirmation attesting that such documents are lost, whether by destruction, theft or otherwise. This provision explicitly does not relieve plaintiff's compliance with obligations under the UCC in connection with lost instruments, which includes 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. Courts, in cases of willful non-compliance, 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." Such relief may be based on a motion of any party or upon the court's own motion and notice to the parties.

Summary of Foreclosure Process

Summary of Foreclosure Process

Rose Marie Cantanno, Esq.

Outline for 2014 Partnership Conference

1. Introduction of speakers and subject matter
2. Basic Foreclosure and Real Estate Concepts
 - a. Note v. Mortgage
 - b. Parties Involved
 - i. Includes who holds responsibilities/rights
 1. In the property
 2. In the legal action
3. Brief Overview of Foreclosure Process in New York
 - a. Acceleration Letter
 - b. 90 day Notice
 - c. Summons and Complaint
 - d. Answer
 - e. Settlement Conferences
 - f. Post-Conference Motions
 - g. Inquest possibility
 - h. Foreclosure Auction
4. Options for Clients
 - a. Payoff Loan
 - i. Through refinance or reverse mortgage
 - b. Reinstate Loan
 - i. Through grant programs or client's own funds
 1. Viable option if loan is now affordable at original terms
 - c. Loan Modification
 - i. Changes terms of the current loan on the property
 1. Reasons include:
 - a. Client does not have credit to get new loan
 - b. Client does not have equity to get new loan
 - d. Sale of Home
 - i. Normal real estate transaction if the home has equity
 - ii. Short sale if home is worth less than client owes at time of sale
 1. Lender agrees to allow sale of home, accept available proceeds and release homeowner from all further liability
 - a. Prevents deficiency judgment

- e. Deed-In-Lieu
 - i. Bank accepts deed from client in exchange for release from future liability
 - 1. Prevents deficiency judgment
5. Loan Modification Specifics
- a. Who can apply
 - i. Problems
 - 1. Deceased borrowers
 - 2. Divorce Situations
 - 3. Missing Borrowers
 - b. Specific Programs
 - i. HAMP – Home Affordable Modification program
 - 1. Referred to as the Obama Plan
 - 2. Not all lenders participate
 - a. Can check HAMP website to see if lender participates
 - 3. Specific application needs to be submitted
 - a. Seven page RMA form
 - i. Requires details about borrower, assets and expenses
 - b. Thirty days of concurrent paystubs or profit and loss statement for self-employed homeowners
 - c. Last two bank statements
 - d. Last two years tax returns
 - e. Dodd-Frank certification
 - f. 4506-T
 - g. Current Utility Bill
 - h. Hardship Letter
 - 4. Client is either:
 - a. In arrears
 - b. In imminent danger of default
 - ii. FHA Loan Modifications
 - 1. Special Rules Apply
 - a. Forbearance Plans
 - b. Partial Claims
 - c. FHA HAMP
 - iii. Streamline Modifications
 - 1. Fannie Mae
 - 2. Freddie Mac
 - iv. In-house modifications

How to Represent Yourself in Foreclosure

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HOW TO REPRESENT YOURSELF IN FORECLOSURE

The homeowner's guide to represent themselves in the foreclosure settlement conference process

By: Rebecca Case-Grammatico, Esq. and Kevin Purcell, Esq.



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1 INTRODUCTION USING THIS GUIDE

Introduction

You have probably picked up this guide because you are in a foreclosure, or may be facing a foreclosure shortly. The possibility of losing your home is a very scary thought. Fighting a foreclosure through the court system can seem overwhelming to many people. This guide is not a substitute for legal assistance, and we would recommend hiring an attorney if possible. But we also understand that fewer non-profits have the resources to help people in need, the reality that attorneys can be expensive, and that finding an attorney may not be an option for you. Therefore, what we hope to do in this guide is give you a better understanding of the foreclosure process in New York State, so that you have the tools to represent yourself in the New York State Settlement Conference Process.

We strongly advise you to obtain the FREE assistance of a local housing counselor. A housing counselor can assist you in communicating with your mortgage lender. Taking the first step of contacting a housing counseling agency and making an appointment will help you immensely in this foreclosure process. You will find a list of local housing counseling agencies in the folder at the front of this guidebook.

Who is this guide for?

This guide is designed for homeowners who live in a one-to-four family home, are behind on their mortgage payments, and are in or could soon face being in foreclosure. These homeowners are entitled to a "Settlement Conference" as part of the foreclosure process.

What is this guide?

This guide is designed to address the needs of homeowners facing foreclosure. This guide contains general legal information about the foreclosure and settlement conference processes. It is NOT a substitute for legal representation, and if possible you should consult an attorney. However, we understand that attorneys can be expensive. If you are not able to hire an attorney to represent you, this guide should provide you with the knowledge to represent yourself in the foreclosure proceeding. This guide will give you basic information to help you understand the foreclosure timeline and will help you participate in the Foreclosure Settlement Conference, which may assist you in reaching an agreement with your lender.

What is a "Settlement Conference"?

Under New York State law, most homeowners in foreclosure are entitled to a "Settlement Conference". This will occur early in the foreclosure process, and will involve the homeowner and an attorney for the bank appearing before a judge, referee or law clerk. The goal of the Settlement Conference is to attempt to come to some alternative to foreclosure. These alternatives can range from entering a loan modification, which would allow you to keep your home and have a revised mortgage payment, to entering a "short sale" or "deed in lieu of foreclosure", which would limit the negative consequences to your credit. Once you have entered foreclosure, the Settlement Conference is the best chance you will have to save your home, so it is vital that you attend and have an understanding of what will happen. Much more about the Settlement Conference process will follow in this guide.

2 IMPORTANT FORECLOSURE PREVENTION TERMS

You may see terms used throughout this booklet and throughout the legal documents you have received with which you are unfamiliar. What follows are definitions for several of these terms. If at any time in any of your Settlement Conferences you aren't sure what the Bank's attorney or court personnel are referencing, please speak up. They will be happy to explain to you what they are talking about, but unless you speak up and ask they will assume you understand everything they have said. Do not be embarrassed to ask! There are a lot of legal terms used in a foreclosure proceeding, and even attorneys that do this work every day often times get confused. No one expects that you will understand all of this without some help. You can also ask a housing counselor for help with these terms, as they should be familiar with them. (A list of local housing counseling agencies is included in the folder at the front of this guidebook.)

31% Payment: A growing trend within the mortgage industry is to have a goal of having your maximum monthly mortgage payment (including principal, interest, real estate taxes, and homeowner's insurance) be at most 31% of your Gross Income.

Acceleration Letter (a.k.a.: demand letter): A letter from your lender, sent after you have stopped paying, stating that the whole amount of your mortgage is due immediately.

Answer: A written response to the Complaint, in which a homeowner lists all of their defenses to the foreclosure, as well as raises any counterclaims they may have against the Bank.

Cancellation of Lis Pendens: A written notice that removes the previously filed Lis Pendens from the county clerk's records, which removes questions regarding the status of title to the property.

Capitalization: Capitalization occurs when items owed on a loan (past due interest,

taxes, late charges, legal costs or other fees) are added to the unpaid principal balance of the loan and are treated as part of a new principal balance.

Complaint: A written document that is filed with the Court and tells you and the Court the reasons the Bank is suing you and what they are asking the Court to do. Because this is a foreclosure, the Bank is claiming you have not made your monthly payments as required by your Mortgage and Note.

Deed in Lieu of Foreclosure: A process where the borrower gives the deed to the property back to the lender, and the lender discontinues any foreclosure action.

Default: Failing to meet the requirements of an agreement. Most defaults involve failing to make required mortgage payments on time.

Deficiency: The amount a borrower owes to the lender after the sale of the property at a foreclosure sale in the event the property is sold for less than the amount of the debt owed.

Discovery: A tool used in lawsuits to obtain information and documents from other parties.

Forbearance: A plan to cure a default that may involve a temporary suspension or reduction of payments.

Interest Rate: The amount charged by a lender for the right to borrow money, as expressed as a percentage of the principal amount borrowed.

Judgment: The final part of a court case. A valid judgment resolves all the contested issues and terminates the lawsuit, since it is regarded as the court's official pronouncement of the law on the action that was pending before it. It states who wins the case and what remedies the winner is awarded.

Lis Pendens: A written notice that a lawsuit has been filed concerning real estate, involving either the title to the property or a claimed ownership interest in it. The notice is usually filed in the county clerk's office. Recording a Lis Pendens alerts a potential purchaser or lender that the property's title is in question, which makes the property less attractive to a buyer or lender.

Loan Modification: An agreement to permanently change one or more terms of the original mortgage (i.e.: interest rate, payment amount, term etc.)

Loss Mitigation: The process in which the Bank will work with homeowners in an effort to avoid foreclosure. This term often refers to the group within the Bank that you will be working with throughout the foreclosure process.

Mortgage: A written document that secures property as collateral for a loan. This is the document that allows the bank to foreclose, because you have agreed that if you default on the Note (i.e.: stop payments) they can sell your property to collect on the debt.

Note: A written document that is a promise to pay. Typically, when you borrow a large sum of money from a lender, you pay it back with interest, in monthly installments, over a period of years. All these loan terms are found in the loan's note.

Notice of Appearance: Formal notification by a party to a court (and to parties already involved in a case) that it wishes to participate in the litigation process.

Order of Reference: A document presented by the Bank to the Court, which allows the foreclosure proceeding to continue in the Court system if a Settlement Conference has been unsuccessful. An Order of Reference would appoint a Referee to determine how much you owe the Bank.

Principal Reduction: A reduction in the total amount owed on the loan.

Pro Se: Appearing in a court proceeding for oneself - without an attorney representing them.

Process Server: A person authorized by law to deliver papers, typically the Summons and Complaint, to the Defendant.

Refinancing: The process of paying off a loan by borrowing new money, either from the existing lender or a new lender.

Repayment Plan: A plan where the borrower pays their regular monthly mortgage payment PLUS an additional amount to pay off the amount they are behind on their mortgage.

Service: The delivery of a summons, complaint, or other legal document to a person.

Short Sale: The sale of a home for less than what is owed on the mortgage. Short sales must be approved by the lender, since the Bank will take a loss on what is owed to them.

Stipulation of Discontinuance: A document filed by the Bank with the Court to signify that an agreement has been reached and that the foreclosure proceeding will be terminated.

Summary Judgment: A motion in a court proceeding to end the case without a trial on all the facts. This is typically done in the foreclosure context before any Discovery has occurred.

Summons: A legal document that notifies a party that a legal proceeding has been started.

3 THE FORECLOSURE PROCESS IN GENERAL

What is a foreclosure?

In New York, a foreclosure is a legal action - a lawsuit - filed by a lender (who is called the Plaintiff, but we will call the "Bank" throughout this guide) against a borrower (who is called the Defendant). This usually happens when a borrower has stopped making payments on their mortgage (otherwise known as "defaulting" on the mortgage or becoming delinquent). The Bank is asking the Court to allow them to take full ownership of your house. Typically the Bank would then attempt to sell your home at a public auction to recover the money still owed under your Mortgage and Note. The Bank files a Summons and Complaint with the Supreme Court in the county where the home is located. (In New York State, the Supreme Court is actually the lowest level of the state court system.) The Bank then gives (or "serves") you with copies of the Summons and Complaint.

A foreclosure proceeding is a long process with many steps, and usually takes no less than six months from start to finish. What follows is a brief summary of the steps in a foreclosure. After the brief summary, we will then go into greater detail on each stage.

The stages of a foreclosure case

STAGE 1: HOMEOWNER FALLS BEHIND ON PAYMENTS - This can happen for any number of reasons, but the end result is the same: your financial situation is such that you have not been able to keep current on your Mortgage. Each Mortgage has specific language about when the Bank may begin a foreclosure proceeding. For instance, we often see mortgages that say if a homeowner falls more than 3 months behind on payments, the Bank can begin foreclosure proceedings.

STAGE 2: 90-DAY PRE-FORECLOSURE NOTICE

Under New York State law, the Bank is required to send you a notice at least 90 days before the start of a foreclosure proceeding. Typically, the Bank will send this out when you are somewhere between 30 and 60 days behind on your payments. Notices must be sent to the last known address of the borrower by registered or certified mail, in addition to first-class mail. The letter must state the number of days you are behind on your Mortgage, the amount of money owed and the telephone number of the Bank. It also must provide a list of at least five government approved housing counseling agencies in your area (as seen in the folder at the front of this guidebook). If you are reading this guide, you most likely have already received this notice.

STAGE 3: THE DEMAND LETTER (OR THE "ACCELERATION LETTER")

- This is a letter sent by the Bank to the Borrower before a foreclosure proceeding is filed in Court, pointing out that the terms of the Mortgage have been violated due to nonpayment. You will typically be given 30 days to pay the delinquent amount and any associated late fees.

STAGE 4: THE SUMMONS AND COMPLAINT

- These documents will be the first notice you will receive that a foreclosure case has been started with the court.

STAGE 5 (OPTIONAL): FILING AN ANSWER

- This is a written statement you may choose to prepare in response to the Summons and Complaint. Typically, an Answer is only done when you feel you have legal claims against the Bank.

STAGE 6: SETTLEMENT CONFERENCE

- This is an opportunity for you to sit down with the Bank at your local courthouse to try to work out an alternative to foreclosure so that you may keep your home. You will find out about the time and date of the Settlement Conference in a letter sent to you by the Court.

STAGE 7A: SUCCESSFUL SETTLEMENT

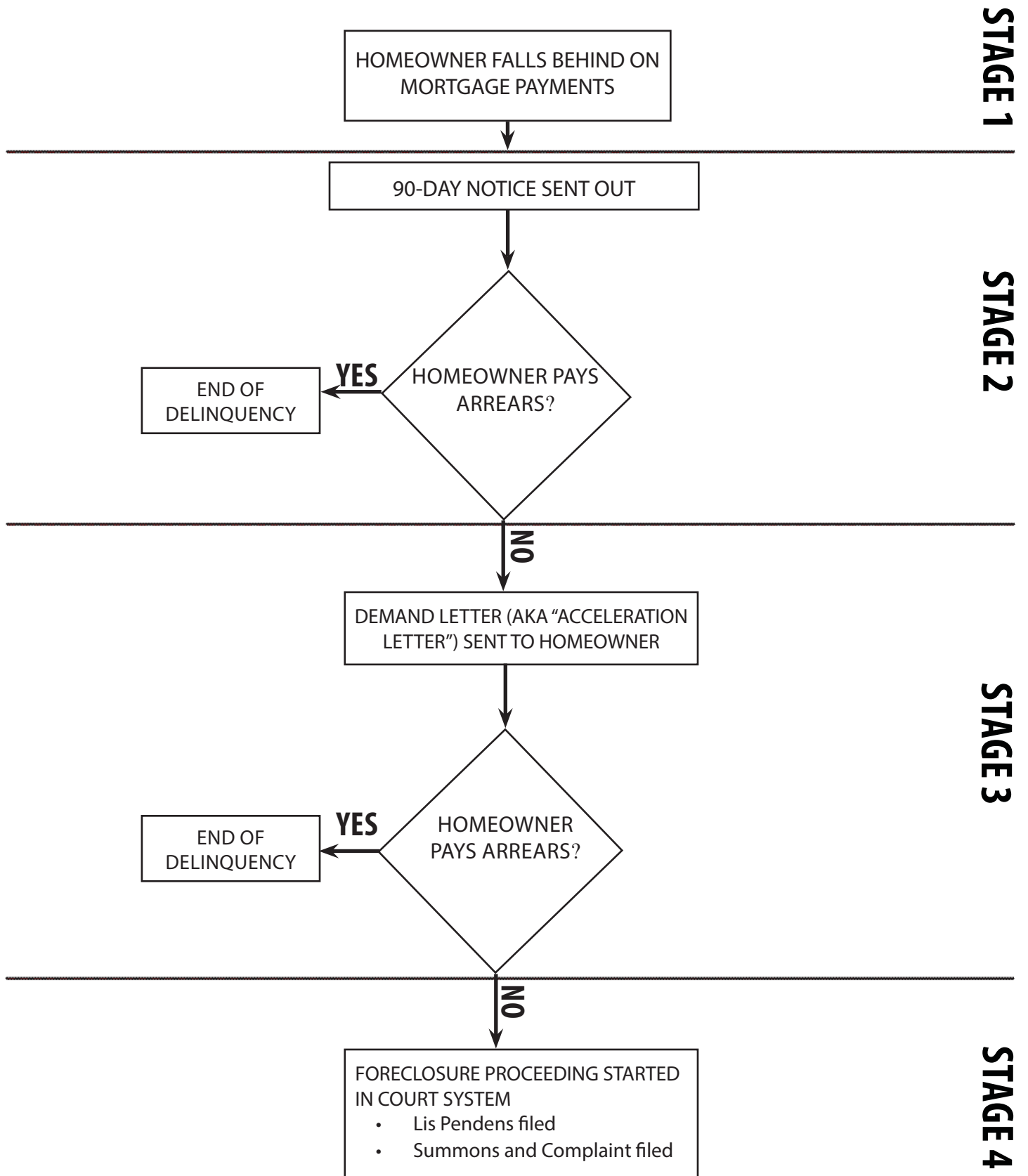
CONFERENCE - It is possible that you and the Bank will work out an arrangement allowing you to keep your home. If this happens, the Bank will file a document called a "Cancellation of Lis Pendens" that will end the foreclosure proceeding in the court system.

STAGE 7B: UNSUCCESSFUL SETTLEMENT

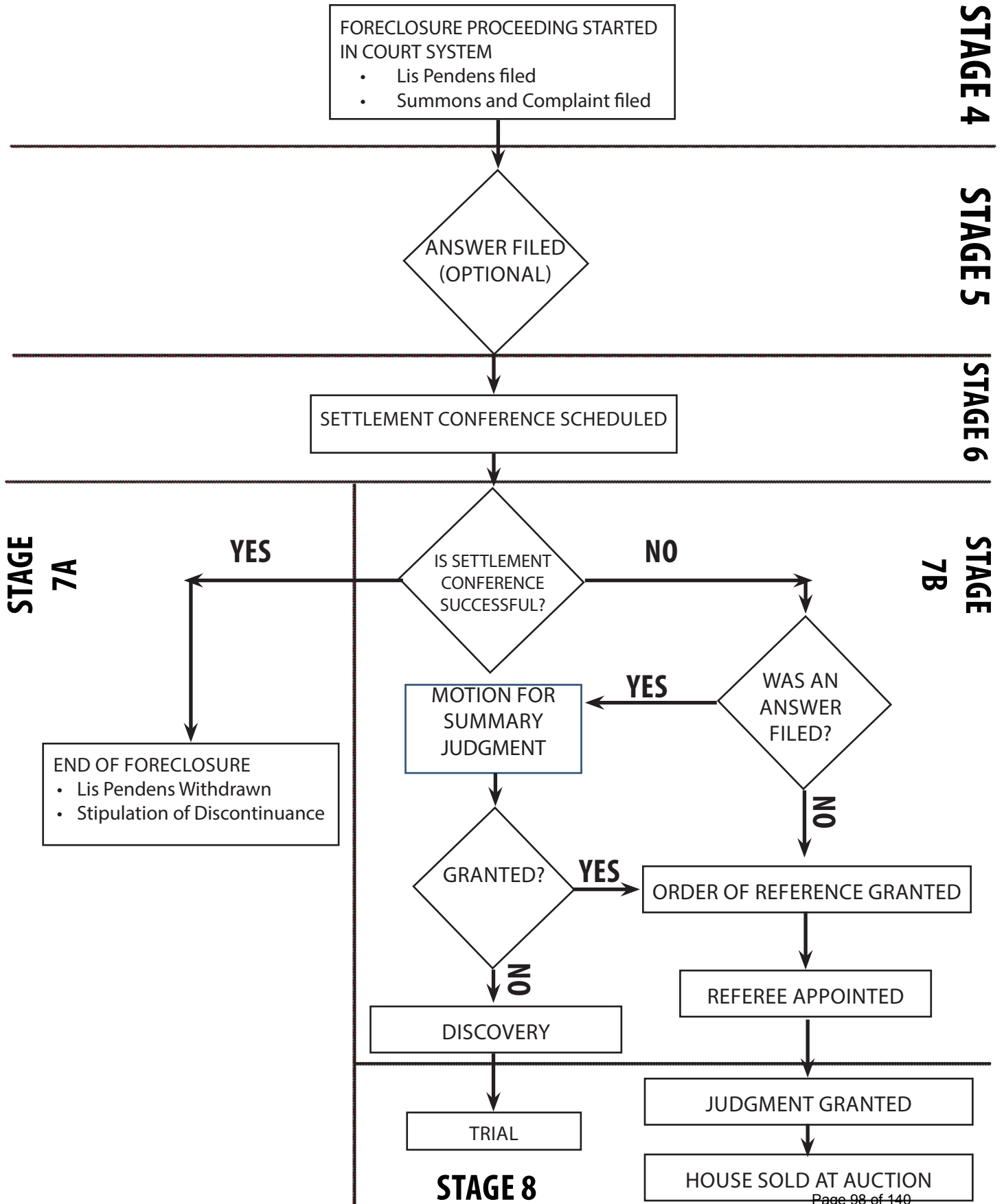
CONFERENCE – If you and the Bank cannot agree on an alternative to foreclosure, the foreclosure will be allowed to move forward in the court system. An "Order of Reference" will likely be granted to the Bank. This allows the Bank to obtain a "Judgment", which will then allow them to take ownership of the house after an auction.

STAGE 8: (IF SETTLEMENT CONFERENCE WAS UNSUCCESSFUL) POST-JUDGMENT - These are the events that occur after Judgment has been entered. Unless a last-minute deal with the Bank is reached, this stage will end with the house being sold at a public auction to the highest bidder and you will have to move out of your house.

PATH OF A FORECLOSURE IN NEW YORK STATE PART 1 – PRE-FORECLOSURE FILING



PATH OF A FORECLOSURE IN NEW YORK STATE PART 2 – POST-FORECLOSURE FILING



4 THE STAGES OF A FORECLOSURE CASE - IN DETAIL

STAGE 1: HOMEOWNER FALLS BEHIND IN PAYMENTS - It may be a loss of a job, or a cut in your pay rate. Perhaps you have just gone through a divorce, or had a major medical concern. Whatever the reason is, you have fallen behind on your mortgage payments. When this happens, often times homeowners are put in the no-win situation of paying all their other bills, or paying their mortgage. There is really no “right” answer to this question, because whichever bill doesn’t get paid has the possibility of leading to negative consequences. If it is the Mortgage that doesn’t get paid, the Bank will begin contacting you to find out when you will make your missed payments. Homeowners often will ignore these calls, because they know they cannot make the payment in the foreseeable future. Perhaps you are able to make some payments, so you are always a month or two behind. Eventually, you fall behind to the point that the Bank is ready to threaten you with foreclosure.

STAGE 2 : THE 90-DAY PRE-FORECLOSURE NOTICE - The timing of when you will receive a 90-Day Pre-Foreclosure Notice varies from case to case, but typically if you fall 30 or more days behind you will likely receive this letter. Under New York State law, this letter is **required** to be sent to you. The Bank must wait at least 90 days from sending this letter before they begin a foreclosure action against you. This 90-day window gives you the opportunity to try to work with the Bank to find an alternative to foreclosure. This notice must tell you how much you must pay to bring your loan current. It must also provide the names and telephone numbers of at least 5 not-for-profit housing counseling agencies serving your county. (You will find a list of local housing counseling agencies for your area in the folder in the front of this guidebook.)

If you are reading this guide, you most likely have already received this notice. If you have

recently received this letter, we **strongly** urge you to do one of two things: (1) Contact a local housing counseling agency and make an appointment to meet with them, as they can help you through the process of working with the Bank without any cost to you; or (2) If you choose not to utilize the services of a housing counseling agency, contact your Bank directly. The longer you wait to work with your Bank, the harder it will be for you to keep your home!

Page 8 shows an example of what a 90-Day Pre-Foreclosure Notice looks like.

STAGE 3: THE DEMAND LETTER

The timing of when you will receive a “Demand Letter” depends on the language in your Mortgage, but typically this will occur when you are 45 to 60 days behind on payments. Although the Bank is threatening to begin a foreclosure proceeding if you do not pay and may even say that you are in foreclosure when you contact them, at this point they have not actually filed any documents with the Court.

It is important to note that you may receive a Demand Letter, even if you have contacted the Bank and have begun to work with them in trying to work out a plan to get current. You may have sent lots of documents to the Bank, which they are actively reviewing. Regardless of these efforts, you still may receive a Demand Letter. With many large banks, the Demand Letter is automatically generated when you fall behind by a certain amount of time on payments. Therefore, even if you are being reviewed for workout solutions, you still will receive the Demand Letter. It does not mean that the Bank has stopped reviewing your documents. Therefore, if the Bank has asked you for more documents, send them in – do not assume that process has ended.

An example of a Demand Letter is on page 9.

SAMPLE 90-DAY PRE-FORECLOSURE NOTICE

*Notice to borrowers with home loans 90 days prior to initiation of legal action
(Pursuant to RPAPL§ 1304)*

**You Could Lose Your Home.
Please Read the Following Carefully**

As of _____, your home loan is _____ days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of _____ dollars by _____.

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure you that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department's toll free helpline at 1-877-Bank-NYS (1-877-226-5697) or visit the department's website at <http://www.banking.state.ny.us>.

SAMPLE DEMAND LETTER

Sent Via Certified Mail
7196 9001 9295 5783 0918

Hours of Operations (CST)
Monday: 8 am – 7 pm
Tuesday-Thursday: 8 am – 8 pm
Friday: 9 am – 5 pm
Saturday: 8 am – 12 pm

10/8/2011

Ms. Betsy Ross
123 Main Street
Anywhere, New York 12345

NOTICE OF DEFAULT AND INTENT TO ACCELERATE

Re: Deed of Trust/Mortgage Dated:	4/1/2006
VA/FHA/PMI:	N/A
Loan #:	7162042400
Property:	123 Main Street, Anywhere New York 12345

Dear Mortgagor(s):

American Dream Loan Servicing LP, on behalf of the owner and holder of your mortgage loan, and in accordance with the referenced Deed of Trust Mortgage and applicable state laws, provides you with formal notice of the following:

The mortgage loan associated with the referenced Deed of Trust/Mortgage is in default for failure to pay amounts due.

To cure this default, you must pay all amounts due under the terms of your Note and Deed of Trust/Mortgage. As of 10/8/2011, the total amount necessary to bring your loan current is \$3,955.30. Additional amounts may become due and payable under your Note and Deed of Trust/Mortgage after 10/8/2011. For the exact amount you may pay to bring your loan current, please contact at our office at (800)999-5678. Payment must be in the form of cashier's check, money order, or bank certified funds.

If you have not cured the default within forty-five (45) days of this notice we will accelerate the maturity date of the Note and declare all outstanding amounts under the Note immediately due and payable. Your property that is collateral for the Note may then be scheduled for foreclosure in accordance with the terms of the Deed of Trust/Mortgage and applicable state laws.

AMERICAN DREAM LOAN SERVICING LP IS A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT YOUR DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

If you are not obligated on the debt or if the debt has been discharged in a bankruptcy proceeding, this is for informational purposes only and is not an attempt to collect the debt from you personally.

STAGE 4: SUMMONS AND COMPLAINT -

The Summons and Complaint is what tells you that a lawsuit has been started. The Summons and Complaint are created by the Bank's attorneys, and throughout them you will be referred to as the Defendant. The Summons is usually one of the first pages, and tells you some basic information about the lawsuit that has been started. It will tell you the name of the entity that has filed the foreclosure against you. This may simply be the name of your Bank.

However, the name of the party suing you may be a long, confusing name that does not sound familiar to you. For example, you may see that the Plaintiff is "MORTGAGE SERVICING AMERICA, AS TRUSTEE FOR MORTGAGE INDEX 2005-RD4, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-RD4 UNDER THE POOLING AND SERVICING AGREEMENT DATED DECEMBER 1, 2005." The example of a Summons that follows this section shows an example of one of these types of trusts.

The reason this sometimes happens is that your Bank may have taken your mortgage, bundled it with hundreds of others, and sold them on Wall Street. If that was the case, they created a "Trust" (which is a type of legal entity) that holds all the mortgages. Therefore, when a foreclosure is filed it has to be the Trust that actually is the Plaintiff.

REGARDLESS OF WHOM YOU SEE LISTED AS THE PLAINTIFF, THERE WILL NOT BE ANY REAL-WORLD DIFFERENCE IN HOW THE FORECLOSURE PROCEEDS.

The Complaint tells you and the Court the reasons the Bank is suing you and what they are asking the Court to do. Because this is a foreclosure, the Bank is claiming you have not made your monthly payments as you promised in your Mortgage and Note. When

you signed your Mortgage you put your house up as collateral, in case you could not pay the amount you borrowed. Now that you have fallen behind on your payments (also known as "defaulting"), the Bank is asking the Court to enforce the terms of the Mortgage. Terms of the Mortgage typically allow the Bank to sell your house if you default on your payments to them.

When you receive the Summons and Complaint, you should also receive a notice that again informs you that help is available through a housing counseling agency. This notice will be on a different colored paper, and in larger font. It should list all the HUD-approved housing counseling agencies listed in the folder of this guidebook. If you have not contacted a housing counseling agency at this point, we once again **STRONGLY** urge you to contact one of them and make an appointment to talk to a counselor.

It is important to note that you may receive a Summons and Complaint even if you have begun working with a housing counseling agency or with the Bank directly. You may be working with the Bank's "loss mitigation" department, which is the group that works with struggling homeowners to come up with a plan that allows you to keep your home. You may have sent in multiple rounds of documents to the Bank, and may be hopeful that a solution to your problem is just around the corner.

However, most large banks have a completely separate department that deals with filing foreclosures. Therefore, even if you are in the process of working with the Bank, the Bank still may start a foreclosure against you. If that is the case, do not despair. You can continue to work with the Bank throughout the foreclosure proceeding. So if they have asked for more documents, or have told you they are reviewing your file, you should continue this process!

Once you receive the Summons and Complaint, it is **EXTREMELY** important that you open **ALL** mail sent to you by your Bank's attorney, and by the Court. Important notices about the status of your case will be mailed to you, and it is critical that you be aware of these developments.

You will find an example of the first pages of a Summons and a Complaint on pages 12 and 13.

STAGE 5 (OPTIONAL): FILING AN ANSWER OR NOTICE OF APPEARANCE - Once you receive the Summons and Complaint you can file an "Answer" or a "Notice of Appearance". If you were personally served the Summons and Complaint (typically done by a "process server", who is a 3rd party that is hired by the Bank's attorneys to deliver legal documents), you have 20 days to file an Answer. If the Summons and Complaint were left on your door, you should also receive a copy in the mail. If this method of delivery is used, you have 30 days to file an Answer.

An Answer is a written response to the Complaint. It does not HAVE to be filed by you – it is optional. You typically would file an Answer only if you have legal claims against the Bank. If you simply fell behind on payments and were not able to catch up, filing an Answer is often not necessary. An Answer typically contains a paragraph-by-paragraph response to each paragraph in the Complaint.

In addition, the Answer is where you would raise any "counterclaims" against the Bank. Counterclaims are simply legal claims you have against the Bank. The Answer is where you can tell the Court any ways that you think the Bank may have violated your rights. If you have claims against the Bank and you do not file an Answer, you may be waiving your right to bring these issues up in the future.

If you wish to file an Answer, please refer to the separate section in this guidebook entitled "Filing a Pro Se Answer", located toward the back of this guidebook.

A "Notice of Appearance" is a document filed with the Court that alerts the Court that you are an active participant in the foreclosure proceeding. By filing a Notice of Appearance, you are telling the Court that you want copies of all future legal documents related to the foreclosure to be sent to you. (If you have chosen to file an Answer, you automatically have made this request and do not need to file a Notice of Appearance.) If you wish to file a Notice of Appearance instead of an Answer, please refer to the separate section in this guidebook entitled "Filing a Notice of Appearance", located toward the back of this guidebook.

IF YOU DO NOT FILE AN ANSWER OR A NOTICE OF APPEARANCE, THE BANK IS NOT REQUIRED TO SEND YOU COPIES OF LEGAL DOCUMENTS FILED WITH THE COURT LATER IN THE FORECLOSURE PROCESS. WE STRONGLY RECOMMEND THAT YOU FILE EITHER AN ANSWER OR A NOTICE OF APPEARANCE AT THIS POINT IN THE PROCEEDING.

Regardless of whether you file anything with the Court, you still have the opportunity to participate in the Settlement Conference process.

SAMPLE SUMMONS

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

NATIONAL TRUST COMPANY, AS TRUSTEE
OF THE AMERICAN INDEX MORTGAGE LOAN
TRUST 2005-AR14, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-AR14 UNDER THE
POOLING AND SERVICING AGREEMENT
DATED JUNE 1, 2005

Plaintiff,

v.

BETSY ROSS

“JOHN DOE #1” to “JOHN DOE #10,” the last 10
names being fictitious and unknown to plaintiff; the
persons or parties intended being the persons or parties,
if any, having or claiming an interest in or lien upon the
mortgage premises described in the verified complaint,

Defendants.

Index No. 2011-12345

Date Filed: 12/5/2011

SUMMONS

Plaintiff designated Monroe county
as the place of trial based on the
mortgaged premises in the action.

Plaintiff’s principal place of
business is 5000 Golden Parkway,
Suite 200, Topeka, Kansas 66601

To the above-named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a
copy of your answer, or, if the complaint is not served with the summons, to serve a notice
of appearance, on the plaintiff’s attorneys within twenty (20) days after the service of this
summons, exclusive of the day of service (or within thirty (30) days after the service is complete
if this summons is not personally delivered to you within the State of New York); and in case
of your failure to appear or answer, judgment will be taken against you by default for the relief
demanded in the complaint.

SAMPLE COMPLAINT

STATE OF NEW YORK
 SUPREME COURT COUNTY OF MONROE

NATIONAL TRUST COMPANY, AS TRUSTEE
 OF THE AMERICAN INDEX MORTGAGE LOAN
 TRUST 2005-AR14, MORTGAGE PASS-THROUGH
 CERTIFICATES, SERIES 2005-AR14 UNDER THE
 POOLING AND SERVICING AGREEMENT DATED
 JUNE 1, 2005

Plaintiff,

v.

Index No. 2011-12345

Date Filed: 12/5/2011

BETSY ROSS

“JOHN DOE #1” to “JOHN DOE #10,” the last 10
 names being fictitious and unknown to plaintiff; the
 persons or parties intended being the persons or parties,
 if any, having or claiming an interest in or lien upon the
 mortgage premises described in the verified complaint,

COMPLAINT

Defendants.

Plaintiff, by its attorneys Steven J. Baum, P.C., complains and alleges, upon information and belief, as follows:

FIRST. Plaintiff is, and at all times relevant herein is a domestic National Trust organized under the laws of the United State of America with its principal place of business at 5000 Golden Parkway, Topeka, Kansas 66602.

SECOND. On or about the following date, the following named obligor, for the purpose of evidencing indebtedness in the following amount and interest, daily executed and computed.

STAGE 6 : THE SETTLEMENT CONFERENCE -

At this point in the process, you have now been made aware through the Summons and Complaint that the Bank has started a foreclosure in the Court system. You may have filed an Answer or Notice of Appearance, or you may have decided to skip that optional step. Either way, the next step in the process will be the scheduling of a "Settlement Conference".

Under New York State law, a Settlement Conference **must** be held if you are living in your 1-to-4 unit home. The idea behind the Settlement Conference is to protect the homeowner. By now, many homeowners will have already contacted the Bank to work out a solution. However, banks can be incredibly difficult to work with. Homeowners send the same documents to the Bank many times, only to have the Bank tell them they never received them, or that still more documents are needed. Sometimes, the Bank will take a long time to review your documents, and then tell you that the documents are out of date and therefore you need to send updated documents again.

The idea behind the Settlement Conference is to give the homeowner an opportunity to work with the Bank to come to some alternative to foreclosure, with the Court's help. The general idea is that until the Bank proves to the Court that they have attempted to find an alternative to foreclosure, the Court will not allow the foreclosure to move forward in the Court system. In this way, the Settlement Conference can be thought of as a "safety zone" for homeowners – while you are in the Settlement Conference phase of the foreclosure process, the foreclosure essentially is "frozen" in the Court system. Therefore, you do not have to worry about showing up at your house to find the locks changed, or a notice saying you must be out of your house in days, or any of the other horror stories you may have read about from other parts of the country.

You should receive a letter in the mail from the Court with the time, date and place of the Settlement Conference. The notice of your Settlement Conference typically comes a few weeks after the Summons and Complaint. The notice will also list the documents you should bring with you to the Settlement Conference.

If you do not show up at your first scheduled Settlement Conference without contacting the Court, the Court may declare this stage of the foreclosure to be over, and allow the foreclosure to move forward. This is your best opportunity to work with the Bank and attempt to save your home, but it only can work if you take an active part in the process.

**IT IS VITAL THAT YOU
ATTEND THE FIRST
SCHEDULED SETTLEMENT
CONFERENCE!**

If for some reason you cannot attend the scheduled Settlement Conference, you will need to contact the Court to reschedule. Contact information can be found in the front folder pocket of this guidebook. You should do this as soon as you realize there is a conflict. If you have received a Summons and Complaint, but have not received the notice for a Settlement Conference yet, you should call the Court and ask if one is scheduled. Page 15 shows an example of the letter you will receive from the Court regarding the scheduling of your Settlement Conference.

SAMPLE SETTLEMENT CONFERENCE LETTER**IMPORTANT NOTICE**

January 5, 2011

Ms. Betsy Ross
123 Main Street
Anywhere, New York 12345

RE: NATIONAL TRUST COMPANY, AS TRUSTEE OF THE AMERICAN INDEX MORTGAGE LOAN TRUST 2005-AR14, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR14 UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2005 v. BETSY ROSS

Dear Ms. Ross,

A mortgage foreclosure action has been commenced against you by your mortgage lender. It is important that you do not ignore this notice or any court papers or **YOU MAY LOSE YOUR HOME.**

A CONFERENCE WITH YOU AND YOUR LENDER IS SCHEDULED BEFORE JUDGE WABNER ON FEBRUARY 1, 2011 at 10:00 A.M. ON THE FOURTH FLOOR OF THE MONROE COUNTY HALL OF JUSTICE, 99 EXCHANGE BLVD., ROCHESTER, NY. THIS CONFERENCE IS AVAILABLE TO YOU IF YOU ARE STILL RESIDING AT THE PREMISES BEING FORECLOSED, 123 Main Street, Rochester, New York 14614.

Sincerely,
Supreme Court County Clerk

Who attends a Settlement Conference?

The homeowner can appear at a Settlement Conference with or without an attorney. (Appearing without an attorney is referred to as appearing “pro se.”) The Bank must have a representative available at the Settlement Conference. Typically, this will be the Bank’s attorney.

What should you expect at a Settlement Conference?

The Settlement Conference is your opportunity to work with the Bank and try to find an alternative to foreclosure. You will describe your situation; the Court may ask questions about your finances, your income and your debts. The Court may also ask whether you have any savings set aside. The Bank should be able to describe how much you owe and how this amount was calculated. There will be no witnesses or testimony, it is simply an opportunity for both sides to ask questions and explore solutions.

The Bank will likely give the homeowner a packet of forms that must be filled out and returned to the Bank, so that the Bank can review your loan for a possible “loan modification.” The forms the Bank asks you to fill out are designed to give the Bank a snapshot of your current financial situation. Therefore, they will ask about both your income and your monthly expenses. Some of the forms will be specific to your Bank, while others will be forms used by all banks as required by federal law. In addition, most banks will ask for your most recent bank statements and a copy of your income taxes. Again, this is used to have a better understanding of your financial situation.

It is very rare that you will be able to come to an agreement with the Bank at the first Settlement Conference. What typically happens is that the Court will schedule another Settlement Conference for you.

Again, it is very important that you attend each and every Settlement Conference that is scheduled.

What are your rights at a Settlement Conference?

At the Settlement Conference, you have the right to:

- Have a friend, family member, attorney or advocate assist you;
- Have anything explained to you;
- Ask for an adjournment (a rescheduling) of the conference if you cannot attend for a valid reason
- Ask for copies of:
 - Your Note
 - Your Mortgage
 - A payment history (so you can review what payments have been applied and when)
 - An explanation of any fees or charges to your loan

What should you do to prepare for your settlement conference?

STEP 1: CONTACT A HUD-APPROVED HOUSING COUNSELING AGENCY - Located in the front folder of this guidebook is a list of your local HUD-approved housing counseling agencies. If other companies or individuals tell you that they can help save your home if you pay them money, you should be suspicious – often times these are scammers who are trying to make a quick dollar at your expense. High quality and expert services are available for free from the agencies listed in this guide, and we recommend you contact one of them if you are looking for help.

STEP 2: GATHER ALL YOUR DOCUMENTS - You are required to bring some documents with you to the Settlement Conference. There are other documents the Bank will require to review your loan. If you have already submitted these documents (often called a “loss mitigation” or “workout” package), you should expect to submit them again.

You should also gather all the documents you received when you originally got the loan (referred to as the “loan documents” or “closing documents”) if you can locate them. A list of documents to gather is included below.

✓	Documents to Gather
	The last two months of pay stubs for everyone who regularly helps pay the mortgage
	If you receive rental income: Copies of your current lease AND Schedule E in tax returns AND/OR Bank statements showing regular rental deposits AND/OR Copies of rent receipts you give to your tenants AND/OR Section 8 or other subsidy agreements
	Tax returns for the last two years
	If you receive money from the state (social security, disability payments, VA benefits etc) or a pension: Most recent award letter AND 3 months worth of bank statements showing deposits of this money OR 3 months worth of payment stubs
	If you are self-employed you should have a profit and loss statement available for the last two quarters
	If other people in your household are contributing to the household bills, copies of their paystubs/income documents
	Your most recent utility bill that is listed in your name
	Financial Form provided by the Bank
	Hardship letter (This is a letter you write that explains why you fell behind. You should indicate in the letter if this was a temporary setback, or if this is a permanent change in your household income.)

✓	Documents to Gather
	Your most recent mortgage statement
	Forbearance, loan modification, or workout offers you have received, regardless of whether you accepted or rejected them
	All papers and letters you have received from the Court, the Bank, and the Bank’s attorney
	Copies of your loan application (or the Uniform Residential Loan Application)
	Your HUD-1 Settlement Statement
	The Note and any riders (Balloon Rider or Adjustable Rate Rider)
	Mortgage and riders
	Truth-in-Lending Disclosure Statement
	Good Faith Estimate
	Your Deed
	Most recent appraisal (if you have one)
	Any other papers related to fees you paid at closing, either to your lender or your broker or anyone else

If you cannot find all these documents, you should still **GO TO THE SETTLEMENT CONFERENCE**. If there are documents the Bank provided to you when you initially got your loan (like the Note or the Mortgage) and you don’t have a copy, you can request a copy of them at the Settlement Conference.

STEP 3: COMPLETE YOUR BUDGET - Read through this entire section before filling out your budget

The budget in this guide is only for your use. No one else is going to see it unless you show it to them. It is designed to help you make an honest assessment if you can afford to keep your home. This is also good preparation for meeting with your housing counselor and filling out your Bank's financial forms.

MONTHLY INCOME

First, you need to compute your total monthly income. Listed below are the most common sources of income. You want to list all of your personal sources of income (Column A), as well as any other income from anyone else in your house if they are helping contribute to the mortgage (Column B).

Please remember that you MUST be able to verify all the sources of income you use in the budget. Your Bank will not consider sources of income without accompanying verification. If you are using another household member's income in your budget, count that person's expenses as well and make sure you have verification of their income.

Gross Household Income: Adding columns A and B gives you your "Total Gross Household Income." This amount is \$_____. Multiply this number by .31. This equals \$_____, and we will refer to this as your "31% Payment". Most of the large banks in the country have recently settled on 31% as being one of the main standards they use in determining if a payment is affordable – anything above 31% is often looked at as being too high. Therefore, your 31% Payment is an approximate amount you should

	Gross Household Income		Net Household Income	
	Your Income BEFORE Taxes (A)	Other Income in Your Home BEFORE Taxes (B)	Your Income AFTER taxes (Net Income) (C)	Other Income in your home AFTER taxes (D)
Regular Wages				
Part Time Work				
Rental Income				
Public Assistance				
Unemployment				
Disability				
Social Security				
Pension				
Alimony				
Other				
Sub-Total				
TOTAL INCOME	TOTAL GROSS INCOME (Add columns A and B) \$ _____		TOTAL NET INCOME (Add columns C and D) \$ _____	

expect to pay in total for your first mortgage, homeowners insurance, property taxes and condo fees/homeowners association fees.

Remember, there is no law that says you cannot pay more than 31% -- this is merely meant as a guide to give you a better idea of what many of the national banks have recently done. In addition, if you were paying less than this before you defaulted, be prepared for your mortgage payment to increase to this amount each month.

Net Household Income: Adding columns C and D gives you your "Total Household Net Income." This amount is \$_____. This is how much you actually receive each month, and the amount available to pay your bills.

MONTHLY EXPENSES

Now that we have looked at your income, we need to compute your total monthly expenses. Included on the next page (page 20) is a list of typical household expenses you may have each month. Fill in each category as best you can. We realize that it often can be difficult to estimate certain categories, such as how much you spend on food each month. However, it is vital for you to fill this out as accurately as possible. The only way to make an accurate determination if you can afford your home is to look at what else you are spending your money on. You will likely have to fill out a very similar form for your Bank, so working on your budget now will help you.

Expenses	Amt.	Expenses	Amt.
Monthly Housing Expenses:		Monthly Food and Groceries:	
First Mortgage (Last known payment amount, even if you are not currently paying it)		Groceries	
Second Mortgage		Lunch (work or school)	
Cond Fees/Maintenance		Dinner Out	
Homeowner's Insurance (if it is not paid by your bank, also known as "escrowed")		Pet Food	
Property Taxes (if it is not escrowed)		Other	
Cable		TOTAL	\$
Internet		Monthly Transportation Expenses:	
Telephone		Car Payments	
Cell Phone		Insurance	
Gas		Gas	
Water		Maintenance - oil changes, etc.	
Electricity		Tolls	
Other		Parking	
TOTAL	\$	Bus	
Monthly Child-Related Expenses:		Other	
Alimony/Child Support		TOTAL	\$
Day Care		Monthly Education Expenses:	
Other		Tuition/Fees	
TOTAL	\$	Student Loans	
Monthly Clothing Expenses:		Books/Supplies	
Clothing		Other	
Laundry- including Dry Cleaning		TOTAL	\$
Other		Other Monthly Expenses:	
TOTAL	\$	Religious Contributions	
Monthly Medical Expenses:		Credit Card Payment	
Insurance		Credit Card Payment	
Premiums/Co-Pays		Credit Card Payment	
Doctor/Dentist		Personal Loans Other	
Medication		Other	
Other			
TOTAL	\$	TOTAL	\$

Now take each of the subtotals from your expense list and copy them in below.

My Total Monthly Expenses	
Type of Expense	Amount
Housing	
Child Related	
Clothing	
Medical	
Food & Grocery	
Transportation	
Education	
Other	
TOTAL MONTHLY EXPENSES	\$

Next you need to calculate how much money you have after you pay all your bills, or how much more you are spending each month than you are earning. Take your Total Net Income, which you calculated earlier, and subtract your Total Monthly Expenses, which you just calculated.

Total Net Income	\$ _____
Total Monthly Expenses	- \$ _____
MONTHLY SURPLUS/DEFICIT	= \$ _____

If this amount is negative, it is referred to as your “monthly deficit”. If this amount is positive, it is referred to as your “monthly surplus”. If you have a monthly deficit, do you see any sources of income that you can increase, or any expenses you may be able to cut back on? In addition, look at the 31% Payment we calculated earlier. If we plugged the 31% Payment amount into your budget in place of the current Monthly Mortgage Payment, would that be enough to turn your monthly deficit into a monthly surplus? If not, you may not be able to afford your home and

you should seriously consider other options (such as a “short sale” or a “deed-in-lieu of foreclosure”).

STEP 4: TELL YOUR STORY - The reasons you ended up in foreclosure are probably long and complicated, and each borrower’s situation is slightly different. The Settlement Conference is a chance for you to share your story with the Court and the Bank. By preparing to tell your story before the Settlement Conference, it is more likely you will tell your story in a way that everyone can understand. They need to know why you are in foreclosure, and what you have done to resolve your situation. The clearer you are to the Court and the Bank, the easier it will be to resolve the foreclosure. You should write out answers to the following questions:

What are the reasons for falling behind on your mortgage? _____

What have you done to try to keep your home? _____

Were there any terms of your loan that were different than what you were promised? _____

You should also be able to talk about basic information about your loan, such as the following:

The current monthly payments are \$ _____.
 The current interest rate is: _____% and my interest rate (circle one) changes/does not change. I last made a payment on my loan in _____ (list month and year).

Have you attempted to work with your Bank to find a solution already? If so, make a list below of all the people you have contacted, and the times you have sent in documents before the Settlement Conference.

STEP 5: ATTEND THE SETTLEMENT CONFERENCE AND WORK TOWARDS A LOAN MODIFICATION

NOTE TAKING PAGES: Bring this with you to all the Settlement Conferences you go to, and take notes during the conference.

Date of Settlement Conference:				
Who attended?				
	Name	Phone Number	Email	Did you receive a business card?
Referee/Judge				
Attorney for the Bank (Plaintiff)				
Other				
Date of Next Settlement Conference:				
Summary of What Happened at this Settlement Conference:				
What you need to do before the next Settlement Conference:				
What the Bank needs to do before the next Settlement Conference:				

Before you leave, try to summarize your understanding of what happened at the Settlement Conference, and what will happen next. Ask the Court to confirm you are correct.

Date of Settlement Conference:				
Who attended?				
	Name	Phone Number	Email	Did you receive a business card?
Referee/Judge				
Attorney for the Bank (Plaintiff)				
Other				
Date of Next Settlement Conference:				
Summary of What Happened at this Settlement Conference:				
What you need to do before the next Settlement Conference:				
What the Bank needs to do before the next Settlement Conference:				

Before you leave, try to summarize your understanding of what happened at the Settlement Conference, and what will happen next. Ask the Court to confirm you are correct.

WORKING TOWARD A LOAN MODIFICATION

If your loan can be modified there are several ways your Bank will likely go about it. The Bank may do any of the following:

- Lower your interest rate
- Convert an Adjustable Rate Mortgage to a Fixed Rate Mortgage
- Extend the term of the loan
- Forgive a portion of your principal balance

Regardless of which way the Bank considers, they typically will modify a loan by doing a "capitalization". Capitalization occurs when items owed on a loan (e.g. past due interest, taxes, late charges, legal costs, etc.) are added to the unpaid principal balance of the loan and are treated as part of a new principal balance. In adding them to the unpaid principal balance, the Bank will cause the overall amount that is owed to the Bank on that loan to increase. The upside to a capitalization is that because all current outstanding charges have been rolled into the unpaid principal balance, the Borrower is now seen as current on their mortgage payments. By doing a capitalization, the homeowner does not have to make up all missed payments at one time.

Any agreement you reach should clearly state how much you owe, what your interest rate will be going forward, what each charge is for, what your monthly payment will be, how long you will be making that payment, and what will happen if either side violates the agreement. Ask for a written explanation of any and all charges that are part of this loan modification, and ask that attorney's fees and late fees be reduced or waived.

STAGE 7A: SUCCESSFUL SETTLEMENT

CONFERENCE - If you have successfully worked out a deal with the Bank in the Settlement Conference, the foreclosure proceeding will be discontinued. The Bank should file a "Stipulation of Discontinuance", which is a document that tells the Court that

the Bank is no longer pursuing a foreclosure. In addition, the Bank will file a "Cancellation of the Lis Pendens", which ensures that the land records with the local County Clerk accurately reflect that the foreclosure proceeding is over.

STAGE 7B: UNSUCCESSFUL SETTLEMENT

CONFERENCE - If you are unable to work out a deal with the Bank at the Settlement Conference, the Bank will ask for an "Order of Reference", which is the next step in the foreclosure proceeding. The Bank will file either a "Summary Judgment Motion" (if you filed an Answer) or a "Default Motion" (if you did not file an Answer). Both these motions allow the foreclosure to go forward against you, and a Referee will be appointed to compute the amount due and owing under the note and mortgage. Once the Referee is done computing the amount owed, the Bank will move for a Judgment of Foreclosure and Sale, which allows them to sell the property.

STAGE 8: POST JUDGMENT - Once a Judgment of Foreclosure and Sale has been signed, a sale date is set and the property is sold at public auction. After the auction to sell the property, you will not have too much time to find a new place to live. If you do not move out on your own, you will be served with eviction papers.

5 CONCLUSION

It bears repeating that there is help available. You may speak with a HUD-approved housing counselor by contacting any of the agencies listed in the front folder pocket of this guidebook. If you are going to represent yourself in the Settlement Conference process, by preparing ahead of time, gathering all your documents and attending all the Settlement Conferences, you are in a much better place to successfully keep your home. Although the Settlement Conference can be long and challenging, it has allowed many New Yorkers to keep their homes.

6 APPENDICES

INSTRUCTIONS ON HOW TO SUBMIT A NOTICE OF APPEARANCE “PRO SE” (Without an attorney)

What is a Notice of Appearance?

A Notice of Appearance is a document filed with the Court that alerts the Court that you would like to be an active participant in the foreclosure proceeding. By filing a Notice of Appearance, you are telling the Court that you want copies of all future relevant legal documents related to the foreclosure to be sent to you. (If you have chosen to file an Answer, you automatically have made this request and do not need to file a Notice of Appearance.)

Why is it important to file a Notice of Appearance?

If you decide to NOT file an Answer, you should file a Notice of Appearance which will guarantee that you will receive all future pleadings and documents in your court case, including notice of sale. If you do not file an Answer or a Notice of Appearance, the Bank is NOT required to send you copies of legal documents filed with the Court later in the foreclosure process. Therefore, we HIGHLY recommend that you file either an Answer or a Notice of Appearance at this point in the foreclosure proceeding.

If you received a Summons and Complaint, you have the right to serve and file an Answer to the Complaint. Sometimes, however, it may not be a good idea to file an Answer. You

have to make that choice if you are unable to find an attorney to help you. There are two possible reasons why you may NOT want to file an Answer.

1. You may not have any legal defenses or claims to the foreclosure and you simply fell behind on your mortgage because of a loss of income.
2. If you file an Answer and are unsuccessful in convincing the Court that you are correct, you will be responsible for the legal fees that the Bank must pay to defend the foreclosure. This will increase the amount of money you owe the Bank, which could increase the amount of money you will have to pay back. This ultimately can make it even harder for you to obtain a loan modification or some other type of workout.

Where can you get the form to fill out?

A blank Notice of Appearance and Affirmation of Service are included in the front folder pocket of this guidebook.

**YOU SHOULD
KEEP COPIES
OF ALL COURT
DOCUMENTS FOR
YOUR RECORDS.**

FILLING OUT THE NOTICE OF APPEARANCE

STEP 2: FILL OUT THE FIRST PAGE OF THE NOTICE OF APPEARANCE - Fill out the first page of the form as indicated below, including signature, current address, and your current and most reliable telephone number. Don't forget to date the document!

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

NATIONAL TRUST COMPANY, AS TRUSTEE OF THE AMERICAN INDEX MORTGAGE LOAN TRUST 2005-AR14, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR14 UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2005

Plaintiff,

v.

BETSY ROSS
"JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff; the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the verified complaint,

Defendants.

Index No. 2011-12345
Date Filed: 12/5/2011

SUMMONS

Plaintiff designated Monroe county as the place of trial based on the mortgaged premises in the action.

Plaintiff's principal place of business is 5000 Golden Parkway, Suite 200, Topeka, Kansas 66601

To the above-named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with the summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF Monroe

National Trust Company
As Trustee, et al

Plaintiff

INDEX NO: 2012-12345

-against-

Betsy Ross, et al

Defendant

NOTICE OF APPEARANCE

1. My name is Betsy Ross and I am the defendant in this case.
2. I enter my pro se appearance in this matter and demand receipt of all documents filed in this case, as well as notice of all further proceedings.
3. I will represent myself, unless I or an attorney notify you otherwise. No attorney will represent me in this case.
4. All court papers may be mailed to me by first class mail at the address listed below.
5. My mailing address where I will accept legal documents is as follows:

Service address:

123 Main Street
(Street address)

Angoliers, NY, 12015
(Town/City, State, Zip Code)

(123) 456-7890
(Telephone Number(s))

Betsy Ross
(Sign your name)

Betsy Ross
(Print your name)

Dated: January 3, 2013

STEP 1: FILL OUT THE "CAPTION" OF THE NOTICE OF APPEARANCE - As shown in the sample Notice of Appearance above, fill in the top part of the Notice of Appearance form (known as the "Caption") by copying the necessary information from the Summons or Complaint.

STEP 3: MAKE 3 COPIES OF THE NOTICE OF APPEARANCE

STEP 4: "SERVE" THE PLAINTIFF'S ATTORNEY

Ask someone **other than yourself** who is at least 18 years old and **not a Defendant** in the lawsuit to "serve" the first copy of the Notice of Appearance on Plaintiff's attorney at the address listed on the Summons and Complaint. The easiest way to "serve" the Notice of Appearance is to arrange for the person to send it by certified mail, return receipt requested, or by overnight delivery service. **Be sure to keep the proof of mailing and delivery.**

STEP 5: FILL OUT THE AFFIDAVIT OF SERVICE

The person who "served" the copy of the Notice of Appearance on the Plaintiff's attorney from step 4, must fill out the Affidavit of Service in front a Notary Public and have it notarized. You can often find a Notary Public at a branch of your local bank. Please be aware they may charge a small fee for this service.

STEP 6: DATE STAMP AND FILE THE NOTICE OF APPEARANCE AT COUNTY CLERK

Bring the original Notice of Appearance, the remaining two copies of the Notice of Appearance, the original notarized Affidavit of Service and a copy of the notarized Affidavit of Service to your County Clerk's office. (See list of the local area court clerks included in the front folder pocket of this guide.) At the County Clerk's office, state that you wish to file a Notice of Appearance. Be sure to ask the clerk to "time-stamp" the original Notice of Appearance, the original Affidavit of Service, the two copies of the Notice of Appearance, and the copy of the Affidavit of Service so that you have proof of the date and time you filed your documents. Keep for your records a time stamped copy of the Notice of Appearance and a stamped copy of the Affidavit of Service.

AFFIDAVIT OF SERVICE

I, Betsy Ross, served the within Notice of Appearance on Plaintiff's attorney as follows
(attorney's name and address):

Lawyer Bob
555 South Street
Anywhere, N.J. 12345

I served the Verified Answer by the following method (check all that apply):

first class mail
 certified mail
 certified mail, return receipt requested
 overnight delivery service
 facsimile
 personal delivery.

on the 1st day of January, 2013.

I am eighteen years or older and I am not a Defendant in this lawsuit.

Betsy Ross
Signature:
Betsy Ross
Print Name:

Sworn to and subscribed before me on this
3rd day of January, 2013

Abraham Lincoln
Notary Public

STEP 7: FILE THE NOTICE OF APPEARANCE AT THE SUPREME COURT CLERK

Go to the Supreme Court Clerk's office with your third copy of the Notice of Appearance. (See list of local area court clerks included in the front pocket of this guide.) Tell the clerk you would like to file a Notice of Appearance. Sometimes the court clerk will not accept a notice of appearance before your first settlement conference. Do not worry. Just bring your copies to your conference and hand it to the judge.

STEP 8: APPEAR AT YOUR SETTLEMENT CONFERENCE

INSTRUCTIONS ON HOW TO SUBMIT AN ANSWER “PRO SE” (Without an attorney)

What is An Answer?

An Answer is a written response to the Complaint, where you list any and all of your defenses to the foreclosure, as well as any counterclaims you may have against the Bank. This section of the guidebook will explain step-by-step how to write and file an Answer if you can't find an attorney to help you.

Should I file an Answer?

If you have received a Summons and Complaint, you have the right to serve and file an Answer to the Complaint. This will help you preserve your legal rights and guarantee that you receive notice of all future actions in the court case, including the sale of your home. If you don't file an Answer, the judge may enter a "default" judgment against you (which means you did not submit an Answer and therefore are not contesting the Bank's legal right to foreclosure). In addition, if you don't file an Answer you will probably lose your right to raise any defenses to the foreclosure down the road.

Sometimes, however, it is not helpful to file an Answer. If you are unable to find an attorney to help, you will have to make that choice. There are two possible reasons why you may NOT want to file an Answer.

1. You may not have any legal defenses or claims to the foreclosure
2. If you file an Answer and are unsuccessful in convincing the judge that you are correct in your claims, you will be responsible for the legal fees that the Bank must pay to successfully pursue the foreclosure. This will increase the amount

of money you owe the Bank. This increase could ultimately make it harder for you to obtain a loan modification or some other type of workout.

If you decide to NOT file an Answer, you should file a Notice of Appearance which will guarantee that you will receive all future pleadings and documents in your court case, including notice of sale. (There are instructions in this guidebook if you choose to file a Notice of Appearance instead of an Answer.) If you do not file an Answer or a Notice of Appearance, the Bank is NOT required to send you copies of legal documents filed with the Court later in the foreclosure process.

We HIGHLY recommend that you file either an Answer or a Notice of Appearance early in the foreclosure proceeding.

This is a general guide through the foreclosure process. Each person's situation is unique, and therefore consultation with an attorney is recommended, if possible.

Where can you get the form to fill out?

A blank Answer and Affirmation of Service is included in the front folder pocket of this guidebook.

When should you file an Answer?

- If you were served personally (the court papers were handed to you in person), you have 20 days from the date of service (the date you were handed the papers) to file your Answer.
- If you were served by mail (you didn't receive a copy personally but instead received the foreclosure summons only by mail), you have 30 days to file your Answer.

If it has been more than 30 days since you were served, you may still be able to file an Answer but you will need to ask permission from the Court. One way to approach this situation is to draft the Answer, try to file it with the Court and serve it on the Bank's attorney. The Bank's attorney may try to claim that your Answer is too late to accept, but the Court also may decide to allow you to file your Answer, so it is worth trying.

Where can you find the information you need to respond?

The information you need to fill in your Answer, comes from the Summons and Complaint you received, your mortgage papers, and your personal experience.

SAMPLE SUMMONS

This sample foreclosure Summons shows the information you need to copy to your Answer.

STATE OF NEW YORK SUPREME COURT		COUNTY OF MONROE
<hr/> NATIONAL TRUST COMPANY, AS TRUSTEE OF THE AMERICAN INDEX MORTGAGE LOAN TRUST 2005-AR14, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR14 UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2005		
Plaintiff,		Index No. 2011-12345
v.		Date Filed: 12/5/2011
BETSY ROSS		SUMMONS
"JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff; the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the verified complaint.		Plaintiff designated Monroe county as the place of trial based on the mortgaged premises in the action.
Defendants.		Plaintiff's principal place of business is 5000 Golden Parkway, Suite 200, Topeka, Kansas 66601
<hr/> To the above-named defendant:		
YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with the summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.		
1		

Do not wait until the last day to file an Answer – writing and filing an Answer takes time!

- 90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law § 1304) were inadequate because (check one or both if applicable):**
- Two copies not delivered; OR**
 - Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.**

For foreclosure lawsuits filed in New York State after September 1, 2008 on one-to-four-family owner-occupied homes, the Bank is required to send you a Pre-Foreclosure Notice by first-class mail and by registered or certified mail that states: "YOU COULD LOSE YOUR HOME" and list the number of days the mortgage payments are late and the amount of money required to catch up. These Pre-Foreclosure Notices must be given at least 90 days before the foreclosure Complaint is filed.

You should raise this defense if you did not receive both copies of this Pre-Foreclosure Notice, or if the foreclosure lawsuit was filed before the end of 90 days after you received the Pre-Foreclosure Notices. Check off the box that applies to your situation.

A sample 90-Day Pre-Foreclosure Notice can be found on page 8 of this guidebook.

- I did not receive the notice titled "Help for Homeowners in Foreclosure" that was supposed to be served with the Foreclosure Summons and Complaint on a colored sheet of paper (NY Real Property Actions and Proceedings Law Section 1303) (amended 2008).**

For foreclosure lawsuits filed after September 1, 2008 on one-to-four family owner-occupied homes, the Bank is required to include a Notice of "Help for Homeowners in Foreclosure" with the Foreclosure Summons and Complaint. This notice must be printed in bold, large type and on colored paper.

90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law Section 1304) were inadequate because (check one or both if applicable):

- Two copies not delivered.
- Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.

I did not receive the notice "Help for Homeowners in Foreclosure" that was supposed to be served with the Foreclosure Summons and Complaint (NY Real Property Actions and Proceedings Law Section 1303).

An active service member is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Service Members Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers' and Sailors' Civil Relief Act, NY Military Law Section 300 et seq.)

Homeowner's Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)

I am eligible for the Home Affordable Modification Program ("HAMP") because it meets the following qualifiers: (1) My loan is secured by a one-to-four unit property, co-op, or condo; (2) This is my principal residence; (3) The loan was originated on or before January 1, 2009; and (4) I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (check one or both if applicable):

- Chapter II, Section 3 of the MHA Handbook prohibits the servicer from referring my loan to foreclosure until I have been evaluated for HAMP or determined ineligible for the program. I did not fail a HAMP trial period plan, I have responded to all reasonable requests for information, and I have not refused help under the program.
- Other reason: _____

Compliance with HAMP is a condition precedent to foreclosure and failure to comply with HAMP gives rise to equitable defenses to this action.

My loan is insured by the Federal Housing Administration ("FHA"). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

An active service member is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Service Members Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers' and Sailors' Civil Relief Act, NY Military Law Section 300 et seq.)

Active-duty members of the armed forces, National Guard and reservists, and their dependents and co-debtors have special rights under federal and New York State laws to interest rate reductions on mortgages and other debts, to request a stay of foreclosure, and to avoid a tax foreclosure sale.

Homeowners who are serving active military duty and are facing foreclosure should advise their mortgage lender, servicer, and the court in writing, and immediately seek assistance from a Judge Advocate General (JAG) Corps or other attorney.

Homeowner's Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)

If you are working with a homeowner whom you believe cannot defend himself or herself due to limited mental competence, you should ask the court to appoint a "Guardian Ad Litem" to represent the homeowner's interests during the lawsuit.

In addition, if you believe that the homeowner was not mentally competent at the time he or she signed the mortgage loan, you should describe in detail the timing and evidence of the homeowner's incompetence, and immediately seek assistance from an attorney.

90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law Section 1304) were inadequate because (check one or both if applicable):

- Two copies not delivered.
- Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.

I did not receive the notice "Help for Homeowners in Foreclosure" that was supposed to be served with the Foreclosure Summons and Complaint (NY Real Property Actions and Proceedings Law Section 1303).

An active service member is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Service Members Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers' and Sailors' Civil Relief Act, NY Military Law Section 300 et seq.)

Homeowner's Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)

I am eligible for the Home Affordable Modification Program ("HAMP") because it meets the following qualifiers: (1) My loan is secured by a one-to-four unit property, co-op, or condo; (2) This is my principal residence; (3) The loan was originated on or before January 1, 2009; and (4) I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (check one or both if applicable):

- Chapter II, Section 3 of the MHA Handbook prohibits the servicer from referring my loan to foreclosure until I have been evaluated for HAMP or determined ineligible for the program. I did not fail a HAMP trial period plan, I have responded to all reasonable requests for information, and I have not refused help under the program.
- Other reason: _____

Compliance with HAMP is a condition precedent to foreclosure and failure to comply with HAMP gives rise to equitable defenses to this action.

My loan is insured by the Federal Housing Administration ("FHA"). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

I am eligible for the Home Affordable Modification Program (“HAMP”) because it meets the following qualifiers: (1) My loan is secured by a one-to-four unit property, co-op, or condo; (2) This is my principal residence; (3) The loan was originated on or before January 1, 2009; and (4) I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (check one or both if applicable):

Chapter II, Section 3 of the MHA Handbook prohibits the servicer from referring my loan to foreclosure until I have been evaluated for HAMP or determined ineligible for the program. I did not fail a HAMP trial period plan, I have responded to all reasonable requests for information, and I have not refused help under the program.

Other reason: _____

The federal Home Affordable Modification Program (“HAMP”) was designed to help homeowners that are facing trouble with their mortgages, and participating banks must follow Treasury guidelines in implementing the program. These guidelines ensure that homeowners are reviewed fairly to see if they qualify for the program.

You should use this defense if you feel that your Bank did not review you for the HAMP program at all or you were incorrectly rejected from the HAMP program. If there is another HAMP-related issue you are facing, check the “Other” box and explain the issue precisely.

90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law Section 1304) were inadequate because (check one or both if applicable):

Two copies not delivered.
 Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.

I did not receive the notice “Help for Homeowners in Foreclosure” that was supposed to be served with the Foreclosure Summons and Complaint (NY Real Property Actions and Proceedings Law Section 1303).

An active service member is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Service Members Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers’ and Sailors’ Civil Relief Act, NY Military Law Section 300 et seq.)

Homeowner’s Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)

I am eligible for the Home Affordable Modification Program (“HAMP”) because it meets the following qualifiers: (1) My loan is secured by a one-to-four unit property, co-op, or condo; (2) This is my principal residence; (3) The loan was originated on or before January 1, 2009; and (4) I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (check one or both if applicable):

Chapter II, Section 3 of the MHA Handbook prohibits the servicer from referring my loan to foreclosure until I have been evaluated for HAMP or determined ineligible for the program. I did not fail a HAMP trial period plan, I have responded to all reasonable requests for information, and I have not refused help under the program.

Other reason: _____

Compliance with HAMP is a condition precedent to foreclosure and failure to comply with HAMP gives rise to equitable defenses to this action.

My loan is insured by the Federal Housing Administration (“FHA”). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

- My loan is insured by the Federal Housing Administration (“FHA”). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.**

Service requirements for mortgages holding FHA guarantees and insurance require that every reasonable effort has been made to arrive at some other solution before the filing of a foreclosure.

You should raise this defense if you have an FHA loan and feel your servicer did NOT make reasonable efforts to work with you before filing the foreclosure.

- 90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law Section 1304) were inadequate because (check one or both if applicable):
- Two copies not delivered.
 - Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.
- I did not receive the notice “Help for Homeowners in Foreclosure” that was supposed to be served with the Foreclosure Summons and Complaint (NY Real Property Actions and Proceedings Law Section 1303).
- An active service member is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Service Members Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers’ and Sailors’ Civil Relief Act, NY Military Law Section 300 et seq.)
- Homeowner’s Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)
- I am eligible for the Home Affordable Modification Program (“HAMP”) because it meets the following qualifiers: (1) My loan is secured by a one-to-four unit property, co-op, or condo; (2) This is my principal residence; (3) The loan was originated on or before January 1, 2009; and (4) I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (check one or both if applicable):
- Chapter II, Section 3 of the MHA Handbook prohibits the servicer from referring my loan to foreclosure until I have been evaluated for HAMP or determined ineligible for the program. I did not fail a HAMP trial period plan, I have responded to all reasonable requests for information, and I have not refused help under the program.
 - Other reason: _____
- Compliance with HAMP is a condition precedent to foreclosure and failure to comply with HAMP gives rise to equitable defenses to this action.
- My loan is insured by the Federal Housing Administration (“FHA”). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

My mortgage is guaranteed by the Veterans Administration (“VA”) pursuant to Title 38 of the United States Code. The loan servicer has not complied with the regulations requiring that the servicer extend all reasonable forbearance options. Compliance with these regulations is a condition precedent to foreclose. Further, failure to comply with these rules gives rise to equitable defenses to this action.

Service requirements for mortgages holding Veteran Administration guarantees and insurance require the mortgagee to demonstrate a proper ability to service loans adequately. The VA Lender’s Handbook states that holders of VA guarantees or insurance are not expected to start a foreclosure action until every reasonable effort has been made to arrive at some other solution.

You should raise this defense if you have a VA loan and feel your servicer did NOT make reasonable efforts to work with you prior to filing the foreclosure.

My mortgage is guaranteed by the VA pursuant to Title 38 of the United States Code. The loan servicer has not complied with the regulations requiring that the servicer extend all reasonable forbearance options. Compliance with these regulations is a condition precedent to foreclose. Further, failure to comply with these rules gives rise to equitable defenses to this action.

I have tried to tender payments in the amount of \$_____ on _____ which would have paid the principal, interest, and fees I owed at the time in full, but the lender refused to accept the payment and proceeded to foreclosure against me wrongfully.

Partial or Full Payment:

I have made payments in the amount of \$_____ which have not been properly credited and are not reflected in the Complaint.

Other explanation or additional information:

On _____ (date of loan origination), Mr./Ms. _____, the _____ made statements to me to intentionally convince me to enter the mortgage and note at issue in this foreclosure action. I relied upon those statements and I was fraudulently induced to sign the mortgage and note. Mr./Ms. _____ told me that:

I would receive a fixed rate loan, but instead I received an adjustable rate loan.

My mortgage term would be no more _____ years, but instead I received a _____ year loan.

My total monthly payment would include principal, interest, property taxes and hazard insurance, but instead my monthly payment did not include property taxes and hazard insurance.

My monthly payment would not be higher than \$_____, but instead my monthly payment was \$_____.

My loan amount would not exceed \$_____, but instead my loan amount was higher at \$_____.

Other _____

I was injured by the above fraudulent statements because I paid more for my mortgage than I could afford and ultimately fell into foreclosure as a result of the higher cost of the mortgage.

I have tried to tender payments in the amount of \$ ___ on ___ which would have paid the principal, interest, and fees I owed at the time in full, but the lender refused to accept the payment and proceeded to foreclosure against me wrongfully.

In a foreclosure proceeding, a valid tender of an amount that is sufficient to fully eliminate all defaults prior to the bank or servicer's option to accelerate is a total defense.

You should raise this defense if you feel that you paid all arrearages to your Bank prior to them sending you an Acceleration Letter, which is the letter you received prior to the foreclosure being filed that stated that the whole amount of your Mortgage is due immediately. Be sure to fill in the blanks with the amount you paid and the date you paid it.

Partial or Full Payment: I have made payments in the amount of \$ ___ which have not been properly credited and are not reflected in the Summons and Complaint:

You have paid the mortgage payments, or some portion of the mortgage payments, that the Plaintiff claims you owe.

You believe that the amount of debt is incorrect and that you do not owe what the mortgage company says you owe.

My mortgage is guaranteed by the VA pursuant to Title 38 of the United States Code. The loan servicer has not complied with the regulations requiring that the servicer extend all reasonable forbearance options. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

I have tried to tender payments in the amount of \$ _____ on _____ which would have paid the principal, interest, and fees I owed at the time in full, but the lender refused to accept the payment and proceeded to foreclosure against me wrongfully.

Partial or Full Payment:

I have made payments in the amount of \$ _____ which have not been properly credited and are not reflected in the Complaint.

Other explanation or additional information:

On _____ (date of loan origination), Mr./Ms. _____, the _____ made statements to me to intentionally convince me to enter the mortgage and note at issue in this foreclosure action. I relied upon those statements and I was fraudulently induced to sign the mortgage and note. Mr./Ms. _____ told me that:

- I would receive a fixed rate loan, but instead I received an adjustable rate loan.
- My mortgage term would be no more _____ years, but instead I received a _____ year loan.
- My total monthly payment would include principal, interest, property taxes and hazard insurance, but instead my monthly payment did not include property taxes and hazard insurance.
- My monthly payment would not be higher than \$ _____, but instead my monthly payment was \$ _____.
- My loan amount would not exceed \$ _____, but instead my loan amount was higher at \$ _____.
- Other _____

I was injured by the above fraudulent statements because I paid more for my mortgage than I could afford and ultimately fell into foreclosure as a result of the higher cost of the mortgage.

On ____ (date of loan origination), Mr./Ms. ____, the ____ made statements to me to intentionally convince me to enter the mortgage and note at issue in this foreclosure action. I relied upon those statements and I was fraudulently induced to sign the mortgage and note. Mr./Ms. _____ told me that:

I would receive a fixed rate loan, but instead I received an adjustable rate loan.

My mortgage term would be no more ____ years, but instead I received a ____ year loan.

My total monthly payment would include principal, interest, property taxes and hazard insurance, but instead my monthly payment did not include property taxes and hazard insurance.

My monthly payment would not be higher than \$____, but instead my monthly payment was \$____.

My loan amount would not exceed \$____, but instead my loan amount was higher at \$____.

Other _____

I was injured by the above fraudulent statements because I paid more for my mortgage than I believed I could afford and ultimately fell into foreclosure as a result of the higher cost of the mortgage.

My mortgage is guaranteed by the VA pursuant to Title 38 of the United States Code. The loan servicer has not complied with the regulations requiring that the servicer extend all reasonable forbearance options. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

I have tried to tender payments in the amount of \$_____ on _____ which would have paid the principal, interest, and fees I owed at the time in full, but the lender refused to accept the payment and proceeded to foreclosure against me wrongfully.

Partial or Full Payment:

I have made payments in the amount of \$_____ which have not been properly credited and are not reflected in the Complaint.

Other explanation or additional information:

On _____ (date of loan origination), Mr./Ms. _____, the _____ made statements to me to intentionally convince me to enter the mortgage and note at issue in this foreclosure action. I relied upon those statements and I was fraudulently induced to sign the mortgage and note. Mr./Ms. _____ told me that:

I would receive a fixed rate loan, but instead I received an adjustable rate loan.

My mortgage term would be no more ____ years, but instead I received a ____ year loan.

My total monthly payment would include principal, interest, property taxes and hazard insurance, but instead my monthly payment did not include property taxes and hazard insurance.

My monthly payment would not be higher than \$____, but instead my monthly payment was \$_____.

My loan amount would not exceed \$____, but instead my loan amount was higher at \$_____.

Other _____

I was injured by the above fraudulent statements because I paid more for my mortgage than I could afford and ultimately fell into foreclosure as a result of the higher cost of the mortgage.

For a fraud to have occurred there MUST have been six things that happened:

1. There was a misrepresentation of fact by another party (frequently a mortgage broker or a representative from the bank) to you;
2. The statement was untrue;
3. The speaker knew the statement was untrue;
4. The speaker was trying to deceive you;
5. You relied on the untrue statement; AND
6. You were injured (injured can mean financially injured) by the untrue statement.

You should use this defense if all six of these events happened to you. If you feel that you were deceived prior to closing on your loan, you believed those deceptions, and as a result you were more likely to sign your loan documents, you should fill in this section.

Fraud is a defense that must be pleaded with particularity – that is to say that you must be VERY specific with your allegations. Therefore, if you are choosing fraud as a defense you must list exactly how the fraud occurred. You will need to check any and all of the above boxes that you feel accurately state the specific fraudulent behavior. If there are other fraudulent statements made to you other than the ones in the boxes below, check the “Other” box and list them out specifically in the lines provided.

My mortgage is guaranteed by the VA pursuant to Title 38 of the United States Code. The loan servicer has not complied with the regulations requiring that the servicer extend all reasonable forbearance options. Compliance with these regulations is a condition precedent to foreclose. Further, failure to comply with these rules gives rise to equitable defenses to this action.

I have tried to tender payments in the amount of \$_____ on _____ which would have paid the principal, interest, and fees I owed at the time in full, but the lender refused to accept the payment and proceeded to foreclosure against me wrongfully.

Partial or Full Payment:

I have made payments in the amount of \$_____ which have not been properly credited and are not reflected in the Complaint.

Other explanation or additional information:

On _____ (date of loan origination), Mr./Ms. _____, the _____ made statements to me to intentionally convince me to enter the mortgage and note at issue in this foreclosure action. I relied upon those statements and I was fraudulently induced to sign the mortgage and note. Mr./Ms. _____ told me that:

I would receive a fixed rate loan, but instead I received an adjustable rate loan.

My mortgage term would be no more _____ years, but instead I received a _____ year loan.

My total monthly payment would include principal, interest, property taxes and hazard insurance, but instead my monthly payment did not include property taxes and hazard insurance.

My monthly payment would not be higher than \$_____, but instead my monthly payment was \$_____.

My loan amount would not exceed \$_____, but instead my loan amount was higher at \$_____.

Other _____

I was injured by the above fraudulent statements because I paid more for my mortgage than I could afford and ultimately fell into foreclosure as a result of the higher cost of the mortgage.

Other Defenses or Counterclaims _____

If you have any other claims you would like to tell the court about, list them all here. Be as specific as possible and add sheets of paper if necessary.

STEP 4: ADD ANY ADDITIONAL INFORMATION TO THE "OTHER FACTS CONCERNING YOUR MORTGAGE" SECTION

This can include facts surrounding any of the defenses you have already checked off or any other facts that you think the Court should know about. This is where you should tell your story. Below are some possible ideas that could apply to you. **Always be as specific as possible and attach additional pages if needed!**

- ✓ You were pressured to sign the mortgage or home purchase documents.
- ✓ You were discouraged from using your own attorney or appraiser or other independent advisor.
- ✓ You did not receive a financial benefit from your mortgage.
- ✓ The interest rate is extremely high, or higher than you qualified for given your credit history at the time you obtained your mortgage.
- ✓ You were charged high closing costs or fees.
- ✓ Your loan application was falsified (e.g. your income was misstated on your application).
- ✓ You were told that utilities, medical expenses, or other bills would be paid off by your mortgage, but they weren't.
- ✓ You were told that your house was worth more than its actual value.
- ✓ Your home was in poor condition when you purchased it and you were promised repairs that were never made.
- ✓ You were falsely told that you could earn rental income from your home to help pay the mortgage.

Other defenses or counterclaims. _____

Other important facts concerning my mortgage or home:

Wherefore, Defendant requests that the Complaint be dismissed; that the relief requested by Defendant be granted in its entirety; that Defendant be granted costs and attorneys' fees if he or she retains counsel; and any other relief allowed by law and considered just by this Court.

DATE: January 1, 2012
 DEFENDANT'S NAME: Bessy Ross
 DEFENDANT'S ADDRESS: 123 Main Street Anywhere, NY 12345
 DEFENDANT'S PHONE NO. 585-555-1234
 Appearing Pro Se

VERIFICATION

I, Bessy Ross, being duly sworn, state that the within Answer is true to the best of my knowledge, except as to those matters alleged upon information and belief, which I believe to be true.

Bessy Ross
 Defendant (Print Name)

Bessy Ross
 Defendant (Signature)

Sworn to and subscribed before me this
1st day of January, 2012
Abraham Lincoln
 Notary Public

- ✓ You believe that you were targeted for an unfair or abusive mortgage loan based on your race, national origin, sex, mental or physical disability, age, alienage/ citizenship status, or other legally protected characteristic.

STEP 5: FILL IN THE BOTTOM OF THE 4TH PAGE WITH YOUR CURRENT CONTACT INFORMATION.

STEP 6: IN FRONT OF A NOTARY PUBLIC, FILL OUT AND SIGN THE VERIFICATION SECTION - A Verification is a statement under oath that the Answer is truthful. After you complete the Answer, you **MUST** sign this verification in front of a Notary Public and have them notarize it. You can often find a Notary Public at a branch of your local bank. Please be aware they may charge you a small fee for this service.

STEP 7: MAKE 2 COPIES OF THE VERIFIED ANSWER You will arrange for one copy to be "served" to the Plaintiff's attorney. (See Step 8). You will keep the second copy for your records.

STEP 8: "SERVE" THE PLAINTIFF'S ATTORNEY Ask someone other than yourself who is at least 18 years old and not a Defendant in the lawsuit to "serve" a copy of the Verified Answer on Plaintiff's attorney at the address listed on the Summons and Complaint. The easiest way to "serve" the Verified Answer is to arrange for the person to send it by certified mail, return receipt requested, or by overnight delivery service. Be sure to keep the proof of mailing and delivery.

Other defenses or counterclaims. _____

Other important facts concerning my mortgage or home: _____

Wherefore, Defendant requests that the Complaint be dismissed; that the relief requested by Defendant be granted in its entirety; that Defendant be granted costs and attorneys' fees if he or she retains counsel; and any other relief allowed by law and considered just by this Court.

DATE: January 1, 2012

DEFENDANT'S NAME: Bessy Ross

DEFENDANT'S ADDRESS: 123 Main Street Anywhere, NY 12345

DEFENDANT'S PHONE NO. 585-555-1234

Appearing Pro Se

VERIFICATION

I, Bessy Ross, being duly sworn, state that the within Answer is true to the best of my knowledge, except as to those matters alleged upon information and belief, which I believe to be true.

Bessy Ross
Defendant (Print Name)

Bessy Ross
Defendant (Signature)

Sworn to and subscribed before me this
1st day of January, 2012
Abraham Lincoln
Notary Public

STEP 9: FILL OUT THE AFFIDAVIT OF SERVICE

The person who “served” the copy of the Verified Answer on the Plaintiff’s attorney must fill out the Affidavit of Service in front a Notary Public and have it notarized. You can often find a Notary Public at a branch of your local bank. Please be aware they may charge a small fee for this service.

STEP 10: FILE THE VERIFIED ANSWER AND AFFIDAVIT OF SERVICE AT THE COUNTY CLERK.

Bring the original Verified Answer, the extra copy of the Verified Answer, the notarized Affidavit of Service, and a copy of the notarized Affidavit of Service to your County Clerk’s office. (See list of the local area court clerks included in the front folder pocket of this guide.) At the County Clerk’s office, state that you wish to file an Answer. Be sure to ask the clerk to “time-stamp” the original Verified Answer, the Affidavit of Service and the copy of the Verified Answer, so that you have proof of the date and time you filed your Answer. Keep for your records a time stamped copy of the Verified Answer and a copy of the Affidavit of Service.

STEP 11: APPEAR AT YOUR SETTLEMENT CONFERENCE

AFFIDAVIT OF SERVICE

I, Betsy Ross, hereby certify that I delivered a copy of the Verified Answer to Plaintiff’s Attorney (attorney’s name and address):

Lawyer Bob

555 South Avenue

Anywhere, NJ 12345

I delivered the Notice of Appearance by the following method (check all that apply):

- first class mail
- certified mail
- certified mail, return receipt requested
- overnight delivery service
- facsimile
- personal delivery

on the 1st day of January, 2012.

Signature: Betsy Ross

Print Name: Betsy Ross

Subscribed to and sworn this 1st day of January, 2012.

Abraham Lincoln

Notary Public

My commission expires: December 31st, 2015

This is a general guide through the foreclosure process. Each person's situation is unique, and therefore consultation with an attorney is recommended, if possible.

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This document and the form Answer included is based on similar documents prepared by Legal Services and Legal Aid of New York City.

For further information, contact:

Empire Justice Center . Telesca Center for Justice
One West Main Street, Suite 200 . Rochester, NY 14614
www.empirejustice.org . (585) 454-4060

Additional funds were provided by the NYS Office of the Attorney General from a settlement of claims brought by the NYS Office of the Attorney General. The views and statements expressed in this guidebook do not necessarily reflect the views and opinions of the Attorney General. The Office of the Attorney General is not responsible for the accuracy of the content of these materials.



This guidebook was initially printed as part of the NYS Subprime Foreclosure Prevention services program, developed to help New York homeowners facing default or foreclosure by providing training and legal services. The program is administrated by the NYS Homes and Community Renewal/Housing Trust Fund Corporation. The program provides training and support for housing counselors, mediators and lawyers who are assisting residents with subprime or unconventional mortgages.

Information on the program can be found at www.nyshcr.org.





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Biographies

Rebecca Caico is a senior attorney in the Rochester office of the Empire Justice Center and has been exclusively doing foreclosure prevention work since 2003 in the Consumer, Finance and Housing unit. She is currently serving as the Regional Coordinator for Central and Western NY under the NY Attorney General's Home Ownership Protection (HOPP) Anchor Partner Program. Through the HOPP Partner Program, she is the lead attorney providing trainings and technical assistance to attorneys across upstate NY who assist homeowners at risk of foreclosure. Prior to joining Empire Justice Center, she earned her law degree from the Pennsylvania State University, Dickinson School of Law.

Rose Marie Cantanno is the supervising attorney of NYLAG's Foreclosure Prevention Project. The unit assists clients in all aspects of foreclosure and the loss mitigation process, including representation at court-mandated Settlement Conferences, negotiation of loan modifications and foreclosure litigation. NYLAG also represents clients in the short sale process from contract to closing.

Before working at NYLAG, she was a partner for twelve years in the real estate law firm of Liotta & Cantanno, LLP which specialized in representing buyers, sellers and lenders in residential real estate transactions. The firm also represented clients seeking loan modifications and short sales.

She received her JD from Brooklyn Law School in 1993 and a BA in Classical Studies from Hunter College in 1990.

Jacob Inwald is Director of Foreclosure Prevention at Legal Services NYC, where he provides training, supervision and support to more than 40 foreclosure prevention advocates engaging in a range of foreclosure prevention and affirmative litigation services to low-income New Yorkers at Legal Services NYC's offices across New York City. Jay came to LSNYC in 2009, after nearly 25 years in private practice as a commercial litigator, most recently at Sonnenschein Nath & Rosenthal (now known as Dentons), bringing considerable litigation expertise to LSNYC's foreclosure and predatory lending city-wide practice, which is the largest (and one of the oldest) practice of its kind in the country. He has become a statewide expert on foreclosure procedural issues, working directly with practitioners throughout New York City, and he has played a leading role in developing and maintaining an on-line foreclosure practice resource used by non-profit foreclosure defense practitioners across New York State. Since 1993, Jay has served as a pro bono arbitrator in the Civil Court of the State of New York, Small Claims Division. After graduating from George Washington University Law School *magna cum laude* in 1984, where he was Notes Editor of the Law Review, Jay served as a law clerk at the United States Court of Appeals for the Ninth Circuit in San Francisco, California before returning to New York to begin practicing law. Jay graduated *summa cum laude*, with High Honors in History, from Brandeis University in 1981, where he was also elected to Phi Beta Kappa.