

NASSAU COUNTY SUPREME COURT

A PRIMER FOR COURT-APPOINTED REFEREES IN FORECLOSURE

October 28, 2008
4:00 P.M. - 6:00 P.M.



Hon. Anthony Marano, J.S.C.
*Administrative Judge
of Nassau County*

Hon. Edward G. McCabe, J.S.C.
*Presiding Justice
Foreclosure Part*

Daniel J. Dillon, Esq.
*Director
Nassau County Supreme Court Foreclosure Project*

NASSAU COUNTY SUPREME COURT

RESPONSIBILITIES OF COURT-APPOINTED REFEREES IN FORECLOSURE

4:00 P.M. — 4:10 P.M. HON. EDWARD G. McCABE, J.S.C.
Presiding Judge, Foreclosure Part

PURPOSES

- Clarify issues respecting duties
- Uniformity in Submissions to Clerk
- Understanding of Duties upon Appointment
- Recognition of your status as Independent Contractors
- Clarification of Fee Arrangements
- Stress need for both thoroughness and promptness in reporting

4:10 P.M. — 4:20 P.M. PETER H. LEVY, ESQ., Moderator
President, Nassau County Bar Association

- Quality of the Speakers and Availability of Panelists should prepare you for most situations you are likely to encounter

INTRODUCTION OF SPEAKERS

- Marita McMahon, Esq.
Office of Court Administration, Deputy Director Guardian
& Fiduciary Services¹
- Bruce Bergman, Esq.
Member of Berkman, Henoch, Peterson & Peddy;
Author of Bergman on New York Mortgage Foreclosures,
Matthew Bender & Co., rev. 2005.

¹ See Exhibits at Exh. V.

- Adam Gross, Esq.
Member of Law Offices of Steven J. Baum, P.C.

NASSAU COUNTY BAR ASSOCIATION
FORECLOSURE TASK FORCE

- Nassau Lawyer has a timely and informative article.²
- Purpose is to provide assistance on voluntary basis for mortgagors in connection with recently enacted requirement for initial conferences on designated cases.
- Text of Statute at Exhibit A.
- IMPORTANT to know that the legal issues as to propriety of mortgage will be decided in connection with motion for foreclosure order. See, eg. *LaSalle Bank v. Shearon*, 19 Misc.2d 433, at Exhibit R.
- These issues are *not for your consideration*. Your job is to carry out Order to compute, or Order to Sell.

4:20 P.M. — 4:45 P.M.

MARITA McMAHON, ESQ.
Office of Court Administration, Deputy
Director, Office of Guardianship
Services³

- Appointments Governed by Part 36 of Rules of Chief Judge
 - Rule 36.1 (a) (9) for referees, 36.1 (a) (2) for

² PETER GOODMAN, *Keeping Up With the Latest Reforms in Foreclosure Litigation*, Nassau Lawyer, Vol. 58, No. 2 (October 2008). See Exh. X.

³ Material at Exh. V.

guardians *ad litem*, 36.1 (a) (8) for receivers, and 36.1 (a) (10) for secondary appointees of receivers.

- 36.2 (b) requires appointment from Approved List
- 36.2 (c) disqualifications due to relationship, employment or political office
 - 36.2 (d) limitations due to compensation
 - Only one appointment greater than \$15,000 per year.
 - If total annual compensation is more than \$75,000 from all appointments, ineligible in the next year.
- Part 36 Paperwork
 - UCS-872 (Notice of Appointment and Certification of Compliance)
 - UCS-875 (Statement of Approval of Compensation)
 - Foreclosure Referee exempt from filing **ONLY** if compensation for Reference to Compute and Reference to Sell not *anticipated to exceed \$750*
 - Fee in excess of \$750 may require completion of forms 872 & 875.
- CPLR § 8003 (b) provides for payment of \$50 per day unless different compensation fixed by Court or by written stipulation of all parties not in default
 - Generally \$250 for the reference to compute
- CPLR § 8003 (b) provides for payment of \$500 for the reference to sell.

- Generally, \$500 upon sale. Includes closing.
- Additional compensation from Plaintiff.
 - CPLR § 8003 (a) referee to compute: 2d Dept has required agreement or court order for payment in excess of statutory fees *in advance*. See, *Pittoni v. Boland*, 278 A.D.2d 396 (2d Dept. 2000).
 - CPLR § 8003 (b) referee to sell:
 - Judicial approval is required for excess compensation or retaining \$500 if no sale. Request by motion.
 - Foreclosure Referee is independent contractor, not entitled to representation by or reimbursement from State. See, *O'Brien v. Spitzer*, 7 N.Y.3d 239 (2006). Exh. S.

4:45 P.M. — 5: 30 P.M. BRUCE BERGMAN, ESQ. ⁴

ROLE OF THE REFEREE - DUTIES AND ISSUES

- I. APPOINTMENT PROCEDURE
 - A. DISTINGUISHING FROM JUDGMENT STAGE
 - B. POSSIBLE NEED FOR SUCCESSOR - PROCEDURE
 - C. REFEREE TO SELL
 - D. SURPLUS MONEY PROCEEDINGS

⁴ With grateful appreciation to NYLJ and Nassau Bar Association, See material at Exh. U.

II. POWERS OF REFEREE

- A. COMPUTE SUMS DUE [(RPAPL § 132 (1))]
- B. SALE IN PARCELS
- C. IN PARTIAL FORECLOSURE, COMPUTE SUMS TO BECOME DUE
- D. BOUND BY ORDER OF APPOINTMENT
 - 1. DUTY NON-DELEGABLE
- E. POWER TO AMEND

III. THE COMPUTATION

A. ROLE OF NOTE AND MORTGAGE

- 1. PRINCIPAL BALANCE
- 2. INTEREST TO DATE OF COMPUTATION (“AS OF DATE”)
 - a. STAGES OF INTEREST
 - b. DEFAULT INTEREST
 - (i) HIGHEST RATE ALLOWED BY LAW
 - c. COMPOUND INTEREST
 - d. 360 DAY YEAR
- 3. LATE CHARGES

4. ADVANCES, WITH INTEREST

a. TAXES

b. INSURANCE

c. PRIOR MORTGAGES

5. CREDITS

a. MORTGAGEE IN POSSESSION

b. PAYMENTS (i.e. Forbearance Agreement)

B. ITEMS NOT COMPUTED

1. LEGAL FEES

2. COSTS AND DISBURSEMENTS
(EXCEPT AS INCLUDABLE PER MORTGAGE)

IV. COURT AS ULTIMATE ARBITER

V. REQUIREMENTS FOR REFEREE'S HEARING

A. VENUE

B. NOTICE

C. EVIDENCE

VI. REFEREE'S REPORT

VII. REFEREE'S FEES

5:30 P.M. — 5:45 P.M.

ADAM GROSS, ESQ.

- Liability of Referee Issues
- *Seems* leave of Court required to sue Referee in individual capacity
Schwartz v. Kurlander, 279 A.D.2d 465, 719 N.Y.S.2d 105 (2d Dept. 2001)
- Referee is not a state employee entitled to representation by AG
O'Brien v. Spitzer, 7 N.Y.3d 239, 851 N.E.2d 1195, 818 N.Y.S.2d 844 (2006)
- Coverage under Malpractice Policy
- See Nassau County Foreclosure Auction Rules at Exh. Y.
- Do not hesitate to call for clarification when needed. A directory of Foreclosure Part personnel is attached as Exh. Z.

5:45 P.M. — 6:00 P.M.

QUESTION AND ANSWER

- **MARITA McMAHON, ESQ.**
- **BRUCE BERGMAN, ESQ.**
- **ADAM GROSS, ESQ.**
- **MICHAEL H. SAHN, ESQ.**

ATTACHMENTS

- A. Amendments to Real Property Actions and Proceedings Law § 1303
- B. Newly enacted Real Property Actions and Proceedings Law § 1304
- C. A09695 Memo from Assembly
- D. Explanation of Statewide Program for Residential Owner-Occupied Foreclosure Proceedings (Now supplanted by Statute)
- E. Draft Affidavit in Support of Application to Proceed as Poor Person
- F. Complaint to Foreclose Mortgage ⁵
- G. Order For Service by Publication
- H. Order Dismissing Affirmative Defenses
- I. Notice of Appearance and Limited Waiver of Service of Papers
- J. Order of Reference to Compute - No Infant or Absentees
- K. Order of Reference to Compute - Infants or Absentees involved
- L. Oath of Referee to Compute

⁵ This and subsequent forms are from West McKinney's Forms

- M. Report of Referee to Compute
- N. Notice of Motion to Confirm Report of Referee
- O. Judgment After Reference to Compute
- P. Report of Sale Where Deficiency Exists
- Q. Report of Sale Where Surplus
- R. *LaSalle Bank v. Shearon*, 19 Misc.3d 433, 850 N.Y.S.2d 871 (Sup. Richmond, 2008).
- S. *O'Brien v. Spitzer*, 7 N.Y.3d 239, 851 N.E.2d 1195, 818 N.Y.S.2d 844 (2006).
- T. *U.S. Mtge. v. Almeida*, 8 Misc.3d 694, 799 N.Y.S.2d 386 (Sup. Bronx, 2005).
- U. Bruce J. Bergman, *So You've Been Appointed a Referee to Compute*, Nassau Lawyer, January 1996, p. 8

Bruce J. Bergman, *So You've Been Appointed a Referee to Compute*, 3rd installment, Nassau Lawyer, March 1996, p. 7.

Bruce J. Bergman, *Referee Fees*, NYLJ, March 29, 2006, p.5, col. 2.
- V. Marita S. McMahon, *Part 36 of the Rules of the Chief Judge and the Foreclosure Referee: Appointment, Paperwork & Compensation*.

W. Correspondence and Model Forms from Nassau County Clerk.

1. Greeting from Hon. Maureen O'Connell, Nassau County Clerk.
2. County Clerk's Instructions to Newly-appointed Referee and Cover letter for Sample Forms:
 - a. Order of Reference;
 - b. Referee's Oath and Computation of Amount Due;
 - c. Judgment of Foreclosure and Sale with Affirmations and Affidavits;
 - d. Referee's Report of Sale. ⁶
3. Instructions for Completion of TP-584, including name and Social Security Number of *defaulting party* as Grantor, as opposed to Referee.
4. Form TP-584
5. Form RP-5217

Y. Nassau County Foreclosure Auction Rules

⁶ Sample templates provided courtesy of Steven J. Baum, Esq.

CONCLUSIONS

Recent developments have caused an exponential increase in the number of Foreclosure filings. Newly enacted legislation imposes a duty on the Court to make every effort to facilitate a resolution of the matters by way of mandatory settlement conferences in certain designated matters, and to conduct voluntary conferences when requested and feasible.

The ability of the Courts to bring to a conclusion those matters which cannot be otherwise resolved will require the cooperation of the litigants and the resolve of Referees to fully familiarize themselves with their responsibilities, and carry them out with dispatch. The specter of thousands of mortgagees losing their foothold on the path to home ownership is distressing to all of us. But the obligation of the Courts is to do justice to all parties, including the holders of valid notes and mortgages which have fallen into default. As a Referee, you are called upon to carry out the mandates of the Court, faithfully calculate the

amount due on non-performing loans, report your calculations to the Court, carry out the sale of property when directed, and submit a timely report of sale to the Court.

The Court is counting on your faithful performance of these duties.

ACKNOWLEDGMENTS

It is with sincere appreciation that we recognize the following individuals and organizations, without whose assistance we would not have been able to provide this program:

Donal Mahoney, Esq., who first recognized and promoted a comprehensive refresher course for Referees;

Honorable Maureen O'Connell, our County Clerk and Barbara Brudie, Esq. her Deputy, for providing suggested document formats for filing in the County Clerk's Office;

Our presenters and panelists, Peter H. Levy, Esq., Marita McMahon, Esq., Bruce Bergman, Esq., Adam Gross, Esq., and Michael H. Sahn, Esq., who have graciously donated their time and expertise;

The Nassau County Bar Association, in particular, the Honorable Lance Clarke, the immediate-past president, under whose guidance the formation of the Foreclosure Task Force was begun, Peter H. Levy, Esq., the current President who has shown enormous support, Dr. Deena Ehrlich, Executive Director, Barbara Kraut, Director of Continuing Legal Education and, the always generous members of the Bar Association for their unflagging contributions of time and energy for the betterment of the judicial system;

The *New York Law Journal* and the *Nassau Lawyer*, for their continuing publication of timely and informative material for the benefit of the Bench and Bar;

To all of our Court Clerks and administrative personnel of the Nassau County Supreme Court, who have worked so hard to formulate

the program; particularly Daniel J. Dillon, Esq. the Director of the Nassau County Supreme Court Foreclosure Project without whom this program could never have taken place; and, his Project Coordinator, Lisa Carlisi, and Principal Court Analyst, Michael Radigan, as well as Principal LAN Administrator, Bob Stewart and his team along with all of our phenomenal volunteers;

....

Last but not least, to the Honorable Anthony Marano, J.S.C., the Administrative Judge of Nassau County, who recognized the need for this program and provided the necessary personnel and facilities, and to the Honorable Edward G. McCabe, J.S.C., who has assumed the difficult burden of presiding over the newly-created Foreclosure Part.

....

We hope this evening has been beneficial to you. All of us here at the Court stand ready to serve the public in this important area of law.

Most sincerely,

Kathryn Driscoll Hopkins, Esq.
Chief Clerk

Cheryl Davis
Deputy Chief Clerk

Philip Costa
Court Clerk Specialist

William B. Harkins
Court Clerk Specialist

A

STATE OF NEW YORK

8143--A

IN SENATE

May 2, 2008

Introduced by Sens. FARLEY, PADAVAN, MALTESE, BONACIC, ROBACH, CONNOR, FLANAGAN, LARKIN, LAVALLE, LEIBELL, MORAHAN, RATH, SALAND, TRUNZO, VOLKER -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property actions and proceedings law, the civil practice law and rules, the banking law and the general obligations law, in relation to home mortgage loans; to amend the penal law and the criminal procedure law, in relation to creating new crimes relating to mortgage fraud; and to amend the real property law, in relation to distressed property consulting contracts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1303 of the real property actions and proceedings
2 law, as added by chapter 308 of the laws of 2006 and subdivision 1 as
3 amended by chapter 154 of the laws of 2007, is amended to read as
4 follows:

5 § 1303. Foreclosures; required notices. 1. The foreclosing party in a
6 mortgage foreclosure action, which involves residential real property
7 consisting of owner-occupied one-to-four-family dwellings shall provide
8 notice to the mortgagor in accordance with the provisions of this
9 section with regard to information and assistance about the foreclosure
10 process.

11 2. The notice required by this section shall be delivered with the
12 summons and complaint to commence a foreclosure action. The notice
13 required by this section shall be in bold, fourteen-point type and shall
14 be printed on colored paper that is other than the color of the summons
15 and complaint, and the title of the notice shall be in bold, twenty-
16 point type. The notice shall be on its own page.

17 3. The notice required by this section shall appear as follows:

18 Help for Homeowners in Foreclosure

19 New York State Law requires that we send you this notice about the
20 foreclosure process. Please read it carefully.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD12060-09-8

1 ~~[Mortgage foreclosure is a complex process. Some people may approach~~
2 ~~you about "saving" your home. You should be extremely careful about any~~
3 ~~such promises.]~~

4 Summons and Complaint

5 You are in danger of losing your home. If you fail to respond to the
6 summons and complaint in this foreclosure action, you may lose your
7 home. Please read the summons and complaint carefully. You should imme-
8 diately contact an attorney or your local legal aid office to obtain
9 advice on how to protect yourself.

10 Sources of Information and Assistance

11 The State encourages you to become informed about your options in
12 foreclosure. ~~[There]~~ In addition to seeking assistance from an attorney
13 or legal aid office, there are government agencies ~~[, legal aid entities]~~
14 and ~~[others]~~ non-profit organizations that you may contact for informa-
15 tion about ~~[foreclosure while you are working]~~ possible options, includ-
16 ing trying to work with your lender during this process.

17 To locate an entity near you, you may call the toll-free helpline
18 maintained by the New York State Banking Department at _____
19 (enter number) or visit the Department's website at _____
20 (enter web address).

21 ~~[The State does not guarantee the advice of these agencies.]~~

22 Foreclosure rescue scams

23 Be careful of people who approach you with offers to "save" your home.
24 There are individuals who watch for notices of foreclosure actions in
25 order to unfairly profit from a homeowner's distress. You should be
26 extremely careful about any such promises and any suggestions that you
27 pay them a fee or sign over your deed. State law requires anyone offer-
28 ing such services for profit to enter into a contract which fully
29 describes the services they will perform and fees they will charge, and
30 which prohibits them from taking any money from you until they have
31 completed all such promised services.

32 4. The banking department shall prescribe the telephone number and web
33 address to be included in the notice.

34 5. The banking department shall post on its website or otherwise make
35 readily available the name and contact information of government agen-
36 cies or non-profit organizations that may be contacted for information
37 about the foreclosure process, including maintaining a toll-free help-
38 line to disseminate the information required by this section.

39 § 2. The real property actions and proceedings law is amended by
40 adding a new section 1304 to read as follows:

41 § 1304. Required prior notices. 1. Notwithstanding any other provision
42 of law, with regard to a high-cost home loan, as such term is defined in
43 section six-1 of the banking law, a subprime home loan or a non-tradi-
44 tional home loan, at least ninety days before a lender or a mortgage
45 loan servicer commences legal action against the borrower, including
46 mortgage foreclosure, the lender or mortgage loan servicer shall give
47 notice to the borrower in at least fourteen-point type which shall
48 include the following:

49 "YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING

50 NOTICE CAREFULLY"

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

55 If you are experiencing financial difficulty, you should know that
56 there are several options available to you that may help you keep your

1 home. Attached to this notice is a list of government approved housing
2 counseling agencies in your area which provide free or very low-cost
3 counseling. You should consider contacting one of these agencies imme-
4 diately. These agencies specialize in helping homeowners who are facing
5 financial difficulty. Housing counselors can help you assess your finan-
6 cial condition and work with us to explore the possibility of modifying
7 your loan, establishing an easier payment plan for you, or even working
8 out a period of loan forbearance. If you wish, you may also contact us
9 directly at _____ and ask to discuss possible options.

10 While we cannot assure that a mutually agreeable resolution is possi-
11 ble, we encourage you to take immediate steps to try to achieve a resol-
12 ution. The longer you wait, the fewer options you may have.

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

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

19 2. Such notice shall be sent by the lender or mortgage loan servicer
20 to the borrower, by registered or certified mail and also by first-class
21 mail to the last known address of the borrower, and if different, to the
22 residence which is the subject of the mortgage. Notice is considered
23 given as of the date it is mailed. The notice shall contain a list of at
24 least five United States department of housing and urban development
25 approved housing counseling agencies, or other housing counseling agen-
26 cies as designated by the division of housing and community renewal,
27 that serve the region where the borrower resides. The list shall include
28 the counseling agencies' last known addresses and telephone numbers. The
29 banking department and/or the division of housing and community renewal
30 shall make available a listing, by region, of such agencies which the
31 lender or mortgage loan servicer may use to meet the requirements of
32 this section.

33 3. The ninety day period specified in the notice contained in subdivi-
34 sion one of this section shall not apply, or shall cease to apply, if
35 the borrower has filed an application for the adjustment of debts of the
36 borrower or an order for relief from the payment of debts, or if the
37 borrower no longer occupies the residence as the borrower's principal
38 dwelling.

39 4. The notice and the ninety day period required by subdivision one of
40 this section need only be provided once in a twelve month period to the
41 same borrower in connection with the same loan.

42 5. (a) "Annual percentage rate" means the annual percentage rate for
43 the loan calculated according to the provisions of the Federal Truth-in-
44 Lending Act (15 U.S.C. § 1601, et seq.), and the regulations promulgated
45 thereunder by the federal reserve board (as said act and regulations are
46 amended from time to time).

47 (b) "Home loan" means a home loan, including an open-end credit plan,
48 other than a reverse mortgage transaction, in which:

49 (i) The principal amount of the loan at origination did not exceed the
50 conforming loan size that was in existence at the time of origination
51 for a comparable dwelling as established by the federal national mort-
52 gage association;

53 (ii) The borrower is a natural person;

54 (iii) The debt is incurred by the borrower primarily for personal,
55 family, or household purposes;

1 (iv) The loan is secured by a mortgage or deed of trust on real estate
2 upon which there is located or there is to be located a structure or
3 structures intended principally for occupancy of from one to four fami-
4 lies which is or will be occupied by the borrower as the borrower's
5 principal dwelling; and

6 (v) The property is located in this state.

7 (c) "Subprime home loan" for the purposes of this section, means a
8 home loan consummated between January first, two thousand three and
9 September first, two thousand eight in which the terms of the loan
10 exceed the threshold as defined in paragraph (d) of this subdivision. A
11 subprime home loan excludes a transaction to finance the initial
12 construction of a dwelling, a temporary or "bridge" loan with a term of
13 twelve months or less, such as a loan to purchase a new dwelling where
14 the borrower plans to sell a current dwelling within twelve months, or a
15 home equity line of credit.

16 (d) "Threshold" means, for a first lien mortgage loan, the annual
17 percentage rate of the home loan at consummation of the transaction
18 exceeds three percentage points over the yield on treasury securities
19 having comparable periods of maturity to the loan maturity measured as
20 of the fifteenth day of the month in which the loan was consummated; or
21 for a subordinate mortgage lien, the annual percentage rate of the home
22 loan at consummation of the transaction equals or exceeds five percent-
23 age points over the yield on treasury securities having comparable peri-
24 ods of maturity on the fifteenth day of the month in which the loan was
25 consummated; as determined by the following rules: if the terms of the
26 home loan offer any initial or introductory period, and the annual
27 percentage rate is less than that which will apply after the end of such
28 initial or introductory period, then the annual percentage rate that
29 shall be taken into account for purposes of this section shall be the
30 rate which applies after the initial or introductory period.

31 (e) "Non-traditional home loan" shall mean a payment option adjustable
32 rate mortgage or an interest only loan consummated between January
33 first, two thousand three and September first, two thousand eight.

34 (f) For purposes of determining the threshold, the banking department
35 shall publish on its website a listing of constant maturity yields for
36 U.S. Treasury securities for each month between January first, two thou-
37 sand three and September first, two thousand eight, as published in the
38 Federal Reserve Statistical Release on selected interest rates, commonly
39 referred to as the H.15 release, in the following maturities, to the
40 extent available in such release: six month, one year, two year, three
41 year, five year, seven year, ten year, thirty year.

42 (g) "Lender" means a mortgage banker as defined in paragraph (f) of
43 subdivision one of section five hundred ninety of the banking law or an
44 exempt organization as defined in paragraph (e) of subdivision one of
45 section five hundred ninety of the banking law.

46 § 3. The civil practice law and rules is amended by adding a new rule
47 3408 to read as follows:

48 Rule 3408. Mandatory settlement conference in residential foreclosure
49 actions. (a) In any residential foreclosure action involving a high-cost
50 home loan consummated between January first, two thousand three and
51 September first, two thousand eight, or a subprime or nontraditional
52 home loan, as those terms are defined under section thirteen hundred
53 four of the real property actions and proceedings law, in which the
54 defendant is a resident of the property subject to foreclosure, the
55 court shall hold a mandatory conference within sixty days after the date
56 when proof of service is filed with the county clerk, or on such

1 adjourned date as has been agreed to by the parties, for the purpose of
2 holding settlement discussions pertaining to the relative rights and
3 obligations of the parties under the mortgage loan documents, including,
4 but not limited to determining whether the parties can reach a mutually
5 agreeable resolution to help the defendant avoid losing his or her home,
6 and evaluating the potential for a resolution in which payment schedules
7 or amounts may be modified or other workout options may be agreed to,
8 and for whatever other purposes the court deems appropriate.

9 (b) At the initial conference held pursuant to this section, any
10 defendant currently appearing pro se, shall be deemed to have made a
11 motion to proceed as a poor person under section eleven hundred one of
12 this chapter. The court shall determine whether such permission shall be
13 granted pursuant to standards set forth in section eleven hundred one of
14 this chapter. If the court appoints defendant counsel pursuant to subdivi-
15 sion (a) of section eleven hundred two of this chapter, it shall
16 adjourn the conference to a date certain for appearance of counsel and
17 settlement discussions pursuant to subdivision (a) of this section, and
18 otherwise shall proceed with the conference.

19 (c) At any conference held pursuant to this section, the plaintiff
20 shall appear in person or by counsel, and if appearing by counsel, such
21 counsel shall be fully authorized to dispose of the case. The defendant
22 shall appear in person or by counsel. If the defendant is appearing pro
23 se, the court shall advise the defendant of the nature of the action and
24 his or her rights and responsibilities as a defendant. Where appropri-
25 ate, the court may permit a representative of the plaintiff to attend
26 the settlement conference telephonically or by video-conference.

27 § 3-a. For any foreclosure action on a residential mortgage loan, in
28 which the action was initiated prior to September 1, 2008 but where the
29 final order of judgment has not yet been issued, the court shall request
30 each plaintiff to identify whether the loan in foreclosure is a subprime
31 home loan as defined in section 1304 of the real property actions and
32 proceedings law or is a high-cost home loan as defined in section 6-1 of
33 the banking law.

34 If the loan is a subprime home loan or high-cost home loan, the court
35 shall notify the defendant that if he or she is a resident of such prop-
36 erty, he or she may request a settlement conference.

37 If the defendant requests a conference, the court shall hold such
38 conference as soon as practicable for the purpose of holding settlement
39 discussions pertaining to the rights and obligations of the parties
40 under the mortgage loan documents, including but not limited to, deter-
41 mining whether the parties can reach a mutually agreeable resolution to
42 help the defendant avoid losing his or her home, and evaluating the
43 potential for a resolution in which payment schedules or amounts may be
44 modified or other workout options may be agreed to, and for whatever
45 other purposes the court deems appropriate.

46 At any conference held pursuant to this section, the plaintiff shall
47 appear in person or by counsel, and if appearing by counsel, such coun-
48 sel shall be fully authorized to dispose of the case. The defendant
49 shall appear in person or by counsel. If the defendant is appearing pro
50 se, the court shall advise the defendant of the nature of the action and
51 his or her rights and responsibilities as a defendant. Where appropri-
52 ate, the court may permit a representative of the plaintiff to attend
53 the settlement conference telephonically or by video-conference.

54 § 4. Paragraphs (c), (h) and (j) of subdivision 2 of section 6-1 of
55 the banking law, as added by chapter 626 of the laws of 2002, are

1 amended and five new paragraphs (r), (s), (t), (u) and (v) are added to
2 read as follows:

3 (c) No negative amortization. No high-cost home loan may contain a
4 payment schedule with regular periodic payments that cause the principal
5 balance to increase. A loan is considered to have such a schedule if
6 the borrower is given the option to make regular periodic payments that
7 cause the principal balance to increase, even if the borrower is also
8 given the option to make regular periodic payments that do not cause the
9 principal balance to increase. This paragraph shall not prohibit nega-
10 tive amortization as a result of a temporary forbearance sought by a
11 borrower.

12 (h) No financing of insurance or other products sold in connection
13 with the loan. No high-cost home loan shall finance, directly or indi-
14 rectly, any credit life, credit disability, credit unemployment, or
15 credit property insurance, or any other life or health insurance premi-
16 ums, or any payments directly or indirectly for any debt cancellation or
17 suspension agreement or contract, ~~[except that insurance]~~ or any product
18 or service that is not necessary or related to the high-cost home loan
19 such as auto club memberships or credit report monitoring, but not
20 including fees paid to the lender, broker, or closing agent, fees
21 related to the recording of the mortgage, title insurance or other
22 settlement fees. Insurance premiums or debt cancellation or suspension
23 fees calculated and paid on a monthly basis shall not be considered
24 financed.

25 (j) No refinancing of special mortgages. No lender or mortgage broker
26 making or arranging a high-cost home loan may refinance an existing home
27 loan that is a special mortgage originated, subsidized or guaranteed by
28 or through a state, tribal or local government, or nonprofit organiza-
29 tion, which either bears a below-market interest rate at the time of
30 origination, or has nonstandard payment terms beneficial to the borrow-
31 er, such as payments that vary with income, are limited to a percentage
32 of income, or where no payments are required under specified conditions,
33 and where, as a result of the refinancing, the borrower will lose one or
34 more of the benefits of the special mortgage, unless the lender is
35 provided prior to loan closing documentation by a HUD ~~[certified]~~
36 approved housing counselor or the lender who originally made the special
37 mortgage that a borrower has received home loan counseling in which the
38 advantages and disadvantages of the refinancing has been received.

39 (r) No prepayment penalties. No prepayment penalties or fees shall be
40 charged or collected on a high-cost home loan. A prepayment penalty in a
41 high-cost home loan shall be unenforceable.

42 (s) No abusive yield spread premiums. In arranging a high-cost home
43 loan, the mortgage broker shall, at the time of application, disclose
44 the exact amount and methodology of total compensation that the broker
45 will receive. Such amount may be paid as direct compensation from the
46 lender, direct compensation from the borrower, or a combination of the
47 two. The provisions of this paragraph shall not restrict the ability of
48 a borrower to utilize a yield spread premium in order to offset any up
49 front costs by accepting a higher interest rate. If the borrower chooses
50 this option, any compensation from the lender which exceeds the exact
51 amount of total compensation owed to the broker must be credited to the
52 borrower. The superintendent shall prescribe the form that such disclo-
53 sure shall take. This provision shall not restrict a broker from accept-
54 ing a lesser amount.

55 (t) Mandatory escrow of taxes and insurance. No high-cost home loan
56 shall be made after July first, two thousand ten unless the lender

1 requires and collects the monthly escrow of property taxes and hazard
2 insurance. With respect to a high-cost home loan, a borrower may waive
3 escrow requirements by notifying the lender in writing after one year
4 from consummation of the loan. The provisions of this paragraph shall
5 not apply to a high-cost home loan that is a subordinate lien when the
6 taxes and insurance are escrowed through another home loan or where the
7 borrower can demonstrate a record of twelve months of timely payments of
8 taxes and insurance on a previous home loan.

9 (u) Mandatory disclosure of taxes and insurance payments. With respect
10 to a high-cost home loan, the first time a borrower is informed of the
11 anticipated or actual periodic payment amount in connection with a
12 first-lien residential mortgage loan for a specific property, the lender
13 or mortgage broker shall inform the borrower that an additional amount
14 will be due for taxes and insurance and shall disclose to the borrower
15 as soon as reasonably possible the approximate amount of the initial
16 periodic payment for property taxes and hazard insurance.

17 (v) No teaser rates. No lender or mortgage broker shall make or
18 arrange a high-cost home loan which has an initial or introductory rate
19 with a duration of less than six months.

20 § 4-a. Subparagraph (ii) of paragraph (1) of subdivision 2 of section
21 6-1 of the banking law, as added by chapter 626 of the laws of 2002, is
22 amended to read as follows:

23 (ii) A lender or mortgage broker shall not make or arrange a high-cost
24 home loan unless either the lender or mortgage broker has given the
25 following notice in writing to the borrower within three days after
26 determining that the loan is a high-cost home loan, but no less than ten
27 days before closing:

28 "CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE

29 If you obtain this loan, which pursuant to New York State Law is a
30 High-Cost Home Loan, the lender will have a mortgage on your home. You
31 could lose your home, and any money you have put into it, if you do not
32 meet your obligations under the loan.

33 You should shop around and compare loan rates and fees. Mortgage loan
34 rates and closing costs and fees vary based on many factors, including
35 your particular credit and financial circumstances, your earnings histo-
36 ry, the loan-to-value requested, and the type of property that will
37 secure your loan. The loan rate and fees could vary based on which lend-
38 er or mortgage broker you select. Higher rates and fees may be related
39 to the individual circumstances of a particular consumer's application.

40 You should consider consulting a qualified independent credit counse-
41 lor or other experienced financial adviser regarding the rate, fees, and
42 provisions of this mortgage loan before you proceed. The enclosed list
43 of counselors is provided by the New York State Banking Department.

44 You are not required to complete any loan agreement merely because you
45 have received these disclosures or have signed a loan application. If
46 you proceed with this mortgage loan, you should also remember that you
47 may face serious financial risks if you use this loan to pay off credit
48 card debts and other debts in connection with this transaction and then
49 subsequently incur significant new credit card charges or other debts.
50 If you continue to accumulate debt after this loan is closed and then
51 experience financial difficulties, you could lose your home and any
52 equity you have in it if you do not meet your mortgage loan obligations.

1 ~~[Property taxes and homeowner's insurance are your responsibility. Not~~
2 ~~all lenders provide escrow services for these payments. You should ask~~
3 ~~your lender about these services.]~~

4 Your payments on existing debts contribute to your credit ratings. You
5 should not accept any advice to ignore your regular payments to your
6 existing creditors. ~~[Accordingly, it is important that you make regular~~
7 ~~payments to your existing creditors.]"~~

8 § 5. The banking law is amended by adding a new section 6-m to read as
9 follows:

10 § 6-m. Subprime home loans. 1. Definitions. The following definitions
11 apply for the purposes of this section:

12 (a) "Annual percentage rate" means the annual percentage rate for the
13 loan calculated according to the provisions of the Federal Truth-in-
14 Lending Act (15 U.S.C. § 1601, et seq.), and the regulations promulgated
15 thereunder by the federal reserve board (as said act and regulations are
16 amended from time to time).

17 (b) "Fully indexed rate" means the index rate that would have applied
18 at the time of the closing had the initial interest rate been determined
19 by the application of the same interest rate formula, (for example, an
20 interest rate index plus or minus a margin) that applies under the terms
21 of the loan documents to subsequent interest rate adjustments, disre-
22 garding any limitations on the amount by which the interest rate may
23 change at any one time.

24 (c) A "Subprime home loan" means a home loan in which the fully
25 indexed annual percentage rate exceeds by more than one and three-quar-
26 ters percentage points for a first-lien loan, or by more than three and
27 three-quarters percentage points for a subordinate-lien loan, the aver-
28 age commitment rate for loans in the northeast region with a comparable
29 duration to the duration of such home loan, as published by the Federal
30 Home Loan Mortgage Corporation (herein "Freddie Mac") in its weekly
31 Primary Mortgage Market Survey (PMS) as posted in the week prior to the
32 week when the lender receives a completed application. A subprime home
33 loan excludes a transaction to finance the initial construction of a
34 dwelling, a temporary or "bridge" loan with a term of twelve months or
35 less, such as a loan to purchase a new dwelling where the borrower plans
36 to sell a current dwelling within twelve months, or a home equity line
37 of credit.

38 (i) The comparable duration for a home loan shall be determined as
39 follows: for an adjustable or variable home loan with an initial rate
40 that is fixed for less than three years, the Freddie Mac survey result
41 for a one-year adjustable rate mortgage; for an adjustable or variable
42 home loan with an initial rate that is fixed for at least three years,
43 the Freddie Mac survey result for a five-year hybrid adjustable rate
44 mortgage; for a fixed rate home loan with a term of fifteen years or
45 less, the Freddie Mac survey result for a fifteen-year fixed rate mort-
46 gage; and for a fixed rate home loan with a term of more than fifteen
47 years, the Freddie Mac survey result for a thirty-year fixed rate mort-
48 gage. The superintendent may prescribe by regulation a different compa-
49 rable duration standard as necessary or appropriate to reflect changes
50 in the terms and types of mortgages included in the Freddie Mac survey.

51 (ii) Notwithstanding the comparable rates set forth in this paragraph,
52 and notwithstanding any other law, if the superintendent determines that
53 by statute, rule or regulation, different thresholds for determining
54 underwriting standards for subprime loans become applicable to
55 nationally chartered lending institutions, or the provisions of this
56 section have had an unduly negative effect upon the availability or

1 price of mortgage financing in this state, the superintendent may from
2 time to time designate such other threshold rates as may be necessary to
3 achieve parity between such nationally chartered institutions and bank-
4 ing organizations, mortgage banks and mortgage brokers in this state or
5 to alleviate such unduly negative effects. Such determination shall
6 promptly be published on the website of the banking department.

7 (d) "Home loan" means a home loan, including an open-end credit plan,
8 other than a reverse mortgage transaction, in which:

9 (i) The principal amount of the loan does not exceed the conforming
10 loan size limit for a comparable dwelling as established from time to
11 time by the federal national mortgage association;

12 (ii) The borrower is a natural person;

13 (iii) The debt is incurred by the borrower primarily for personal,
14 family, or household purposes;

15 (iv) The loan is secured by a mortgage or deed of trust on real estate
16 upon which there is located or there is to be located a structure or
17 structures intended principally for occupancy of from one to four fami-
18 lies which is or will be occupied by the borrower as the borrower's
19 principal dwelling; and

20 (v) The property is located in this state.

21 (e) "Lender" means a mortgage banker as defined in paragraph (f) of
22 subdivision one of section five hundred ninety of this chapter or an
23 exempt organization as defined in paragraph (e) of subdivision one of
24 section five hundred ninety of this chapter.

25 (f) "Mortgage broker" means a mortgage broker as defined in paragraph
26 (g) of subdivision one of section five hundred ninety of this chapter
27 and a mortgage banker as defined in paragraph (f) of subdivision one of
28 section five hundred ninety of this chapter, when such mortgage banker
29 solicits, processes, places or negotiates a mortgage loan for others.

30 2. Limitations and prohibited practices for subprime home loans. A
31 subprime home loan shall be subject to the following limitations:

32 (a) No call provisions. No subprime home loan may contain a provision
33 that permits the lender, in its sole discretion, to accelerate the
34 indebtedness. This provision shall not prohibit acceleration of the loan
35 in good faith due to the borrower's failure to abide by the material
36 terms of the loan.

37 (b) No negative amortization. No subprime home loan may contain a
38 payment schedule with regular periodic payments that cause or may cause
39 the principal balance to increase. A loan is considered to have such a
40 schedule if the borrower is given the option to make regular periodic
41 payments that cause the principal balance to increase, even if the
42 borrower is also given the option to make regular periodic payments that
43 do not cause the principal balance to increase. This paragraph shall
44 not prohibit negative amortization as a result of a temporary forbear-
45 ance sought by a borrower.

46 (c) No increased interest rate. No subprime home loan may contain a
47 provision which increases the interest rate after default. This
48 provision shall not apply to interest rate changes in a variable rate
49 loan otherwise consistent with the provisions of the loan documents;
50 provided that the change in the interest rate is not triggered by the
51 event of default or the acceleration of the indebtedness.

52 (d) Limitation on advance payments. No subprime home loan may include
53 terms under which more than two periodic payments required under the
54 loan are consolidated and paid in advance from the loan proceeds
55 provided to the borrower.

1 (e) No modification or deferral fees. A lender may not charge a
2 borrower any fees to modify, renew, extend, or amend a subprime home
3 loan or to defer any payment due under the terms of a supprime home loan
4 if, after the modification, renewal, extension or amendment, the loan is
5 still a subprime home loan or, if no longer a subprime home loan, the
6 annual percentage rate has not been decreased by at least two percentage
7 points. For purposes of this paragraph, fees shall not include interest
8 that is otherwise payable and consistent with the provisions of the loan
9 documents. This paragraph shall not prohibit a lender from charging
10 points and fees in connection with any additional proceeds received by
11 the borrower in connection with the modification, renewal, extension or
12 amendment (over and above the current principal balance of the existing
13 subprime home loan) provided that the points and fees charged on the
14 additional sum must reflect the lender's typical point and fee structure
15 for subprime home loans. This paragraph shall not apply if the existing
16 subprime home loan is in default or is sixty or more days delinquent and
17 the modification, renewal, extension, amendment or deferral is part of a
18 work-out process.

19 (f) No oppressive mandatory arbitration clauses. No subprime home
20 loan may be subject to a mandatory arbitration clause that is oppres-
21 sive, unfair, unconscionable, or substantially in derogation of the
22 rights of consumers.

23 (g) No financing of insurance or other products sold in connection
24 with the loan. No subprime home loan shall finance, directly or indi-
25 rectly, any credit life, credit disability, credit unemployment, or
26 credit property insurance, or any other life or health insurance premi-
27 ums, or any payments directly or indirectly for any debt cancellation or
28 suspension agreement or contract, or any product or service that is not
29 necessary or related to the home loan such as auto club memberships or
30 credit report monitoring, but not including fees paid to the lender,
31 broker, or closing agent, fees related to the recording of the mortgage,
32 title insurance or other settlement fees. Insurance premiums or debt
33 cancellation or suspension fees calculated and paid on a monthly basis
34 shall not be considered financed.

35 (h) No "loan flipping". No lender or mortgage broker making or arrang-
36 ing a subprime home loan may engage in the unfair act or practice of
37 "loan flipping". "Loan flipping" is making a home loan to a borrower
38 that refinances an existing home loan when the new loan does not have a
39 tangible net benefit to the borrower considering all of the circum-
40 stances, including the terms of both the new and refinanced loans, the
41 cost of the new loan, and the borrower's situation.

42 (i) No refinancing of special mortgages. No lender making a subprime
43 home loan may refinance an existing home loan that is a special mortgage
44 originated, subsidized or guaranteed by or through a state, tribal or
45 local government, or nonprofit organization, which either bears a
46 below-market interest rate at the time of origination, or has nonstand-
47 ard payment terms beneficial to the borrower, such as payments that vary
48 with income, are limited to a percentage of income, or where no payments
49 are required under specified conditions, and where, as a result of the
50 refinancing, the borrower will lose one or more of the benefits of the
51 special mortgage, unless the lender is provided prior to loan closing
52 documentation by a HUD approved housing counselor or the lender who
53 originally made the special mortgage that the borrower has received home
54 loan counseling about the advantages and disadvantages of the refinanc-
55 ing.

1 (j) No lending without counseling disclosure and list of counselors. A
2 lender or mortgage broker must deliver, place in the mail, fax or elec-
3 tronically transmit the following notice in at least twelve point type
4 to the borrower of a subprime home loan at the time of application:
5 "You should consider financial counseling prior to executing loan docu-
6 ments. The enclosed list of counselors is provided by the New York State
7 Banking Department." In the event of a telephone application, the
8 disclosures must be made immediately after receipt of the application by
9 telephone. Such disclosure shall be on a separate form. In order to
10 utilize an electronic transmission, the lender or broker must first
11 obtain either written or electronically transmitted permission from the
12 borrower. A list of approved counselors, available from the New York
13 state banking department, shall be provided to the borrower by the lend-
14 er or the mortgage broker at the time that this disclosure is given.

15 (k) No encouragement of default. In making or arranging a subprime
16 home loan, a lender or mortgage broker shall not recommend or encourage
17 default on an existing loan or other debt prior to and in connection
18 with the closing or planned closing of the subprime home loan that refi-
19 nances all or any portion of such existing loan or debt.

20 (l) Prohibited payments to mortgage brokers. In making or arranging a
21 subprime home loan, no lender or mortgage broker shall accept or give
22 any fee, kickback, thing of value, portion, split or percentage of
23 charges, other than as payment for goods or facilities that were actual-
24 ly furnished or services that were actually performed. Such payment
25 must be reasonably related to the value of the goods or facilities that
26 were actually furnished or services that were actually performed.

27 (m) No prepayment penalties on subprime home loans. No prepayment
28 penalties or fees shall be charged or collected on a subprime home loan.
29 A prepayment penalty in a subprime home loan shall be unenforceable.

30 (n) No abusive yield spread premiums. In arranging a subprime home
31 loan, the mortgage broker shall, at the time of application, disclose
32 the exact amount and methodology for determining the total compensation
33 that the broker will receive. Such amount may be paid as direct compen-
34 sation from the lender, direct compensation from the borrower, or a
35 combination of the two. The provisions of this paragraph shall not
36 restrict the ability of a borrower to utilize a yield spread premium in
37 order to offset any upfront costs by accepting a higher interest rate.
38 If the borrower chooses this option, any compensation from the lender
39 which exceeds the exact amount of total compensation owed to the broker
40 must be credited to the borrower. The superintendent shall prescribe the
41 form that such disclosure shall take. This paragraph shall not restrict
42 a broker from accepting a lesser amount.

43 (o) Mandatory escrow of taxes and insurance. No subprime home loan
44 shall be made after July first, two thousand ten unless the lender
45 requires and collects the monthly escrow of property taxes and hazard
46 insurance. With respect to a subprime home loan, a borrower may waive
47 escrow requirements by notifying the lender in writing after one year
48 from consummation of the loan. The provisions of this paragraph shall
49 not apply to a subprime home loan that is a subordinate lien when the
50 taxes and insurance are escrowed through another home loan or where the
51 borrower can demonstrate a record of twelve months of timely payments of
52 taxes and insurance on a previous home loan.

53 (p) Mandatory disclosure of taxes and insurance payments. With respect
54 to a subprime home loan, the first time a borrower is informed of the
55 anticipated or actual periodic payment amount in connection with a
56 first-lien residential mortgage loan for a specific property, the lender

1 or mortgage broker shall inform the borrower that an additional amount
2 will be due for taxes and insurance and shall disclose to the borrower
3 as soon as reasonably possible the approximate amount of the initial
4 periodic payment for property taxes and hazard insurance.

5 (q) No teaser rates. No lender or mortgage broker shall make or
6 arrange a subprime home loan which has an initial or introductory rate
7 with a duration of less than six months.

8 3. Any provision in a subprime home loan that violates subdivision two
9 of this section shall be rendered void.

10 4. No arrangement of certain subprime loans. No lender or mortgage
11 broker shall make or arrange a subprime home loan unless the lender or
12 mortgage broker reasonably and in good faith believes at the time the
13 loan is consummated that one or more of the borrowers, when considered
14 individually or collectively, has the ability to repay the loan accord-
15 ing to its terms and to pay applicable real estate taxes and hazard
16 insurance premiums. If a lender or mortgage broker making or arranging a
17 subprime home loan knows that one or more home loans secured by the same
18 real property will be made contemporaneously to the same borrower with
19 the subprime home loan being made or arranged by that lender or mortgage
20 broker, the lender or mortgage broker making or arranging the subprime
21 home loan must document the borrower's ability to repay the combined
22 payments of all loans on the same real property.

23 (a) A lender or mortgage broker's analysis of a borrower's ability to
24 repay a subprime home loan according to the loan terms and to pay
25 related real estate taxes and insurance premiums shall be based on a
26 consideration of the borrower's credit history, current and expected
27 income, current obligations, employment status, and other financial
28 resources other than the borrower's equity in the real property that
29 secures repayment of the subprime home loan.

30 (b) In determining a borrower's ability to repay a subprime home loan,
31 the lender or mortgage broker shall take reasonable steps to verify the
32 accuracy and completeness of information provided by or on behalf of the
33 borrower using tax returns, payroll receipts, bank records, reasonable
34 alternative methods, or reasonable third-party verification.

35 (c) In determining a borrower's ability to repay a subprime home loan
36 according to its terms when the loan has an adjustable rate feature, the
37 lender or mortgage broker shall calculate the monthly payment amount for
38 principal and interest by assuming (i) the loan proceeds are fully
39 disbursed on the date of the loan closing, (ii) the loan is to be repaid
40 in substantially equal monthly amortizing payments of principal and
41 interest over the entire term of the loan, with no balloon payment, and
42 (iii) the interest rate over the entire term of the loan is a fixed rate
43 equal to the fully indexed rate at the time of the loan closing, without
44 considering any initial discounted rate.

45 (d) A lender or mortgage broker's analysis of a borrower's ability to
46 repay a subprime home loan may utilize reasonable commercially recog-
47 nized underwriting standards and methodologies, including automated
48 underwriting systems, provided the standards and methodologies comply
49 with the provisions of this section.

50 5. Subprime home loan mortgages shall include a legend on top of the
51 mortgage in twelve-point type stating that the mortgage is a subprime
52 home loan subject to this section.

53 6. The provisions of this section shall apply to any person who in bad
54 faith attempts to avoid the application of this section by any subter-
55 fuge, including but not limited to splitting or dividing any loan trans-

1 action into separate parts for the purpose of evading the provisions of
2 this section.

3 7. A lender of a subprime home loan that, when acting in good faith,
4 fails to comply with the provisions of this section, shall not be deemed
5 to have violated this section if, prior to the institution of any action
6 and before the borrower is prejudiced, the lender notifies the borrower
7 of the compliance failure, appropriate restitution is made, and whatever
8 adjustments that are necessary are made to the loan to make the loan
9 satisfy the requirements of this section.

10 8. The attorney general or the superintendent may enforce the
11 provisions of this section.

12 9. Any person found by a preponderance of the evidence to have
13 violated this section shall be liable to the borrower of a subprime home
14 loan for actual damages.

15 10. A court may also award reasonable attorneys' fees to a prevailing
16 borrower in a foreclosure action.

17 11. A borrower may be granted injunctive, declaratory and such other
18 equitable relief as the court deems appropriate in an action to enforce
19 compliance with this section.

20 12. The remedies provided in this section are not intended to be the
21 exclusive remedies available to a borrower of a subprime home loan.

22 13. In any action by a lender or assignee to enforce a loan against a
23 borrower in default more than sixty days or in foreclosure, a borrower
24 may assert as a defense, any violation of this section.

25 14. The provisions of this section shall be severable, and if any
26 phrase, clause, sentence, or provision is declared to be invalid, or is
27 preempted by federal law or regulation, the validity of the remainder of
28 this section shall not be affected thereby. If any provision of this
29 section is declared to be inapplicable to any specific category, type,
30 or kind of points and fees with respect to a home loan, the provisions
31 of this section shall nonetheless continue to apply with respect to all
32 other points and fees.

33 § 6. The banking law is amended by adding a new section 590-b to read
34 as follows:

35 § 590-b. Responsibilities. 1. Each mortgage broker shall, in addi-
36 tion to the duties imposed by otherwise applicable provisions of state
37 and federal law, with respect to any transaction, including any prac-
38 tice, or course of business in connection with the transaction, in which
39 the mortgage broker solicits, processes, places or negotiates a home
40 loan:

41 (a) act in the borrower's interest;

42 (b) act with reasonable skill, care and diligence;

43 (c) act in good faith and with fair dealing;

44 (d) not accept, give, or charge any undisclosed compensation, directly
45 or indirectly, that inures to the benefit of the mortgage broker, wheth-
46 er or not characterized as an expenditure made for the borrower;

47 (e) clearly disclose to the borrower, not later than three days after
48 receipt of the loan application, all material information as specified
49 by the superintendent that might reasonably affect the rights, inter-
50 ests, or ability of the borrower to receive the borrower's intended
51 benefit from the home loan, including total compensation that the broker
52 would receive from any of the loan options that the lender or mortgage
53 broker presents to the borrower; and

54 (f) diligently work to present the borrower with a range of loan
55 products for which the borrower likely qualifies and which are appropri-

1 ate to the borrower's existing circumstances, based on information known
2 by, or obtained in good faith by, the broker.

3 2. No lender or mortgage broker shall improperly influence or attempt
4 to improperly influence the development, reporting, result or review of
5 a real estate appraisal relating to real property securing a home loan,
6 provided that it shall not be a violation of this prohibition to:

7 (a) ask an appraiser to consider additional information about a
8 borrower's principal dwelling or about comparable properties;

9 (b) request that an appraiser provide additional information about the
10 basis for a valuation;

11 (c) request that an appraiser correct factual errors in a valuation;

12 (d) obtain multiple appraisals of a borrower's principal dwelling, so
13 long as the lender or mortgage broker adheres to a policy of selecting
14 the most reliable appraisal, rather than the appraisal that states the
15 highest value;

16 (e) withhold compensation from an appraiser for breach of contract or
17 substandard performance of services;

18 (f) terminate a relationship with an appraiser for violations of
19 applicable state or federal law or breaches of ethical or professional
20 standards; and

21 (g) take action permitted or required by applicable state or federal
22 statute, regulation, or agency guidance.

23 3. Any mortgage broker found by a preponderance of evidence to have
24 violated subdivision one of this section, shall be liable to the borrow-
25 er for actual damages.

26 4. Any lender or mortgage broker found by a preponderance of evidence
27 to have violated subdivision two of this section, shall be liable to the
28 borrower for actual damages.

29 5. A borrower may be granted injunctive, declaratory, and such other
30 equitable relief as the court deems appropriate in an action to enforce
31 compliance with this section.

32 6. A court may also award reasonable attorneys' fees to a prevailing
33 borrower in a foreclosure action.

34 7. The attorney general or the superintendent may enforce the
35 provisions of this section.

36 8. The remedies provided in this section are not intended to be the
37 exclusive remedies available to a borrower.

38 § 7. Paragraph (g) of subdivision 1 of section 590 of the banking law,
39 as amended by chapter 293 of the laws of 1987, is amended and two new
40 paragraphs (h) and (i) are added to read as follows:

41 (g) "Registrant" or "mortgage broker" shall mean a person or entity
42 registered pursuant to section five hundred ninety-one-a of this chapter
43 to engage in the business of soliciting, processing, placing or negoti-
44 ating mortgage loans for others, or offering to solicit, process, place
45 or negotiate mortgage loans for others[-];

46 (h) "Mortgage loan servicer" or "servicer" shall mean a person or
47 entity registered pursuant to subdivision two of this section to engage
48 in the business of servicing mortgage loans for property located in this
49 state;

50 (i) "Servicing mortgage loans" shall mean receiving any scheduled
51 periodic payments from a borrower pursuant to the terms of any mortgage
52 loan, including amounts for escrow accounts under section six-k of this
53 chapter, title three-A of article nine of the real property tax law or
54 section ten of 12 U.S.C. 2609, and making the payments to the owner of
55 the loan or other third parties of principal and interest and such other
56 payments with respect to the amounts received from the borrower as may

1 be required pursuant to the terms of the mortgage service loan documents
2 or servicing contract. In the case of a home equity conversion mortgage
3 or reverse mortgage as referenced in section six-h of this chapter,
4 sections two hundred eighty and two hundred eighty-a of the real proper-
5 ty law or 24 CFR 3500.2, servicing includes making payments to the
6 borrower.

7 § 8. Subdivisions 2, 3, 4 and 5 of section 590 of the banking law,
8 subdivisions 2, 3 and 5 as added by chapter 571 of the laws of 1986,
9 paragraph (b) of subdivision 2 and subdivision 4 as amended by chapter
10 293 of the laws of 1987, are amended to read as follows:

11 2. Necessity for license. (a) No person, partnership, association,
12 corporation or other entity shall engage in the business of making five
13 or more mortgage loans in any one calendar year without first obtaining
14 a license from the superintendent in accordance with the licensing
15 procedure provided in this article and such regulations as may be
16 promulgated by the banking board or prescribed by the superintendent.
17 The licensing provisions of this subdivision shall not apply to any
18 exempt organization nor to any entity or entities which shall be
19 exempted in accordance with regulations promulgated by the banking board
20 hereunder.

21 (b) No person, partnership, association, corporation or other entity
22 shall engage in the business of soliciting, processing, placing or nego-
23 tiating a mortgage loan or offering to solicit, process, place or nego-
24 tiate a mortgage loan in this state without first being registered with
25 the superintendent as a mortgage broker in accordance with the registra-
26 tion procedure provided in this article and by such regulations as may
27 be promulgated by the banking board or prescribed by the superintendent.
28 The registration provisions of this subdivision shall not apply to any
29 exempt organization or mortgage banker. No real estate broker or sales-
30 man, as defined in section four hundred forty of the real property law,
31 shall be deemed to be engaged in the business of a mortgage broker if he
32 does not accept a fee, directly or indirectly, for services rendered in
33 connection with the solicitation, processing, placement or negotiation
34 of a mortgage loan. No attorney-at-law who solicits, processes, places
35 or negotiates a mortgage loan incidental to his legal practice shall be
36 deemed to be engaged in the business of a mortgage broker. The registra-
37 tion provisions of this subdivision shall not apply to any person or
38 entity which shall be exempted in accordance with regulations promulgat-
39 ed by the banking board hereunder.

40 (b-1) No person, partnership, association, corporation or other entity
41 shall engage in the business of servicing mortgage loans with respect to
42 any property located in this state without first being registered with
43 the superintendent as a mortgage loan servicer in accordance with the
44 registration procedure provided by such regulations as may be prescribed
45 by the superintendent. The superintendent may refuse to register a mort-
46 gage loan servicer on the same grounds that he or she may refuse to
47 issue a registration certificate to a mortgage broker pursuant to subdi-
48 vision two of section five hundred ninety-two-a of this article. The
49 registration provisions of this subdivision shall not apply to any
50 exempt organization, mortgage banker, or mortgage broker or any person
51 or entity which shall be exempted in accordance with regulations
52 prescribed by the superintendent hereunder; provided that such exempt
53 organization, mortgage banker, mortgage broker, or exempted person noti-
54 fies the superintendent that it is acting as a mortgage loan servicer in
55 this state and complies with any regulation applicable to mortgage loan

1 servicers, promulgated by the banking board or prescribed by the super-
2 intendent with respect to mortgage loan servicers.

3 (c) A licensee [~~or~~] registrant or mortgage loan servicer may apply for
4 authority to open and maintain one or more branch offices.

5 (d) No person or entity engaged in the building and sale of residen-
6 tial real property, or a financing subsidiary thereof, shall be deemed
7 to be making a mortgage loan, as defined in paragraph (c) of subdivision
8 one of this section, or soliciting, processing, placing or negotiating a
9 mortgage loan, as defined in paragraph (d) of subdivision one of this
10 section, if and only if such person, entity or financing subsidiary
11 shall make, solicit, process, place or negotiate a mortgage loan with
12 respect to residential real property it has built through a licensee or
13 exempt organization which is acting as its agent in compliance with this
14 article and regulations promulgated hereunder.

15 3. [~~Banking board~~] Rules and regulations. In addition to such powers
16 as may otherwise be prescribed by this chapter, the banking board is
17 hereby authorized and empowered to promulgate such rules and regulations
18 as may in the judgement of the banking board be consistent with the
19 purposes of this article, or appropriate for the effective adminis-
20 tration of this article, including, but not limited to:

21 (a) Such rules and regulations in connection with the activities of
22 mortgage brokers, mortgage bankers, mortgage loan servicers and exempt
23 organizations as may be necessary and appropriate for the protection of
24 consumers in this state;

25 (b) Such rules and regulations as may be necessary and appropriate to
26 define improper or fraudulent business practices in connection with the
27 activities of mortgage brokers, mortgage bankers, mortgage loan servi-
28 cers and exempt organizations in making mortgage loans;

29 (c) Such rules and regulations as may define the terms used in this
30 article and as may be necessary and appropriate to interpret and imple-
31 ment the provisions of this article; and

32 (d) Such rules and regulations as may be necessary for the enforcement
33 of this article.

34 The banking board is hereby authorized and empowered to make such
35 specific rulings, demands and findings as it may deem necessary for the
36 proper conduct of the mortgage lending industry.

37 4. Exemptions from provisions of article. No person shall be subject
38 to the licensure or registration provisions of this article if he or she
39 is employed by an exempt organization, a licensee or registrant, or a
40 mortgage loan servicer to assist in the performance of the business
41 activities described in this article for the exempt organization, licen-
42 see or registrant, or a mortgage loan servicer or is engaged in regu-
43 lated activities as an associate or affiliate of a registrant, a licen-
44 see, a mortgage loan servicer or exempt organization which has filed an
45 undertaking of accountability with the superintendent.

46 No employee of an exempt organization shall be subject to the licen-
47 sure or registration provisions of this article due to such employee's
48 assisting in the performance of the business activities of a mortgage
49 banker that is controlled by the exempt organization or affiliated with
50 the exempt organization through common ownership or control.

51 5. Activities of mortgage brokers, mortgage bankers, mortgage loan
52 servicers and exempt organizations. (a) Mortgage brokers may not make
53 mortgage loans in this state;

54 (b) Mortgage brokers shall solicit, process, place and negotiate mort-
55 gage loans [~~only~~] in conformity with the provisions of this [~~article~~
56 ~~and~~] chapter, such rules and regulations as may be promulgated by the

1 banking board or prescribed by the superintendent [~~pursuant to this~~
2 ~~article~~] thereunder and all applicable federal laws and the rules and
3 regulations promulgated thereunder;

4 (c) Mortgage bankers and exempt organizations shall make mortgage
5 loans [~~only~~] in conformity with the provisions of this [~~article and~~]
6 chapter, such rules and regulations as may be promulgated by the banking
7 board or prescribed by the superintendent [~~pursuant to this article~~]
8 thereunder and all applicable federal laws and the rules and regulations
9 promulgated thereunder;

10 (d) Mortgage loan servicers shall engage in the business of servicing
11 mortgage loans in conformity with the provisions of this chapter, such
12 rules and regulations as may be promulgated by the banking board or
13 prescribed by the superintendent thereunder and all applicable federal
14 laws and the rules and regulations promulgated thereunder.

15 (e) Nothing in this section shall be construed to limit any otherwise
16 applicable state or federal law or regulations.

17 § 9. The banking law is amended by adding a new section 595-b to read
18 as follows:

19 § 595-b. Regulation of mortgage loan servicers. 1. Establishment of
20 grounds to impose a fine or penalty. In addition to such other rules,
21 regulations and policies as the banking board may promulgate or the
22 superintendent may prescribe to effectuate the purposes of this article,
23 the superintendent shall promulgate regulations and policies governing
24 the establishment of grounds to impose a fine or penalty with respect to
25 the activities of a mortgage loan servicer.

26 2. Servicing practices. In addition to such other rules, regulations
27 and policies as the banking board may promulgate to effectuate the
28 purposes of this article, the superintendent may prescribe regulations
29 which relate to: (a) providing for disclosures to borrowers of the basis
30 for any interest rate resets; (b) requirements for the provision of
31 pay-off statements; and (c) governing the timing of the crediting of
32 payments made by the borrower.

33 § 10. Section 596 of the banking law, as amended by chapter 571 of the
34 laws of 1986, is amended to read as follows:

35 § 596. Superintendent authorized to examine; expenses. For the purpose
36 of discovering violations of this article or securing information
37 lawfully required by him hereunder, the superintendent may at any time,
38 and as often as he or she may determine, either personally or by a
39 person duly designated by him, investigate the business and examine the
40 books, accounts, records, and files used therein of every licensee,
41 servicer and registrant. For that purpose the superintendent and his or
42 her duly designated representative shall have free access to the offices
43 and places of business, books, accounts, papers, records, files, safes
44 and vaults of all such licensees, servicers and registrants. The super-
45 intendent and any person duly designated by him or her shall have
46 authority to require the attendance of and to examine under oath all
47 persons whose testimony he or she may require relative to such business.
48 The expenses incurred in making any examination pursuant to this section
49 shall be assessed against and paid by the licensee, servicer or regis-
50 trant so examined, except that traveling and subsistence expenses so
51 incurred shall be charged against and paid by licensees, servicers or
52 registrants in such proportions as the superintendent shall deem just
53 and reasonable, and such proportionate charges shall be added to the
54 assessment of the other expenses incurred upon each examination. Upon
55 written notice by the superintendent of the total amount of such assess-

1 ment, the licensee, servicer or registrant shall become liable for and
2 shall pay such assessment to the superintendent.

3 In any hearing in which the bank examiner acting under authority of
4 this chapter is available for cross-examination, any official written
5 report, worksheet, other related papers, or duly certified copy thereof,
6 compiled, prepared, drafted, or otherwise made by said bank examiner,
7 after being duly authenticated by said examiner, may be admitted as
8 competent evidence upon the oath of said examiner that said worksheet,
9 investigative report, or other related documents were prepared as a
10 result of an examination of the books and records of a licensee, servi-
11 cer or registrant or other person, conducted pursuant to the authority
12 of this chapter.

13 § 11. Section 597 of the banking law, as amended by chapter 571 of the
14 laws of 1986 and the opening paragraph as amended by chapter 499 of the
15 laws of 1995, is amended to read as follows:

16 § 597. Books and records; reports. Each licensee, servicer, registrant
17 and exempt organization shall keep and use in its business such books,
18 accounts and records as will enable the superintendent to determine
19 whether such licensee, servicer, registrant or exempt organization is
20 complying with the provisions of this article and with the rules and
21 regulations lawfully made by the superintendent and the banking board.
22 Every licensee, servicer, registrant and exempt organization shall
23 preserve such books, accounts, and records, for at least three years;
24 provided, however, that preservation by photographic reproduction there-
25 of or records in photographic form, including an optical disk storage
26 system and the use of electronic data processing equipment that provides
27 comparable records to those otherwise required and which are available
28 for examination upon request shall constitute compliance with the
29 requirements of this section.

30 Each licensee and registrant shall annually, on or before a date to be
31 determined by the superintendent, file a report with the superintendent
32 giving such information as the superintendent may require concerning the
33 business and operations during the preceding calendar year of such
34 licensee or registrant under authority of this article. Such report
35 shall be subscribed and affirmed as true by the licensee or registrant
36 under the penalties of perjury and shall be in the form prescribed by
37 the superintendent. In addition to annual reports, the superintendent
38 may require such additional regular or special reports as he may deem
39 necessary to the proper supervision of licensees and [~~registrant~~] regis-
40 trants under this article. Such additional reports shall be in the form
41 prescribed by the superintendent and shall be subscribed and affirmed as
42 true under the penalties of perjury.

43 The superintendent may require servicers to file annual reports or
44 other regular or special reports, including reports with respect to
45 mortgage delinquencies and foreclosures. Such reports shall be in the
46 form prescribed by the superintendent and shall be subscribed and
47 affirmed as true under the penalties of perjury.

48 § 12. Subdivision 1 of section 598 of the banking law, as amended by
49 section 57 of part 0 of chapter 59 of the laws of 2006, is amended to
50 read as follows;

51 1. In addition to such penalties as may otherwise be applicable by
52 law, the superintendent may, after notice and hearing as provided else-
53 where in this article, require any entity, licensee, servicer, regis-
54 trant or exempt organization found violating the provisions of this
55 article or the rules or regulations promulgated hereunder to pay to the
56 people of this state an additional penalty for each violation of the

1 article or any regulation or policy promulgated hereunder a sum not to
2 exceed an amount as determined pursuant to section forty-four of this
3 chapter for each such violation.

4 § 13. Subdivision 3 of section 599-b of the banking law, as amended by
5 chapter 553 of the laws of 2007, is amended to read as follows:

6 3. "Originating entity" means a person or entity licensed as a mort-
7 gage banker or registered as a mortgage broker pursuant to article
8 twelve-D of this chapter.

9 § 14. Subdivision 10 of section 36 of the banking law, as amended by
10 chapter 566 of the laws of 2004, is amended to read as follows:

11 10. All reports of examinations and investigations, correspondence and
12 memoranda concerning or arising out of such examination and investi-
13 gations, including any duly authenticated copy or copies thereof in the
14 possession of any banking organization, bank holding company or any
15 subsidiary thereof (as such terms "bank holding company" and "subsidi-
16 ary" are defined in article three-A of this chapter), any corporation
17 or any other entity affiliated with a banking organization within the
18 meaning of subdivision six of this section and any non-banking subsid-
19 iary of a corporation or any other entity which is an affiliate of a
20 banking organization within the meaning of subdivision six-a of this
21 section, foreign banking corporation, licensed lender, licensed cashier
22 of checks, licensed mortgage banker, registered mortgage broker,
23 licensed sales finance company, registered mortgage loan servicer,
24 licensed insurance premium finance agency, licensed transmitter of
25 money, licensed budget planner, or the department, shall be confidential
26 communications, shall not be subject to subpoena and shall not be made
27 public unless, in the judgment of the superintendent, the ends of
28 justice and the public advantage will be subserved by the publication
29 thereof, in which event the superintendent may publish or authorize the
30 publication of a copy of any such report or any part thereof in such
31 manner as may be deemed proper. For the purposes of this subdivision,
32 "reports of examinations and investigations, and any correspondence and
33 memoranda concerning or arising out of such examinations and investi-
34 gations", includes any such materials of a bank, insurance or securities
35 regulatory agency or any unit of the federal government or that of this
36 state any other state or that of any foreign government which are
37 considered confidential by such agency or unit and which are in the
38 possession of the department or which are otherwise confidential materi-
39 als that have been shared by the department with any such agency or unit
40 and are in the possession of such agency or unit.

41 § 15. Subdivisions 1, 2 and 5 of section 39 of the banking law, as
42 amended by chapter 553 of the laws of 2007, are amended to read as
43 follows:

44 1. To appear and explain an apparent violation. Whenever it shall
45 appear to the superintendent that any banking organization, bank holding
46 company, registered mortgage broker, licensed mortgage banker, regis-
47 tered mortgage loan servicer, authorized mortgage loan originator,
48 licensed lender, licensed cashier of checks, licensed sales finance
49 company, licensed insurance premium finance agency, licensed transmitter
50 of money, licensed budget planner, out-of-state state bank that main-
51 tains a branch or branches or representative or other offices in this
52 state, or foreign banking corporation licensed by the superintendent to
53 do business or maintain a representative office in this state has
54 violated any law or regulation, he or she may, in his or her discretion,
55 issue an order describing such apparent violation and requiring such
56 banking organization, bank holding company, registered mortgage broker,

1 licensed mortgage banker, authorized mortgage loan originator, licensed
2 lender, licensed casher of checks, licensed sales finance company,
3 licensed insurance premium finance agency, licensed transmitter of
4 money, licensed budget planner, out-of-state state bank that maintains a
5 branch or branches or representative or other offices in this state, or
6 foreign banking corporation to appear before him or her, at a time and
7 place fixed in said order, to present an explanation of such apparent
8 violation.

9 2. To discontinue unauthorized or unsafe and unsound practices. When-
10 ever it shall appear to the superintendent that any banking organiza-
11 tion, bank holding company, registered mortgage broker, licensed mort-
12 gage banker, registered mortgage loan servicer, authorized mortgage loan
13 originator, licensed lender, licensed casher of checks, licensed sales
14 finance company, licensed insurance premium finance agency, licensed
15 transmitter of money, licensed budget planner, out-of-state state bank
16 that maintains a branch or branches or representative or other offices
17 in this state, or foreign banking corporation licensed by the super-
18 intendent to do business in this state is conducting business in an
19 unauthorized or unsafe and unsound manner, he or she may, in his or her
20 discretion, issue an order directing the discontinuance of such unau-
21 thorized or unsafe and unsound practices, and fixing a time and place at
22 which such banking organization, bank holding company, registered mort-
23 gage broker, licensed mortgage banker, registered mortgage loan servi-
24 cer, authorized mortgage loan originator, licensed lender, licensed
25 casher of checks, licensed sales finance company, licensed insurance
26 premium finance agency, licensed transmitter of money, licensed budget
27 planner, out-of-state state bank that maintains a branch or branches or
28 representative or other offices in this state, or foreign banking corpo-
29 ration may voluntarily appear before him or her to present any explana-
30 tion in defense of the practices directed in said order to be discontin-
31 ued.

32 5. To keep books and accounts as prescribed. Whenever it shall appear
33 to the superintendent that any banking organization, bank holding compa-
34 ny, registered mortgage broker [~~or~~], licensed mortgage banker, regis-
35 tered mortgage loan servicer, authorized mortgage loan originator,
36 licensed lender, licensed casher of checks, licensed sales finance
37 company, licensed insurance premium finance agency, licensed transmitter
38 of money, licensed budget planner, agency or branch of a foreign banking
39 corporation licensed by the superintendent to do business in this state,
40 does not keep its books and accounts in such manner as to enable him or
41 her to readily ascertain its true condition, he or she may, in his or
42 her discretion, issue an order requiring such banking organization, bank
43 holding company, registered mortgage broker, licensed mortgage banker,
44 registered mortgage loan servicer, authorized mortgage loan originator,
45 licensed lender, licensed casher of checks, licensed sales finance
46 company, licensed insurance premium finance agency, licensed transmitter
47 of money, licensed budget planner, or foreign banking corporation, or
48 the officers or agents thereof, or any of them, to open and keep such
49 books or accounts as he or she may, in his or her discretion, determine
50 and prescribe for the purpose of keeping accurate and convenient records
51 of its transactions and accounts.

52 § 16. Paragraph (a) of subdivision 1 of section 44 of the banking law,
53 as amended by chapter 553 of the laws of 2007, is amended to read as
54 follows:

55 (a) Without limiting any power granted to the superintendent under any
56 other provision of this chapter, the superintendent may, in a proceeding

1 after notice and a hearing, require any safe deposit company, licensed
 2 lender, licensed casher of checks, licensed sales finance company,
 3 licensed insurance premium finance agency, licensed transmitter of
 4 money, licensed mortgage banker, registered mortgage broker, authorized
 5 mortgage loan originator, registered mortgage loan servicer or licensed
 6 budget planner to pay to the people of this state a penalty for any
 7 violation of this chapter, any regulation promulgated thereunder, any
 8 final or temporary order issued pursuant to section thirty-nine of this
 9 article, any condition imposed in writing by the superintendent or bank-
 10 ing board in connection with the grant of any application or request, or
 11 any written agreement entered into with the superintendent.

12 § 17. Section 1302 of the real property actions and proceedings law,
 13 as added by chapter 626 of the laws of 2002, is amended to read as
 14 follows:

15 § 1302. Foreclosure of high-cost home loans and subprime home loans.
 16 1. Any complaint served in a proceeding initiated pursuant to this arti-
 17 cle relating to a high-cost home loan or a subprime home loan, as such
 18 terms are defined in section six-l and six-m of the banking law, respec-
 19 tively, must contain an affirmative allegation[, ~~which allegation must~~
 20 ~~be proven to the satisfaction of the court before entry of judgment by~~
 21 ~~default or otherwise,~~] that at the time the proceeding is commenced, the
 22 plaintiff [~~mortgage banker or exempt organization~~]:

23 (a) is the owner and holder of the subject mortgage and note, or has
 24 been delegated the authority to institute a mortgage foreclosure action
 25 by the owner and holder of the subject mortgage and note; and

26 (b) has complied with all of the provisions of section five hundred
 27 ninety-five-a of the banking law and any rules and regulations promul-
 28 gated thereunder, section six-l or six-m of the banking law, and section
 29 thirteen hundred four of this article.

30 2. It shall be a defense to an action to foreclose a mortgage for a
 31 high-cost home loan or subprime home loan that the terms of the home
 32 loan [~~violates~~] or the actions of the lender violate any provision of
 33 section six-l or six-m of the banking law or section thirteen hundred
 34 four of this article.

35 § 18. Paragraph b of subdivision 3 of section 5-501 of the general
 36 obligations law, as amended by chapter 883 of the laws of 1980, is
 37 amended to read as follows:

38 b. notwithstanding any other provision of law, the unpaid balance of
 39 the loan or forbearance may be prepaid, in whole or in part, at any
 40 time. If prepayment is made on or after one year from the date the loan
 41 or forbearance is made, no penalty may be imposed. If prepayment is made
 42 prior to such time, no penalty may be imposed unless provision therefor
 43 is expressly made in the loan contract, provided that no penalty may be
 44 imposed if prohibited by sections six-l and six-m of the banking law.
 45 In all cases, the right of prepayment shall be stated in the instrument
 46 evidencing the loan or forbearance, provided, however, that the
 47 provisions of this subdivision shall not apply to the extent such
 48 provisions are inconsistent with any federal law or regulation.

49 § 19. The penal law is amended by adding a new article 187 to read as
 50 follows:

51 ARTICLE 187

52 RESIDENTIAL MORTGAGE FRAUD

53 Section 187.00 Definitions.

54 187.05 Residential mortgage fraud in the fifth degree.
 55 187.10 Residential mortgage fraud in the fourth degree.
 56 187.15 Residential mortgage fraud in the third degree.

1 187.20 Residential mortgage fraud in the second degree.

2 187.25 Residential mortgage fraud in the first degree.

3 § 187.00 Definitions.

4 As used in this article:

5 1. "Person" means any individual or entity, other than an individual
6 who applies for a residential mortgage loan and intends to occupy such
7 residential property which such mortgage secures unless such person acts
8 as an accessory to an individual or entity in committing any crime
9 defined in this article.

10 2. "Residential mortgage loan" means a loan or agreement to extend
11 credit, including the renewal or refinancing of any such loan, made to a
12 person, which loan is primarily secured by either mortgage, deed of
13 trust, or other lien upon any interest in residential real property or
14 certificate of stock or other evidence of ownership in a corporation or
15 partnership formed for the purpose of cooperative ownership of residen-
16 tial real property.

17 3. "Residential real property" means real property improved by a one-
18 to-four family dwelling, or a residential unit in a building including
19 units owned as condominiums or on a cooperative basis, used or occupied,
20 or intended to be used or occupied, wholly or partly, as the home or
21 residence of one or more persons, but shall not refer to unimproved real
22 property upon which such dwellings are to be constructed.

23 4. "Residential mortgage fraud" is committed by any person who, know-
24 ingly and with intent to defraud, presents, causes to be presented, or
25 prepares with knowledge or belief that it will be used in soliciting an
26 applicant for a residential mortgage loan, or in applying for, the
27 underwriting of, or closing of a residential mortgage loan, or in docu-
28 ments filed with a county clerk of any county in the state arising out
29 of and related to the closing of a residential mortgage loan, any writ-
30 ten statement which he or she knows to:

31 (a) contain materially false information concerning any fact material
32 thereto; or

33 (b) conceal, for the purpose of misleading, information concerning any
34 fact material thereto.

35 § 187.05 Residential mortgage fraud in the fifth degree.

36 A person is guilty of residential mortgage fraud in the fifth degree
37 when he or she commits residential mortgage fraud.

38 Residential mortgage fraud in the fifth degree is a class A misdemea-
39 nor.

40 § 187.10 Residential mortgage fraud in the fourth degree.

41 A person is guilty of residential mortgage fraud in the fourth degree
42 when he or she commits residential mortgage fraud and thereby receives
43 proceeds or any other funds in the aggregate in excess of one thousand
44 dollars.

45 Residential mortgage fraud in the fourth degree is a class E felony.

46 § 187.15 Residential mortgage fraud in the third degree.

47 A person is guilty of residential mortgage fraud in the third degree
48 when he or she commits residential mortgage fraud and thereby receives
49 proceeds or any other funds in the aggregate in excess of three thousand
50 dollars.

51 Residential mortgage fraud in the third degree is a class D felony.

52 § 187.20 Residential mortgage fraud in the second degree.

53 A person is guilty of residential mortgage fraud in the second degree
54 when he or she commits residential mortgage fraud and thereby receives
55 proceeds or any other funds in the aggregate in excess of fifty thousand
56 dollars.

1 Residential mortgage fraud in the second degree is a class C felony.
2 § 187.25 Residential mortgage fraud in the first degree.
3 A person is guilty of residential mortgage fraud in the first degree
4 when he or she commits residential mortgage fraud and thereby receives
5 proceeds or any other funds in the aggregate in excess of one million
6 dollars.

7 Residential mortgage fraud in the first degree is a class B felony.
8 § 20. Paragraph (b) of subdivision 8 of section 700.05 of the criminal
9 procedure law, as separately amended by chapters 568 and 570 of the laws
10 of 2007, is amended to read as follows:

11 (b) Any of the following felonies: assault in the second degree as
12 defined in section 120.05 of the penal law, assault in the first degree
13 as defined in section 120.10 of the penal law, reckless endangerment in
14 the first degree as defined in section 120.25 of the penal law, promot-
15 ing a suicide attempt as defined in section 120.30 of the penal law,
16 criminally negligent homicide as defined in section 125.10 of the penal
17 law, manslaughter in the second degree as defined in section 125.15 of
18 the penal law, manslaughter in the first degree as defined in section
19 125.20 of the penal law, murder in the second degree as defined in
20 section 125.25 of the penal law, murder in the first degree as defined
21 in section 125.27 of the penal law, abortion in the second degree as
22 defined in section 125.40 of the penal law, abortion in the first degree
23 as defined in section 125.45 of the penal law, rape in the third degree
24 as defined in section 130.25 of the penal law, rape in the second degree
25 as defined in section 130.30 of the penal law, rape in the first degree
26 as defined in section 130.35 of the penal law, criminal sexual act in
27 the third degree as defined in section 130.40 of the penal law, criminal
28 sexual act in the second degree as defined in section 130.45 of the
29 penal law, criminal sexual act in the first degree as defined in section
30 130.50 of the penal law, sexual abuse in the first degree as defined in
31 section 130.65 of the penal law, unlawful imprisonment in the first
32 degree as defined in section 135.10 of the penal law, kidnapping in the
33 second degree as defined in section 135.20 of the penal law, kidnapping
34 in the first degree as defined in section 135.25 of the penal law, labor
35 trafficking as defined in section 135.35 of the penal law, custodial
36 interference in the first degree as defined in section 135.50 of the
37 penal law, coercion in the first degree as defined in section 135.65 of
38 the penal law, criminal trespass in the first degree as defined in
39 section 140.17 of the penal law, burglary in the third degree as defined
40 in section 140.20 of the penal law, burglary in the second degree as
41 defined in section 140.25 of the penal law, burglary in the first degree
42 as defined in section 140.30 of the penal law, criminal mischief in the
43 third degree as defined in section 145.05 of the penal law, criminal
44 mischief in the second degree as defined in section 145.10 of the penal
45 law, criminal mischief in the first degree as defined in section 145.12
46 of the penal law, criminal tampering in the first degree as defined in
47 section 145.20 of the penal law, arson in the fourth degree as defined
48 in section 150.05 of the penal law, arson in the third degree as defined
49 in section 150.10 of the penal law, arson in the second degree as
50 defined in section 150.15 of the penal law, arson in the first degree as
51 defined in section 150.20 of the penal law, grand larceny in the fourth
52 degree as defined in section 155.30 of the penal law, grand larceny in
53 the third degree as defined in section 155.35 of the penal law, grand
54 larceny in the second degree as defined in section 155.40 of the penal
55 law, grand larceny in the first degree as defined in section 155.42 of
56 the penal law, health care fraud in the fourth degree as defined in

1 section 177.10 of the penal law, health care fraud in the third degree
2 as defined in section 177.15 of the penal law, health care fraud in the
3 second degree as defined in section 177.20 of the penal law, health care
4 fraud in the first degree as defined in section 177.25 of the penal law,
5 robbery in the third degree as defined in section 160.05 of the penal
6 law, robbery in the second degree as defined in section 160.10 of the
7 penal law, robbery in the first degree as defined in section 160.15 of
8 the penal law, unlawful use of secret scientific material as defined in
9 section 165.07 of the penal law, criminal possession of stolen property
10 in the fourth degree as defined in section 165.45 of the penal law,
11 criminal possession of stolen property in the third degree as defined in
12 section 165.50 of the penal law, criminal possession of stolen property
13 in the second degree as defined by section 165.52 of the penal law,
14 criminal possession of stolen property in the first degree as defined by
15 section 165.54 of the penal law, trademark counterfeiting in the second
16 degree as defined in section 165.72 of the penal law, trademark counter-
17 feiting in the first degree as defined in section 165.73 of the penal
18 law, forgery in the second degree as defined in section 170.10 of the
19 penal law, forgery in the first degree as defined in section 170.15 of
20 the penal law, criminal possession of a forged instrument in the second
21 degree as defined in section 170.25 of the penal law, criminal
22 possession of a forged instrument in the first degree as defined in
23 section 170.30 of the penal law, criminal possession of forgery devices
24 as defined in section 170.40 of the penal law, falsifying business
25 records in the first degree as defined in section 175.10 of the penal
26 law, tampering with public records in the first degree as defined in
27 section 175.25 of the penal law, offering a false instrument for filing
28 in the first degree as defined in section 175.35 of the penal law, issu-
29 ing a false certificate as defined in section 175.40 of the penal law,
30 criminal diversion of prescription medications and prescriptions in the
31 second degree as defined in section 178.20 of the penal law, criminal
32 diversion of prescription medications and prescriptions in the first
33 degree as defined in section 178.25 of the penal law, residential mort-
34 gage fraud in the fourth degree as defined in section 187.10 of the
35 penal law, residential mortgage fraud in the third degree as defined in
36 section 187.15 of the penal law, residential mortgage fraud in the
37 second degree as defined in section 187.20 of the penal law, residential
38 mortgage fraud in the first degree as defined in section 187.25 of the
39 penal law, escape in the second degree as defined in section 205.10 of
40 the penal law, escape in the first degree as defined in section 205.15
41 of the penal law, absconding from temporary release in the first degree
42 as defined in section 205.17 of the penal law, promoting prison contra-
43 band in the first degree as defined in section 205.25 of the penal law,
44 hindering prosecution in the second degree as defined in section 205.60
45 of the penal law, hindering prosecution in the first degree as defined
46 in section 205.65 of the penal law, sex trafficking as defined in
47 section 230.34 of the penal law, criminal possession of a weapon in the
48 third degree as defined in subdivisions two, three and five of section
49 265.02 of the penal law, criminal possession of a weapon in the second
50 degree as defined in section 265.03 of the penal law, criminal
51 possession of a [dangerous] weapon in the first degree as defined in
52 section 265.04 of the penal law, manufacture, transport, disposition and
53 defacement of weapons and dangerous instruments and appliances defined
54 as felonies in subdivisions one, two, and three of section 265.10 of the
55 penal law, sections 265.11, 265.12 and 265.13 of the penal law, or
56 prohibited use of weapons as defined in subdivision two of section

1 265.35 of the penal law, relating to firearms and other dangerous weap-
2 ons, or failure to disclose the origin of a recording in the first
3 degree as defined in section 275.40 of the penal law;

4 § 21. Paragraph (a) of subdivision 1 of section 460.10 of the penal
5 law, as amended by chapter 568 of the laws of 2007, is amended to read
6 as follows:

7 (a) Any of the felonies set forth in this chapter; sections 120.05,
8 120.10 and 120.11 relating to assault; sections 125.10 to 125.27 relat-
9 ing to homicide; sections 130.25, 130.30 and 130.35 relating to rape;
10 sections 135.20 and 135.25 relating to kidnapping; section 135.35 relat-
11 ing to labor trafficking; section 135.65 relating to coercion; sections
12 140.20, 140.25 and 140.30 relating to burglary; sections 145.05, 145.10
13 and 145.12 relating to criminal mischief; article one hundred fifty
14 relating to arson; sections 155.30, 155.35, 155.40 and 155.42 relating
15 to grand larceny; sections 177.10, 177.15, 177.20 and 177.25 relating to
16 health care fraud; article one hundred sixty relating to robbery;
17 sections 165.45, 165.50, 165.52 and 165.54 relating to criminal
18 possession of stolen property; sections 165.72 and 165.73 relating to
19 trademark counterfeiting; sections 170.10, 170.15, 170.25, 170.30,
20 170.40, 170.65 and 170.70 relating to forgery; sections 175.10, 175.25,
21 175.35; 175.40 and 210.40 relating to false statements; sections 176.15,
22 176.20, 176.25 and 176.30 relating to insurance fraud; sections 178.20
23 and 178.25 relating to criminal diversion of prescription medications
24 and prescriptions; sections 180.03, 180.08, 180.15, 180.25, 180.40,
25 180.45, 200.00, 200.03, 200.04, 200.10, 200.11, 200.12, 200.20, 200.22,
26 200.25, 200.27, 215.00, 215.05 and 215.19 relating to bribery; sections
27 187.10, 187.15, 187.20 and 187.25 relating to residential mortgage
28 fraud, sections 190.40 and 190.42 relating to criminal usury; section
29 190.65 relating to schemes to defraud; sections 205.60 and 205.65 relat-
30 ing to hindering prosecution; sections 210.10, 210.15, and 215.51 relat-
31 ing to perjury and contempt; section 215.40 relating to tampering with
32 physical evidence; sections 220.06, 220.09, 220.16, 220.18, 220.21,
33 220.31, 220.34, 220.39, 220.41, 220.43, 220.46, 220.55 and 220.60 relat-
34 ing to controlled substances; sections 225.10 and 225.20 relating to
35 gambling; sections 230.25, 230.30, and 230.32 relating to promoting
36 prostitution; section 230.34 relating to sex trafficking; sections
37 235.06, 235.07 and 235.21 relating to obscenity; section 263.10 relating
38 to promoting an obscene sexual performance by a child; sections 265.02,
39 265.03, 265.04, 265.11, 265.12, 265.13 and the provisions of section
40 265.10 which constitute a felony relating to firearms and other danger-
41 ous weapons; and sections 265.14 and 265.16 relating to criminal sale of
42 a firearm; and section 275.10, 275.20, 275.30, or 275.40 relating to
43 unauthorized recordings; and sections 470.05, 470.10, 470.15 and 470.20
44 relating to money laundering; or

45 § 22. Section 78 of the banking law, as added by chapter 321 of the
46 laws of 1992, is amended to read as follows:

47 § 78. Powers of the bureau. If the criminal investigations bureau has
48 a reasonable suspicion that a person or entity subject to the jurisdic-
49 tion of the department has, in connection with activities authorized by
50 this chapter, engaged in, or is engaging in an activity which is a
51 misdemeanor or felony under this chapter or under ~~articles~~ article one
52 hundred fifty-five, one hundred seventy, one hundred seventy-five, one
53 hundred seventy-six, one hundred eighty, one hundred eighty-five, one
54 hundred eighty-seven, one hundred ninety, two hundred, two hundred ten
55 or four hundred seventy of the penal law, the superintendent may under-
56 take such investigation as is deemed necessary, and in the enforcement

1 of this chapter, determine whether any such person or entity has
2 violated or is about to violate any of the above referenced laws or
3 articles. Provided, however, that the scope of authority set forth in
4 this section shall not be deemed to otherwise limit or impair the abili-
5 ty of the department to assist any other entity in an investigation
6 involving a violation of law.

7 § 23. Subdivision 2 of section 592 of the banking law, as amended by
8 chapter 146 of the laws of 2003, is amended to read as follows:

9 2. The superintendent may refuse to issue a license pursuant to this
10 article if he or she shall find that the applicant, or any person who is
11 a director, officer, partner, agent, employee, substantial stockholder
12 of the applicant, consultant or person having a relationship with the
13 applicant similar to a consultant, (a) has been convicted of a crime
14 involving an activity which is a felony under this chapter or under
15 article one hundred fifty-five, one hundred seventy, one hundred seven-
16 ty-five, one hundred seventy-six, one hundred eighty, one hundred eight-
17 y-five, one hundred eighty-seven, one hundred ninety, two hundred, two
18 hundred ten or four hundred seventy of the penal law or any comparable
19 felony under the laws of any other state or the United States, provided
20 that such crime would be a felony if committed and prosecuted under the
21 laws of this state or (b) has had a license or registration revoked by
22 the superintendent or (c) has been a director, partner, or substantial
23 stockholder of an entity which has had a license or registration revoked
24 by the superintendent or (d) has been an agent, employee or officer of
25 an entity, or a consultant to, or person having had a similar relation-
26 ship with, any entity which has had a license or registration revoked by
27 the superintendent where such person shall have been found by the super-
28 intendent to bear responsibility in connection with the revocation. The
29 term "substantial stockholder", as used in this subdivision, shall be
30 deemed to refer to a person owning or controlling directly or indirectly
31 ten per centum or more of the total outstanding stock of a corporation.

32 § 24. Subdivision 2 of section 592-a of the banking law, as amended by
33 chapter 146 of the laws of 2003, is amended to read as follows:

34 2. The superintendent may refuse to issue a certificate pursuant to
35 this article if he or she shall find that the applicant, or any person
36 who is a director, officer, partner, agent, employee, substantial stock-
37 holder of the applicant, consultant or person having a relationship with
38 the applicant similar to a consultant, (a) has been convicted of a crime
39 involving an activity which is a felony under this chapter or under
40 article one hundred fifty-five, one hundred seventy, one hundred seven-
41 ty-five, one hundred seventy-six, one hundred eighty, one hundred eight-
42 y-five, one hundred eighty-seven, one hundred ninety, two hundred, two
43 hundred ten or four hundred seventy of the penal law or any comparable
44 felony under the laws of any other state or the United States, provided
45 that such crime would be a felony if committed and prosecuted under the
46 laws of this state or (b) has had a license or registration revoked by
47 the superintendent or (c) has been a director, partner, or substantial
48 stockholder of an entity which has had a license or registration revoked
49 by the superintendent or (d) has been an agent, employee or officer of
50 an entity, or a consultant to, or person having had a similar relation-
51 ship with, any entity which has had a license or registration revoked by
52 the superintendent where such person shall have been found by the super-
53 intendent to bear responsibility in connection with the revocation. The
54 term "substantial stockholder", as used in this subdivision, shall be
55 deemed to refer to a person owning or controlling directly or indirectly
56 ten per centum or more of the total outstanding stock of a corporation.

1 § 25. Paragraph (a) of subdivision 3 of section 599-c of the banking
2 law, as amended by chapter 553 of the laws of 2007, is amended to read
3 as follows:

4 (a) The superintendent may refuse to issue a certificate pursuant to
5 this article if he or she shall find that the applicant (i) has been
6 convicted of a crime involving an activity which is a felony under this
7 chapter or under article one hundred fifty-five, one hundred seventy,
8 one hundred seventy-five, one hundred seventy-six, one hundred eighty,
9 one hundred eighty-five, one hundred eighty-seven, one hundred ninety,
10 two hundred, two hundred ten or four hundred seventy of the penal law or
11 any comparable felony under the laws of any other state or the United
12 States, provided that such crime would be a felony if committed and
13 prosecuted under the laws of this state, or (ii) has had an authori-
14 zation revoked by the superintendent or a regulatory person or entity of
15 another state that regulates persons engaging in mortgage loan originat-
16 ing, or (iii) has been a director, partner, or substantial stockholder
17 of an originating entity which has had a registration or license revoked
18 by the superintendent or a regulatory person or entity of another state
19 that regulates such originating entity, or (iv) has been an employee,
20 officer or agent of, or a consultant to, an originating entity which has
21 had a registration or license revoked by the superintendent or a regula-
22 tory person or entity of another state that regulates such originating
23 entity where such person shall have been found by the superintendent or
24 by such similar regulatory person or entity of another state to bear
25 responsibility in connection with such revocation.

26 § 26. The real property law is amended by adding a new section 265-b
27 to read as follows:

28 § 265-b. Distressed property consulting contracts. 1. Definitions.
29 The following definitions shall apply to this section:

30 (a) "Homeowner" means a natural person who is the mortgagor with
31 respect to a distressed home loan or who is in danger of losing a home
32 for nonpayment of taxes.

33 (b) "Consulting contract" or "contract" means an agreement between a
34 homeowner and a distressed property consultant under which the consult-
35 ant agrees to provide consulting services.

36 (c) "Consulting services" means services provided by a distressed
37 property consultant to a homeowner that the consultant represents will
38 help to achieve any of the following:

39 (i) stop, enjoin, delay, void, set aside, annul, stay or postpone a
40 foreclosure filing, a foreclosure sale or the loss of a home for nonpay-
41 ment of taxes;

42 (ii) obtain forbearance from any servicer, beneficiary or mortgagee or
43 relief with respect to the potential loss of the home for nonpayment of
44 taxes;

45 (iii) assist the homeowner to exercise a right of reinstatement or
46 similar right provided in the mortgage documents or any law or to refi-
47 nance a distressed home loan;

48 (iv) obtain any extension of the period within which the homeowner may
49 reinstate or otherwise restore his or her rights with respect to the
50 property;

51 (v) obtain a waiver of an acceleration clause contained in any promi-
52 sory note or contract secured by a mortgage on a property in foreclo-
53 sure;

54 (vi) assist the homeowner to obtain a loan or advance of funds;

1 (vii) assist the homeowner in answering or responding to a summons and
2 complaint, or otherwise providing information regarding the foreclosure
3 complaint and process;

4 (viii) avoid or ameliorate the impairment of the homeowner's credit
5 resulting from the commencement of a foreclosure proceeding or tax sale;
6 or

7 (ix) save the homeowner's property from foreclosure or loss for non-
8 payment of taxes.

9 (d) "Distressed home loan" means a home loan that is in danger of
10 being foreclosed because the homeowner has one or more defaults under
11 the mortgage that entitle the lender to accelerate full payment of the
12 mortgage and repossess the property, or a home loan where the lender has
13 commenced a foreclosure action. For purposes of this paragraph, a "home
14 loan" is a loan in which the debt is incurred by the homeowner primarily
15 for personal, family or household purposes, and the loan is secured by a
16 mortgage or deed of trust on property upon which there is located or
17 there is to be located a structure or structures intended principally
18 for occupancy of from one to four families which is or will be occupied
19 by the homeowner as the homeowner's principal dwelling.

20 (e) "Distressed property consultant" or "consultant" means an individ-
21 ual or a corporation, partnership, limited liability company or other
22 business entity that, directly or indirectly, solicits or undertakes
23 employment to provide consulting services to a homeowner for compen-
24 sation or promise of compensation with respect to a distressed home loan
25 or a potential loss of the home for nonpayment of taxes. A consultant
26 does not include the following:

27 (i) an attorney admitted to practice in the state of New York;

28 (ii) a person or entity who holds or is owed an obligation secured by
29 a lien on any property in foreclosure while the person or entity
30 performs services in connection with the obligation or lien;

31 (iii) a bank, trust company, private banker, bank holding company,
32 savings bank, savings and loan association, thrift holding company,
33 credit union or insurance company organized under the laws of this
34 state, another state or the United States, or a subsidiary or affiliate
35 of such entity or a foreign banking corporation licensed by the super-
36 intendent of banks or the comptroller of the currency;

37 (iv) a federal Department of Housing and Urban Development approved
38 mortgagee and any subsidiary or affiliate of such mortgagee, and any
39 agent or employee of these persons while engaged in the business of such
40 mortgagee;

41 (v) a judgment creditor of the homeowner, if the judgment creditor's
42 claim accrued before the written notice of foreclosure sale is sent;

43 (vi) a title insurer authorized to do business in this state, while
44 performing title insurance and settlement services;

45 (vii) a person licensed as a mortgage banker or registered as a mort-
46 gage broker or registered as a mortgage loan servicer as defined in
47 article twelve-D of the banking law;

48 (viii) a bona fide not-for-profit organization that offers counseling
49 or advice to homeowners in foreclosure or loan default; or

50 (ix) a person licensed or registered in the state to engage in the
51 practice of other professions that the superintendent of banks has
52 determined should not be subject to this section.

53 (f) "Property" shall mean real property located in this state improved
54 by a one-to-four family dwelling used or occupied, or intended to be
55 used or occupied, wholly or partly, as the home or residence of one or

1 more persons, but shall not refer to unimproved real property upon which
2 such dwellings are to be constructed.

3 (g) "Business day" shall mean any calendar day except Sunday or the
4 public holidays as set forth in section twenty-four of the general
5 construction law.

6 2. Prohibitions. A distressed property consultant is prohibited from
7 doing the following:

8 (a) performing consulting services without a written, fully executed
9 consulting contract with a homeowner;

10 (b) charging for or accepting payment for consulting services before
11 the full completion of such services;

12 (c) taking a power of attorney from a homeowner;

13 (d) retaining any original loan document or other original document
14 related to the distressed home loan, the property or the potential loss
15 of the home for nonpayment of taxes; or

16 (e) inducing or attempting to induce a homeowner to enter a consulting
17 contract that does not fully comply with the provisions of this article.

18 3. Distressed property consulting contracts. (a) A distressed property
19 consulting contract shall:

20 (i) contain the entire agreement of the parties;

21 (ii) be provided in writing to the homeowner for review before sign-
22 ing;

23 (iii) be printed in at least twelve point type and written in the same
24 language that is used by the homeowner and was used in discussions
25 between the consultant and the homeowner to describe the consultant's
26 services or to negotiate the contract;

27 (iv) fully disclose the exact nature of the distressed property
28 consulting services to be provided by the distressed property consultant
29 or anyone working in association with the distressed property consult-
30 ant;

31 (v) fully disclose the total amount and terms of compensation for such
32 consulting services;

33 (vi) contain the name, business address and telephone number of the
34 consultant and the street address (if different) and facsimile number or
35 email address of the distressed property consultant where communications
36 from the homeowner may be delivered;

37 (vii) be dated and personally signed by the homeowner and the
38 distressed property consultant and be witnessed and acknowledged by a
39 New York notary public; and

40 (viii) contain the following notice, which shall be printed in at
41 least fourteen point boldface type, completed with the name of the
42 distressed property consultant, and located in immediate proximity to
43 the space reserved for the homeowner's signature:

44 "NOTICE REQUIRED BY NEW YORK LAW

45 You may cancel this contract, without any penalty or obligation, at
46 any time before midnight of _____ (fifth business day after
47 execution).

48 _____ (Name of Distressed Property Consultant) (the "Consultant") or
49 anyone working for the Consultant may not take any money from you or ask
50 you for money until the Consultant has completely finished doing every-
51 thing this Contract says the Consultant will do.

52 You should consider consulting an attorney or a government-approved
53 housing counselor before signing any legal document concerning your
54 home. It is advisable that you find your own attorney, and not consult
55 with an attorney recommended or provided to you by the Consultant. A
56 list of housing counselors may be found on the website of the New York

1 State Banking Department, www.banking.state.ny.us or by calling the
 2 Banking Department toll-free at 1-877-BANK-NYS (1-877-226-5697). The
 3 law requires that this contract contain the entire agreement between you
 4 and the Consultant. You should not rely upon any other written or oral
 5 agreement or promise."

6 The distressed property consultant shall accurately enter the date on
 7 which the right to cancel ends.

8 (b) (i) The homeowner has the right to cancel, without any penalty or
 9 obligation, any contract with a distressed property consultant until
 10 midnight of the fifth business day following the day on which the
 11 distressed property consultant and the homeowner sign a consulting
 12 contract. Cancellation occurs when the homeowner, or a representative of
 13 the homeowner, either delivers written notice of cancellation in person
 14 to the address specified in the consulting contract or sends a written
 15 communication by facsimile, by United States mail or by an established
 16 commercial letter delivery service. A dated proof of facsimile delivery
 17 or proof of mailing creates a presumption that the notice of cancella-
 18 tion has been delivered on the date the facsimile is sent or the notice
 19 is deposited in the mail or with the delivery service. Cancellation of
 20 the contract shall release the homeowner of all obligations to pay fees
 21 or any other compensation to the distressed property consultant.

22 (ii) The consulting contract shall be accompanied by two copies of a
 23 form, captioned "notice of cancellation" in at least twelve-point bold
 24 type. This form shall be attached to the contract, shall be easily
 25 detachable, and shall contain the following statement written in the
 26 same language as used in the contract, and the contractor shall insert
 27 accurate information as to the date on which the right to cancel ends
 28 and the contractor's contact information:

29 "NOTICE OF CANCELLATION

30 Note: You may cancel this contract, without any penalty or obligation,
 31 at any time before midnight of _____ . (Enter date)

32 To cancel this contract, sign and date both copies of this cancellation
 33 notice and personally deliver one copy or send it by facsimile, United
 34 States mail, or an established commercial letter delivery service, indi-
 35 cating cancellation to the Distressed Property Consultant at one of the
 36 following:

37 Name of Contractor _____
 38 Street Address _____
 39 City, State, Zip _____
 40 Facsimile: _____

41 I hereby cancel this transaction.

42 Name of Homeowner: _____

43 Signature of Homeowner: _____

44 Date: _____ "

45 (iii) Within ten days following receipt of a notice of cancellation
 46 given in accordance with this subdivision, the distressed property
 47 consultant shall return any original contract and any other documents
 48 signed by or provided by the homeowner. Cancellation shall release the
 49 homeowner of all obligations to pay any fees or compensation to the
 50 distressed property consultant.

1 4. Penalties and other provisions. (a) If a court finds that a
2 distressed property consultant has violated any provision of this
3 section, the court may make null and void any agreement between the
4 distressed homeowner and the distressed property consultant.

5 (b) If the distressed property consultant violates any provision of
6 this section and the homeowner suffers damage because of the violation,
7 the homeowner may recover actual and consequential damages and costs
8 from the distressed property consultant in an action based on this
9 section. If the distressed property consultant intentionally or reck-
10 lessly violates any provision of this section, the court may award the
11 homeowner treble damages, attorneys' fees and costs.

12 (c) Any provision of a consulting contract that attempts or purports
13 to limit the liability of the distressed property consultant under this
14 section shall be null and void. Inclusion of such provision shall at
15 the option of the homeowner render the consulting contract void. Any
16 provision in a contract which attempts or purports to require arbi-
17 tration of any dispute arising under this section shall be void at the
18 option of the homeowner. Any waiver of the provisions of this section
19 shall be void and unenforceable as contrary to public policy.

20 (d) In addition to the other remedies provided, whenever there shall
21 be a violation of this section, application may be made by the attorney
22 general in the name of the people of the state of New York to a court or
23 justice having jurisdiction by a special proceeding to issue an injunc-
24 tion, and upon notice to the defendant of not less than five days, to
25 enjoin and restrain the continuance of such violations; and if it shall
26 appear to the satisfaction of the court or justice that the defendant
27 has, in fact, violated this section, an injunction may be issued by such
28 court or justice, enjoining and restraining any further violation, with-
29 out requiring proof that any person has, in fact, been injured or
30 damaged thereby. In any such proceeding, the court may make allowances
31 to the attorney general as provided in paragraph six of subdivision (a)
32 of section eighty-three hundred three of the civil practice law and
33 rules, and direct restitution. Whenever the court shall determine that a
34 violation of this section has occurred, the court may impose a civil
35 penalty of not more than ten thousand dollars for each violation. In
36 connection with any such proposed application, the attorney general is
37 authorized to take proof and make a determination of the relevant facts
38 and to issue subpoenas in accordance with the civil practice law and
39 rules.

40 (e) The provisions of this section are not exclusive and are in addi-
41 tion to any other requirements, rights, remedies, and penalties provided
42 by law.

43 § 27. Severability clause. If any clause, sentence, paragraph, section
44 or part of this act shall be adjudged by any court of competent juris-
45 isdiction to be invalid, such judgment shall not affect, impair or invali-
46 date the remainder thereof, but shall be confined in its operation to
47 the clause, sentence, paragraph, section or part thereof directly
48 involved in the controversy in which such judgment shall have been
49 rendered.

50 § 28. This act shall take effect immediately; provided, however, that:

51 a. sections one and seventeen of this act shall apply to actions that
52 are commenced on or after September 1, 2008;

53 b. sections two and twenty-six of this act shall take effect September
54 1, 2008;

55 c. sections four, five, six, thirteen and eighteen of this act shall
56 apply to loans that are consummated on or after September 1, 2008;

1 d. section four-a of this act shall of this act take effect July 1,
2 2010;
3 e. sections seven through twelve and fourteen through sixteen of this
4 act shall take effect July 1, 2009;
5 f. sections nineteen through twenty-five of this act shall take effect
6 on the first day of November next succeeding the date upon which it
7 shall have become a law; and
8 g. provided however, effective immediately the promulgation of any
9 rules, regulations or actions necessary for timely implementation of the
10 provisions of this act are hereby authorized.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S8143A

SPONSOR: FARLEY

TITLE OF BILL: An act to amend the real property actions and proceedings law, the civil practice law and rules, the banking law and the general obligations law, in relation to home mortgage loans; to amend the penal law and the criminal procedure law, in relation to creating new crimes relating to mortgage fraud; and to amend the real property law, in relation to distressed property consulting contracts

PURPOSE: This bill seeks to address the mortgage foreclosure crisis in the state by: (1) providing additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes; (2) strengthening the Banking Law to prevent similar crises from occurring in the future; (3) establishing standards for lenders and mortgage brokers to prevent borrowers from being placed into unaffordable home loans; (4) registering and regulating mortgage loan servicers to enhance loan servicing standards in the state; and (5) defining the crime of residential mortgage fraud and establishing strict criminal penalties to deter those who may engage in such activity.

SUMMARY OF PROVISIONS: Section 1 of the bill amends Real Property Actions and Proceedings Law ("RPAPL") § 1303 to provide a clear and concise notice detailing instructions and potential options for those homeowners against whom foreclosure proceedings are being commenced.

Section 2 of the bill adds a new Real Property Actions and Proceedings Law ("RPAPL") § 1304 to require lenders and mortgage loan servicers to send a notice to borrowers who took out a subprime or nontraditional loan between January 1, 2003 and September 1, 2008, at least 90 days before they may commence legal action against the borrower. The notice would provide the names and telephone numbers of housing counseling agencies approved by the United States Department of Housing and Urban Development ("HUD") or designated by the Division of Housing and Community Renewal ("DHCR") and serving the borrower's area.

Section 3 of the bill adds a new CPLR Rule 3408 to require a court, in a residential foreclosure action involving a subprime or a non-traditional home loan made between January 1, 2003 and September 1, 2008, to schedule a settlement conference within 60 days of when the proof of service of the complaint is filed with the county clerk's office. The plaintiff, or a representative with authority to settle the matter, must appear at the conference. The court may allow the plaintiff's representative to appear via phone or video-conference. If the homeowner appears and is not represented by counsel, he or she would be deemed to have made a motion to proceed as a "poor person" under CPLR § 1101, and the judge may relieve the defendant of certain procedural court requirements and appoint counsel under CPLR § 1102(a).

Section 3-a of the bill allows those homeowners against whom a foreclosure action has already been commenced to also participate in a settlement conference. Sections 4 and 4-a of the bill make certain conforming changes to Banking Law § 6-1.

Section 5 of the bill adds a new Banking Law § 6-rn which- (1) defines the term "subprime home loan": (2) provides consumer protections and minimum underwriting standards for such loans; and (3) establishes an enforcement mechanism for these provisions, and remedies for violations. The bill allows the Superintendent of Banks ("Superintendent") to adjust the definition of subprime home loan under certain circumstances. In addition, this provision of the bill provides an opportunity to cure a violation to those lenders who, while acting in good faith, violate Banking Law § 6-m. The Attorney General or the Superintendent may enforce the provisions of the new Banking Law § 6-m, and a borrower may raise the violation of this section as a defense to foreclosure.

Section 6 of the bill adds a new Banking Law § 590-b to establish certain responsibilities for lenders and mortgage brokers. In particular, this section of the bill establishes: (1) a duty of care for mortgage brokers in soliciting, placing, processing and arranging home loans; and (2) standards for lenders and mortgage brokers in their dealings with appraisers. Section 6 of the bill further establishes remedies for violations of these provisions, and allows the Attorney General or Superintendent to enforce the provisions of Banking Law § 590-b.

Sections 7 through 16 of the bill amend the Banking Law to require mortgage loan servicers to register with the Superintendent before engaging in the business of mortgage loan servicing in the state. These sections of the bill further empower the Banking Board to promulgate regulations and require mortgage loan servicers to comply with the regulations. These provisions of the bill would also permit the Superintendent to inspect the books and records of registered mortgage loan servicers.

Section 17 of the bill amends RPAPL § 1302 to extend its application to subprime home loans. Plaintiffs in a legal action brought under Article 13 of the RPAPL will be required to make an affirmative allegation that at the time the proceeding is commenced the plaintiff is the owner and the holder of the mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the mortgage and the note. In addition, plaintiffs in foreclosure actions involving subprime loans will be required to make an affirmative allegation of compliance with Banking Law § 6-m and RPAPL § 1304. This section of the bill further provides that a violation Banking Law § 6-m or RPAPL § 1304 will be a defense to a subprime foreclosure action.

Section 18 of the bill amends General Obligations Law § 5-501(3)(b) to make a technical amendment related to Banking Law § 6-1 and 6-m.

Section 19 of the bill adds a new Article 187 to the Penal Law to define the crime of residential mortgage fraud.

Section 20 of the bill amends Criminal Procedure Law § 700.5(8)(b) to add residential mortgage fraud in the first, second, third and fourth degrees as predicate crimes in the crimes of enterprise corruption.

Section 21 of the bill amends Penal Law § 460.10(1)(a) to add violations of the mortgage fraud statute to the predicate crimes of money laundering.

Sections 22 through 25 of the bill amend various sections of the Banking Law that allow the Superintendent to refuse a license or registration to a person for having committed certain named felonies to add residential mortgage fraud to the named felonies.

Section 26 of the bill adds a new Real Property Law § 265-b to prevent certain foreclosure rescue scams by prohibiting "distressed property".

consultants" from performing services without a written and fully executed consulting contract with the homeowner; and from charging or accepting payment for consulting services before completion of services. In addition, the new Real Property Law § 265-b requires these consultants to provide the homeowner with an opportunity to review a contract before signing it, and requires that the contract be in the language that was used in discussions between the consultant and the homeowner, and contain a notice of the homeowner's right to cancel the contract.

Section 27 of the bill contains a severability clause.

Section 28 of the bill provides for the effective date of various provisions of the bill.

EXISTING LAW RPAPL §§ 1303 and 1320 require that a notice be sent to the borrower when legal action is commenced. There is no present requirement that borrowers receive any notice prior to the commencement of a foreclosure action, nor any requirement for an early settlement conference in such actions.

If a litigant wishes to be considered for "poor person" status, the litigant must make a motion under CPLR § 1101. If the court determines that the litigant is a poor person, then the court will waive certain procedural requirements for the borrower, and may, in its discretion, appoint counsel under CPLR § 1102(a).

While New York does have an Antipredatory Lending Law, Banking Law § 6-1, very few subprime home loans actually receive protections under this law.

At present, an ability to pay standard has not been established in the state for subprime home loans that are not protected under Banking Law § 6-1. This standard, however, is part of strong underwriting criteria considered by many lenders.

Mortgage brokers do not at present have a duty of care towards borrowers. In addition, the State does not register or regulate any mortgage loan servicers. Furthermore, there is no defined crime of "residential mortgage fraud" and prosecutors must typically rely on the larceny and scheme to defraud statutes to prosecute such cases. Lastly, while the state recently enacted the Home Equity Theft Prevention Act, that law did not cover distressed property consultants that often prey on homeowners at risk of foreclosure.

STATEMENT IN SUPPORT: New York State faces a mortgage crisis of immense magnitude. Many families have lost their homes and entire neighborhoods have been devastated. In 2007, there were more than 52,000 foreclosure filings in the state - an increase of 10% from 2006 and 55% from 2005. These statistics, especially in light of inaction by the federal government, make clear the need for state action on this issue. This bill attempts to address the mortgage foreclosure crisis in two ways. First, this bill provides assistance to homeowners currently at risk of losing their homes by providing additional protections and foreclosure prevention opportunities for such homeowners. Second, this bill establishes further protections in the law to mitigate the possibility of similar crises in the future.

1. Elements of legislation targeted to help homeowners currently at risk of foreclosure

A. Pre-Foreclosure Notice According to industry experts, a majority of distressed homeowners do not attempt to contact their lender prior to the commencement of foreclosure proceedings. While there are a myriad of reasons for this, it is undisputed that this lack of communication often leads to needless foreclosure proceedings in cases where a foreclosure alternative might otherwise have been possible. This legislation seeks to bridge that communication gap in order to facilitate a resolution that avoids foreclosure.

In particular, this bill would require lenders and mortgage loan servi-

cers to provide a pre-foreclosure notice to borrowers with subprime loans at least 90 days before a legal action may be commenced against the borrower. The notice would advise the borrower of HUD-approved and DHCR designated housing counseling services available in the borrower's area. The additional period of time in many cases would allow borrowers to work on a resolution without fear of imminent loss of their homes. This proposal recognizes that avoiding foreclosure is a better outcome than a quick foreclosure. However, if the borrower is unable to reach resolution with the lender in the prescribed time, the lender will have the opportunity to pursue legal action against the borrower.

B. Early Settlement Conference While reaching resolution during the pre-foreclosure time period is indeed preferred, that will not always occur. As a result, this bill provides that if an action is commenced, the homeowner will receive a second opportunity to reach resolution with the lender early in the foreclosure process, without delaying the continuation of the action.

In particular, this bill would require a court in a residential foreclosure action to schedule a mandatory settlement conference within 60 days of when the plaintiff files a proof of service of the complaint with the county clerk. The plaintiff, or its representative with authority to settle the matter, must appear at that conference. The court may allow an appearance by phone or video-conference for the plaintiff's representative. If the homeowner appears and does not have an attorney, he or she will be deemed to have made a motion to proceed as a "poor person" under CPLR § 1101 and the court may, in its discretion, waive certain procedural requirements and even appoint counsel to the homeowner under CPLR § 1102(a). Under the bill, the mandatory settlement conference would also be available for certain homeowners who are already in foreclosure when this act takes effect.

C. Affirmative Allegation of Ownership Because of the practice of bundling and selling mortgages as investment products, often it is difficult to determine who owns the mortgage and note. In addition, mortgage loan servicers frequently change over time. To maintain the integrity of New York's standing requirements, it is critically important to ensure that those who initiate a foreclosure action actually have standing to do so. Therefore, this bill would require the plaintiff in a foreclosure action to make an affirmative allegation that it is the holder of the note and mortgage, or has been given the authority to commence the action by the holder of the note and mortgage. In addition, this bill would also require a plaintiff in a subprime foreclosure action to make an affirmative allegation of compliance with the new Banking Law § 6-rn, as well as the new RPAPL § 1304.

D. Rescue Scams Distressed homeowners are not only at risk of losing their homes, but of also being scammed by those who operate fraudulent rescue scams. Indeed, as homeowners become more desperate to keep their homes, they also become more prone to being swindled. This bill enacts tough measures to help prevent distressed homeowners from falling prey to rescue scams.

In particular, this provision of the bill would target foreclosure rescue scams operated by "consultants" who seek to take advantage of homeowners in default. These consultants take upfront payments from consumers in exchange for false promises that they will negotiate with the lender on the borrower's behalf or take other action that will prevent foreclosure. In fact, they often perform no such services or do anything more than, for example, advise the lender to file for bankruptcy.

This bill would prohibit a "distressed property consultant" from performing services without a written and fully executed consulting contract, and prohibit the consultant from charging for or accepting payment for consulting services before completing all services. The bill would further require that a consultant provide the homeowner with an opportunity to review the contract before signing it, that the contract be in the language that was used in discussions between the consultant

and the homeowner, and that the contract contain a notice of the homeowner's right to cancel the contract. Establishing these standards will help ensure that legitimate consultants remain in business, while protecting homeowners from those fraudsters who might have otherwise been successful in preying on them.

II. Elements of the bill targeted to prevent similar future crises
A. New Banking Law § 6-m The scope of the current New York State Anti-predatory lending law is extremely narrow. Indeed, only a handful of loans fall within its protections each year. With property values soaring in the recent past and predatory lending practices ever-evolving, the current Anti-predatory Lending Law does not provide adequate protections for homeowners.

This bill would add a new Banking Law § 6-m to establish standards and limitations for lenders and brokers making "subprime home loans." Banking Law § 6-m defines the term "subprime home loan" as a home loan in which the fully indexed annual percentage rate exceeds by more than .75 percentage points for a first lien loan, or by more than 175 percentage points for a subordinate lien loan, the average commitment rate for loans in the northeast region with a comparable duration to the duration of such home loan, as published by the Federal Home Loan Mortgage Corporation ("Freddie Mac") in its weekly Primary Mortgage Market Survey ("PMMS"). This definition of subprime home loan would target the new protections to specific loans, while not intruding into the prime market.

This bill applies certain standards and prohibitions to "subprime home loans" including: (a) no prepayment penalties, (b) no abusive yield spread premiums; (c) no option adjustable rate mortgages where one or more options causes the principal balance to increase; (d) no loan flipping; and (e) no negative amortization. The bill would also require the escrow of taxes and insurance and the timely disclosure taxes and insurance payments

This section of the bill would also establish an "ability to pay" standard for making and arranging all subprime home loans. Under the bill, lenders would have to make a reasonable and good faith determination of the borrower's ability to repay the loan, including the principal, interest, taxes, insurance, assessments, points and fees, based upon the borrower's income, employment status and other financial resources. The borrower's ability to pay would be verified based on tax returns, payroll receipts or other third-party income verification. The Attorney General and the Superintendent would be permitted to enforce the provisions of this statute and homeowners would be permitted to raise a violation of Banking Law § 6-m as a defense to foreclosure.

B Standards for Mortgage Brokers One of the major causes for the current mortgage crisis is that borrowers were placed into loans they could not afford. While many lenders adhered to strong underwriting standards, other lenders did not. Unscrupulous lenders and brokers sometimes placed borrowers into loans that were more costly than loans the borrowers would have otherwise qualified for.

This bill would also establish a general duty of care for mortgage brokers with regard to all home loans. For example, this bill would require brokers to: (1) act in the borrower's interest; (2) act with reasonable care, skill and diligence; (3) act with good faith and fair dealing; (4) not accept, give, or charge any undisclosed compensation; (5) disclose all material facts known to the broker that might reasonably affect the borrower's rights, and interests; and (6) diligently work to present a range of loan products for which the borrower likely qualifies and which are appropriate for the borrower's circumstances. The ability to pay standard along with the mortgage broker duty of care would help prevent borrowers from being steered into home loans they cannot afford.

C. Registration of Servicers Mortgage loan servicers perform administrative functions for the owner of the mortgage and the note, such as collecting checks and crediting payment. Even though mortgage loan

servicers perform a central function in the mortgage industry, they are not at present regulated by the state. This bill would require mortgage loan servicers to be registered with the Superintendent in order to engage in the business of mortgage loan servicing. The bill would further require mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Banking Board.

D Mortgage Fraud There currently is no separate Penal Law provision expressly prohibiting residential mortgage fraud, and thus prosecutors must bring such cases under different theories, such as scheme to defraud and larceny. This bill therefore seeks to simplify such prosecutions by explicitly defining and criminalizing the act of residential mortgage fraud.

In particular, the bill would define residential mortgage fraud as conduct in which a person, knowingly and with intent to defraud, among other things, presents, or causes to be presented a written statement that the person knows contains materially false information, or conceals, for the purpose of misleading, facts that are material. Under the bill, the magnitude of the fraud may be aggregated and stiffer penalties may be sought by prosecutors. In addition, while under the scheme to defraud theory the most a person may be charged with is a Class E felony, this bill would allow a person guilty of residential mortgage fraud in excess of \$1 million to be charged with a Class B felony. However, the bill provides that a person does not commit mortgage fraud when he or she is acting to obtain a residential mortgage loan and intends to occupy residential property, although criminal liability is not precluded for a person acting as an accessory to an individual or entity committing a crime under Penal Law Article 187.

BUDGET IMPLICATIONS: This bill would not have a significant impact on state finances.

EFFECTIVE DATE: This bill would take effect immediately, unless otherwise provided under section 28 of the bill.

B



Thursday, August 7, 2008

Bill Text - A09695

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S T A T E O F N E W Y O R K

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I N A S S E M B L Y

January 16, 2008

Introduced by M. of A. BRENNAN, SILVER, CLARK, JEFFRIES, ORTIZ, ROBINSON, ROSENTHAL, R. DIAZ, PERRY, CAMARA, CAHILL, GALEF, J. RIVERA, P. RIVERA, SCARBOROUGH, BOYLAND, N. RIVERA, BRODSKY, LANCMAN, KAVANAGH, DINOWITZ, RAMOS, MAISEL, ESPAILLAT, HOOPER -- Multi-Sponsored by -- M. of A. ABBATE, ALESSI, ALFANO, ARROYO, AUBRY, BENEDETTO, BENJAMIN, BING, BROOK-KRASNY, COLTON, COOK, CYMBROWITZ, DELMONTE, DESTITO, L. DIAZ, EDDINGTON, FIELDS, GLICK, GOTTFRIED, GREENE, HEASTIE, HOYT, HYER-SPENCER, JACOBS, JAFFEE, KELLNER, LAFAYETTE, LENTOL, LIFTON, V. LOPEZ, LUPARDO, MARKEY, MCENENY, MILLMAN, NOLAN, PEOPLES, PERALTA, PHEFFER, POWELL, PRETLOW, QUINN, REILLY, SALADINO, SCHIMEL, SWEENEY, TITUS, WEISENBERG, WRIGHT, YOUNG -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property actions and proceedings law, in relation to providing foreclosure relief; and providing for the repeal of such provisions upon expiration thereof

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Legislative intent. The legislature declares that a public
 2 emergency exists in regards to real estate foreclosures due to the
 3 extension of fundamentally unaffordable mortgage loans, fundamentally
 4 unaffordable second mortgages and fundamentally unaffordable home equity
 5 loans. Many such loans were extended under conditions which evince
 6 deception, misrepresentation and fraud on the part of many lenders and
 7 agents. This is particularly true of loans which qualify as subprime.
 8 The presence of such subprime loans is distorting the New York state
 9 real estate market. The problems associated with these subprime loans
 10 are adversely affecting availability of capital, the demand for housing,
 11 and the value of real estate. The financial problems created by such
 12 subprime loans threaten to spill over into the rest of the real estate
 13 market and the general economy. It is in the interest of New York state

14 to ensure the rights of all parties are protected and that all foreclo-

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
{ } is old law to be omitted.

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1 sures which come into the New York courts during this period are care-
2 fully scrutinized.

3 S 2. The real property actions and proceedings law is amended by
4 adding a new section 1304 to read as follows:

5 S 1304. FORECLOSURES; COURT RELIEF. 1. VENUE. IN ANY ACTION TO FORE-
6 CLOSE A MORTGAGE UNDER THIS ARTICLE A MORTGAGOR NAMED IN SUCH ACTION MAY
7 APPLY FOR RELIEF IN STATE SUPREME COURT PURSUANT TO THIS SECTION.

8 2. TIMING OF YEAR-LONG MORATORIUM. IF A MORTGAGEE HAS OTHERWISE ESTAB-
9 LISHED ITS LEGAL RIGHT TO JUDGMENT ON AN ACTION TO FORECLOSE A MORTGAGE
10 PURSUANT TO THIS CHAPTER, THEN SUCH ACTION SHALL BE HELD IN ABEYANCE BY
11 THE COURT BEFORE WHICH SUCH ACTION IS PENDING. SUCH PERIOD OF TIME IS
12 INTENDED TO PERMIT THE PARTIES TO SETTLE THE ACTION OUTSIDE OF COURT AND
13 TO FORESTALL FORECLOSURE WITHIN THE CURRENT ECONOMIC CLIMATE.

14 3. PROCESS AND FEES. IF AN ACTION TO FORECLOSE A MORTGAGE HAS BEEN
15 COMMENCED PRIOR TO THE EFFECTIVE DATE OF THIS SECTION, A MORTGAGOR MAY
16 ASK THE COURT BEFORE WHICH SUCH ACTION IS COMMENCED TO HOLD SUCH ACTION
17 IN ABEYANCE PURSUANT TO SUBDIVISION TWO OF THIS SECTION. MOTIONS ON
18 NOTICE IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES MADE BY THE
19 MORTGAGOR SHALL BE DEEMED TO HAVE BEEN FILED BY A POOR PERSON PURSUANT
20 TO ARTICLE ELEVEN OF THE CIVIL PRACTICE LAW AND RULES AND ALL COURT FEES
21 OTHERWISE APPLICABLE TO SUCH ACTIONS AND PAYABLE BY A MORTGAGOR SHALL BE
22 WAIVED. IF A FORECLOSURE ACTION HAS NOT BEEN COMMENCED PRIOR TO THE
23 EFFECTIVE DATE OF THIS SECTION, A MORTGAGOR MUST COMMENCE AN ACTION IN
24 STATE SUPREME COURT BY FILING AND SERVING A SUMMONS PURSUANT TO ARTICLE
25 THREE OF THE CIVIL PRACTICE LAW AND RULES WITH A REQUEST FOR RELIEF
26 PURSUANT TO THE TERMS OF THIS SECTION. IN SUCH CASE, SUCH FILING SHALL
27 BE DEEMED TO HAVE BEEN FILED BY A POOR PERSON PURSUANT TO ARTICLE ELEVEN
28 OF THE CIVIL PRACTICE LAW AND RULES AND ALL FILING AND COURT FEES OTHER-
29 WISE APPLICABLE TO SUCH ACTIONS AND PAYABLE BY A MORTGAGOR IN THE FORM
30 OF INDEX AND MOTION FEES SHALL BE WAIVED.

31 4. PRIMA FACIE CASE. A MORTGAGOR MUST ESTABLISH A PRIMA FACIE CASE IN
32 THE MOTION OR PLEADING. AMENDMENTS TO SUCH MOTION OR PLEADING SHALL BE
33 LIBERALLY GRANTED. SUCH PLEADING MUST ESTABLISH THAT:

34 A. THE MORTGAGOR IS A NATURAL PERSON; AND

35 B. THE DEBT IS INCURRED BY THE MORTGAGOR PRIMARILY FOR PERSONAL, FAMI-
36 LY OR HOUSEHOLD PURPOSES; AND

37 C. THE LOAN IS SECURED BY A MORTGAGE, SECOND MORTGAGE OR HOME EQUITY
38 LOAN ON REAL PROPERTY WHICH IS IMPROVED WITH A RESIDENTIAL BUILDING
39 CONTAINING ONE TO SIX DWELLING UNITS; AND

40 D. THE REAL PROPERTY SUBJECT TO FORECLOSURE IS THE PRINCIPAL RESIDENCE
41 OF THE MORTGAGOR; AND

42 E. THE MORTGAGOR OWNS NO OTHER REAL PROPERTY; AND

43 F. THE REAL PROPERTY IS LOCATED IN THIS STATE; AND

44 G. THE MORTGAGE, SECOND MORTGAGE OR HOME EQUITY LOAN QUALIFIES AS A
45 SUBPRIME HOME LOAN. A SUBPRIME HOME LOAN FOR A FIRST LIEN LOAN IS ONE
46 WHICH HAS AN ANNUAL PERCENTAGE RATE OF THREE OR MORE PERCENTAGE POINTS
47 ABOVE THE YIELD ON TREASURY SECURITIES OF COMPARABLE MATURITY MEASURED
48 AS OF THE FIFTEENTH DAY OF THE MONTH PRECEDING THE MONTH IN WHICH THE
49 APPLICATION FOR THE LOAN IS RECEIVED BY THE LENDER. A SUBPRIME HOME LOAN
50 FOR A SUBORDINATE LIEN LOAN IS ONE WHICH HAS AN ANNUAL PERCENTAGE RATE
51 OF FIVE OR MORE PERCENTAGE POINTS ABOVE THE YIELD ON TREASURY SECURITIES

52 OF COMPARABLE MATURITY MEASURED AS OF THE FIFTEENTH DAY OF THE MONTH
53 PRECEDING THE MONTH IN WHICH THE APPLICATION FOR THE LOAN IS RECEIVED BY
54 THE LENDER.

55 5. MONTHLY PAYMENT SCHEDULE. IF A PRIMA FACIE CASE HAS BEEN ESTAB-
56 LISHED, THE COURT MUST SET FORTH THE TERMS OF A MONTHLY PAYMENT SCHEDULE

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1 WHICH WILL PRESERVE THE RELATIVE FINANCIAL INTERESTS OF BOTH PARTIES
2 UNDER TERMS WHICH ARE EQUITABLE AND JUST. TOWARDS THAT END, THE COURT
3 SHALL INQUIRE INTO THE FINANCES OF BOTH THE MORTGAGEE AND THE MORTGAGOR.
4 THE PURPOSE OF SUCH INQUIRY SHALL BE TO DETERMINE THE MINIMUM AMOUNT
5 NECESSARY TO MAINTAIN THE MORTGAGEE'S FINANCIAL POSITION AND TO DETER-
6 MINE THE AMOUNT WHICH THE MORTGAGOR WILL BE ABLE TO AFFORD. SUCH MONTH-
7 LY PAYMENTS SHALL BE APPLIED TO THE PRINCIPAL AND INTEREST UPON THE
8 INDEBTEDNESS. IF THE FINANCIAL CONDITION OF THE MORTGAGOR EXCEEDS THE
9 MINIMUM AMOUNT NECESSARY TO MAINTAIN THE FINANCIAL POSITION OF THE MORT-
10 GAGEE, SUCH MONTHLY AMOUNT MAY BE INCREASED BEYOND THE MINIMUM AMOUNT AS
11 DETERMINED WITHIN THE DISCRETION OF THE COURT. IT IS WITHIN THE COURT'S
12 DISCRETION TO DETERMINE WHETHER THE ESTABLISHMENT OF SUCH PAYMENT SCHED-
13 ULE IS POSSIBLE UNDER TERMS WHICH ARE EQUITABLE AND JUST. THE PURPOSE OF
14 SUCH MONTHLY PAYMENTS ARE TO PRESERVE THE RELATIVE FINANCIAL INTERESTS
15 OF BOTH PARTIES UNTIL A SETTLEMENT CAN BE REACHED BUT IN NO EVENT SHALL
16 SUCH ORDER GOVERN FOR MORE THAN ONE YEAR. FAILURE TO ADHERE TO THE TERMS
17 OF SUCH SCHEDULE MAY ALSO RESULT IN FORECLOSURE OR LIFTING OF THE ABEY-
18 ANCE. MORE THAN ONE SINGLE YEAR LONG MORATORIUM MAY BE GRANTED IN THE
19 DISCRETION OF THE COURT SUBJECT TO THE FACTS ESTABLISHED DURING THE
20 PROCEEDINGS.

21 6. POSTPONEMENT ORDER. ONCE THE COURT DETERMINES THAT AN EQUITABLE AND
22 JUST PAYMENT SCHEDULE CAN BE ESTABLISHED, IT SHALL ISSUE AN ORDER WHICH
23 SETS FORTH THE TERMS OF SUCH PAYMENT SCHEDULE AND SERVE IT UPON ALL
24 PARTIES TO THE PROCEEDING. SUCH ORDER SHALL SET FORTH A RETURN DATE FOR
25 THE REEXAMINATION OF SUCH MATTER AFTER PASSAGE OF THE POSTPONEMENT TIME
26 PERIOD AT A FORMAL HEARING ON NOTICE TO THE PARTIES. THE COURT MAY
27 TAILOR RELIEF AS REQUIRED BY THE FACTS OF EACH CASE THAT FALLS WITHIN
28 THE PURVIEW OF THIS SECTION. HOWEVER, IN NO EVENT SHALL SUCH ORDER POST-
29 PONE FINAL ACTION BEYOND ONE YEAR WITHOUT A RE-EXAMINATION OF THE
30 PARTIES' FINANCIAL CIRCUMSTANCES AFTER FORMAL HEARING ON NOTICE TO THE
31 PARTIES. THE TIME PERIOD OF SUCH ORDER SHALL RUN FROM THE DATE OF THE
32 ENTRY OF SUCH ORDER. SUCH ABEYANCE SHALL NOT BEGIN UNTIL THE FORECLO-
33 SURE PROCESS HAS REACHED THE POINT WHERE A FINAL DETERMINATION IS POSSI-
34 BLE BUT SHALL BE WITHHELD UNTIL THE POSTPONEMENT PERIOD HAS ELAPSED.
35 ENTITLEMENT TO SUCH ABEYANCE MAY BE ESTABLISHED AT ANY TIME REGARDLESS
36 OF WHETHER FORECLOSURE IS BEING SOUGHT BY THE MORTGAGEE. MULTIPLE POST-
37 PONEMENTS MAY BE GRANTED IN THE DISCRETION OF THE COURT IF WARRANTED BY
38 THE FACTS OF A GIVEN CASE AND THE ECONOMIC CONDITIONS ACROSS THE STATE.

39 7. CONTINUING JURISDICTION. THE COURT SHALL MAINTAIN CONTINUING JURIS-
40 DICTION OF THE MATTER UNTIL IT REACHES FINAL RESOLUTION. UPON THE APPLI-
41 CATION OF EITHER PARTY, PRIOR TO THE EXPIRATION OF THE POSTPONEMENT
42 PERIOD, UPON PRESENTATION OF EVIDENCE THAT THE TERMS FIXED BY THE COURT
43 ARE NO LONGER JUST AND EQUITABLE, THE COURT MAY REVISE AND ALTER SUCH
44 TERMS IN SUCH MANNER AS THE CHANGED CIRCUMSTANCES AND CONDITIONS MAY
45 REQUIRE.

46 S 3. This act shall take effect immediately and shall expire and be
47 deemed repealed 3 years after such date.

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05/07/2008 REFERRED TO JUDICIARY

A09695 Votes:

BILL: A09695B DATE: 05/07/2008 MOTION:

YEA/NAY: 126/011

Abbate	Y	Calhoun	Y	Espail	Y	Hyer-Sp	Y	Markey	Y	Pretlow	Y	Sweeney	Y
Alessi	Y	Camara	Y	Farrell	Y	Jacobs	Y	Mayerso	Y	Quinn	Y	Tedisco	Y
Alfano	Y	Canestr	Y	Fields	Y	Jaffee	Y	McDonal	Y	Rabbitt	Y	Thiele	Y
Amedore	Y	Carrozz	ER	Finch	NO	Jeffrie	Y	McDonou	Y	Raia	Y	Titone	Y
Arroyo	ER	Christe	Y	Fitzpat	NO	John	Y	McEneny	Y	Ramos	Y	Titus	Y
Aubry	Y	Clark	Y	Gabrysz	NO	Kavanag	Y	McKevit	Y	Reilich	NO	Tobacco	Y
Bacalle	NO	Cole	Y	Galef	Y	Kellner	Y	Miller	Y	Reilly	Y	Towns	Y
Ball	Y	Colton	Y	Gantt	Y	Kirwan	ER	Millman	Y	Rive J	Y	Townsen	Y
Barclay	NO	Conte	Y	Gianari	Y	Kolb	NO	Molinar	Y	Rive N	ER	Walker	Y
Barra	Y	Cook	Y	Giglio	Y	Koon	Y	Morelle	Y	Rive PM	Y	Weinste	Y
Benedet	Y	Crouch	Y	Glick	ER	Lafayet	Y	Nolan	ER	Robinso	Y	Weisenb	Y
Benjami	Y	Cusick	Y	Gordon	Y	Lancman	Y	Oaks	NO	Rosenth	Y	Weprin	Y
Bing	Y	Cymbrow	Y	Gottfri	Y	Latimer	Y	O`Donne	ER	Saladin	Y	Wright	Y
Boyland	Y	DelMont	Y	Greene	Y	Lavine	Y	O`Mara	Y	Sayward	Y	Young	Y
Boyle	Y	Destito	Y	Gunther	Y	Lentol	Y	Ortiz	Y	Scarbor	Y	Zebrows	Y
Bradley	Y	Diaz LM	Y	Hawley	Y	Lifton	ER	Parment	Y	Schimel	Y	Mr Spkr	ER
Brennan	Y	Diaz R	Y	Hayes	NO	Lope PD	Y	Paulin	Y	Schimmi	NO		
Brodsky	Y	Dinowit	Y	Heastie	Y	Lope VJ	ER	Peoples	Y	Schroed	Y		
Brook-K	Y	Duprey	Y	Hevesi	Y	Lupardo	Y	Peralta	Y	Scozzaf	Y		
Burling	NO	Eddingt	Y	Hikind	Y	Magee	Y	Perry	Y	Seminer	Y		
Butler	Y	Englebr	Y	Hooper	Y	Magnare	Y	Pheffer	Y	Spano	Y		
Cahill	Y	Errigo	Y	Hoyt	Y	Maisel	Y	Powell	ER	Stirpe	Y		

A09695 Memo:

BILL NUMBER: A9695B

TITLE OF BILL : An act to amend the real property actions and proceedings law, in relation to providing foreclosure relief; and providing for the repeal of such provisions upon expiration thereof

PURPOSE OR GENERAL IDEA OF BILL :

The purpose of this bill is to impose a one year delay between the moment where the lender has proven entitlement to foreclosure and the actual court order which transfers title and enables foreclosure to proceed.

SUMMARY OF SPECIFIC PROVISIONS :

Section 1 sets out the legislative intent, declaring that a public emergency exists in the housing market due to the extension of unaffordable mortgage loans, second mortgages and home equity loans.

Section 2 adds a new section 1304 to the real property actions and proceedings law to allow a court to delay the actual order to transfer title and proceed with the foreclosure under specific conditions for no more than one year. A mortgagor named in a foreclosure action would

be allowed to apply for relief according to this section.

If the mortgagee establishes its right to foreclosure, the action would be held in abeyance by the court with the time intended to allow for the parties to work out a payment schedule that would be both equitable and just for both parties. Such monthly payments shall preserve the relative financial interests of both parties until a settlement can be reached, but shall not be for more than one year.

JUSTIFICATION :

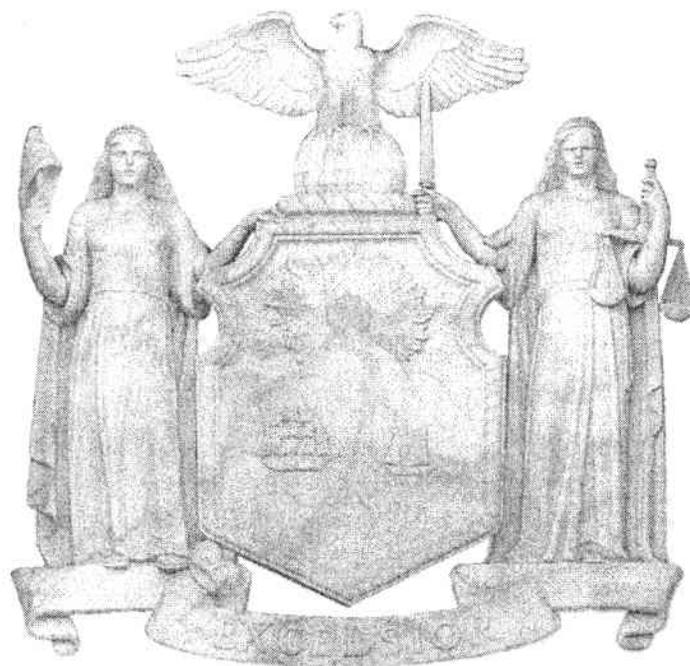
Large numbers of New Yorkers face imminent foreclosure due to the extension of fundamentally unaffordable mortgage loans under circumstances which evince deception, misrepresentation and/or fraud on the part of many lenders and agents. In July 2007, there were 4270 foreclosures in New York State, including 2561 in New York City according to Realty/Trac. Foreclosure filings rose 22% statewide from July 2006 and 55% in New York City. The sheer quantity of such foreclosures create a depressed market that is more reflective of poor lending practices and "hard sell" sales tactics than any weakness in the New York State economy. It is in New York State's interest to encourage settlements instead of lengthy litigation which will only prolong, and prevent a resolution of, this crisis. Towards that end, the New York State Legislature finds that the imposition of a one-year moratorium on the execution of foreclosure is warranted for certain types of mortgages. Such time period will run from the time that a mortgagee has proven entitlement to the remedy of foreclosure. The purpose is to impose a one year delay between the moment where the lender has proven entitlement to foreclosure and the actual court order which transfers title and enables foreclosure to proceed. Until that one-year period has elapsed - or a shorter time period at the discretion of the court - no court order entitling the lender to foreclose may be issued. The purpose is to prevent the transfer of title and postpone the mortgagee's right to foreclosure. It is intended that this will provide an incentive to all parties to compromise on the fundamental issues in dispute regarding each individual mortgage to avoid foreclosure to the maximum extent possible. However, the year long moratorium must not come wholly at the expense of the mortgagee. In addition to the establishment of a prima facie case by the mortgagor which establishes that they are eligible for a court ordered postponement, the court must be able to create a temporary payment schedule under such terms that are equitable and just. The purpose of such payment schedule is to preserve the relative financial position of both parties until a hearing can be held on the matter after the passage of time established by the postponement. The purpose is to postpone the mortgagee's profit and not to cancel or alter the terms of the mortgage agreement. The postponement must not be used to forcibly diminish the financial interests of the lender or to leverage the mortgagee into surrendering substantive rights. Instead, it is intended to postpone the eventual resolution of the matter to enable the parties to settle the dispute outside of the foreclosure process. To prove entitlement a mortgagor must establish that they live in the home subject to foreclosure and that they own no other real property. Further, as part of the year long moratorium, the lender must establish to the satisfaction of the court the minimum monthly amount necessary to preserve their relevant financial position so as to prevent an erosion of the mortgagee's financial position. The mortgagor must establish the ability to make such monthly payments to the mortgagee in order to acquire the right to a moratorium. The

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JUNE 2008

RESIDENTIAL MORTGAGE FORECLOSURES:

PROMOTING EARLY COURT INTERVENTION



NEW YORK STATE UNIFIED COURT SYSTEM

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PROMOTING EARLY COURT INTERVENTION

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STATEWIDE PROGRAM FOR RESIDENTIAL OWNER-OCCUPIED FORECLOSURES

SCOPE AND PURPOSE OF THE PROGRAM

DRAMATIC INCREASES IN FORECLOSURE FILINGS

Mortgage foreclosure filings have reached record levels in the New York State courts. There has been a 150% increase in foreclosure filings statewide from January 2005 through April 2008. Early data suggests that foreclosure filings will be up another 40% statewide in 2008. Moreover, specific areas of the State are being disproportionately affected. Foreclosure filings are up by 269% in Suffolk since January 2005, and an estimated 7,500 filings are expected there in 2008 alone. Since January 2005, filings are up by 223% in Queens County, 191% in Nassau County, 217% in Orange County, 195% in Dutchess County, 184% in Westchester County, 183% in Rockland County, and 160% in the Bronx.

As has been well reported in the media, the sharp increase in filings appears attributable largely to foreclosures on residential properties, a development which is having wide-ranging effects — not only on the families displaced from their homes, but also on the banking community, on neighborhoods destabilized by the rising number of foreclosed properties sitting vacant, and on the state economy. This has led to a recent increase in the availability of funds and programs to help prevent foreclosures or to assist homeowners in the foreclosure process. Further, legislative reform, as well as changes to national and state banking policies and regulations, are under consideration.

Meanwhile, the court system can take steps to promote better outcomes for homeowners and lenders alike.¹

HIGH DEFAULT RATE, LENGTHY PROCEEDINGS

Statistics show that defaults occur in about 90% of foreclosure cases. Many of these are intentional, informed defaults by homeowners who have concluded that they simply cannot afford to save their homes. Other defaults may be the result of the homeowner's lack of knowledge or understanding of the legal process, or the inability to afford or access help from available legal or counseling services. In addition, some homeowners decide that they will represent themselves in the litigation, whether by choice or because they are unaware of the resources available to them. Some of these instances represent missed opportunities to avoid foreclosure or reach an agreement with the lender that could benefit both sides.

¹ For simplicity, this report will use the terms "lender" and "homeowner" to describe the plaintiff (although the plaintiff may not be the actual lender, but a nominee, mortgage servicer or other representative) and the borrower-defendant.

Furthermore, completing the foreclosure process can take many months, even in those cases in which the homeowner defaults or legal and factual issues can be resolved quickly.² Discussions with advocates for borrowers and persons familiar with the banking community have indicated that a conference under court auspices early in the foreclosure litigation could be beneficial to both lenders and homeowners.

RESIDENTIAL FORECLOSURE PROGRAM

EARLY FORECLOSURE CONFERENCE PARTS

In view of the time-consuming nature of the foreclosure process, lenders and homeowners generally would benefit from early court resolutions that reduce the time, expense, and potential losses involved in the typical foreclosure case. In furtherance of this objective, the court system is planning a Statewide Foreclosure Conference Program, as set forth below, for foreclosure cases involving owner-occupied, one- to four-family residences. The Program will begin with a preliminary pilot in Queens County. The goal of this Program is to encourage lender-borrower negotiations prior to the filing of a foreclosure action, conduct court conferences as early as possible in the case to explore the possibility of a workout or settlement, and failing that, to arrive at a case management plan that helps avoid unnecessary delays. The homeowner will be encouraged to access legal and financial counseling service providers before the conference. These providers will assist the homeowner in exploring an out-of-court settlement with the lender and/or preparing for a meaningful court conference.³

FORECLOSURE CONFERENCE PROCEDURES

- Local court rules will be amended to require the plaintiff, when serving the summons and complaint on the homeowner, to include a brief, easy-to-read notice that describes the early foreclosure conference program, provides information about available services, and is accompanied by a “request for early conference” form.⁴
- The court will send a second notice to the homeowner upon the filing of a special Foreclosure

² In a typical residential mortgage foreclosure case, the entire process from commencement of the action to sale of the property currently ranges from about 12 to 18 months in New York City and Long Island. It can be eight months or less in areas outside New York City. Foreclosures take as much time as they do primarily because of the detailed procedures required by law. A simplified review of the stages of a typical foreclosure case is included later in this document.

³ Lenders obviously are in a better position to assess a potential workout or settlement if the borrower provides, in advance, financial information such as tax returns, proof of employment and financial statements. It is the court system's expectation that homeowners — particularly where they obtain assistance from available legal service providers and/or counseling services — will be gathering that financial information for purposes of evaluating what kind of workout, if any, is feasible. It is also expected that where a workout appears feasible, the advisors will consider supplying it to plaintiff's counsel in advance of the conference in order to settle the matter outside of court.

⁴ Before beginning the foreclosure action, the lender or a representative has sent the homeowner notice or notices of default and notice of acceleration of the debt in conformity with the terms of the mortgage, and may have made or attempted to make personal contact for purposes of formulating a workout. The lender is also required by RPAPL § 1303 to serve, with the summons and complaint, a separate notice headed “Help for Homeowners in Foreclosure,” with general information about the potential

Request for Judicial Intervention (RJI) at the time that proof of service on the homeowner is filed with the County Clerk. The Foreclosure RJI will include the names, addresses and contact telephone numbers of all defendants, and identify both the current servicer and the current note holder.

- The court's notice will inform homeowners and lenders that an early conference is available to be held within 60 days, at the option of the homeowner, to explore whether the case can be resolved without foreclosure or, alternatively, to streamline subsequent proceedings.
- The court's notice will explain that the availability and effectiveness of this early conference will be enhanced by the homeowner's accessing assistance BEFORE the conference, whether it is the help of a lawyer or housing counselor.
- The court's notice will supplement the RPAPL §§ 1303 and 1320 notices by providing contact information for local organizations that have agreed to provide homeowners with legal assistance, financial counseling, and other services, as well informational brochures about the foreclosure process, Offices for the Self-Represented, online help resources, etc.
- The court's notice will be accompanied by a "request for early conference" form to be mailed to the Foreclosure Conference Part. In order to place the conference on the court calendar, the homeowner will be required to confirm in the request form that he/she has scheduled an appointment for legal assistance or housing counseling with a service provider, or, if not, explain why they have not yet done so.
- The notice will inform the homeowner that scheduling the conference does not relieve him or her of the obligation to respond to the complaint in a timely manner.⁵
- Upon receiving the request for early conference form, a case manager assigned to the new conference part will contact the parties to schedule a conference. The case manager may follow up with the homeowner or the identified service provider to ensure that the homeowner is receiving essential assistance.
- After the RJI is filed, case information will be made available to service providers that can initiate contact with homeowners to assist them with settlement opportunities.
- The parties will be informed that the court conference will precede any motions in the case.

If the parties cannot reach a settlement either before or at the conference, the conference will at least enable the court and parties to arrive at a case management plan designed to streamline

(footnote 4, continued) availability of "government agencies, legal aid entities and other nonprofit organizations" that may provide assistance to homeowners (in owner-occupied, one-to-four family dwellings), and includes reference to a New York State Banking Department toll-free helpline (1-877-Bank-NYS) and website (www.banking.state.ny.us). Additionally, where residential property being foreclosed has "not more than three units," RPAPL § 1320 mandates that the summons contain a notice headed "You Are in Danger of Losing Your Home," notifying the homeowner of the need to respond to the complaint to avoid default, and suggesting the homeowner speak to an attorney or go to the court for further information on how to answer.

⁵ It is expected that the service provider accessed by the homeowner will either assist the homeowner in filing a pleading or request from the plaintiff an extension of time to respond. Defendants will not be precluded from requesting leave to submit a late answer at the conference. A judge will be available to address such requests, if necessary.

subsequent proceedings and promote active case management going forward. For lenders, an early court conference in which it becomes clear that there is no reasonable ability to achieve a workout should lead to quicker, more cost-effective outcomes. For homeowners who might otherwise default unnecessarily, the court notice may encourage them to access services and attempt to resolve the case. Where homeowners appear and raise defenses, early court intervention and continuing case management will ensure that the case does not languish. The rights of the parties will be preserved during the early conference process.

The availability of lawyers and financial/housing counselors is a critical component of this program. These professionals can educate homeowners about their rights and options, and advocate with lenders and service companies to re-negotiate mortgage terms. Indeed, with the assistance of these outside service providers, many cases potentially could be settled with limited or no court intervention. The court system has had discussions with representatives of legal services and mortgage counseling providers about the anticipated availability of such services.

CONDUCTING THE CONFERENCE

The assigned case manager will not only schedule conferences, but also answer procedural questions, including questions about the "request for early conference" form, and reinforce the importance of homeowners accessing legal and/or housing counseling services before the conference date. Plaintiffs and defendants will be able to communicate electronically or by telephone with case managers to learn the status and anticipated calendaring of each case. For the convenience of plaintiffs who may have multiple cases pending, the court will calendar together all cases involving a particular plaintiff for a specific date and time. Plaintiffs will be able to appear by telephone or in person, but will be required to be represented by someone with the authority to settle the case, including authority to modify loan terms or amounts.

The court system will assign Judicial Hearing Officers and court-attorney referees to preside over the early conference parts, with the assistance of case managers. A judge will be available in the event that matters arise that require a judge's decision or order. For prepared parties, the objective at this conference will be to assist them in reaching a workout, or if that is not possible, identifying issues that can be addressed at the outset to permit the case to proceed efficiently. If the homeowner has not received legal assistance or housing counseling and does not have assistance at the conference, the homeowner will be linked to lawyers and housing counselors at that time and the conference will be rescheduled for a brief period.

ADDITIONAL FORECLOSURE PROGRAM COMPONENTS

RESIDENTIAL FORECLOSURE ADVISORY COMMITTEE TO PROMOTE COORDINATION AND BEST PRACTICES

An Advisory Committee of Judges and nonjudicial staff with expertise in this area will be appointed by the Chief Administrative Judge to promote statewide coordination given the broad scope of

this program and the complex nature of the mortgage foreclosure crisis. The Advisory Committee would convene regularly to:

- consider further recommendations for how the court system, the legislature and other entities can respond effectively to the foreclosure problem;
- focus on efforts to train judges and court staff around the state;
- identify and disseminate best practices;
- develop protocols and forms for use around the state; and,
- serve as a point of contact with the service provider and banking communities to promote communication and build consensus.

SPECIALIZED TRAINING

The Judicial Institute and the Advisory Committee will work together on a fast track to develop a special curriculum tailored to all foreclosure conference part judges and staff, including training in the law and economics of mortgage foreclosures and alternative dispute resolution.

TIMING OF PROGRAM

We anticipate testing the Foreclosure Conference Program in Queens this summer. We hope to expand the Program statewide this Fall.

CURRENT NEW YORK EFFORTS

KINGS COUNTY

In Kings County Supreme Court, judges and staff began implementing a number of measures in 2003 to address the extremely high default rate as well as certain recurring substantive issues, including a high incidence of improperly qualified borrowers and disproportionately priced properties. These measures included: closer court scrutiny of all foreclosure papers; standardized foreclosure forms (providing heightened standards and uniformity); requiring the lender to send an additional round of notice informing homeowners in simple language that they have an opportunity to come to court to oppose the foreclosure; orders of reference that set forth rules for distribution of surplus monies; and, increasing the referee's computation fee to \$250 from \$50.

NEW YORK CITY

The Federal Reserve Bank of New York and the New York City Bar Association are co-sponsoring the Lawyers' Foreclosure Intervention Network (LFIN), which will provide *pro bono* legal services to low-income homeowners facing foreclosure. The Federal Reserve Bank has committed funding for each of the next two years to support the LFIN, which will be administered by the City Bar. Volunteer lawyers are being recruited and trained to assist homeowners in understanding and assessing their options, negotiating workout arrangements with lenders, and where appro-

priate, representing homeowners in litigation. LFIN is recruiting lawyers from the New York City legal community, and the Federal Reserve Bank is encouraging financial institutions to waive, in appropriate situations, conflicts of interest that may arise in counsel's representation of a homeowner. LFIN is offering free training and CLE credits to its volunteer lawyers, the first of which is scheduled for June 18 and 19 at the City Bar.

NASSAU COUNTY

Nassau County has started the Mortgage Foreclosure Pro Bono Project to give free legal advice to Nassau homeowners facing foreclosure. The Project is a collaboration of the County, the Attorney General's office, and Nassau/Suffolk Legal Services. Training for volunteer lawyers is being conducted by the Nassau County Bar Association. Nassau residents are advised to call the County's Foreclosure Prevention Hotline (516-571-HOME). Homeowners who meet poverty guidelines may be assigned counsel from a legal services provider. Homeowners above the poverty level may be referred to pro bono attorneys. Approximately 60 Nassau County-based lawyers attended the first training session.

ERIE COUNTY

The State Banking Department and four state Senators from central and western New York have sponsored six five-hour public forums, "Operation Protect Your Home," designed to give homeowners facing foreclosure an opportunity to meet with housing counselors and participating mortgage lenders such as Citigroup, HSBC Finance, and many others. More than 1,700 letters have been mailed to the participating lenders' customers who are more than 30 days late in payments and live in the four state Senate Districts.

In February 2008, the City of Buffalo brought a lawsuit against 39 lenders under state and local public nuisance laws and state property maintenance laws (*City of Buffalo and Mayor Byron W. Brown v ABN Amro Mortgage Co.*, No. 2008002200 (Sup. Ct., Erie Co.)). The suit seeks to recover the costs the City incurred in 2007 in demolishing 57 houses (\$16,000 each). In addition, the City has been prosecuting banking officials in local housing court to compel them to repair and maintain foreclosed and abandoned properties.

MONROE COUNTY

The Federal Deposit Insurance Corporation has recently started a pilot program — the Alliance for Economic Inclusion (AEI) — to educate and assist homeowners harmed by the subprime mortgage crisis in the Rochester region. The AEI is a coalition of financial institutions, community-based organizations, researchers, state and local government officials, federal bank regulators and other community stakeholders. AEI offers legal counseling and financial products to homeowners in need of assistance, including short-term loans, savings accounts, and targeted financial education programs.

THE TYPICAL JUDICIAL FORECLOSURE PROCESS IN NEW YORK

A typical residential mortgage foreclosure case in New York can take anywhere from 8 to 18 months from commencement to sale of the property, depending on location. Foreclosures take as much time as they do in large part because of the detailed procedures required by law. The stages of a typical case are as follows:

Summons, Complaint, Notice of Pendency

A lender seeking to foreclose on real property commences the litigation by filing a summons and complaint with the County Clerk for the county in which the property is located. All plaintiffs are given up to 120 days from the filing of the summons and complaint to serve process under CPLR § 306-b, but in most foreclosure cases, due to the requirements of CPLR Article 68 governing the Notice of Pendency and the prevalent practice of filing it with the summons and complaint, plaintiff effectively has 30 days to serve process or risk the lapsing of the Notice of Pendency.⁶

Time to Respond to the Complaint

Once service is completed, the homeowner has 20 days to answer the complaint if it was personally served, and 30 days or more if substituted service was employed.⁷

Computation of the Amount Due

If the time to answer passes without a response from the homeowner, the plaintiff will file a Request for Judicial Intervention (RJI) together with an *ex parte* application for appointment of a "referee to compute."⁸ The application requires approval of the court, and includes selection of a referee. If the homeowner answers and raises defenses, the lender is likely to move simultaneously for summary judgment and the appointment of a referee to compute.⁹ How long it takes for all motion papers to be filed and readied for consideration by the court, and how long it will take the

⁶ Most plaintiffs file a Notice of Pendency (also referred to as "lis pendens") with the County Clerk at the time of filing of the summons and complaint. The Notice of Pendency is constructive notice to subsequent purchasers or encumbrancers of the pendency of the foreclosure action, so that any interest subsequently acquired is foreclosed by the plaintiff's action and the holders need not be named as parties. CPLR 6512 states that a "notice of pendency is effective only if, within 30 days after filing, a summons is served upon the defendant or first publication of the summons against defendant is made pursuant to an order and publication is subsequently completed."

⁷ This assumes that the defendant can readily be found and served. If not, the plaintiff may be required to move for permission to serve process in another manner, such as publication.

⁸ RPAPL § 1321(1).

⁹ For purposes of this overview, the assumptions are that (1) the homeowner has not filed a motion to dismiss the complaint or other preliminary motion; (2) no other defendant is opposing the foreclosure and other defendants have filed only notices of appearance and waiver under CPLR § 320 (usually waiving notice of further proceedings, except notice of sale, surplus money proceedings and/or notice of discontinuance of the action); and (3) no discovery is sought. In cases in which those assumptions do not apply, the course of the litigation and the time it will take cannot be readily estimated.

court to decide the motion, will depend on the complexity and merits of the issues raised on the motion and in opposition.

When the court orders the appointment of a referee to compute, the clerk of the court is required to send the referee a copy of the order of reference.

In the default case, the referee performs the computation *ex parte*. If the homeowner has appeared and/or another defendant has appeared or not waived notice of the appointment of a referee, the referee is required to notify the parties of the time and place for the "first hearing to be held within twenty days after the date of the order."

Referee's Report of Amount Due

Upon completion of the referee's hearing or *ex parte* review of evidence supporting the amount due, the referee files an Oath and Report of Amount Due.

Judgment of Foreclosure and Sale

When the referee report is filed, the plaintiff's next step is usually to apply simultaneously for confirmation of the referee's report and for a judgment of foreclosure and sale. The application is made either *ex parte* in the default situation or by motion on notice to any parties who have appeared without waiving such notice.

Among other things, the judgment will appoint a "referee to sell," who often is the same individual as the referee to compute,¹⁰ and direct that the auction of the property be advertised in a publication selected by the court and in compliance with complex statutory requirements for publication of notice of the foreclosure sale. Satisfying publication requirements takes approximately four weeks. The notice of sale also contains the terms of the auction sale.

Sale

The foreclosure sale is conducted under the auspices of the referee, typically on courthouse property.

Closing

If plaintiff is the successful bidder, the deed can be signed at the time of sale or some later convenient date. When there is a successful third-party bidder, a closing is usually required by the terms of sale to take place 30 days after the sale, usually at the referee's office.

Following the Foreclosure Sale and Closing

If the proceeds of the foreclosure sale do not cover the amounts due, plaintiff has the option of moving to obtain a judgment against the homeowner for the deficiency. If the sale price exceeds the amount due, then surplus money proceedings may ensue to determine distribution of the

¹⁰ The court instead may appoint the sheriff of the county to conduct the sale. RPAPL § 1351(1).

excess funds. If there are occupants or tenants remaining on the property, other proceedings may be required for the purchaser at foreclosure to obtain possession of the property.

INITIATIVES IN OTHER JUDICIAL FORECLOSURE STATES

New York is one of approximately 19 states where judicial foreclosure is the primary foreclosure process.¹¹ Of this group, only a few states and/or localities around the country have responded to the residential foreclosure crisis by establishing, through court rule or legislation, new procedures to improve and expedite the courts' handling of residential mortgage foreclosures. The following is an overview of programs recently instituted in Connecticut, Philadelphia, Pennsylvania, Ohio, and New Jersey.

CONNECTICUT

In response to a sharp increase in foreclosure filings,¹² Chief Justice Rogers appointed a statewide committee of judges, attorneys and court staff to study the problem and make recommendations. The committee is considering issuing the following recommendations, among others: (1) an amendment to standing orders requiring that a special notice be included as a cover sheet to all summonses/complaints in residential foreclosure actions; (2) a rule change concerning the showing necessary to obtain a default judgment; and, (3) a rule change mandating that a motion for judgment not be filed before 30 days after the return date.¹³

In addition, the Connecticut Legislature recently enacted a law authorizing the judiciary to establish a mediation program for all residential foreclosure actions with a return date on or after July 1, 2008. Under this legislation, the lender must attach to the front of the complaint a copy of a notice of availability of mediation, and a mediation request form. The borrower has 15 days from the return date of the foreclosure action to file the request. The court has three days from receipt of the request to notify all appearing parties, and a mediation session must be held within 10 days of notification. The borrower and lender (or its representative) are required to appear in person. The mediator has two days to file a report with the court stating whether the parties would benefit from further mediation. If so, additional sessions may be held, but the mediation must conclude within 60 days of the return date of the foreclosure action. If further mediation is not recommended, the process ends automatically. The mediator has two days from the conclusion of the mediation to file a report setting forth all resolved and unresolved issues.

¹¹ Like the majority of states, New York also has a non-judicial foreclosure statute, but it is considered onerous and is rarely used.

¹² Filings increased from 11,764 in 2005-06 to almost 20,000 in 2007-08.

¹³ Pursuant to Connecticut practice, the return date is the date the case is considered started in the court system. The defendant's appearance must be filed within two days of the return date, and defendant's responsive pleading must be filed within 15 days of the return date.

The legislature appropriated \$2 million to fund the mediation program and hire court-employed mediators.

PHILADELPHIA, PENNSYLVANIA

In April 2008, the Sheriff of Philadelphia unilaterally postponed all judicial sales of owner-occupied residential properties.¹⁴ In response, the Philadelphia Court of Common Pleas established by court rule a Mortgage Foreclosure Diversion Pilot Program designed to provide early court intervention via a “conciliation conference” in all residential foreclosure cases. Under the program, the court issues a “Case Management Order” that:¹⁵

- schedules a conciliation conference for a specific date, place and time;
- requires the defendant-homeowner and the plaintiff’s servicer to appear (in person or by telephone);
- requires defendant immediately to call a hotline for a housing counseling agency;
- requires defendant to provide housing counselors with specific financial information;
- requires defendant to provide certain financial documentation to the plaintiff; and,
- authorizes plaintiff to send defendant the 10-day notice regarding entry of a default judgment, but delays the request for entry of judgment until after the conference.

Prior to the conference, the defendant must file with the court and mail to plaintiff’s counsel a “Certification of Participation” stating he/she met with a housing counselor and a loan resolution proposal will be submitted before the conference.¹⁶ Among the main issues to be addressed at the conciliation conference are:

- whether the defendant is represented and the availability of volunteer counsel;
- whether the defendant met with a housing counselor and an assessment of a possible loan work-out was prepared;
- defendant’s income and expense information, employment status, etc.;
- defendant’s eligibility for available work-out programs;
- any necessity for a subsequent conference; and
- whether, where there is no prospect of resolution, the case may proceed to sale.

The pilot program was developed by a judicial steering committee formed in 2004. The Court has appointed six *judges pro tem* to hear the first 700 conferences scheduled for June 10-13. Training is being provided to law firms and attorneys who will serve *pro bono*.

¹⁴ Residential mortgage foreclosure filings in Philadelphia have increased from 5562 cases in 2006, to 6603 cases in 2007.

¹⁵ While the court must serve this Order in all pending foreclosure cases, the plaintiff will be required to serve the Order along with the complaint for all new cases filed after July 7, 2008.

¹⁶ There is no penalty imposed for defendant’s failure to file this certificate and the conference will proceed despite noncompliance with this rule.

OHIO

Ohio has also seen a dramatic increase in foreclosure filings (85,000 statewide in 2007). The state has launched a public awareness campaign and set up a telephone hotline to provide information and connect homeowners to approved housing counselors. In addition, as of April 2008, 1100 lawyers have volunteered to provide *pro bono* legal services to homeowners.

In February 2008, the Ohio Supreme Court issued a directive that all courts with foreclosure dockets consider implementing a foreclosure mediation program based on a model program developed by its special Advisory Committee in collaboration with elected state officials, representatives of mortgage lenders, bar associations and other groups. Cuyahoga County (encompassing Cleveland) responded by announcing a proposed mediation program in April 2008.¹⁷ Under this program, all summonses served on homeowners must include a form by which the homeowner may request mediation. In addition, a magistrate may order mediation in any case, even if not requested by the homeowner. If mediation is ordered, the lender must complete a questionnaire regarding the history of the loan within 14 calendar days. The case is stayed pending completion of the mediation process, which consists of approximately three face-to-face meetings. At the first mediation conference, the homeowner must produce recent pay stubs, bank statements, W-2 forms and tax returns. At the second meeting, the mediator determines whether the parties are prepared to negotiate in good faith. The third meeting is the actual mediation session. If the lender's representative does not attend or have settlement authority, sanctions may be imposed, including dismissal. Lenders have criticized Cuyahoga's model for the large number of required mandated personal appearances.

The Summit County Court of Common Pleas (which includes the City of Akron) has been mediating foreclosure cases for the past four years. In 2007, it successfully settled 65% of the cases sent to mediation. The magistrates do not send a case to mediation until an answer has been filed, which only occurs in 10-15% of the cases. In the first three months of 2008, the Summit County mediators handled 37 foreclosure cases, resulting in 26 settlements.

NEW JERSEY

The New Jersey Supreme Court has established an Office of Foreclosure within the Administrative Office of the Courts. The Office of Foreclosure's function is to assist General Equity judges throughout the state by taking on fixed duties that expedite the processing of all uncontested mortgage foreclosure actions. Pursuant to court rule, all foreclosure complaints and initial pleadings must be centrally filed with the Superior Court Clerk's Office in Trenton. Unless the action becomes contested, all responsive and subsequent pleadings must also be filed in Trenton. The overwhelming majority of foreclosure actions in New Jersey are uncontested and therefore remain with the Office of Foreclosure until disposition.

¹⁷ As of early June 2008, approximately 60% of Ohio's 88 counties have instituted or are in the process of instituting the Foreclosure Mediation Program Model.

The Office of Foreclosure is responsible for “recommending” entry of foreclosure-related orders and judgments to the General Equity judge sitting in the Mercer County (Trenton) vicinage. The Office recommends entry of orders and judgments when an action's uncontested pleadings establish a *prima facie* case, all procedural requirements are discharged, and the relief requested is appropriate. If an answer or other pleading creates a dispute requiring adjudication, the Office of Foreclosure transfers the foreclosure file to the appropriate vicinage for disposition. As a result, judges and court staff are unaware of any foreclosure action filed in their vicinage until the foreclosure case file is forwarded for adjudication.

Where a foreclosure is contested, the judge will schedule a case management conference within 30 days of a plaintiff's motion to strike an answer or for summary judgment. If the matter is not resolved during the case management conference, the judge hears the motion. If an order striking the answer or for summary judgment is entered, the case is returned to the Office of Foreclosure to be handled as an uncontested foreclosure action. The Office of Foreclosure, on behalf of the Superior Court Clerk, processes writs of execution and writs of possession.

To deal with the increase in foreclosure complaints, the court system has added paralegals to supplement existing staff.

E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

Index No.:

Plaintiff,

- against -

**AFFIDAVIT IN SUPPORT OF
APPLICATION TO PROCEED
AS A POOR PERSON**

Defendants.

-----X

STATE OF NEW YORK)
) ss.;

COUNTY OF NASSAU)

_____, being duly sworn, says:

1. I reside at _____,
County of Nassau, State of New York, and have resided in the State of New York for the past
_____ years.

2. I am the Defendant in a Foreclosure Proceeding, and make this application pursuant to
Civil Practice Law and Rules §§ 1101, 1102, and 3408 (b).

3. The mortgage which is the subject of this foreclosure proceeding was originally in the
principal amount of _____, and the current balance claimed by the lender is _____.

4. The mortgage is a lien on my home at _____.

5. The estimated present market value of my home is _____.

5. The household (all wage earners) annual income from all sources is
_____.

6. The monthly principal and interest payment on my mortgage (excluding payments for real estate taxes) is _____.

7. The annual real estate taxes on my home are _____.

8. The taxes ARE or ARE NOT (CROSS OUT ONE) paid monthly to the lender.

9. In addition to my mortgage and real estate taxes, my estimated monthly expenses for other necessities for me and my family members are as follows:

Food: \$ _____

Auto Payments: \$ _____

Gasoline: \$ _____

Home Heating: \$ _____

Electric \$ _____

Court-ordered Payments: \$ _____

Other: Description

_____ \$ _____

_____ \$ _____

TOTAL \$ _____

10. I make this application on the ground that I am unable to pay costs, fees and expenses necessary to defend this foreclosure action, and I am unable to obtain the funds to do so, and unless an order is entered relieving me from the obligations to pay, I will be unable to defend or otherwise resolve this action.

11. No person other than the owners of the home upon which foreclosure is sought have a beneficial interest in this proceeding.

12. I have not previously made an application for the relief requested.

WHEREFORE, I request that the Court issue an Order permitting me to proceed to defend or otherwise resolve this action as a poor person.

The foregoing statements have been read and are understood by the undersigned, and I state that they are true.

(Signature)

Subscribed and Sworn to before me this
_____ day of _____, 200

Notary Public

F

Westlaw.

MCF REALPROP § 17:30
 12B West's McKinney's Forms Real Property Practice § 17:30

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West's McKinney's Forms
 Database updated August 2008

Real Property Practice
 Chapter 17. Mortgage Foreclosure
 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:30. Complaint to foreclose mortgage [Form]

[Add title of court and cause]

COMPLAINT

Index No. _____

The Plaintiff complains and shows to the Court upon information and belief:

FIRST: That during the times hereinafter mentioned, the plaintiff was and still is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York.

SECOND: Upon information and belief, the defendant _____ Savings Bank of _____, was a domestic banking corporation, organized and existing under the banking laws of the State of New York.

THIRD: That the defendants _____ and _____ for the purpose of securing the payment to plaintiff of the sum of _____ Dollars (\$ _____), with interest thereon, on or about the _____ day of _____, 20____, executed and delivered to plaintiff their certain bond bearing date on that day, sealed with their seals whereby they bound themselves, their heirs, executors, and administrators in penalty of _____ Dollars (\$ _____), upon condition that the same should be void if the said defendants should pay to the said plaintiff in monthly installments of _____ Dollars (\$ _____) each, together with interest thereon the sum of money first above mentioned at the rate of _____% per annum, payable monthly, with each installment of principal until _____, 20____, with the proviso that the whole of the principal sum and interest shall become due and payable at the option of the plaintiff on default in the payment of any installment of principal for 10 days or after default in the payment of interest and principal for 15 days.

FOURTH: That as collateral security for the payment of the said indebtedness, the said defendants _____ and _____ on the same day, executed, duly acknowledged and delivered to the said plaintiff a mortgage whereby they granted, bargained and sold to the said plaintiff the following described premises, with the appurtenances thereto described in said mortgage as follows, to wit:

[description of property].

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FIFTH: That the said mortgage contained the same condition as the said bond; and in case of default in the payment of the said sum of money, or the interest that might grow due thereon, or of any part thereof, the said plaintiff thereby was empowered to sell the said mortgaged premises according to law.

SIXTH: That the said mortgage was duly recorded in the office of the Register of the County of _____ on the _____ day of _____, 20____, in Liber _____ of Mortgages, page _____, and the mortgage recording tax imposed thereon by law was duly paid.

SEVENTH: That the said defendants have failed to comply with the conditions of the said bond and mortgage by omitting to pay the sum of _____ Dollars (\$_____), which became due and payable on the _____ day of _____, 20____; and that there is now justly due to the plaintiff upon the said bond and mortgage the principal sum of _____ Dollars (\$_____), together with interest thereon from the _____ day of _____, 20____, at the rate of _____% per an- num.

EIGHTH: That no other action has been had for the recovery of the said sum secured by the said bond and mortgage, or any part thereof.

NINTH: That each and all of the defendants herein have or claim to have some interest in, or lien upon, the said mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage, and is subject and subordinate thereto.

WHEREFORE, the plaintiff demands judgment, that the defendants herein, and all persons claiming under them or any or either of them, subsequent to the filing of the notice of the pendency of this action, may be forever barred and foreclosed of all right, claim, lien, title, and equity of redemption of, in, and to the said mortgaged premises and each and every part thereof; and that the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into court; that the plaintiff may be paid the amount due on the said mortgage and bond with interest to the time of such payment, and the costs and disbursements of this action, and the expenses of said sale, together with any amounts which have been or may be advanced by the plaintiff to protect the security afforded by said mortgage with interest thereon from the time of such payment, so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendants _____ and _____ may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such further or other relief, or both, in the premises, as shall be just and equitable.

Attorneys for Plaintiff
P.O. Address
Tel. No.

[Verification]

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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Real Property Practice
 Chapter 17. Mortgage Foreclosure
 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:47. Order for service of summons by publication [Form]

At a Term, Part _____ of the Supreme Court
 of the State of New York, held in and for the County
 of _____, at the Supreme Court Building,
 _____ Boulevard, _____, New
 York on the _____ day of _____,
 20__.

PRESENT: Hon. _____, Justice.
 [Add title of cause]

ORDER FOR SERVICE BY
 PUBLICATION

Index No. _____

Upon the summons, verified complaint and notice of pendency of action heretofore filed herein in the office of the Clerk of the County of _____ on _____ [date], _____ [year], and upon the annexed proposed supplemental summons, amended verified complaint and amended notice of pendency of action, from all of which it appears that the verified complaint herein demands judgment foreclosing a mortgage against specific real property within this county and the State of New York, and it appearing that there is a sufficient cause of action stated therein against the defendants, who are necessary parties defendant herein; and upon the annexed affirmation of _____, Esq., dated _____ [date], _____ [year], from which it appears that the said defendants cannot be served personally within the State of New York, and plaintiff having thereby made proof to the Court's satisfaction that the location of said defendants or their personal representatives cannot with due diligence be ascertained and that the plaintiff has been and will be unable in the exercise of such due diligence to make personal service of the summons herein or by any other prescribed method on said defendants within the state;
 NOW, on motion of _____, _____ & _____, Esqs., attorneys for the plaintiff, by _____, Esq., of counsel, it is hereby
 ORDERED that the plaintiff be and is hereby granted leave to issue, file and serve, where required, the an-

nexed supplemental summons and amended verified complaint and amended notice of pendency of action, and that the title of this action is hereby amended to conform with the title as shown on said supplemental summons, amended verified complaint and amended notice of pendency of action without prejudice to any of the proceedings heretofore had herein, and it is further

ORDERED that the service of the supplemental summons in this action upon the defendants, if living, and if any be dead, their respective heirs-at-law, next-of-kin, distributees, executors, administrators, trustees, devisees, legatees, assignees, lienors, creditors, and successors in interest, and generally all persons having or claiming under, by or through said defendants who may be deceased, by purchase, inheritance, lien, or otherwise, any right, title, or interest in and to the premises described in the verified complaint herein, be made by publication of said supplemental summons in two newspapers, at least one in the English language, hereby designated as most likely to give notice to the said defendants, viz: in the _____, published in _____ County, State of New York, and in the _____, published in _____

County, State of New York, together with a notice to the defendants containing a brief statement of the nature of this action and the relief sought, and the sum of money for which judgment may be taken in a case of default, and a brief description of the property, once a week for four successive weeks; and it is further

ORDERED that a copy of the summons and complaint be mailed to the defendant _____ T, by air mail registered, return receipt requested c/o Mrs. _____ T, _____ Road, _____, _____, Africa; and it is further

ORDERED that the supplemental summons and amended verified complaint herein be delivered on behalf of the said defendants, who may be served herein by publication pursuant to this Order, to _____, _____ Street, _____, New York, Counselor-at-law, who is hereby authorized, empowered and designated to appear herein as Guardian ad Litem and Military Attorney on behalf of any of the said defendants who may be absentees, infants or incompetents or unknown successors in interest of defendants who may be deceased, or defendants who may be in military service, and to protect and defend the interests of said defendants in the action upon filing his acknowledged consent and qualifying affidavit; and it is further

ORDERED, that said Guardian ad Litem and Military Attorney shall also act for said defendants should they be in default or be in the military service of the United States of America, and is hereby authorized and appointed for the purpose of representing them and protecting their interest in this action pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act and Military Law of 1940, as amended and the Military Law of the State of New York, and it is further

ORDERED that the supplemental summons and amended verified complaint and the papers on which this order is based be filed on or before the first day of publication, and that the first publication be made within 20 days after the date of this order.

ENTER,

J.S.C.

Notes

The above form was supplied through the courtesy of the firms of Coulston, Coulston & Goldstein, New York City, and Renander, Monaghan & Davis, Lynbrook, New York.

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also

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the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:82. Order dismissing affirmative defenses in mortgage foreclosure action [Form]

At a Term, Part _____ of
the Supreme Court, _____
County, at the Courthouse,
_____ Concourse,
_____, New York, on the
_____ day of _____,
20__.

Present: Hon. _____, Justice.
[Add title of cause]

ORDER
Index No. _____

Plaintiff having moved for an order dismissing the four affirmative defenses asserted in defendant's answer, and upon the notice of motion dated _____, 20__, the summons, the verified complaint, the verified answer, the affirmation of _____, Esq., dated _____, 20__, the affirmation in opposition of _____ which is undated, defendant's memorandum of law, the affirmation in reply of _____, Esq., dated _____, 20__, the sur-reply affirmation of _____, dated _____, 20__, and upon the exhibits submitted to this Court with the said motion, and after due deliberation it is
ORDERED that the said motion be and it hereby is granted and that the first, second, third and fourth affirmative defenses are dismissed.

Enter,

J.S.C.

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Notes

The above form was adapted from the record in 1015 Gerard Realty Corp. v. A & S Improvements Corp., 91 A.D.2d 927, 457 N.Y.S.2d 821 (1st Dep't 1983).

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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Correlation Table References

§ 17:51. Notice of appearance and limited waiver of service of papers [Form]

[Add title of court and cause]

NOTICE OF APPEARANCE
AND WAIVER OF SERVICE
OF PAPERS

Index No. _____

[Name of Assigned Judge]

PLEASE TAKE NOTICE, that the defendant _____, hereby appears in the above-entitled action, and that I have been retained by and appear as attorney for him therein, and hereby waive service of all papers and notices of proceedings in the above-entitled action except notice of application for discontinuance, notice of sale, and notice of proceedings for surplus moneys.

Dated, _____ *[date]*, _____ *[year]*.

Attorney for Defendant
P.O. Address
Tel. No.
To:

Attorney for plaintiff
P.O. Address
Tel. No.

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:100. Order of reference to compute where there are no infant or absentee defendants [Form—Real Prop. Acts. Law § 1321]

At a Term, Part _____, of
 the Supreme Court of the
 State of New York, held in
 and for the County of
 _____ at the County Court
 House, _____ and _____
 Streets, in the Borough of
 _____, City of New York,
 on the _____ day of
 _____, 20__.

Present: Hon. _____, Justice.

[Add title of cause]

ORDER

Index No. _____

Upon the summons, duly verified complaint and notice of pendency of action now on file in the office of the Clerk of the County of _____, upon proof by affidavit that each and all of the defendants have been duly and personally served with the summons and complaint within the State of New York, and upon the affidavit of _____, attorney at law, associated with Messrs. _____ & _____, attorneys for the plaintiff herein, sworn to the _____ day of _____, 20__, and upon all the proceedings heretofore had herein, whereby it appears that this is an action to foreclose a mortgage upon real property located in _____ County by reason of defaults in the payment of interest; that the time to answer has expired as to each and all of the defendants; that no answer or notice of motion raising an objection to the complaint has been interposed by any defendant; that none of such defendants is an infant or absentee;

NOW, upon motion of _____ & _____, attorneys for the plaintiff herein, and no one ap-

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pearing in opposition hereto, it is
 ORDERED, that this motion be, and hereby is, in all respects granted; and it is further
 ORDERED, that this action be and it hereby is referred to _____, Esq., attorney at law with offices
 at No. _____ Street, Borough of _____, New York City, who is hereby ap-
 pointed referee to ascertain and compute the amount due the plaintiff on the bond and mortgage set forth in
 the complaint, and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to
 examine and report as to whether the mortgaged premises can be sold in parcels and, if the whole amount
 secured by the mortgage has not become due, to report the amount thereafter to become due, and that said
 referee report to this court with all convenient speed.

Enter,

 J.S.C.

Notes

The order of reference must direct the referee to compute the amount due to the plaintiff and to such of the
 defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mort-
 gaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to
 report the amount thereafter to become due. Where the defendant is an infant, and has put in a general answer by
 his guardian, or if any of the defendants are absentees, the order of reference must also direct the referee to take
 proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as
 to any payments which have been made. N.Y. Real Prop. Acts. Law § 1321(1).

The above form is an order of reference to compute where there are no infant or absentee defendants. Thus,
 it does not direct the referee to take proof of the facts and circumstances stated in the complaint and to examine
 the plaintiff or his agent, on oath, as to any payments which have been made. However, some attorneys feel that
 it is good practice to so direct the referee even if there are no infant or absentee defendants.

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also
 the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supple-
 ments for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New
 York Law and Practice of Real Property, 2d.

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I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:101. Order of reference to compute where there are infant or absentee defendants [Form—Real Prop. Acts. Law § 1321]

At a Term, Part _____ of
 the Supreme Court of the
 State of New York, held in
 and for the County of
 _____, at the County
 Court House in the City of
 _____ on the _____ day
 of _____, 20__.

Present: Hon. _____, Justice.
 [Add title of cause]

ORDER
 Index No. _____

On reading and filing the affidavits of service and notices of appearance proving the due service of the summons on all the defendants herein, and the affidavit of _____, sworn to on the _____ day of _____, 20__, by which it appears that the whole amount secured by the bond and mortgage described in the complaint has become due; that none of the defendants are infants except the defendants [names of infant defendants], who have appeared by their guardian ad litem; that none of the defendants are absentees except the defendants [names of absentee defendants], who have been duly served with the summons by publication and mailing under an order of this court entered on the _____ day of _____, 20__; that the time to answer has expired as to all of the defendants; that no answer or motion raising an objection to the complaint has been received, except the usual general answer of the said infant defendants; and that a due notice of the pendency of this action was filed more than twenty days since; NOW, upon motion of _____, attorney for the plaintiff, it is ORDERED, that this motion be, and the same is hereby in all respects granted; and it is further

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ORDERED, that this action be and it hereby is referred to _____, Esq., attorney at law with offices located at No. _____ Street, City of _____, County of _____, and State of New York, who is hereby appointed referee to ascertain and compute the amount due the plaintiff on the bond and mortgage set forth in the complaint and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report as to whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due and to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and that said referee report to this court with all convenient speed.

Enter,

J.S.C.

Notes

The above form is an order of reference to compute where there are infant or absentee defendants. In addition to directing the referee to compute the amount due to the plaintiff and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, such order must also direct the referee to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as to any payments which have been made. N.Y. Real Prop. Acts. Law § 1321(1).

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of *New York Landlord and Tenant Including Summary Proceedings* (4th ed.) and the supplements for Rasch, *New York Landlord and Tenant Rent Control and Rent Stabilization* (2d ed.) and *New York Law and Practice of Real Property*, 2d.

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I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:102. Oath of referee to compute [Form—Real Prop. Acts. Law § 1321]

[Add title of court and cause]

REFEREE'S OATH

Index No. _____

State of New York

ss.:

County of _____

I, _____, the Referee appointed by an Order of this Court dated _____, 20__ in the above-entitled action, by which said Order it was referred to the undersigned to ASCERTAIN AND COMPUTE the amount due to the Plaintiff for principal and interest or otherwise on the bond and mortgage set forth in the complaint, and to such of the defendants, if any, as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, and if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, and to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to make a report thereon with all convenient speed, being duly sworn, depose and say THAT I will faithfully and fairly hear and determine the questions herein referred to me, and that I will make a just and true report thereon according to the best of my understanding.

Referee

[Jurat]

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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Correlation Table References

§ 17:103. Report of referee to compute [Form—Real Prop. Acts. Law § 1321]

[Add title of court and cause]

REFEREE'S REPORT

Index No. _____

[Name of Assigned Judge]

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF _____:

Pursuant to an order of this Court duly made and entered in the above entitled action and bearing date the _____ day of _____, 20____, whereby it was referred to me as referee to ascertain and compute the amount due to the Plaintiff for principal and interest or otherwise on the bond and mortgage set forth in the complaint, and to such of the defendants, if any, as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, and if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, I respectfully report:

1. That before proceeding in this matter, I duly took and subscribed the oath as prescribed by law.
2. That notice of hearing was duly given to _____ & _____, Esq., attorneys for Defendant, _____ Realty, Inc., to _____, Esq., Attorney for Defendant, _____ and _____, Esq., Attorney for the United States of America, the only parties entitled to notice thereof, as appears from the notice of hearing hereto annexed with proof of service thereof.
3. That on the _____ day of _____, 20____, at No. _____ Road, _____, New York, I was attended by _____ & _____, Esqs., Attorneys for the Plaintiff.
4. That I have ascertained and computed the amount due to the Plaintiff upon said bond and mortgage and extension agreement, together with interest thereon from _____, 20____, and that there is due to the Plaintiff for such principal and interest on the aforesaid bond and mortgage and extension agreement, the sum of _____ (\$ _____) Dollars.

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5. That none of the defendants in the above entitled action are prior encumbrancers of the mortgaged premises.
6. Schedule A, hereto annexed, contains a schedule of the documentary evidence introduced before me.
7. Schedule B, hereto annexed, is the deposition of _____, Vice President of the Plaintiff Corporation, taken and sworn to the _____ day of _____, 20__.
8. Schedule C, hereto annexed, shows the sums due to the Plaintiff for principal and interest and otherwise on the bond and mortgage and extension agreement sought to be foreclosed herein to the date hereof.
9. I have made inquiry as to the advisability of selling the mortgaged premises in parcels and find and accordingly report that the mortgaged premises should be sold in one parcel.
- Dated: _____, 20__.

[Signature]

[Type Name]
Referee

SCHEDULE A. ABSTRACT OF DOCUMENTARY EVIDENCE

1. Bond bearing date the _____ day of _____, 20__, made and executed by _____ Realty Corporation to The _____ Federal Savings & Loan Association of New York, in the sum of _____ (\$ _____) Dollars (received and marked Exhibit A).
2. Mortgage of even date with said bond made and executed by _____ Realty Corporation to The _____ Federal Savings and Loan Association of New York, as security for the payment of said bond and recorded in the Office of the Clerk of the County of _____, on _____, 20__, in Liber _____, page _____, of Mortgages (received and marked Exhibit B).
3. Bond bearing date the _____ day of _____, 20__, made and executed by _____ and _____ to The _____ Federal Savings & Loan Association of New York, in the sum of _____ (\$ _____) Dollars, (received and marked Exhibit C).
4. Mortgage of even date with said bond made and executed by _____ and _____ to The _____ Federal Savings & Loan Association of New York, as security for the payment of said bond, and recorded in the Office of the Clerk of the County of _____, on _____, 20__, in Liber _____, page _____, of Mortgages (received and marked Exhibit D).
5. Agreement bearing date the _____ day of _____, 20__, made and executed by _____ and _____ and The _____ Federal Savings & Loan Association of New York, which said agreement consolidates, modifies, and extends the aforementioned bonds and mortgages so as to create one first mortgage lien in the sum of _____ (\$ _____) Dollars, and recorded in the Office of the Clerk of the County of _____, on _____, 20__, in Liber _____, page _____ of Mortgages (received and marked Exhibit F).

Dated: _____, 20__.

Referee.

SCHEDULE B. DEPOSITION OF PLAINTIFF

STATE OF NEW YORK

ss.:

COUNTY OF _____

_____, being duly sworn, says:

I am the Vice-President of The _____ Federal Savings & Loan Association of New York, the Plaintiff herein, and the holder of the bond, mortgage, and extension agreement sought to be foreclosed herein, as appears from the bond, mortgage, and extension agreement introduced in evidence before the Referee as Exhibits A, B, and C, respectively, and have knowledge of the facts and circumstances herein.

This is an action to foreclose a mortgage on real property situate in the Town of _____, County of _____, and State of New York, and known as No. _____ Road.

The outstanding balance of the principal sum of the bond, mortgage, and extension agreement sought to be foreclosed herein at the time of the commencement of this action was the sum of _____ (\$ _____) Dollars. No payment or payments in reduction of or on account of the said principal sum has been made since the commencement of this action, and there is now due and payable and still unpaid to the Plaintiff, the entire balance of such principal sum, to wit, the sum of _____ (\$ _____) Dollars.

No payment or payments on account of interest on the aforesaid indebtedness has been made since the commencement of this action, or since _____, 20____, and there is therefore due to the Plaintiff interest on the entire balance of the principal sum of _____ (\$ _____) Dollars, for the period extending from _____, 20____, the last date to which interest had been paid, to the date hereof, which, at the rate of _____ per centum per annum, is the sum of _____ (\$ _____) Dollars.

That, by reason of the failure of the Defendants, _____ and _____, to pay the taxes assessed on the mortgaged premises by the School District for the Town of _____ for the year 20____, which became due and payable on _____, 20____, the Plaintiff was compelled and did pay on the _____ day of _____, 20____, the District School taxes, amounting to _____ (\$ _____) Dollars, of which the sum of _____ (\$ _____) Dollars was paid from the trust account for payment of taxes, and the balance of _____ (\$ _____) Dollars was advanced by the Plaintiff. The Plaintiff similarly advanced the sum of _____ (\$ _____) Dollars on the _____ day of _____, 20____, in payment of the renewal premium for fire insurance on the mortgaged premises, which became due and payable on said date.

That the total sum so advanced and paid by Plaintiff for District School taxes, exclusive of moneys applied from the trust account aforementioned, together with the renewal premium advanced and paid, is _____ (\$ _____) Dollars, which said sum, pursuant to Paragraph No. 9 of the Extension Agreement, is made a part of the mortgage indebtedness secured herein.

The aggregate amount therefore which is now due and payable to the Plaintiff and which remains unpaid on its bond, mortgage, and extension agreement, and the interest thereon, is the sum of _____ (\$ _____) Dollars as appears herein from Schedule C hereto annexed.

The premises sought to be foreclosed herein consists of a single family house which is known by the street number _____ Road, in the Town of _____, County of _____ and

State of New York. The only feasible method therefore of effecting the sale thereof pursuant to a judgment of foreclosure and sale that may hereafter be entered herein is by sale in one parcel.
 The interests of the parties herein concerned would best be served by a sale of the mortgaged premises in one parcel.

[Signature]

 [Type Name]

[Jurat]

SCHEDULE C.

Balance of principal sum of bond and mortgage remaining unpaid.	\$ _____
Interest thereon at the rate of _____ per cent (____%) per annum, from _____, 20__ to _____, 20__ (____ yrs. _____ mos. _____ days).	_____
Taxes advanced by Plaintiff.	_____
Interest thereon at the rate of _____ per cent (____%) per annum from _____, 20__ to _____, 20__.	_____
Fire insurance renewal premium for _____ yrs..	_____
Interest thereon at the rate of _____ per cent (____%) per annum from _____, 20__ to _____, 20__.	_____
Total amount due Plaintiff.	\$ _____
Dated: _____, 20__	

 Referee

Notes

The above form was adapted from the record in First Federal Sav. and Loan Ass'n of N.Y. v. Lewis, 14 A.D.2d 150, 218 N.Y.S.2d 857 (2d Dep't 1961).

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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Real Property Practice
 Chapter 17. Mortgage Foreclosure
 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:104. Notice of motion to confirm report of referee to compute and for judgment of foreclosure and sale [Form—Real Prop. Acts. Law § 1321]

[Add title of court and cause]

NOTICE OF MOTION

Index No. _____

[Name of Assigned Judge]

Oral argument is requested

(check box if applicable)

Upon the report of _____, Esq., Referee, to whom it was referred by an order of this Court, to ascertain and compute the amount due to the Plaintiff for principal and interest on the bond and mortgage set forth in the complaint, and the amount due to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, and if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, which report was filed in the Office of the Clerk of the County of _____ on _____, 20____, and upon the order of reference made and entered herein, dated _____, 20____, and on all other papers and proceedings hereinbefore had, _____ will move this court in Room _____ at the Courthouse, _____, New York, on the _____ day of _____, 20____, at _____ (a.m./p.m.), for an order confirming said report of the said Referee and for the relief demanded in the complaint, and for the usual judgment of foreclosure and sale, and for such other and further relief as may be just and equitable.

A judgment, a copy of which is annexed hereto, will at the same time and place be submitted to the Justice above-named for signature.

The above-entitled action is brought to foreclose a mortgage on real property.

Pursuant to N.Y. C.P.L.R. 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of this motion.

(check box if applicable)

Dated: _____, 20____.

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 Attorneys for Plaintiff
 P.O. Address.
 Tel. No.
 To:

 Attorneys for Defendant
 _____ Realty, Inc.

P.O. Address.
 Tel. No.

[Continue with names, addresses and telephone numbers of attorneys for other defendants]

Notes

In *Gasco Corp. & Gordian Group of Hong Kong, Inc. v. Tosco Properties Ltd.*, 236 A.D.2d 510, 653 N.Y.S.2d 687 (2d Dep't 1997), the Appellate Division, Second Department, reversed the supreme court's order and judgment of foreclosure and sale and confirmation of the referee's report and remitted the matter for recomputation of the amount due on the mortgage on the basis of objections of delay and mismanagement raised by the owner, who had acquired title to the property subject to the mortgage but without having assumed the same, and by the holder of a second mortgage. The action had been commenced in 1991 and, although not opposed by any of the defendants, the foreclosure judgment was not obtained until 1995. In the interim, the plaintiff's predecessor in interest had taken possession of the property pursuant to a collateral lease assignment and thereby became a mortgagee in possession. Noting the "fundamental difference" between a court-appointed receiver and a mortgagee in possession, the court stated that the latter "takes the rents and profits in the quasi character of a trustee or bailiff of the mortgagor ... so he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default" (citations omitted). On the other hand, said the court, a receiver's power to lease vacant space is generally quite limited. Here the collateral assignment pursuant to which the mortgagee had taken possession gave it broad powers to manage and lease the property on such terms and for such periods of time as it deemed proper. Consequently, the court held, "the mortgagee may be charged with the loss of any rentals he might have received if the loss be due to his fraud or negligence" (citations omitted). Thus, the delay in completing the foreclosure, the loss of rents, all of which would have had to have been applied in reduction of the debt, were held to be sufficient grounds to call for a recomputation of the amount due on the mortgage. The decision once again highlights the risks inherent in becoming a mortgagee in possession.

An interesting case involving the subrogation rights of a surety whose \$750,000 bond secured a portion of a first mortgage debt is *Pep'e v. McCarthy*, 249 A.D.2d 286, 672 N.Y.S.2d 350 (2d Dep't 1998). There, the surety appealed from a judgment of the supreme court confirming a referee's report which, inter alia, found that the amount due on the \$3,000,000 first mortgage should be reduced by the amount of the bond which had been paid by the surety upon the borrower's default under the mortgage. In reversing the judgment, the Appellate Division, Second Department, held that it is "well settled that a surety paying on a bond at the behest of a creditor is entitled by operation of law to be subrogated to the rights and remedies available to the creditor for enforcement of the debtor's obligation [citations omitted]." The court further held that a subrogated claim is neither diminished nor extinguished by the subrogation and, consequently, payment of the \$750,000 to the first mortgagee did not

reduce the principal amount of the mortgage debt; "the only change," said the court, "is in the allocation of payment." Additionally, the court observed that a denial of subrogation rights would result in the elevation of the lien of a junior mortgagee who had agreed to be subordinate to the entire \$3,000,000 principal of the first mortgage. Lastly, the court responded to the junior mortgagee's contention that the surety's failure to pay the entire debt prevented it from becoming subrogated to the rights of the first mortgagee. While the general rule, the court stated, required one to discharge the entire obligation in order to be equitably subrogated to the rights of a creditor with respect to another's obligation, a rule intended to protect a senior lienholder's right to proceed against the debtor, in the instant case the first mortgagee did not argue that permitting the surety to be subrogated to the extent of \$750,000 would be detrimental to its interests. The fact that the entire first mortgage debt was not discharged was not, according to the court, a matter about which the junior mortgagee could complain. Accordingly, the court held that the entire principal of \$3,000,000 was due from the mortgagor and upon the foreclosure sale the proceeds should be used to satisfy both the first mortgagee's and the surety's claims before being used to satisfy the second mortgagee's claim. The court did not reach the issue as to the respective priorities, if any, between the first mortgagee and the surety should the proceeds of sale be inadequate to satisfy both claims.

Failure to timely complete a foreclosure action was again at issue in *Danielowich v. PBL Development*, 292 A.D.2d 414, 739 N.Y.S.2d 408 (2d Dep't 2002), in which the plaintiff-mortgagee's unexplained delay in moving to confirm the referee's report (approximately five months) caused the court to limit the period for which a 16% per annum default rate of interest could be recovered. The court's judgment awarded the plaintiff interest at the default rate for a period ending five weeks following the date of the referee's report and, thereafter, at the statutory rate of 9% per annum.

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of *New York Landlord and Tenant Including Summary Proceedings* (4th ed.) and the supplements for *Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization* (2d ed.) and *New York Law and Practice of Real Property*, 2d.

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Real Property Practice
Chapter 17. Mortgage Foreclosure
Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:149. Judgment after reference to compute [Form: N.Y. Real Prop. Acts. Law § 1351]

At a Term, Part _____, of the Supreme
Court, held in and for the County of _____,
at the County Court House in the City of
_____, on the _____ day of
_____, 20__.

Present: Hon. _____, Justice.

The plaintiff,
-against-
_____, et al.,
The defendants.

JUDGMENT OF
FORECLOSURE AND SALE
Index No. _____

On the summons, verified complaint, and notice of pendency heretofore filed herein on the _____ day of _____, 20__; on the affidavit of regularity of _____, sworn to the _____ day of _____, 20__, and the affidavits of service on the defendants and the notices of appearance thereto annexed, heretofore filed herein, and upon the order entered herein on the _____ day of _____, 20__, appointing _____, Esq. as Referee to ascertain and compute the amount due to the plaintiff for principal, interest and otherwise on the bond, mortgage, and extension agreement set forth in the complaint, and the amount due to such of the defendants, as are prior incumbrancers of the mortgaged premises, if any, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, and upon all proceedings had herein, from all of which it appears that this action was brought to foreclose a mortgage on real property situated in the County of _____, and that the outstanding balance of the principal sum secured by the said mortgage, to wit, the sum of _____ (\$_____) Dollars, together with interest thereon and carrying charges expended by the plaintiff is now due and payable; that all of the defendants herein have been duly served with the summons and complaint, and all of the defendants have appeared in this action, and have waived service of all papers except

notice of sale and surplus money proceedings, except _____ and _____ Coal and Lumber Co., Inc., who have defaulted both in appearing and pleading, and _____ Realty, Inc., and _____, both of whom have appeared by their attorneys, and demanded copies of all papers upon them, but who have defaulted in pleading, and The United States of America who has, by stipulation dated _____, 20____, withdrawn its answer dated _____, 20____ and substituted therefor a notice of appearance and demand that copies of all papers be served upon them; that none of the defendants is an infant, incompetent or absentee; that the notice of pendency heretofore filed contains correctly and truly all of the particulars required by law to be stated in such notice; that more than twenty days have elapsed since the filing of such notice of pendency; and the report of the Referee, dated the _____ day of _____, 20____, having been duly filed in the Office of the Clerk of the County of _____ on the _____ day of _____, 20____, from which report it appears that the sum of _____ (\$ _____) Dollars was due to the plaintiff on the _____ day of _____, 20____, the date of the said report, on the bond, mortgage, and extension agreement described in the complaint, and that the mortgaged premises should be sold in one parcel, and on reading and filing the notice of filing of said report and notice of motion herein dated the _____ of _____, 20____, with proof of service thereof on the attorneys for all parties entitled to notice, and the said motion having duly come on to be heard, and no one having appeared in opposition thereto, NOW, on motion of _____ & _____, attorneys for the plaintiff herein, it is ORDERED that the motion be and the same is hereby granted, and it is further ORDERED, ADJUDGED AND DECREED that the report of the said Referee be, and the same hereby is in all respects ratified and confirmed, and it is further ORDERED, ADJUDGED AND DECREED that the plaintiff is entitled to have judgment herein for the sum of _____ (\$ _____) Dollars together with interest thereon from the date of the said report, the _____ day of _____, 20____, besides the sum of _____ (\$ _____) Dollars as taxed by the Clerk of the Court and hereby adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of _____ (\$ _____) Dollars hereby awarded to the plaintiff in addition to costs and disbursements, with interest thereon from the date hereof, and it is further ORDERED, ADJUDGED AND DECREED that the mortgaged premises described in the complaint and as hereinafter described be sold in one parcel, subject to zoning ordinances, restrictions, and regulations and amendments thereto, of the municipality in which the premises are located; subject to covenants and restrictions of record, if any; subject to any state of facts an accurate survey may show; at public auction in the Rotunda of the County Court House, in the City of _____, County of _____, and State of New York by and under the direction of _____, Esq., who is hereby appointed Referee for that purpose; that the said Referee give public notice of the time and place of said sale according to law and the course and practice of this Court; that the plaintiff and any other parties to this action may become the purchaser or purchasers at such sale; that in case the plaintiff shall become the purchaser at the said sale he shall not be required to make any deposit thereon; that said Referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that said Referee on receiving the proceeds of such sale forthwith pay therefrom the taxes, assessments or water rates which are or may become liens on the premises at the time of sale with such interest or penalties which may lawfully accrue thereon to the date of payment; that current taxes be apportioned; that the said referee then deposit the balance of said proceeds of sale in his own name as Referee in _____ Bank; and shall thereafter make the following payments and his checks drawn for that purpose shall be paid by the said depository;

1st. A sum not exceeding _____ (\$ _____) Dollars to the said Referee for his fees herein.

2nd. The expenses of the sale and advertising expenses as shown on the bills presented and certified by the said Referee to be correct, and duplicate copies of which shall be left with said depository.

3rd. The sum of _____ (\$ _____) Dollars to the plaintiff or his attorneys, adjudged to the plaintiff for his costs and disbursements in this action, with interest thereon from the date of entry hereof, together with an additional allowance of _____ (\$ _____) Dollars, hereby awarded to the plaintiff in addition to costs, with interest thereon from the date of entry hereof; and also the sum of _____ (\$ _____) Dollars the said amount so reported due as aforesaid, together with the legal interest thereon from the _____ day of _____, 20____, the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

In case the plaintiff is the purchaser of said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this judgment shall be assigned to and be acquired by the plaintiff, and a valid assignment thereof filed with said Referee, said Referee shall not require the plaintiff to pay in cash the entire amount bid at such sale, but shall execute and deliver to the plaintiff a deed or deeds of the premises sold upon the payment to said Referee of the amount specified above in items marked "1st" and "2nd," and the amount of the aforesaid taxes, assessments and water rates and interest or penalties thereon, or in lieu of the payment of said last mentioned amounts upon filing with said Referee receipts of the proper municipal authorities, showing the payment thereof; that the balance of the amount bid after deducting therefrom the aforesaid amount paid by the plaintiff for Referee's fees, advertising expenses and taxes, assessments and water rates, shall be allowed to the plaintiff and applied by said Referee upon the amounts due to the plaintiff as specified above in item marked "3rd"; that if after so applying the balance of the amount bid there shall be a surplus over and above the said amounts due to the plaintiff, the plaintiff shall pay to said Referee upon delivery to him of said Referee's deed the amount of such surplus; that said Referee on receiving said several amounts from the plaintiff shall forthwith pay therefrom said taxes, assessments, water rates and interest on penalties thereon, unless the same shall have already been paid, and shall pay the surplus moneys into court.

That said Referee take the receipt of the plaintiff or his attorney for the amounts paid as hereinbefore directed, in item marked "3rd" and file it with his report of sale; that he pay the surplus moneys, if any, into court within five days after the same shall be received and be ascertainable, to the credit of this action, to be withdrawn only on the order of the Court signed by a Justice of this Court; that said Referee shall make a report of such sale and file it with the Clerk of _____ County, with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff with the expenses of the sale, interest, costs and allowances, as aforesaid, the said Referee specify the amount of such deficiency in his report of sale and that if the proceeds of such sale be insufficient to pay the amount reported due to the plaintiff with interest and costs as aforesaid, the plaintiff recover of the defendants, _____ and _____, the whole deficiency or so much thereof as the Court may determine to be just and equitable of the residue of the mortgaged debt remaining unsatisfied after a sale of the mortgaged premises and the application of the proceeds thereof, provided a motion for a deficiency judgment shall be made as prescribed by Section 1371 of the Real Property Actions Law, within the time limited therein, and the amount thereof is determined and awarded by an order of this Court as provided for in said section; and it is further ORDERED that the purchaser or purchasers at said sale be let into possession on production of the Referee's deed or deeds; and it is further

ORDERED, ADJUDGED AND DECREED that each and all of the defendants in this action and all persons

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claiming under them or any or either of them after the filing of the notice of the pendency of this action, be and they hereby are forever barred and foreclosed of all right, claim, lien, title, interest, and equity of redemption in said mortgaged premises and each and every part thereof.

The following is a description of the said mortgaged premises hereinbefore mentioned: *[description of property]*.

Enter,

J.S.C.

Notes

The above form was adapted from the record in *First Federal Sav. and Loan Ass'n of N.Y. v. Lewis*, 14 A.D.2d 150, 218 N.Y.S.2d 857 (2d Dep't 1961).

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of *New York Landlord and Tenant Including Summary Proceedings* (4th ed.) and the supplements for Rasch, *New York Landlord and Tenant Rent Control and Rent Stabilization* (2d ed.) and *New York Law and Practice of Real Property*, 2d.

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Real Property Practice
 Chapter 17. Mortgage Foreclosure
 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:178. Report of sale where deficiency exists [Form: N.Y. Real Prop. Acts. Law § 1355]*[Add title of court and cause]*

REPORT OF SALE

Index No. _____

[Name of Assigned Judge]

TO THE COUNTY COURT OF _____ COUNTY:

I, _____, the Referee appointed by the judgment made and entered herein the _____ day of _____, 20____, to sell the mortgaged lands and premises therein particularly described, do hereby respectfully report as follows:

FIRST: That I caused due notice of the sale of such mortgaged premises, on the _____ day of _____, 20____, at _____, at _____ M. of that day, to be given and published according to law and the rules and practice of this court, as will more fully appear by the affidavits of publication and of service hereto annexed.

SECOND: That I attended in person at the time and place for which said sale was noticed, as aforesaid, and agreeably to such notice made known the terms of sale, offered the said premises for sale to the highest bidder, and sold the same to the plaintiff *[if appropriate, add and insert items: subject to _____]*, for the sum of \$ _____, that being the highest sum bid therefor.

THIRD: The payment of ten per cent deposit was waived by the plaintiff's attorney.

FOURTH: That subsequent to such sale, and in accordance with the provisions of the judgment hereinabove referred to, I executed, acknowledged and delivered to _____, the purchaser at the sale, a good and sufficient deed of the premises sold.

FIFTH: That I have allowed to the named purchaser out of the purchase money the sum of \$ _____, paid by it for taxes, assessments and the interest and penalties thereon, which were liens on the mortgaged premises at the time of the sale, and the receipts for which are annexed hereto.

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SIXTH: That I have credited myself in accordance with the provisions of the judgment hereinabove referred to, out of the balance of the purchase money received from the purchaser, with the sum of \$ _____, disposed of as follows:

1st. I have received for my fees and expenses on the sale the sum of \$ _____.

2nd. I have allowed to the attorney for the plaintiff the sum of \$ _____ for the costs, disbursements and additional allowance awarded to the plaintiff in and by the judgment, together with interest thereon to the date hereof, and also the sum of \$ _____ for the amount advanced by the plaintiff in advertising such sale in accordance with the judgment, for which a receipt is hereto attached.

3rd. That I have allowed to the plaintiff on account of the sum due, as adjudged by the judgment aforesaid, the sum of \$ _____, for which a receipt is hereto annexed.

4th. That after such sale, and the disposal of the proceeds thereof as above reported, the amount of the deficiency is the sum of \$ _____, with interest thereon from the date of this report.

Annexed hereto and made part of this report is a statement showing the several items aforesaid and the mode of computation of the deficiency herein reported.

All of which is respectfully submitted.

Dated, _____, 20 ____.

Referee

[Annex statement, verification and receipts]

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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 Hon. Robert F. Dolan[*]

I. Action to Foreclose a Mortgage

Correlation Table References

§ 17:179. Report of sale where surplus exists [Form: N.Y. Real Prop. Acts. Law § 1355]*[Add title of court and cause]*

REPORT OF SALE

Index No. _____

[Name of Assigned Judge]

TO THE SUPREME COURT; _____ COUNTY:

I, _____, the Referee appointed by the Judgment made and entered in this action bearing date the _____ day of _____, 20____, to make the sale of the mortgaged lands and premises therein particularly described, do respectfully report as follows:

FIRST: That I caused due notice of the sale of the said lands and premises on the _____ day of _____, 20____, at _____ o'clock in the _____ noon of that day at Room _____, Municipal Building, _____ and _____ Streets, _____, New York, to be given and published according to law and the rules and practice of this Court, as will fully appear by the affidavits hereto annexed.

SECOND: That at the time and place for which the sale was noticed as aforesaid, I attended in person, and agreeably to such notice, offered the said mortgaged lands and premises for sale to the highest bidder, and sold the same to _____, for the sum of _____ (\$ _____) Dollars, that being the highest sum bid therefor.

THIRD: That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the mortgaged premises so sold, and have paid over or disposed of the proceeds of sale as follows:

1st. I have retained the sum of _____ (\$ _____) Dollars for my fees and expenses on such sale.

2nd. I have paid to _____, the attorney for the plaintiff, the sum of _____ (\$ _____) Dollars, being the amount of the costs and disbursements awarded to the plaintiff by said judgment. The receipt of the plaintiff's attorney therefor is annexed hereto.

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3rd. I have paid to said attorney for the plaintiff the sum of _____ (\$ _____) Dollars to be applied on the mortgage debt. The receipt of the plaintiff's attorney therefor is annexed hereto.

4th. I have paid for taxes, assessments and water rates the sum of _____ (\$ _____) Dollars, which said taxes, assessments and water rates were liens on the mortgaged premises. Receipts therefor, are annexed hereto.

5th. I have paid into court to the credit of this action the sum of _____ (\$ _____) Dollars, the surplus moneys arising on the sale of the mortgaged property. The voucher of the County Treasurer for the surplus moneys is annexed hereto.

Annexed hereto and made part of this report is a statement showing the several items aforesaid and the mode of computation of such surplus.

All of which is respectfully submitted.

Dated, _____, New York, _____, 20__.

[Signature]

[Type name]

[Annex statement, verification and receipts]

[FN*] Hon. Robert F. Dolan was formerly a Nassau County District Court Judge. Currently, he is also the author of New York Landlord and Tenant Including Summary Proceedings (4th ed.) and the supplements for Rasch, New York Landlord and Tenant Rent Control and Rent Stabilization (2d ed.) and New York Law and Practice of Real Property, 2d.

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C

LaSalle Bank, N.A. v. Shearon
N.Y.Sup.,2008.

Supreme Court, Richmond County, New York.
LASALLE BANK, N.A. as Trustee for the MLMI
Trust Series, 2006-WMC2, c/o Wilshire Credit Cor-
poration, Plaintiff

v.

David SHEARON, Commerce Bank, N.A., New
York City Environmental Control Board, New York
City Parking Violations Bureau, New York City
Transit Adjudication Bureau, John Doe (Said name
being fictitious it being the intention of the Plaintiff
to designate any and all occupants or premises be-
ing foreclosed herein, and any parties, having or
claiming an interest or lien upon the mortgaged
premises), Defendants.

Jan. 28, 2008.

Background: Mortgagee brought mortgage fore-
closure action against mortgagor.

Holdings: On mortgagee's motion for summary
judgment, the Supreme Court, Richmond County,
Joseph J. Maltese, J., held that:

- (1) mortgagee violated Banking Law provision lim-
iting the financing of points and fees in a high-cost
home loan;
- (2) mortgagee violated Banking Law provision re-
quiring due diligence inquiries for high-cost home
mortgages; and
- (3) mortgagee violated Banking Law's counseling
provision.

Ordered accordingly.

West Headnotes

[1] Consumer Credit 92B ⚡11

92B Consumer Credit

92BI In General

92Bk10 Interest and Charges

92Bk11 k. Rate and Amount of Interest or

Finance Charge. Most Cited Cases

Usury 398 ⚡34

398 Usury

398I Usurious Contracts and Transactions

398I(A) Nature and Validity

398k34 k. Mortgages. Most Cited Cases

Usury 398 ⚡53

398 Usury

398I Usurious Contracts and Transactions

398I(A) Nature and Validity

398k53 k. Compensation for Services or
Expenses or Losses Incurred by Lender. Most Cited
Cases

Mortgagee violated Banking Law provision limit-
ing the financing of points and fees in a high-cost
home loan by providing financing for mortgage that
it considered a high cost loan, where 5.4% of the
loan, or nearly 6% of the original purchase price of
the home, was used to pay points and fees associ-
ated with the closing of the property. McKinney's
Banking Law § 6-1(2)(m).

[2] Consumer Credit 92B ⚡11

92B Consumer Credit

92BI In General

92Bk10 Interest and Charges

92Bk11 k. Rate and Amount of Interest or
Finance Charge. Most Cited Cases

Mortgagee violated Banking Law provision requir-
ing due diligence inquiries for high-cost home
mortgages by moving mortgagors into a sub-prime,
adjustable rate mortgage loan without inquiring into
their ability to repay, even though mortgagors had
initially qualified for traditional fixed loan products
at lower rates, because of their "A paper" credit-
worthiness. McKinney's Banking Law § 6-1(2)(k).

[3] Antitrust and Trade Regulation 29T ⚡218

29T Antitrust and Trade Regulation

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29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk218 k. Credit Repair and Counseling.

Most Cited Cases

Mortgagee violated Banking Law's counseling provision by providing financing for high-cost home mortgage without first providing mortgagors with a list of licensed credit counselors. McKinney's Banking Law § 6-1(2)(l)(i).

[4] Judgment 228 ↪183

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k183 k. In General. Most Cited Cases

Judgment 228 ↪185(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

When making a motion for summary judgment, the movant always runs the risk that the court may search the record, and in the absence of a cross-motion, award summary judgment on behalf of the non-moving party; when doing so, the court must offer the same careful scrutinization of the proof in the light most favorable to party which summary judgment is being sought against. McKinney's CPLR 3212(b).

[5] Consumer Credit 92B ↪17

92B Consumer Credit

92BI In General

92Bk17 k. Effect of Violation of Regulations or Lack of License. Most Cited Cases

Usury 398 ↪76

398 Usury

398I Usurious Contracts and Transactions

398I(A) Nature and Validity

398k74 Effect of Usury

398k76 k. Validity of Contract or Indebtedness. Most Cited Cases

Usury 398 ↪97

398 Usury

398I Usurious Contracts and Transactions

398I(B) Rights and Remedies of Parties

398k96 Enforcement of Usurious Contract or Security

398k97 k. In General. Most Cited Cases

Usury 398 ↪102(7)

398 Usury

398I Usurious Contracts and Transactions

398I(B) Rights and Remedies of Parties

398k102 Recovery of Usury Paid

398k102(7) k. Extent of Recovery.

Most Cited Cases

Finding that mortgagee intentionally violated Banking Law's predatory lending provisions when financing high-cost home mortgage would render the mortgage void, strip mortgagee of right to collect, receive, or retain any principal, interest, or other charges with respect to the loan, and give mortgagor ability to recover any payments made under the mortgage. McKinney's Banking Law § 6-1(8, 10).

****872** Steven J. Baum, P.C., for Plaintiff.
 Cilmi & Associates, PLLC, for Defendant.

JOSEPH J. MALTESE, J.

***434** This court has denied the plaintiff bank's summary judgment motion in a mortgage foreclosure action because it has found that the original lender has violated the "predatory lending" statutes found in New York Banking Law § 6L. As a result of the findings of violations of the predatory lending sections of the New York Banking Law this court grants the defendant home owner summary judgment.

ment wherein he may be entitled to damages to include the voiding of the mortgage and loan, along with the return of all mortgage payments, the expenses of obtaining the loans and attorney fees.

Facts

In the summer of 2005, after living in a rental home for three years, the Shearons, as first time home buyers, decided to purchase a house in Staten Island, New York. After searching for the "right" home, they executed a contract of sale for real property located at 33 Westport Lane in Staten Island, New York.

To locate this home, the Shearons utilized the services of a real estate agent from Coldwell Banker. After finding their home, they utilized the services of Glen DeLuca and Michael Farber, mortgage brokers associated with Liberty Capital Mortgage,^{FN1} to provide them with all necessary financial information and potential lenders in order to obtain financing for the purchase. In August and September 2005, Michael Farber advised the Shearons that they would qualify for traditional loan products with fixed interest rates and that he was "shopping around for the best rates." At the time the Shearons were ****873** applying for financing, as husband and wife, in connection with purchasing their home, David Shearon's credit score was 696 ***435** and Karen Shearon's credit score was 760 on a scale where 800 is the maximum score.

FN1. Liberty Capital Mortgage was doing business as (d/b/a) HCI Mortgage Company located in Lake Ariel, Pennsylvania.

The Shearons presented a joint tax return which shows a combined adjusted gross income of \$29,567.^{FN2} On October 17, 2005 the Shearons entered into a contract of sale to purchase the house for \$335,000. However, the Contract listed a purchase price of \$355,100 with a "Seller's Concession" of \$20,100. At the execution of the contract, the Shearons deposited \$5,000 with the seller's at-

torneys, which would leave a balance of \$350,100. But the financing was for the full \$355,000, implying that it would be a "no money down" purchase at closing where arguably that amount should have reflected a deduction of the \$5,000 deposit that the Shearons paid at the contract signing.

FN2. 2005 Internal Revenue Service Abstract and Return for David and Karen Shearon.

From the time of the contract until closing in January 2006, Michael Farber advised the Shearons that WMC Mortgage Corp. would be able to finance the entire \$355,100 of the purchase price in two loans. The plaintiff, LaSalle Bank, N.A., (hereinafter "lender") was the trustee and successor for WMC. The first mortgage was for \$284,000 and the second mortgage was for \$71,000. The closing for the subject property occurred on or about January 27, 2006. However, David Shearon was listed as the sole purchaser and sole borrower on all closing documents.

Shearon, in his answer alleges that he has been the victim of "*Predatory Lending*" practices by the mortgage brokers and the lender regarding the finance of his home. Shearon alleges the following six separate and distinct acts to justify his claim of predatory lending:

- 1) Excessive financing was approved and extended to 106% of the purchase price, which permitted Shearon to finance the points, broker fees and costs;
- 2) Improper, inadequate or non-existent lender due diligence regarding Shearon's ability to repay the high cost home loan given;
- 3) The intentional and improper placement of Shearon into sub-prime loan products with excessively high interest rates, longer loan terms and impaired refinancing flexibility to the sole benefit of the lender;
- 4) Absent or inadequate state and federally man-

dated truth-in-lending (“TILA”) disclosures regarding material elements of the financing being obtained including, without limitation, *436 matters relating to closing costs and fees, counseling services, loan terms, amortization schedules and balloon payment requirements;

5) Forgeries of numerous loan-related documents, including without limitation the (i) Residential Loan Application, dated November 7, 2005;

(ii) undated “Addendum to Contract of Sale”; and

(iii) “Request for Verification of Rent”, dated January 3, 2006 (purportedly signed by Jennifer Ogman) reflecting inaccurate information used to underwrite the Loans; and

6) The employment of repeated and continuous coercive and concerted tactics by plaintiff and other non-parties who stood to benefit from the loan process, which successfully targeted and forced Shearon to close on the loans and the property or face significant and dire financial consequences (i.e. losing the loan commitment, defaulting under the purchase contract, losing the down-payment/deposit).

****874 New York Banking Law**

Predatory lending practices are prohibited by both New York State and Federal laws. Here, the “home loans” ^{FN3} in question are governed by New York Banking Law § 6-L (1)(d) which governs “High Cost Home Loans” which are classified as such by the scheme provided for in Banking Law § 6-L(1)(g). New York Banking Law § 6-L(2) prohibits certain practices by lending institutions when offering High Cost Loans. The statute also provides for a six year statute of limitations accruing from the origination of the loan, ^{FN4} as well as remedies for violations of the statute.^{FN5} A court may also award reasonable attorneys fees to the prevailing borrower.^{FN6} And the Court may grant the borrower injunctive, declaratory and such other equitable relief to enforce compliance with this

FN7

FN3. “Home Loans” are defined in N.Y. Banking Law § 6-L(1)(e).

FN4. N.Y. Banking Law § 6-L(6).

FN5. N.Y. Banking Law § 6-L(7).

FN6. N.Y. Banking Law § 6-L(8).

FN7. N.Y. Banking Law 6-L(9).

However, the most drastic remedies provided are found in Banking Law §§ 10 and 11 of the statute. Banking Law § 6-L(10) states:

“Upon a finding by the court of an intentional violation by the lender of this section, or regulation thereunder, the home loan agreement shall be rendered void, and the lender shall have no right to collect, receive or retain any principal, interest, or *437 other charges whatsoever with respect to the loan, and the borrower may recover any payments made under the agreement.”

New York Banking Law 6-L(11) states:

“Upon a judicial finding that a high-cost home loan violates any provision of this section, whether such violation is raised as an affirmative claim or as a defense, the loan transaction may be rescinded. Such remedy of rescission shall be available as a defense without time limitation.”

Discussion

Shearon is alleging that he is the victim of “predatory lending” defined by New York Banking Law § 6-L, *et. seq.* Specifically, Shearon alleges that he was given excessive financing on a High Cost Loan without the lenders inquiry as to his ability to pay, which is mandated by N.Y. Banking Law § 6-L(2)(k). The lender alleges that loans of 7.65% and 10.5% are less than the 16% usury statute and hence are not “high cost” loans. But the home loans were considered high cost loans by the lender because the lender prepared the following forms dated

December 8, 2005: a New York High Cost Loan Disclosure; New York High Cost Loan Payment Disclosure; and New York High Cost Loan Insurance.

[1] It is undisputed that Shearon was given \$355,000 to finance the purchase of a \$335,000 house, where the extra \$20,000 or 6% of the purchase price was used to pay points and fees associated with the closing on the property. Specifically, when examining the HUD-1 closing statement prepared at the time of closing, it is apparent that \$19,145.69 was used to pay all costs and fees associated with securing the High Cost Loans. These monies were paid from financing received above and beyond the contract price of \$335,000. This ultimately left Shearon with negative equity in the property.

The financing of the fees and points associated with the loan is also a violation of Banking Law 6-L(2)(m) which states:

****875** "In making a high-cost home loan, a lender shall not, directly or indirectly, finance any points and fees as defined in paragraph (f) of subdivision one of this section, in an amount that *exceeds three percent* of the principal amount of the loan" (emphasis added).

Here, the amount financed to cover the fees are in violation of the statute because the points and fees exceed 3% of the principal amount of the loan. Three percent of the loan equates ***438** to \$10,650. However, the expenses of the loan were \$19,145.69, which equates to about 5.4% ($\$19,145.69 / \$335,000 = .0539$) which is more than the 3% allowed by the statute. What is more egregious is that \$19,145.69 in expenses is 5.72% of the original cost of the \$335,000 house ($\$19,145.69 / \$335,000 = .0572$).

[2] Shearon also alleges that the Lender did not conduct a "due diligence" or any inquiry into their ability to repay the High Cost Loan. The plaintiff argues in its motion for summary judgment that

David Shearon stated that he reported \$7,200 as monthly income when he first applied for the loan. The plaintiff then states in paragraph 25 of their attorney's affirmation that Mr. Shearon "cannot argue that his annual income of \$86,400 places him in a category of low-income."

If David Shearon and his wife stated on the original loan application that their monthly income was \$7,200, the lender's statutory requirement is to make an inquiry as to the truth of the statement and the borrower's ability to repay the loan. While this court will not condone fraud by the borrower, New York Banking Law § 6-L(2)(k) states that:

"A lender or mortgage broker shall not make or arrange a high-cost home loan without due regard to repayment ability, based upon consideration of the resident borrower or borrowers' current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan), *as verified by detailed documentation of all sources of income and corroborated by independent verification.*"(emphasis added).

Here, plaintiff's counsel states in both the moving papers and reply papers that "Based on Defendant's income, credit history, and the low interest rate on the Mortgage loan, along with the Defendant's lack of evidence supporting predatory lending, the Defendant is precluded from alleging the same. As such, the Defendant's mortgage loan was in compliance with all applicable laws, including, but not limited to, all anti-predatory lending laws."

***439** While statements contained in an attorney's affirmation are not proper evidence before the court,^{FN8} the plaintiffs do not offer one scintilla of evidence as to their required "due diligence" inquiry regarding David Shearon's ability to pay, which is a violation of New York's Banking Law governing High Cost Loans.

FN8. *Jeune v. O.T. Trans Mix Corp.*, 29

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A.D.3d 635, 815 N.Y.S.2d 182 [2d Dept.2006]; *Pautienis v. Legacy Capital Corp.*, 36 A.D.3d 462, 828 N.Y.S.2d 336 [1st Dept.2007].

Shearon also alleges that he and his wife were intentionally placed into a sub-prime loan product. He bases the argument upon two facts. First, David Shearon and his wife originally applied jointly for the loans where he had a credit score of 696 and his wife had a score of 760 on a scale of 800. The Shearons jointly were considered "A paper," a term given to those loan applicants that are deemed to have the highest level of credit-worthiness.^{FN9} Shortly**876 before the closing, Karen Shearon was removed as a borrower for the loans. The Lender claimed that since no loan terms were modified, the application was not subject to any new underwriting or analysis and the closing occurred without any apparent change to the entire financing process. However, removing the higher rated borrower from the loan would require a new underwriting inquiry, but none was conducted. Therefore, the Shearons argue that they were intentionally placed into a sub-prime loan product.

FN9. *See EMC Mortg. Corp. v. Batista*, 15 Misc.3d 1143(A), 2007 WL 1599986 [Sup.Ct. Kings County].

The second factor that the Lender used to place the Shearons into a sub-prime product was an adjustable rate mortgage. Throughout the process, Michael Faber from Liberty Capital stated that the Shearons would be placed into a traditional loan product with fixed interest rates. However, when Shearon closed title, he obtained the First Loan with a 7.59% rate for the first 2 years, which would thereafter re-adjust and rise to no more than 10.59% in February 2008. However, every six (6) months thereafter it was subject to increase with a ceiling of 14.09% with anticipated finance charges over the life of the loan of \$682,821.49. The Second Loan had a fixed rate of 10.750% for the life of the loan with anticipated finance charges over the life of the loan of \$121,861.87. Therefore, Shearon would be

obligated to pay up to \$804,683.36 for a house that sold for \$335,000. At the time of closing, these loans were considered sub-prime products, even though they had qualified for traditional fixed loan products at lower rates, because of their "A paper" credit worthiness.

[3] *440 Shearon also alleges a violation of Banking Law § 6-L(2)(l) (I), which has been dubbed the "Counseling Statute." This section provides that a lender or mortgage broker must deliver, place in the mail, fax or electronically transmit the following notice in at least twelve point type to the borrower at the time of application: "You should consider financial counseling prior to executing loan documents. The enclosed list of counselors is provided by the New York State Banking Department." Banking Law § 6-L(2)(l) (ii) requires that the lender or mortgage broker within three days after determining that the loan is a high-cost loan, but no less than ten days before closing, give the "Consumer Caution and Home Ownership Counseling Notice" to the borrower. This was not done.

David Shearon states in his affidavit that: 1) he has never been provided with, nor did Liberty Capital ever advise him of the nature of the loans and or the disclosures regarding counseling services available; and 2) the repercussions of the loans on his credit or that a balloon payment was required in connection with the loan. Moreover, the plaintiff fails to provide any evidence of the required disclosure in any of their papers. Their attorney simply states that their loans were sold in compliance with the various regulating statutes including *RESPA*, *TILA*, *HOEPA*, *New York State Banking law* and *Federal Statutory Law* prohibiting predatory lending.

A motion for summary judgment must be denied if there are facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the mo-

tion".^{FN10} Summary judgment should not be **877 granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.^{FN11} As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist *441 and the movant is entitled to judgment as a matter of law.^{FN12} On a motion for summary judgment, the function of the court is to issue findings, and not to issue a determination.^{FN13} In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.^{FN14} Here, the plaintiff has put forth a plethora of documentary evidence that, at the very least, precludes summary judgment on behalf of the plaintiff; and accordingly, their motion is denied.

FN10. *Marine Midland Bank, N.A., v. Dino, et al.*, 168 A.D.2d 610, 563 N.Y.S.2d 449 [2d Dept.1990].

FN11. *American Home Assurance Co., v. Amerford International Corp.*, 200 A.D.2d 472, 606 N.Y.S.2d 229 [1st Dept.1994].

FN12. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141, 385 N.E.2d 1068 [1978]; *Herrin v. Airborne Freight Corp.*, 301 A.D.2d 500, 753 N.Y.S.2d 140 [2d Dept.2003].

FN13. *Wiener v. Ga-Ro Die Cutting*, 104 A.D.2d 331, 479 N.Y.S.2d 35 [2d Dept.1984]. *Aff'd* 65 N.Y.2d 732, 492 N.Y.S.2d 29, 481 N.E.2d 569 [1985].

FN14. *Glennon v. Mayo*, 148 A.D.2d 580, 540 N.Y.S.2d 190 [2d Dept.1989].

[4] However, when making a motion for summary judgment, the movant always runs the risk that the court may search the record, and in the absence of a cross-motion, award summary judgment on behalf of the non-moving party.^{FN15} When doing so, the court must offer the same careful scrutinization of the proof in the light most favorable to party which

summary judgment is being sought against.^{FN16} In moving for summary judgment, the plaintiff was required to assemble and lay bare its proof entitling it to summary judgment.^{FN17}

FN15. CPLR 3212(b); *Gorman v. Town of Huntington*, 47 A.D.3d 30, 844 N.Y.S.2d 421 [2d Dept.2007]; *Dunham v. Hilco Const. Co., Inc.*, 89 N.Y.2d 425, 654 N.Y.S.2d 335, 676 N.E.2d 1178 [1996].

FN16. *Federal Nat. Mortg. Ass'n v. Katz*, 33 A.D.3d 755, 822 N.Y.S.2d 759 [2d Dept.2006]; *Lacy v. New York City Housing Authority*, 4 A.D.3d 455, 772 N.Y.S.2d 360 [2d Dept.2004].

FN17. *First Nat. City Bank v. Mayes*, 35 A.D.2d 922, 316 N.Y.S.2d 136 [1st Dept.1970].

Here, the voluminous documentary evidence demonstrates violations of New York Banking Law § 6-L(2)(k), which deals with the plaintiff's due diligence into the ability of the defendants to repay the loan. The plaintiff has not offered one scintilla of evidence of any inquiry into the defendants ability to repay the loan. New York Banking Law § 6-L(2)(k) requires this inquiry to be "verified by detailed documentation of all sources of income and corroborated by independent verification." This failure to inquire is a violation of New York's Banking Law. Therefore, summary judgment on this affirmative defense is granted in favor of the defendant.

The plaintiff apparently also violated N.Y. Banking Law § 6-L(2)(l)(I), which requires the lending institution to provide a list of credit counselors licensed in New York State to any recipient of a High Cost Loan. David Shearon states in his affidavit that he never received the notice for required counseling. This document was also not provided to the court by plaintiff, although a *442 copy of the entire origination file was provided.^{FN18} Failure to provide this notice is a violation of N.Y. Banking

Law § 6-L(2)(l)(I).

FN18. *See* Reply Affirmation of Heather A. Johnson, Esq. paragraph 3.

In this action, clearly the most egregious violation of N.Y. Banking Law is the violation**878 of § 6-L(2)(m) which states that no more than 3 percent of the amount financed is eligible to pay the points and fees associated with closing the loans on the real property. The amount financed to cover the fees are violative of the statute because more than 3% of the amount financed was used to pay the fees and points associated with the loan. The \$19,145.69 in expenses equates to almost 5.4% of the High Cost Loan and is a clear violation of the statute.

After searching the record, it is clear that the lending institution, in providing home financing to David Shearon, violated, at least three provisions of New York's Banking Law. Therefore, summary judgment is granted in favor of the defendant, David Shearon, on his counter claims for violations of N.Y. Banking Law § 6-L(2)(k); 6-L(2)(l)(I); and 6-L(2)(m). Consequently, the finding of these violations now triggers N.Y. Banking Law § 6-L(7) through § 6-L(10) which is the remedy and damages provisions of the statute.

New York Banking Law § 6-L(7) provides in pertinent part that: "Any person found by a preponderance of the evidence to have violated this section shall be liable to the borrower for the following:

- (a) actual damages, including consequential and incidental damages; and
- (b) statutory damages as follows (i) all of the interest, earned or unearned, points and fees, and closing costs charged on the loan shall be forfeited and any amounts paid shall be refunded; except that this element of statutory damages shall not be awarded for violations of:

(1) paragraph (i) of subdivision two of this section regarding loan flipping;

and

(2) paragraph (k) of subdivision two of this section regarding ensuring the borrower's ability to repay the loan, so long as the lender demonstrates that at the time of the loan, it verified by detailed documentation all sources of the borrower's income and corroborated it with independent verification;

or

(ii) five thousand dollars per violation or twice the amount of points and fees and closing costs as *443 defined in this section, whichever is greater, for violations of:

(1) paragraph (i) of subdivision two of this section regarding loan flipping;

and

(2) paragraph (k) of subdivision two of this section regarding ensuring the borrower's ability to repay the loan, where the borrower is not entitled to relief under subparagraph (i) of this paragraph."

In this case, the defendant David Shearon demonstrated by a preponderance of the evidence that the Lender violated the anti-predatory lending statutes of New York's Banking Law. Therefore, David Shearon may be entitled to receive: actual, consequential and incidental damages, as well as all of the interest, earned or unearned, points, fees, the closing costs charged for the loan; and a refund of any amounts paid.

[5] This court will hold a hearing where all parties shall present any evidence as to actual damages and any other evidence not otherwise mentioned herein that may mitigate the findings of this court pertaining to the alleged intentional behavior of the Lender who violated several sections of the New York Banking Law § 6-L. The finding of intentional violation renders the home loan agreement (mortgage) void, and strips the lender from having a right to

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collect, receive or retain any principal, interest, or other charges whatsoever with respect to the loan, as **879 well as giving the borrower the ability to recover any payments made under the agreement.FN19 The hearing shall also be used to determine the amount of damages.

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END OF DOCUMENT

FN19. N.Y. Banking Law § 6-L(10).

Additionally, the defendant is entitled to receive reasonable attorneys fees in conjunction with the defense of this action.^{FN20}

FN20. N.Y. Banking Law § 6-L(8).

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the **foreclosure** action shall be stayed until the final determination by this court as to the extent of the applicability of New York Banking Law § 6-L(10) as well as the assessment of any damages; and it is further

ORDERED, that the defendant, David Shearon, shall prepare an affidavit outlining his financial damages in detail to be exchanged with plaintiff's counsel by February 15, 2008; and it is further

ORDERED, that counsel for the Defendants, Cilmi & Associates, PLLC, shall prepare an affidavit outlining their attorney's fees for the defense of this action and shall serve same upon the plaintiff's counsel and this Court on or before February 15, 2008; and it is further

ORDERED, that all parties shall appear in this court at DCM3, 355 Front Street, Staten Island, New York 10304, at 1:30PM on Friday, **February 29, 2008** for a hearing to determine the extent of any damages the defendant, David Shearon, has sustained and for counsel fees.

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LaSalle Bank, N.A. v. Shearon

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Westlaw.

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H

O'Brien v. Spitzer
N.Y., 2006.

Court of Appeals of New York.
In the Matter of **Stephen L. O'BRIEN**, Respondent,
v.

Eliot SPITZER, as Attorney General of the State of New York, Appellant.
June 29, 2006.

Background: Court-appointed referee initiated article 78 proceeding to review Attorney General's denial of his request for defense and indemnification in federal civil rights action. The Supreme Court, Suffolk County, James M. Catterson, J., granted petition. Attorney General appealed. The Supreme Court, Appellate Division, 24 A.D.3d 9, 802 N.Y.S.2d 737, affirmed, and appeal was taken.

Holding: The Court of Appeals, R.S. Smith, J., held that referee was an independent contractor, not a state employee entitled to defense and indemnification from the State.

Reversed.

West Headnotes

[1] Statutes 361 ↪219(1)

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most

Cited Cases

While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term.

[2] Labor and Employment 231H ↪23

231H Labor and Employment

231HI In General

231Hk22 Nature, Creation, and Existence of Employment Relation

231Hk23 k. In General. Most Cited Cases

Labor and Employment 231H ↪29

231H Labor and Employment

231HI In General

231Hk28 Independent Contractors and Their Employees

231Hk29 k. In General. Most Cited Cases

Broadly speaking, an "employee" is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results; a person who works for another subject to less extensive control is an "independent contractor."

[3] States 360 ↪62

360 States

360II Government and Officers

360k56 Compensation of Officers, Agents and Employees

360k62 k. Expenses and Losses; Reimbursement. Most Cited Cases

Referee appointed to supervise sale of property in mortgage foreclosure proceeding was an independent contractor, not a state employee entitled to defense and indemnification from the state in a federal civil rights suit subsequently brought against him by the mortgagor; referee worked without day-to-day supervision and chose his own hours of work, selected date for the foreclosure sale, performed his duties on a part-time basis, while also working for clients of his private law practice, and his compensation did not come from state funds, but from the sale proceeds. McKinney's Public Officers Law § 17(2)(a).

***844 Eliot Spitzer, Attorney General, New York

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City (Richard Rifkin, Caitlin J. Halligan, Daniel Smirlock, Michael S. Belohlavek and David Lawrence III of counsel), appellant pro se. O'Brien & O'Brien, LLP, Nesconset (**Stephen L. O'Brien** pro se and Daniel P. O'Brien of counsel), for respondent.

*242 Supreme Court granted the petition, and the Appellate Division affirmed. The Appellate Division permitted the Attorney General to appeal to this Court on a certified question, and we now reverse.

Discussion

*241 **1195 OPINION OF THE COURT

R.S. SMITH, J.

We hold that the Attorney General properly found a private lawyer who was appointed as referee in a mortgage foreclosure proceeding to be an independent contractor, not a state employee. The referee therefore was not entitled to defense and indemnification from the State in a lawsuit brought against him.

Public Officers Law § 17(2)(a) requires the State to “provide for the defense” of an “employee” in an action arising out of his or her public duties. “Employee” is defined in Public Officers Law § 17(1)(a), which provides in relevant part: “As used in this section, unless the context otherwise requires the term ‘employee’ shall mean any person holding a position by election, appointment or employment in the service of the state, ... but shall not include an independent contractor....”

***845 **1196 Facts and Procedural History

This case arises out of a proceeding to foreclose a mortgage on a home owned by Donald MacPherson. Supreme Court entered a judgment of foreclosure and sale, and appointed petitioner, a lawyer in private practice, as referee to supervise the sale of the property. The property was sold and MacPherson, contending that the foreclosure and sale violated his constitutional rights, brought a lawsuit in federal court seeking damages and injunctive relief against several defendants, including petitioner.

The issue is whether petitioner was an “employee” or an “independent contractor” within the meaning of this section. We first consider whether the Attorney General's resolution of this issue is entitled to deference, and we conclude that it is.

Petitioner informed the Attorney General of the lawsuit, and requested defense and indemnification pursuant to Public Officers Law § 17. The Attorney General rejected the request, relying on the exclusion of “independent contractor[s]” from the rights given by the statute. Petitioner then brought this proceeding under CPLR article 78 against the Attorney General, seeking an order annulling the Attorney General's determination and directing the Attorney General to defend petitioner in MacPherson's suit. MacPherson later withdrew his claims against petitioner, but petitioner continues to seek indemnification for the expense the suit caused him.

[1] While as a general rule courts will not defer to administrative agencies in matters of “pure statutory interpretation” (*Matter of KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Community Renewal*, 5 N.Y.3d 303, 312, 801 N.Y.S.2d 783, 835 N.E.2d 643 [2005]), deference is appropriate “where the question is one of specific application of a broad statutory term” (*Matter of American Tel. & Tel. Co. v. State Tax Commn.*, 61 N.Y.2d 393, 400, 474 N.Y.S.2d 434, 462 N.E.2d 1152 [1984], quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 [1944] [interpreting the term “employees”]). This case is in that category.

[2] The terms “employee” and “independent contractor” are familiar ones, and their definitions are well known. Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but

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also over the means used to produce the results. A person who works for another subject to less extensive control is an independent contractor (e.g., *Matter of Hertz Corp. [Commissioner of Labor]*, 2 N.Y.3d 733, 735, 778 N.Y.S.2d 743, 811 N.E.2d 5 [2004]; *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 N.Y.2d 516, 521, 498 N.Y.S.2d 111, 488 N.E.2d 1223 [1985]). But it is often not easy to apply those definitions to specific facts. When a person claiming to be a public employee requests indemnification, the Attorney General must first decide whether ****1197 ***846** that person is indeed an employee, or is an independent contractor. Where his decision is a reasonable one, courts should not second-guess it.

[3] Here, there was ample basis for the Attorney General's determination that petitioner was an independent contractor, not an ***243** employee. Petitioner worked without day-to-day supervision and chose his own hours of work; it was he who selected the date for the foreclosure sale. He performed his duties on a part-time basis, while also working for clients of his private law practice. His compensation did not come from state funds, but from the sale proceeds. The State did not withhold income tax or provide workers' compensation. Petitioner furnished whatever materials he needed for his work, and paid his own expenses, subject to reimbursement from the sale proceeds. He deposited the proceeds in a special bank account bearing his own name, as required by CPLR 2609. He was, in short, substantially more independent from state control over his activities than a typical state employee. Beyond this, public policy supports the Attorney General's decision: The purpose of Public Officers Law § 17 is, in essence, to provide insurance against litigation. Private lawyers like petitioner ordinarily have malpractice coverage, and the Legislature is unlikely to have intended to substitute the State for lawyers' malpractice carriers.

Accordingly, the order of the Appellate Division should be reversed, without costs, the petition dismissed and the certified question answered in the

negative.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO and READ concur.
Order reversed, etc.

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C

**1 U.S. Mortgage, Plaintiff
 v
 Gustavo Almeida et al., Defendants

 Supreme Court, Bronx County

May 11, 2005
 CITE TITLE AS: U.S. Mtge. v Almeida

HEADNOTE

References

Compensation of Referee
 Foreclosure Action--Additional Compensation in
 Excess of Maximum \$500 Statutory Fee

A court-appointed referee to sell property pursuant to a judgment of foreclosure is not automatically entitled to additional compensation in excess of the maximum \$500 statutory fee where the referee has made additional appearances caused by adjournments of the scheduled sale. Unless additional compensation has been fixed by the court in accordance with CPLR 8003 (b) if the property sold for \$50,000 or more, or the mortgagee has agreed to pay additional compensation, \$500 is all that can be recovered by the referee. The \$500 amount set forth in the statute is the total amount, not an amount routinely payable for each scheduled sale. The awarding of additional compensation must await the conclusion of the sale. Furthermore, referees who receive compensation in excess of \$500 for a sale, whether pursuant to court order or by stipulation, must comply with fiduciary reporting requirements (*see* 22 NYCRR 36.4).

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Mortgages § 610; Am Jur 2d, References § 26.

Bowmar, Mortgage Liens in New York, ch 20, Judgment and Sale in Foreclosure.

Carmody-Wait 2d, Foreclosure of Mortgages on Real Estate § 92:253.

McKinney's, CPLR 8003 (b).

22 NYCRR 36.4.

NY Jur 2d, Mortgages and Deeds of Trust § 713;
 NY Jur 2d, References § 48.

ANNOTATION REFERENCE

See ALR Index under Foreclosure; Referee or Referee.

FIND SIMILAR CASES ON WESTLAW
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Query: referee /3 compensation & foreclosure /2 sale & adjourn!

APPEARANCES OF COUNSEL

Fein, Such, Kahn & Shepard P.C., Chestnut Ridge (Andrew J. Kehoe of counsel), for plaintiff.*695

OPINION OF THE COURT

Paul A. Victor, J.

Issue Presented

May the court authorize a payment in excess of \$500 to a referee appointed to sell property as a result of, among other things, additional services caused by several adjournments of the scheduled sale? In other words, under what circumstances may the court authorize or permit a referee appointed to sell property a fee in excess of \$500, as a result of, among other things, additional appearances caused by adjournments of the scheduled sale?

The issue is unsettled and sparsely reported; and the present dispute provides an opportunity for the court to set forth its view on the subject of the total allowable compensation of referees to sell generally. In any event, this decision may provide some guidance to the bar in a legal arena in which the

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statute and decisional law are neither explicit nor seemingly cognizant of actual practice, i.e., the routine adjournment of foreclosure sales, often without advanced notice to the referee. The court is aware that foreclosure sales are frequently scheduled and then canceled, for reasons which include bankruptcy stays, stays granted by the foreclosure court, or voluntary attempts to resolve the dispute. It appears to be the custom in this county (and many other counties) for referees to seek additional compensation of \$500 *per scheduled sale*, and for plaintiff mortgagees to voluntarily pay such compensation. Indeed, it appears routine to voluntarily pay the referee not only in the circumstance when, as here, the referee has appeared on a date scheduled for a sale and the sale does not go forward, but even in some cases when sales have merely been scheduled and then canceled, with no appearance made by the referee.

It is this custom and practice which has so far escaped review in the reported cases. Moreover, it is unclear whether the referees receiving this enhanced compensation are in compliance with the reporting requirements of part 36 of the Rules of the Chief Judge (22 NYCRR).

Background and Procedural History**2

This is a foreclosure action in which the court has appointed a referee to sell. As is commonplace in mortgage foreclosure actions, two scheduled sales were canceled by the mortgagee's counsel after the referee had confirmed the sale dates and appeared *696 at the courthouse. The reasons for these canceled sales are not disclosed in the record. The referee has been paid the \$500 fee which is set forth in the judgment.

In accordance with a custom prevalent at the bar, counsel for the plaintiff mortgagee has seen fit to communicate with the court-appointed referee to sell by letter, with a copy to the court. The letter from counsel for plaintiff states that the mortgagee has been attempting to schedule a foreclosure sale; that the referee has already been paid the amount of \$500, although no foreclosure sale has taken place;

and that, in the event the referee seeks additional compensation, an application must be made to the court. The letter concludes by stating that plaintiff will seek the appointment of a successor referee in the event the referee fails to communicate within two days with plaintiff's counsel. The court-appointed referee has responded with a letter directly to the court, with a copy to counsel for plaintiff, requesting that the court fix the fee of the referee and award additional compensation in the amount of \$1,000, i.e., \$500 for each of the scheduled sales less the \$500 already paid to the referee.

In the hope of resolving this matter expeditiously, and in view of the fact that the parties have charted their own procedural course by communicating with the court by letter as opposed to motion, this court will deem the letter forwarded to the court by the referee to constitute a motion, and determines as follows:

Law Regarding Compensation of Referees to Sell
 CPLR 8003 (b) provides the mechanism for payment of the fees of a referee appointed to sell property pursuant to a judgment of foreclosure. That section states:

"(b) Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A *697 referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in

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which event the referee may receive such additional compensation as to the court may seem proper." (Emphasis added.)

As noted above, many referees in this and other counties follow a custom and practice whereby they seek, and are often paid, \$500 per scheduled sale, whether or not a sale has taken place. Nevertheless, a referee must not assume that local custom has the force of law, or that an entitlement exists to additional compensation merely because a sale has been scheduled, or, if scheduled, canceled. A referee appointed in a foreclosure action is "an officer of the court" (**3*Jorgensen v Endicott Trust Co.*, 100 AD2d 647, 648 [3d Dept 1984]; see 7-75 Warren's Weed, New York Real Property, Judicial Sales § 75.05), and must take the utmost care not to violate CPLR 8003 (b), which limits the compensation of the referee to sell at \$500. Unless additional compensation is fixed by the court in accordance with CPLR 8003 (b), \$500 for the sale is all that can be recovered by the referee. *The amount set forth in the statute and mirrored in the judgment of the court is a total amount, and not, as many referees appear to believe, an amount routinely payable per each scheduled closing.*

The referee appointed by the court in this action appeared for the scheduled sales, and only then was advised that they were not going forward. Although not at issue in this case, this court cannot permit a referee, who has already received the maximum fee of \$500, to demand an additional fee without court approval for merely rescheduling a foreclosure sale, especially when there has been a failure to comply with CPLR 8003 (b).

It is settled that the plaintiff may agree to pay additional compensation to a referee in a foreclosure action. (*National Bank of N. Am. v New Paltz Growers*, 89 AD2d 647 [3d Dept 1982].) But unless such compensation is voluntarily paid, the referee must go forward with the sale and then seek additional compensation. "If a referee is dissatisfied with and unwilling to accept the statutory fees, and the parties, of their own volition, have failed to agree

and stipulate to an acceptable fee, his course of action is to seek relief from the court and not from the parties." (*National Bank of N. Am. v New Paltz Growers*, 89 AD2d 647, 648 [3d Dept 1982].) It is therefore evident that the awarding *698 of additional compensation must await the conclusion of the sale, as the power of the court to award additional compensation is dependent on the sale of the property in an amount of \$50,000 or more. [FN1]

Compliance with Part 36 of the Rules of the Chief Judge

The court notes that part 36 of the Rules of the Chief Judge regarding fiduciary appointments provides that "[t]he procedure set forth in this section shall not apply to the appointment of a referee to sell property *and* a referee to compute whose compensation for such appointments is not anticipated to exceed \$550." (22 NYCRR 36.4 [d] [emphasis supplied].) This language was clearly intended to obviate the filing of a notice of appointment, certification of compliance, and a statement of approval of compensation in "routine" mortgage foreclosure cases. That having been said, there are two ambiguities in the language of the court rule. The first is whether the sum of \$550 was intended to reflect an aggregate fee of \$550 (\$50 for the computation and \$500 for the sale), or whether each fee could be in an amount equal to or less than \$550. It appears reasonable to assume that the reporting requirement exempts referees from filing if the aggregate fee for both appointments does not exceed \$550, both because the rule is drafted in terms of the compensation for such "appointments" (plural), **4 and because in most instances a fee of \$550 would be the customary fee in foreclosure cases. [FN2]

The second ambiguity contained in the court rule is the use of the language "is not *anticipated* to exceed \$550." The word *699 "anticipate" leaves some question as to whether a referee who receives additional compensation is required to file a notice of appointment, certification of compliance, and a statement of approval of compensation. It may be

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argued, in any given case, that a referee paid \$50 for the computation does not "anticipate" the receipt of a fee in excess of \$500 for the sale. But clearly such an interpretation would eviscerate the rule and create an unworkable exception, exempting numerous cases from reporting requirements when a fee well in excess of \$500 is actually paid to the referee for the sale of the property.

The court concludes that in cases in which the referee's fee to compute is \$50, and the same person is appointed as referee to sell, in view of the mandate of section 36.4 (b) (2) that a judge may not approve compensation of more than \$500 unless the appropriate part 36 filings have been accomplished, this court holds that referees who receive compensation in excess of \$500 for a sale (whether pursuant to court order or by stipulation) must comply with section 36.4 and file the appropriate forms.

Conclusion

Turning to the present case, in the court's view, based on the limited facts before it, the court would be inclined to award the sum of \$500 for the actual sale which is to take place in the future, and an additional amount of \$350 for each of the closings for which the referee appeared, for a total of \$700 in addition to the statutory fee of \$500. However, any award of additional compensation, unless agreed by stipulation, must abide the actual sale and the making of an application pursuant to CPLR 8003 (b). This court is thus constrained to deny the present request by the referee as premature.

While it would be preferable to settle the issue prior to the sale, the statute is drafted somewhat inartfully, at least with respect to routine adjournments, which should be compensable when counsel has actually appeared ready to proceed with the sale. However, unless the Legislature acts to streamline the process, the court is bound by the statutory procedure.

It is ordered that the sale be scheduled and proceed as soon as practicable.

FOOTNOTES

FN1. As to the determination whether the sale price exceeded \$50,000, which is a prerequisite to an award of an additional fee, there is authority for the proposition that the amount is to be based on the amount actually bid, excluding the amount of the underlying mortgage. (*See* 2 Bergman, New York Mortgage Foreclosures § 27.03 [2] ["Referee's Fee to Sell"] [stating that purchase price is the amount bid and citing ancient lower court cases].) This court is not prepared to follow such a rule, which seems manifestly unjust, and is prepared to receive argument on the subject in an appropriate case.

FN2. Fifty dollars per diem is the statutory fee for a referee to compute pursuant to CPLR 8003 (a), which provides: "(a) Generally. A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead." In Bronx County, it is not unusual to fix compensation at \$250 in the order appointing the referee. When a referee is awarded \$250 for the computation, and subsequently appointed for the sale, there must be full compliance with the reporting requirements of part 36 because the aggregate fee for both appointments will be \$750.

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So You've Been Appointed a Referee to Compute

By Bruce J. Bergman

In the first installment of a three-part article, NCBA member Bruce Bergman starts a primer for attorneys named as referees in foreclosure actions.

For such an important task to be assigned without a "how to" handbook ingrained in the mind of all attorneys so appointed is singularly perplexing. And it is genuinely important — although as some referees have been known to observe — the fee seems somewhat archaic for an undertaking of such significance. After all, the amount calculated by the referee (with later additions if the case proceeds further) is the quantum of the mortgagor's responsibility. At the same time, it defines the confines of a mortgagee's possible recovery. In the end, it is part of the formula to determine the amount of any surplus, or the even more portentous

reverse, any deficiency.

So, with the indulgence of the relatively few who serve as referees with great regularity, some thoughts are offered about the job of referee to compute.

Some Further Perspective

The mortgage foreclosure case in a judicial foreclosure state like New York is lengthy and must proceed according to set plateaus. In general terms, these stages can be graphically set forth as follows:

- Acceleration of mortgage debt
- Ordering and analyzing foreclosure search
- Preparation and filing of summons, complaint and lis pendens
- Default or answer
- Order to appoint referee to compute (ex parte if default, by motion if appearance) or motion for summary judgment, or trial, if contested by submission of

answer

- Referee's computation (ex parte if on default); hearing if contested
- Judgment of foreclosure and sale
- Sale (conducted by referee)
- Closing (Referee is nominal grantor)

Whatever problems a foreclosure plaintiff may have previously encountered, when finally a referee to compute is appointed (roughly just past the midpoint of the case) there is most often some zeal to go forward. In other words, an efficient plaintiff does not want papers to repose on a referee's desk, nor do they wish to encounter any miscommunication. With interest accruing daily on the mortgage debt, this posture is certainly understandable.

The referee's computation, in turn, is a prerequisite to moving for the judgment of foreclosure and sale. It is the judgment which authorizes the sale -

the ultimate goal of the foreclosure action.

Conducting the sale is another, later, function of the referee. Although the referee was previously appointed in the case to compute, the referee to sell is a separate appointment made in the judgment of foreclosure and sale. Absent some major defalcation upon the referee's part, or his or her unavailability, the referee to compute is almost invariably also named in the judgment as the referee to sell.

General Powers of the Referee

R.P.A.P.L. section 1321(1) authorizes appointment of a referee to compute the sum due to plaintiff. The section further directs the referee (or the court in the rare instances where the power is retained) to also examine and report whether the mortgaged premises can be sold in parcels and if the whole sum secured by the mortgage has not become due, to report such amount as is to become due. (This authority to report as to the sum yet to become due is relevant in the instance of a partial foreclosure and is only very rarely encountered.)¹

Relevant, too, is the statutory pronouncement that an order of reference may specify or limit the powers of the referee.² A referee is appointed to compute and to report to the court, with the report to be confirmed by the court and then to become a part of the judgment.³ Significantly, where an order of reference is expressly limited to the subject of payments due on the mortgage obligation, the referee has no discretion and is bound to pursue only the directions contained in the decree⁴ or, as more recently ruled, "[a] referee has no power beyond that limited in the order of reference."⁵

Clearly, a referee appointed to compute is not thereby authorized to sell the secured property at a foreclosure sale.⁶ Although that same referee could, and likely would be appointed in the ultimate judgment of foreclosure and sale, where no judgment of foreclosure and sale has yet issued, a referee who has sold the property has exceeded his authority.⁷ Any such foreclosure sale should be rescinded.⁸

Where a defendant is an infant and has interposed a general answer by his guardian, or where any defendant is an absentee, the order of reference is required to direct the referee to take proof of the facts stated in the complaint and to examine plaintiff (or his agent) under oath as to any payments that have been made.⁹ Only where such a situation prevails, is the referee to take proof of the facts and circumstances stated in the complaint¹⁰ and to report the proofs and examinations had before him.¹¹ He is to perform his duty as though he were an examiner, but it is the court that must determine whether the facts proved and reported are sufficient to sustain the plaintiff's allegations.¹²

In the absence of an infant or absentee defendant, a referee is appointed solely to ascertain the sum due plaintiff and to determine whether the premises can be sold in parcels. There have been occasions in foreclosure actions when referees have been improperly called upon to assess other issues.¹³ Conversely, to the extent an issue does affect the sum due on the mortgage, such as in the case of the defendant's claim for credit to his mortgage account, the court may allow the referee to consider the matter.¹⁴ One power a referee appointed to compute does not possess, even if

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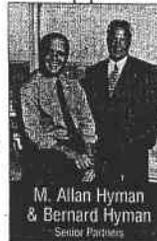
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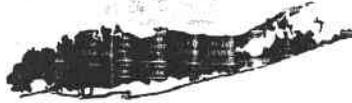
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REFEREE

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appointed to sell as well, is to apply pursuant to New York City Administrative Code §111424(f) for a release of the City's interest in the mortgage premises taken by an in rem tax foreclosure proceeding.¹⁵ Nor is a referee empowered to compute the amount of legal fees due upon foreclosure.¹⁶

Computation of Sums Due

To the extent they are legally authorized, the terms of the mortgage note and mortgage — and, of course, the facts relevant thereto — will control the referee's computation. The amount due the mortgagee will generally consist of:

- outstanding principal balance;
- interest to the date of the referee's computation;
- late charges up to acceleration;¹⁷
- amounts paid by mortgagee to protect the lien of the mortgage, such as taxes; together with
- costs and disbursements incident to the foreclosure, although the latter is computed in the bill of costs submitted to the court with the judgment of foreclosure and sale.¹⁸

The quantum of payments made on account of the mortgage lien is thus a matter to be determined by the referee.¹⁹

As to the formula for interest, many lenders have a general policy of computing on the basis of a 360 day year. Although it would be prudent for a lender to disclose such policy to a borrower in advance in some manner, perhaps in the mortgage documents themselves, the mere existence of the policy is sufficient to support a referee's computation in compliance therewith.²⁰

A referee's assessment of sums due is always subject to court scrutiny and can be recomputed by the court if warranted. This has occurred where mortgages had provisions securing amounts of indebtedness specifically lower than as computed by the referee²¹ and where a referee did not employ a prevailing rate of interest upon the maturity of the debt. In the latter case, the court concluded that it had the discretion to prescribe that prevailing rate of interest pursuant to CPR 5001(a).²² A referee was also ordered to recompute the amount due the mortgagee where the court decided that the mortgagors would not be held liable for the extra costs and interest incurred in the foreclosure caused by the mortgagee's unusual and prolonged delay in its prosecution.²³

The material in this article is adapted in part from Bergman on New York Mortgage Foreclosures, Matthew Bender & Co., Inc., Rev. 1995, and used with the kind permission of the publisher.

Mr. Bergman, a partner with Certilman Balin Adler & Hyman in East Meadow, New York, is outside counsel to a number of major lenders and servicers, and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is also on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking, and a member of the American College of Real Estate Lawyers. Mr. Bergman served four terms as Chair of NCBA's Real Property Law Committee and was a Director of this Association as well as an Associate Dean of the Academy of Law.

¹ See 1 *Bergman on New York Mortgage Foreclosures*, Chapter 17, Partial Foreclosure, Matthew Bender & Co., Inc. (Rev. 1995).

² CPLR 4311.

³ *Suarthout v. Cutis*, 4 N.Y. 415 (1850); *Weyand v. Park Terrace Co.*, 135 A.D. 821, 120 N.Y.S. 192 (2d Dept. 1909), rev'd on other grounds, 202 N.Y. 231 (1911).

⁴ *McCrackan v. Valentine*, 9 N.Y. 42 (1853).

⁵ *L.H. Feder Corp. v. Bozkurtian*, 48 A.D.2d 701, 368 N.Y.S.2d 247 (2d Dept. 1975).

⁶ *New York State Mort. Loan Enforcement and Admin. Corp. v. New Colony Camp Houses, Inc.*, 187 A.D.2d 955, 590 N.Y.S.2d 635 (4th Dept. 1992), citing *Hartsfield v. City of New York, Div. Of Real Prop.*, 146 A.D.2d 141, 539 N.Y.S.2d 896.

⁷ *New York State Mort. Loan Enforcement and Admin. Corp. v. New Colony Camp Houses, Inc.*, 187 A.D.2d 955, 590 N.Y.S.2d 635 (4th Dept. 1992).

⁸ *Id.*

⁹ R.P.A.P.L. §1321(1); *Smith v. Warringer*, 41 Misc. 94, 83 N.Y.S. 655 (1903); *Wolcott v. Weaver*, 3 How. Pr. 159 (1847).

¹⁰ *Brody, Adler & Koch Co. v. Hochstadter*, 160 A.D. 310, 144 N.Y.S. 631 (1st Dept. 1913); *Wolcott v. Weaver*, 3 How. Pr. 159 (1847).

¹¹ *Wolcott v. Weaver*, 3 How. Pr. 159 (1847).

¹² *Id.*

¹³ See, e.g., *Jasie v. Greenwich Village Dev. Corp.*, 247 A.D. 350, 287 N.Y.S. 425 (1st Dept. 1936) (referee not authorized to report on whether plaintiffs had sufficient funds to pay interest due on mortgage); *Sternbach v. Friedman*, 75 A.D. 418, 78 N.Y.S. 318 (1st Dept. 1902) (referee properly refused to report on partnership accounts in foreclosure of partnership property).

¹⁴ *Federal Nat'l Mortgage Ass'n v. Connelly*, 84 A.D.2d 805, 444 N.Y.S.2d 147 (2d Dept. 1981); *Crest/Good Mfg. Co., Inc. v. Baumann*, 160 A.D.2d 831, 554 N.Y.S.2d 264 (2d Dept. 1990).

¹⁵ *Hartsfield v. City of New York, Div. Of Real Property*, 146 A.D.2d 141, 539 N.Y.S.2d 896 (1st Dept. 1989).

¹⁶ *Emery v. Fishmarket Inn of Granite Springs*, 173 A.D.2d 765, 570 N.Y.S.2d 821 (2d Dept. 1991).

¹⁷ *Centerbank v. D'Assaro*, 158 Misc. 2d 92, 600 N.Y.S.2d 1015 (1993); *Barrow v. Rock-springs Management Co.*, 169 A.D.2d 585, 564 N.Y.S.2d 437 (1st Dept. 1991); *Trustco Bank of New York v. 37 Clark Street*, 157 Misc. 2d 843, 599 N.Y.S.2d 404 (1993); *Wain v. Polizzi*, N.Y.L.J., Oct. 25, 1993, at 24, col. 3 (Sup. Ct., N.Y. Co., Cahn, J.). See also *Security Mut. Life Ins. Co. of N.Y. v. Contemporary Real Estate Assoc.*, 979 F.2d 329 (1992); *Crest Sav. & Loan Ass'n v. Mason*, 243 N.J. Super. 646, 581 A.2d 120 (1990); RPL § 254-b(1). For a more extensive review of late charges and applicable law, see Bergman, "Confirmed at Last — Yes Virginia, There are Late Charges, and in New York Too," N.Y.L.J., Jan. 26, 1994, at 5 col. 2.

¹⁸ *Dollar Fed. Sav. & Loan Ass'n v. Herbert Kallen, Inc.*, 91 A.D.2d 601, 456 N.Y.S.2d 430 (2d Dept. 1982), citing *Grady v. Utica Mut. Ins. Co.*, 69 A.D.2d 668, 419 N.Y.S.2d 565 (2d Dept. 1979).

¹⁹ *Berkowitz v. D.D. Holding Corp.*, 229 A.D. 443, 242 N.Y.S. 615 (1st Dept. 1930).

²⁰ *CitiBank, N.A. v. Coddon*, N.Y.L.J., Apr. 21, 1988, at 14, col. 6 (Sup. Ct. N.Y. Co., Kirschenbaum, J.).

²¹ *Telmak, Inc. v. National Commercial Bank & Trust Co.*, 73 A.D.2d 777, 423 N.Y.S.2d 531 (3d Dept. 1979).

²² *Dime Sav. Bank of Williamsburgh v. Mah-tah Realty Corp.*, N.Y.L.J., Oct. 28, 1975, at 5, col. 3 (Sup. Ct. N.Y. Co., Tyler, J.), citing *Matter of Grove*, 12 Misc.2d 727, 177 N.Y.S.2d 317.

²³ *Dollar Fed. Sav. & Loan Ass'n v. Herbert Kallen, Inc.*, 91 A.D.2d 601, 456 N.Y.S.2d 430 (2d Dept. 1982). ♦

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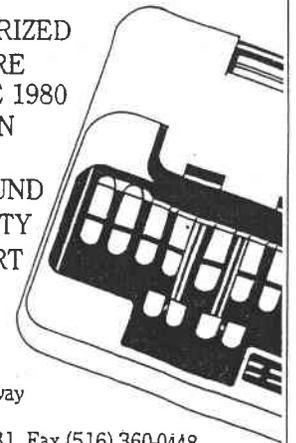
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So You've Been Appointed a Referee to Compute

By Bruce J. Bergman



In the second installment of a three-part article, NCBA member Bruce Bergman continues a primer for attorneys named as referees in foreclosure actions.

Interest

In computing the sum due upon the mortgage, one of the key assessments is the interest accruing upon the principal balance. While the mechanics of the computation are relatively straightforward, the principles for determining what rate is applicable at each of the various stages is somewhat more elusive.

From the time a mortgagor defaults and until maturity is declared by acceleration, the applicable rate of interest is that provided in the mortgage contract.¹ Subsequent to the acceleration and until the judgment of foreclosure and sale issues, the statutory legal rate of interest pursuant to CPR §5004 (i.e., 9%) is applicable, but only if the mortgage contract is silent on the point.² Where the mortgage contract makes provision for the applicable rate of interest subsequent to maturity, it is to be enforced. That rate would therefore be applicable to the period of time between the date of acceleration and the date of issuance of the judgment of foreclosure.³ That is to say, a foreclosing plaintiff is entitled to prejudgment interest accrued until the date the judgment of foreclosure and sale is entered.⁴ Because there is appropriate widespread general recognition that the "legal" rate of interest in New York is 16%, where a default rate of interest may exceed that level - as frequently it will - referees may become dis-

comfited by authorizing such a rate. As noted though, the actuality is that the rate agreed upon by the parties will control and is clearly authorized by case law.⁵ Moreover, any rate of interest is authorized,⁶ and will not run afoul of usury proscriptions.⁷

Although the referee need not address in his computations the question of what rate of interest is to be borne by the ultimate judgment of foreclosure, the principle is nevertheless an important one. (It has relevance to the figures in the referee's report of sale.) That rate will govern the interest accrued from the date of the issuance of the judgment until the date of the foreclosure sale (and thereafter if the terms of sale so provide). Because a mortgage merges with the judgment of foreclosure and sale, the applicable rate for that time period is the statutory legal rate (9%).⁸

However, the legal rate may not necessarily prevail even after judgment of foreclosure and sale has been entered; the issue will ultimately depend upon the clarity of the applicable language in the mortgage.⁹ Where the parties intend to depart from the otherwise established principle that the contract merges into the judgment, the contract rate can be applied.¹⁰ However, the contract provision must be clear and unequivocal and in the absence of such clarity, the judgment rate must apply.¹¹

Late Charges

Where the mortgage makes provision for collection of late charges, they should form a component of the referee's computation.¹² They are not compensable, however, beyond the time of acceleration.¹³ Some authority urges that it is not compensable upon a balloon payment which

has matured.¹⁴

The percentage of the overdue payment attributable to the late charge is confined by New York statute to two percent where the premises secured are a one-to-six family dwelling and where the grace period was no less than fifteen days.¹⁵ State statutory constraints do not apply, however, to loans insured by the federal housing commissioner,¹⁶ loans insured or guaranteed pursuant to the federal Servicemen's Readjustment Act of 1944¹⁷ or to federal savings associations.¹⁸ Nor does state law control when its application would be inconsistent with any other federal law or regulation.¹⁹

The material in this article is adapted in part from Bergman on New York Mortgage Foreclosures, Matthew Bender & Co., Inc., Rev. 1995, and used with the kind permission of the publisher.

¹ *Title Guarantee & Trust Co. v. 2846 Brigs Ave., Inc.*, 283 N.Y. 512, 29 N.E.2d 66, reh'g denied, 284 N.Y. 685, 30 N.E.2d 725 (1940); *Ferris v. Hard*, 135 N.Y. 354, 32 N.E. 129 (1892); *O'Brien v. Young*, 95 N.Y. 428 (1884); *European American Bank v. Peddlers Pond Holding Corp.*, 185 A.D.2d 805, 586 N.Y.S.2d 637 (2d Dept. 1992); *Emery v. Fishmarket Inn of Granite Springs*, 173 A.D.2d 765, 570 N.Y.S.2d 821 (2d Dept. 1991); *Ward v. Walkley*, 143 A.D.2d 415, 532 N.Y.S.2d 426 (2d Dept. 1988).

² *Metropolitan Sav. Bank v. Tuttle*, 290 N.Y. 497, 49 N.E.2d 983, reh'g denied, 291 N.Y. 634, 50 N.E. 1018 (1943); *Title Guarantee & Trust Co. v. 2846 Brigs Ave., Inc.*, 283 N.Y. 512, 29 N.E.2d 66, reh'g denied, 284 N.Y. 685, 30 N.E.2d 725 (1940); *Ferris v. Hard*, 135 N.Y. 354, 32 N.E. 129 (1892); *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230 (2d Dept. 1992); *Ward v. Walkley*, 143 A.D.2d 415, 532 N.Y.S.2d 426 (2d Dept. 1988); *Levy v. Par 3 Golf Dev. Corp.*, 74 A.D.2d 865, 426 N.Y.S. 2d 49 (2d Dept. 1980); *Jamaica Sav. Bank v. Cohan*, 38 A.D.2d 841, 330 N.Y.S.2d 119 (2d Dept. 1972).

³ *European Am. Bank v. Peddlers Pond Holding Corp.*, 185 A.D.2d 805, 586 N.Y.S.2d 637 (2d Dept. 1992); *Emery v. Fishmarket Inn of Granite Springs*, 173 A.D.2d 765, 570 N.Y.S.2d

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⁴ *Petito v. Piffath*, 199 A.D.2d 252, 604 N.Y.S.2d 591 (2d Dept. 1993), citing *Kenneth Pregno Agency v. Letterese*, 112 A.D.2d 1032, 492 N.Y.S.2d 824; *Schwally v. Bergstol*, 97 A.D.2d 540, 468 N.Y.S.2d 47.

⁵ See Bergman on New York Mortgage Foreclosures, §1.11[1], Matthew Bender & Co., Inc. (Rev. 1995).

⁶ See Bergman on New York Mortgage Foreclosures, §6.02[3][g], Matthew Bender & Co., Inc. (Rev. 1995).

⁷ Id.

⁸ See CPR 5004; *Taylor v. Wing*, 84 N.Y. 471 (1881); *Ward v. Walkley*, 143 A.D.2d 415, 532 N.Y.S.2d 426 (2d Dept. 1988); *CitiBank v. Liebowitz*, 110 A.D.2d 615, 487 N.Y.S.2d 368 (2d Dept. 1985); *Schwally v. Bergstol*, 97 A.D.2d 540, 468 N.Y.S.2d 47 (2d Dept. 1983); *Astoria Fed. Sav. & Loan Ass'n v. Rambalakis*, 49 A.D.2d 715, 372 N.Y.S.2d 689 (2d Dept. 1975).

⁹ *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dept. 1991).

¹⁰ Id.

¹¹ Id.

¹² *Barrow v. Rocksprings Management Co.*, 169 A.D.2d 585, 564 N.Y.S.2d 437 (1st Dept. 1991); *Centerbank v. D'Assaro*, 158 Misc.2d 92, 600 N.Y.S.2d 1015 (1993).

¹³ *Centerbank v. D'Assaro*, 158 Misc.2d 92, 600 N.Y.S.2d 1015 (1993).

¹⁴ *Trustco Bank of New York v. 37 Clark Street, Inc.*, 157 Misc.2d 843, 599 N.Y.S.2d 404 (1993).

¹⁵ RPL §254-b.

¹⁶ RPL §254-b(2).

¹⁷ Id.

¹⁸ 12 CFR §§545, 34(b); 12 CFR §545.2.

¹⁹ RPL §254-b(2). ♦

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So You've Been Appointed a Referee to Compute

By Bruce J. Bergman

In the third installment of a five-part article, NCBA member Bruce Bergman continues his primer for attorneys named as referees in foreclosure actions.

Computation Procedure When Notice Not Required

CPLR §4313 mandates that the court clerk transmit a copy of the order of reference to the referee. Nevertheless, upon obtaining the order of reference, it is customary for plaintiff's counsel to send a copy to the referee. Alternatively, this may be postponed until plaintiff's counsel can submit to the referee all at once: the order of reference, the referee's oath of office and the plaintiff's report of the amount due the plaintiff.

When no party is entitled to notice and when no defendants are infants or absentees, a hearing is not required. In that event, plaintiff's counsel prepares and submits to the referee the oath and report of the amount due. The report is typically supported by a schedule of the documentary evidence and any "testimony" (i.e., affidavits in the absence of a hearing) presented before the referee. This schedule either can itself set forth the proposed sums due the plaintiff, or those sums can be contained in a further schedule often denominated as a "statement."

The Referee's Hearing

Where defendants have appeared and have not waived the right to a hearing, a hearing must be held, unless such defendants as are entitled to notice subsequently waive the right to a hearing. Moreover, even if defendants have otherwise

waived a notice of hearing, if any defendants are infants or absentees, a hearing may be necessary in order to enable the referee to take proof of the facts.

Although the court has authority to appoint a referee to compute the sum due upon a mortgage, and can by the order of reference define the breadth of the reference and set forth the referee's duties pursuant to CPLR § 4311, unless restrictions are imposed, the referee has the powers enumerated in CPLR Article 43.¹ One of the procedures therein set forth is the conducting of a hearing² upon notice. Where a referee's hearing is required, or when held but notice may not have been given to a party otherwise entitled thereto, the resultant referee's report can be voided.³ If, however, the hearing would not have genuinely been necessary, a subsequent attack on neglect to hold the hearing can be rejected.⁴

Where a hearing should have been conducted, but after the fact it can be determined that the error in not scheduling a hearing was harmless, the report will be upheld.⁵ Critically, a referee's findings are only advisory and have no binding effect, with the court retaining the ultimate tribunal.⁶ The court is empowered to reject a report, make its own findings, take testimony or order a new referee's hearing.⁷ Consequently, if upon application for judgment of foreclosure and sale and confirmation of the referee's computation a party denied a hearing before the referee is afforded the chance to offer its position to the court, failure to demonstrate why prejudice resulted from inability to make the pre-

Continued on page 12

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sentation to the referee precludes necessity to remit anew to the referee.⁸

Conversely, where a required hearing is held, and there is a party who defaults in attendance, but is unable to offer a reasonable excuse and a meritorious defense to vacate the default, the hearing results will be confirmed.⁹ And in the face of numerous defaults and delays, there is no burden upon the referee to have adjourned the hearing.¹⁰

A referee should be mindful that CPLR 4318 requires that unless the order of reference otherwise specifies, the trial is to be conducted by the referee in the same manner as a court without a jury. Other than the conduct prescribed in CPLR 4318, formalities concerning the hearing are limited.

1 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (3d Dept. 1993).

2 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (3d Dept. 1993); CPR §4320[a].

3 *Community Sav. Bank v. Shadd*, 105 A.D.2d 1063, 482 N.Y.S.2d 162 (4th Dept. 1984); *Reconstruction Finance Corp. v. Metro-*

politan Steel Products Corp., 31 N.Y.S.2d 85 (1941), *aff'd*, 262 A.D. 1034, 31 N.Y.S.2d 659 (2d Dept. 1941), *leave to appeal denied*, 263 A.D. 725, 31 N.Y.S.2d 659 (2d Dept. 1941); *Connecticut General Life Ins. Co. v. Parker, N.Y.L.J.*, Sept. 8, 1967, at 18, col. 5 (Sup. Ct. Westchester Co., Gagliardi, J.).

4 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (1993); *LBV Properties v. Greenport Dev. Co.*, 188 A.D.2d 588, 591 N.Y.S.2d 70 (2d Dept. 1992).

5 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (2d Dept. 1993).

6 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (2d Dept. 1993).

7 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (2d Dept. 1993).

8 *Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677, 599 N.Y.S.2d 340 (2d Dept. 1993).

9 *Troy Sav. Bank v. Marcy Place Realty Corp.*, 602 N.Y.S.2d 866 (1st Dept. 1993).

10 *Troy Sav. Bank v. Marcy Place Realty Corp.*, 602 N.Y.S.2d 866 (1st Dept. 1993).

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So You've Been Appointed a Referee to Compute

By Bruce J. Bergman

In the fourth installment of a five-part article, NCBA member Bruce Bergman continues his primer for attorneys named as referees in foreclosure actions.

Venue

The hearing is to be held in the county where the venue of the foreclosure action has been placed,¹ but a defendant's failure to timely object to a referee's hearing in another county waives the defect.²

Notice

The requirements as to notice are usually as agreed upon by the parties and the referee. Three days notice of the hearing has been held sufficient since it is not a motion and therefore not governed by motion rules.³ Actual notice of a referee's hearing six days prior to the hearing has been adjudged adequate notice without apparently weighing the three-day provision.⁴ That a notice of the referee's hearing arrived before a copy of the order of reference does not affect the viability of the referee's hearing.⁵ Where plaintiff's counsel testifies that he mailed notice of the referee's hearing, the presumption of mailing is not rebutted merely by defendants' testimony that it was not received.⁶

If there is any indication that a party could be entitled to notice, it appears that the courts will opt to do all that is necessary to ensure an equitable result. Clearly, where a defendant appears in the action but is not given notice of the

proceedings, the referee's computation and the subsequent judgment could be invalid.⁷ Moreover, where a plaintiff allows a defendant to interpose a late answer after the referee has completed his computation, that defendant can have the right to be heard by the referee.⁸ Still further, where a dispute arose over the reasonableness of insurance premiums advanced by the mortgagee and the defendant was denied notice and opportunity to be heard on that issue at the referee's hearing, a rehearing was ordered.⁹

¹ *Troy Sav. Bank v. Marcy Place Realty Corp.*, 602 N.Y.S. 2d 866 (1st Dept. 1993).

² *Mortgage Comm'n v. Bellucci*, 191 Misc. 107, 291 N.Y.C. 267 (1936).

³ *Isaacson v. Karpe*, 84 A.D.2d 868, 445 N.Y.S.2d 37 (3d Dept. 1981).

⁴ *Bowery Sav. Bank v. 130 East 72nd St. Realty Corp.*, 180 A.D.2d 559, 580 N.Y.S.2d 264 (1st Dept. 1992).

⁵ *Id.*

⁶ *Morgan v. Long Beach Entertainment Complex, Inc.*, 125 A.D.2d 378, 509 N.Y.S.2d 105 (2d Dept. 1986).

⁷ *Connecticut General Life Ins. Co. v. Parker*, N.Y.L.J., Sept. 8, 1967, at 18, col. 5 (Sup. Ct. Westchester Co., Gagliardi, J.).

⁸ *Reconstruction Finance Corp. v. Metropolitan Steel Products Corp.*, 31 N.Y.S.2d 85 (1941), aff'd, 262 A.D. 1034, 31 N.Y.S.2d 659 (2d Dept. 1941), leave to appeal denied, 263 A.D. 725, 31 N.Y.S.2d 659 (2d Dept. 1941).

⁹ *Community Sav. Bank v. Shadd*, 105 A.D.2d 1063, 482 N.Y.S.2d 162 (4th Dept. 1984). ♦

CPLR

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error is a jurisdictional defect, requiring dismissal. OK, you say, plaintiff can still use the 6-month recommencement statute [CPLR 205], right? Wrong! As the case was not timely commenced against X, plaintiff may not utilize CPLR 205(a). *Brown v. Marine Midland Bank, NA*, ___ A.D.2d ___, 637 NYS2d 535 (4th Dept. 1996).

[Note: Had plaintiff paid another \$170 and filed the second summons

and complaint with the County Clerk prior to the termination of the statutory period of limitations, plaintiff would have been fine. Plaintiff could have subsequently moved to consolidate the two actions. Although there is talk in Albany about loosening this requirement, of prior court permission, so far the statute has not been changed. Be forewarned.]

Editor's note: Joel Asurch is the Corporation Counsel for the City of Long Beach, the Treasurer of this Association and a Senior Editor of the Nassau Lawyer. ♦

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So You've Been Appointed a Referee to Compute



By Bruce J. Bergman
In the final installment of a five-part article, NCBA member Bruce Bergman concludes his primer for attorneys named as referees in foreclosure actions.
Evidence

Where oral proof is taken, it need not be supported by documentary evidence,¹ although as a practical matter an advocate would be remiss in not producing such documentary evidence as was available. Introduction of evidence as to the mortgage contract and competent testimony as to the sum due establishes a prima facie case.² More specifically, introduction of the bond and mortgage into evidence establishes a prima facie case of both ownership of the document and non-payment.³ Once the prima facie case is established, even though a defendant avers payment of the debt, where plaintiff disputes this and there is insufficient evidence that the defendant had the ability to make such a payment, the defendant's testimony can be found to be lacking in credibility.⁴ A defendant's failure to object or neglect to move to strike that which might be inadmissible is fatal to opposing a later motion to confirm the referee's report. This is because where a defendant first raises the issue of the sufficiency of the proof in opposing the plaintiff's motion to confirm, the issue is beyond the scope of the court's review of the record.⁵

Referee's Fee to Compute

A referee is entitled to \$50 for each day spent in the business of the reference, unless the court fixes a different compensation, or if all parties who have appeared so stipulate.⁶ Although seldom encountered in a mortgage foreclosure case, there can be circumstances where a sum in excess of \$50 per day could be awarded to a referee.⁷ In a case where a referee labored for 46 days, the court ruled itself authorized to fix a fee fairly compensating the referee, a power existing even at the conclusion of the reference.⁸ Based on complexity of issues, volume of testimony adduced and the thoroughness of the referee's report, compensation based on an hourly rate was awarded.⁹

Of significant consequence both to the referee and the party who will bear the burden of the referee's fee—almost invariably the mortgagor in the sense that this fee is added on to the mortgage debt—is the need for the referee seeking a sum in excess of the statutory \$50 per day to proceed with care and foresight if a larger sum is to be obtained. First, a referee must be mindful that a dispute over fees can be grounds for disqualification¹⁰ and where he seeks relief from the parties, rather than the court, he can be removed at the instance of the party resisting the demand for a higher fee.¹¹ Thus, a referee who puts the parties in a position of either acceding to or denying his request for a greater fee can be removed.¹²

Notwithstanding the possible jeopardy to his position, the referee may wish to seek additional compensation. In order to accomplish this, the referee must make application to the court and the motion must be timely made.¹³ More particularly, unless the order of reference states the method of computation for the referee's fee, or the parties stipulate to a different arrangement, compensation will be limited to the statutory \$50 per day.¹⁴ Indeed, the setting of a different rate would have to occur at some preliminary point in the proceeding.¹⁵ While this rule would not apply to the referee appointed to sell the property¹⁶ or to the referee in a surplus money proceeding,¹⁷ it means that a referee, who believes that more than the statutory compensation to compute will be warranted, must either apply to the court for a greater sum before his duties are undertaken, or secure agreement of the parties before or after the computation.

Practical Recommendations on Tasks and Fees

A referee appointed to sell or to supervise a surplus money proceeding may be entitled to obtain recompense on a quantum meruit basis.¹⁸ In contrast, the referee to compute is almost invariably confined to the statutory amount of compensation, \$50 per day.¹⁹

Where there have been no appearances in the action, the oath and report will simply be presented to the referee by plaintiff's counsel for review and signing. Comparing those documents to the pleadings should not be especially time consuming and although \$50 (under the reasonable assumption that this is not more than one day's work) is hardly generous compensation, it may be viewed as a public service and is the responsibility undertaken if the referee accepts the appointment.

To avoid the fee issue becoming an item of contention, what a referee should not do is assume that he is appointed to try the entire case—although he would at least take proof of the facts where infants or absentees are named and served as defendants. Rather, the referee should read the order of appointment to determine precisely the purview of his tasks. As a matter of course, he is appointed solely to compute the sums due plaintiff and to determine whether the property is to be sold in one parcel or multiple parcels. The order controls, and most often limits the referee's efforts only to those items.

A referee should not assume that he must travel to the court to review the entire file to assess the efficacy of service or a host of other potential issues. If he does so, the most compensation he can receive is still \$50 per day,²⁰ and that compensation would be available only for services rendered within the purview of the order. Exploring extraneous matters would not be authorized and a demand for a further fee therefore would likely encounter resistance. This remains the case when a hearing takes place. Such a hearing would not usually encompass more than a few hours, but even when it does, the referee is still confined to \$50 per day.²¹

With the admonition that a referee should meticulously comply with his order of appointment, it is difficult to imagine a case where the referee could determine in advance that quantum meruit would greatly exceed the statutory fee sufficient to warrant steps to assure the granting of a higher fee. Assuming such prescience, however, and further that the order of appointment has not already provided for different compensation, the referee has two choices.

First, he might seek stipulation of the parties. If any party is aggrieved by the request, though, it could compromise the referee's position and present grounds for removal. Even where the parties are not disturbed by the request, compliance is not likely to be forthcoming except in extraordinary circumstances where it is obvious that the referee will be grossly undercompensated for valuable necessary services.

From a defendant's point of view, whatever a referee is paid is a taxable disbursement to be encompassed in the bill of costs and added to the sum due in the judgment of foreclosure and sale. If the case is settled, defendant will be called upon to pay this expense. Even if not settled, it still impacts adversely—at least on a monetary basis—since it increases the sum due to plaintiff, therefore serving to decrease any possible surplus and increase the quantum of any deficiency, albeit marginally. Thus, unless a defendant is persuaded by an appeal to his sense of fairness, he would probably view the request with disfavor.

Only slightly more comfort might be forthcoming from the plaintiff. While the plaintiff may not normally be the party

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The FBI report of the victim's criminal record was neither new evidence under CPL 330.30(3), and was not such evidence as "probably" would have changed the result if a new trial were granted, nor did his report constitute *Brady* material.

CASE SUMMARY

PEOPLE V. WHITFIELD,
___ A.D.2d ___, 634 N.Y.S.2d 315
(4th Dept., November 1995).

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CPLR

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ment against him on a loan for over \$25,000, entered in Supreme Court some seven months pre-Bankruptcy petition. Instead of moving in the Bankruptcy Court to avoid the lien as impinging upon the homestead exemption (could there have been too much equity in the house?), the debtor moved in the Supreme Court — after receiving his discharge in bankruptcy — for an order discharging the judgment under Debtor and Creditor Law Section 150.

IAS Part (Justice Burke) granted the debtor a qualified (read: meaningful to title company) discharge, reasoning that there was nothing in the bankruptcy proceeding to show that the lien (created prior to the bankruptcy) was affected by the discharge in bankruptcy. The debtor appealed, but the Appellate Division affirmed. *Bank of New York v. Magri*, A.D.2d 641 N.Y.S.2d 68 (2d Dept. 1996) (Thompson, JP and Sullivan, Pizzuto and McGinity, JJ). [Moral: just because the debt is discharged, don't assume that the lien is discharged as well.

Don't be in the position of having to explain to your client that while the creditor can't collect the judgment from his/her paycheck, s/he can from the sale of the house.)

When Is a Law Secretary Not the Clerk of the Court? [CPLR 304]

Petitioner (an aggrieved property owner seeking a reversal of zoning variance denial) waited until the last day of the statute of limitations to file an Order to Show Cause and Petition. On that day, Petitioner purchased an index number and filed the proposed Order to Show Cause with the Clerk of the Supreme Court.

Later that day, the Order to Show Cause was signed and a TRO was struck. Apparently, the original papers remained with the IAS justice's law secretary. Neither the original nor a conformed copy of the Order to Show Cause was filed with the clerk of the court.

Respondents moved to dismiss the petition for failure to comply with CPLR 304 [a special proceeding "is commenced by filing a notice of petition or order to

show cause and a petition with the clerk of the court in the county in which the special proceeding is brought"]. IAS Part dismissed the petition and petitioner appealed. Result?

Affirmed. The Second Department rejected the argument that a law secretary to the IAS judge is the equivalent of "the clerk of the court." "[W]e find such a proffered interpretation to be contrary to the plain language of CPLR 304, the overwhelming common understanding of attorneys as is evidenced by everyday practice, and the opinions of informed commentators." Secondly, the Court reiterated its stance that strict construction of CPLR 304 requires the Order to Show Cause "as executed" to be filed with the clerk of the court. Failure to file (or filing the unexecuted Order to Show Cause, as Petitioner's counsel did) was a jurisdictional defect. *Matter of Fry v. Village of Tarrytown*, AD2d 641 N.Y.S.2d 54 (2d Dept. 1996) (Ritter, JP and Pizzuto, Santucci and Krausman, JJ). [Moral: To be safe after reading this case, file a conformed copy of the Order to Show Cause used to commence a special proceeding

with the County Clerk. I would endorse on the copy to be served, underneath the language concerning "filing with the Clerk of the Court," language which indicates that "conformed copy of OSC filed with clerk of Court on ____." Then, in your affidavit of service, indicate that the conformed copy was filed and served. Personally, I think this resembles the caucus race in Wonderland (excessive work resulting from a revenue raising statute) — but I am only a voice in the wilderness. If you have any thoughts on this situation, I'd welcome the correspondence.]

Bar Notes

Speaking of correspondence, thank you Bert Bauman for alerting me to the Governor's signing of a bill allowing parties to be added by stipulation (without court order) [see my April column re: CPLR 305(a) and 1003]. Please keep those cards and letters coming — and more importantly, have a wonderful summer! See you in September (unless the Yankees exercise my option or the calls of Tahiti become overpowering). ♦

REFEREE

Continued from page 9

responsible for the referee's fee, the plaintiff does have to advance the sum. But then, the plaintiff lender has some vested interest in being viewed kindly by referees, especially those appointed with some regularity. This, incidentally, is one of the reasons why even asking for a greater fee could be a ground to remove the referee. So, if the request has any reasonable foundation, plaintiff may be marginally more amenable than the defendant.

In the event the stipulation approach does not elicit the desired result, the other option available to the referee is a motion to fix greater compensation. However, this motion must be made before the reference

is actually undertaken.²² Moving after the computation will be unavailing. Again, how a referee would have the foresight and a valid basis to fix a higher fee in advance appears to be perplexing in most instances.

1. *Johnson v. Frederick*, 219 N.Y.S.2d 482 (Sup. Ct. 1961).
2. *Kenyon v. Spinelli*, 135 A.D.2d 503, 522 N.Y.S.2d 11, (2d Dept. 1987); *Northeast Son v. Rodriguez*, 159 A.D.2d 820, 553 N.Y.S.2d 490 (3d Dept. 1990).
3. *Isaacson v. Karpe*, 84 A.D.2d 868, 445 N.Y.S.2d 37 (3d Dept. 1981).
4. *Kenyon v. Spinelli*, 135 A.D.2d 503, 522 N.Y.S.2d 11, (2d Dept. 1987).
5. *Id.*, citing *Globe-Brite Elec. Serv. Corp. v. Frecal Restaurant Corp.*, 56 A.D.2d 909, 392 N.Y.S.2d 695, motion for leave to appeal denied, 42 N.Y.2d 807, 368 N.E.2d 45.

6. CPLR 8003(a). The referee's compensation to sell is governed by CPLR 8003(b) which provides a fee of \$200, unless the property sold for \$10,000 or more, in which event such compensation as the court deems proper can be awarded.

7. Such a holding, albeit not in a mortgage foreclosure case, and with a vigorous dissent, is found in *Blake Terrace Assoc. v. Sommers*, 176 A.D.2d 394, 574 N.Y.S.2d 101 (3d Dept. 1991).

8. *Blake Terrace Assoc. v. Sommers*, 176 A.D.2d 394, 574 N.Y.S.2d 101 (3d Dept. 1991), citing *Matter of O'Dwyer v. Robson*, 103 A.D.2d 1036, 478 N.Y.S.2d 407.

But see *Kolomick v. Kolomick*, 133 A.D.2d 69, 518 N.Y.S.2d 413 (2d Dept.); *Neuman v. Syosset Hosp. Anesthesia Group*, 112 A.D.2d 1029, 493 N.Y.S.2d 26 (2d Dept. 1985); *Shorr v. Marwill Realty Corp.*, 258 A.D. 33, 15 N.Y.S.2d 528 (1st Dept. 1959).

9. *Blake Terrace Assoc. v. Sommers*, 176 A.D.2d 394, 574 N.Y.S.2d 101 (3d Dept. 1991).

10. See *Neuman v. Syosset Hosp. Anesthesia Group, P.C.*, 112 A.D.2d 1029, 493 N.Y.S.2d 26 (2d Dept. 1985); *Shorr v. Marwill Realty Corp.*, 258 A.D. 33, 15 N.Y.S.2d 528 (1st Dept. 1959).

11. *National Bank of N. Am. v. New Paltz Grocers, Inc.*, 89 A.D.2d 647, 453 N.Y.S.2d 124 (3d Dept. 1982).

12. *Miles Labs., Inc. v. American Pharmaceutical Co.*, 261 A.D. 108, 24 N.Y.S.2d 405 (1st Dept. 1941); *Roberts v. Evans*, 247 A.D. 409, 287 N.Y.S. 828 (3d Dept. 1936).

13. *National Bank of N. Am. v. New Paltz Grocers, Inc.*, 89 A.D.2d 647, 453 N.Y.S.2d 124 (3d Dept. 1982); *Hewig v. Kleinman*, 282 A.D. 1001, 125 N.Y.S.2d 712 (4th Dept. 1953), leave to appeal denied, 283 A.D. 767, 128 N.Y.S.2d 584 (4th Dept. 1954).

14. *Neuman v. Syosset Hosp. Anesthesia Group, P.C.*, 112 A.D.2d 1029, 493 N.Y.S.2d 26 (2d Dept. 1985).

15. *Scher v. Apt*, 100 A.D.2d 582, 473 N.Y.S.2d 521 (2d Dept. 1984), leave to appeal dismissed, 63 N.Y.2d 866, 482 N.Y.S.2d 271 (1984); *National*

Bank of N. Am. v. New Paltz Grocers, Inc., 89 A.D.2d 647, 453 N.Y.S.2d 124 (3d Dept. 1982); *Rosen Trust v. Rosen*, 53 A.D.2d 342, 386 N.Y.S.2d 491 (4th Dept. 1976), aff'd, 43 N.Y.2d 693, 401 N.Y.S.2d 66 (1977); contra, *Blake Terrace Assoc. v. Sommers*, 176 A.D.2d 394, 574 N.Y.S.2d 101 (3d Dept. 1991).

16. CPR 8003(b).

17. R.P.A.L. § 1361(2).

18. *Barclays Bank of New York v. Bayport Assocs., N.Y.L.I.*, May 18, 1994, at 26. Col. 4 (Sup. Ct. Suff. Co., Underwood, J.).

19. CPLR 8003(a).

20. Except as discussed, infra.

21. CPLR 8003(a).

22. *Scher v. Apt*, 100 A.D.2d 582, 473 N.Y.S.2d 521 (2d Dept. 1984), leave to appeal dismissed, 63 N.Y.2d 866, 482 N.Y.S.2d 271 (1984); *National Bank of N. Am. v. New Paltz Grocers, Inc.*, 89 A.D.2d 647, 453 N.Y.S.2d 124 (3d Dept. 1982).

The material in this article is adapted in part from Bergman on New York Mortgage Foreclosures, Matthew Bender & Co., Inc., Rev. 1995, and used with the kind permission of the publisher.

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Referee Fees

Courts Clarify Issue of Extra Payment

BY BRUCE J. BERGMAN

When law and custom clash, law will likely prevail. But if they do not intersect, informal custom will remain uncircumscribed by legal requirements. Until recently, this was the situation affecting fees for referees to sell in mortgage foreclosure actions and it led to some abuses not addressed (and now tacitly exposed) by case law.¹

The problem that existed - and likely quietly continues - is best understood with a very brief introduction to the basics. Referees are paid at two stages of a foreclosure action: computation and sale. Pursuant to CPLR §8003(a), the fee to compute is \$50 for each day devoted to the reference, meaning for the overwhelming number of foreclosures that fee is \$50. Because such compensation is understandably viewed as penurious, and because the statute empowers the court to provide for a different fee, some courts routinely fix the fee in the order of reference at \$100 or \$250. All parties can also consent to a greater fee to the referee.²

But compensation to compute is not the area of concern. Rather it is the fee to sell which, per CPLR §8003(b), is \$500, so long as the amount bid at the sale was \$50,000 or more. A critical part of the statute is that this fee cannot exceed \$500, although such additional sum as the court deems proper can be awarded.³

This seems straightforward enough and ought not be an arena for mischief. To compute, either the court or the parties can designate greater compensation; to sell, the statutory maximum is inviolate unless the court orders further remuneration. In this latter regard, the court should proceed only upon application, not *sua sponte*.⁴ And where the referee really has provided unusual or exceptional services, additional compensation can be directed.⁵

Although the rules seem apparent, and while compliance would seem routine, the real world is different. Some time after a judgment of foreclosure and sale appoints a referee to compute, counsel to the foreclosing plaintiff (or perhaps its legal advertising service) will contact the referee to schedule a convenient date to conduct the auction sale. (The date depends upon the availability of the referee, the publication schedule of the newspaper designated for the sale advertisement and, where applicable, the court's schedule for foreclosure sales.)

These sales, however, are frequently cancelled or postponed. The mortgagor, or some other party, might obtain an order to show cause staying the sales.⁶ Bankruptcy filings (sometimes multiple filings) impose an automatic stay upon the foreclosure action.

Then too, the mortgagee and the mortgagor may be seriously pursuing settlement which elicits a voluntary adjournment or cancellation of the foreclosure sale.

Mindful that the referee will have set aside some portion of a day to devote to the sale, the hours may be lost to productive work, particularly if the notification comes close to the date of the prospective sale. In such an instance, the referee might ask for, and the plaintiff might understandably agree, to pay some fee for the cancellation. While the request might be for \$250 (editorially observed as reasonable) sometimes the fee asked for is the full \$500. Should the sale later be held, with the standard \$500 fee paid (the total is now \$750), it is clear in such an instance that the statutory maximum has been exceeded.

Often, the event causing sale cancellation is not revealed until the referee is already at the courthouse ready to proceed. Having actually attended the sale, albeit one not consummated, a requirement that \$500 be paid would not seem excessive. Again, though, when a later sale would be held, there is no doubt that the aggregate fees paid to the referee without court order violate CPLR §8003(b).

These examples are exacerbated by repeated postponements or cancellations of sales, which is hardly unusual. And the scenario becomes worse when a referee subtly demonstrates a reluctance to schedule a new sale without a check for (or a promise to pay) the additional fee in hand. Candor and experience compel the notation that these things do occur.

Then there are the referees who treat the sale and the closing (typically set for 30 days after the auction) as discrete events requiring a separate, additional fee for the closing.

The dilemma faced by foreclosing mortgagees was obvious. They need the good will and cooperation of referees, at least to the extent of promptly scheduling sales and closings. Delay is a sometimes mortal enemy of mortgagees because time translates into accrual of interest and the mounting of debt. Indeed, the accrual of interest could easily be greater than whatever additional fee the referee was requesting, even when those requests were excessive. Observing too that in many cases the additional fee to the referee was eminently fair and deserved, mortgagees had little incentive to oppose the fee entreaties. In short, the fees at issue were not worth litigating. And so these problems remained essentially unreported - until now.

The New Cases

In *U.S. Mortgage v. Almeida*,⁷ the issue came to the fore by happenstance: the mortgagee and the referee were jousting by mail, copying each letter to the court. Thereupon, the court treated the letters as a motion and thereby found a vehicle to confront the heretofore neglected concepts. In this case, two sales were scheduled, the referee appeared and each was cancelled (for reasons unstated). The referee was paid \$500. The plaintiff-mortgagee was endeavoring to set a third sale, presumably aware that the referee would first require another \$500 because plaintiff's letter stated that if

the referee wanted additional payment it would have to be via application to the court. The letter also advised that plaintiff would seek a successor referee if the current referee did not promptly communicate with the plaintiff. The referee's letter response to the court was a request to fix the fee and award further pay of \$500 for the second sale, totaling \$1000 in all, presumably with an expectation to garner yet another \$500 for the third sale.

Noting that it appeared to be the custom (in the Bronx and many other counties) for referees to seek \$500 per scheduled sale, and for plaintiffs to voluntarily pay such sums, the court framed the issue as whether it could authorize payment of more than \$500 to a referee to sell because of additional services caused by adjournments of sales.

The decision was a series of cogent and enlightening precepts, although one must be questioned: the holding that the law is settled that a plaintiff can agree to additional compensation for the referee in a foreclosure action. The citation for that proposition, *National Bank of North America v. New Paltz Growers, Inc.*, 89 A.D.2d 647, 453 N.Y.S.2d 124 (3d Dept. 1982), dealt with agreement at the computation stage. That is consistent with CPLR §8003(a). But CPLR §8003(b), addressing the sale stage, confines a further fee award to court order, not agreement of the parties. Arising out of the noted misinterpretation, the US. Mortgage court noted that it would be inclined to agree to \$350 for each additional sale but nonetheless sagely ruled that any award of additional compensation to the referee must await conclusion of the sale, then to be awarded only upon an application.⁸

The other recent case contemplating the referee fee issue (*Wells Fargo Bank Minnesota v. Davis*⁹) did so in the context of a surplus money proceeding. There, the referee retained or otherwise received \$1,250 for the sale, a fact revealed by the motion to confirm the referee's report of sale and appoint a referee in the surplus money proceeding. Finding a violation of CPLR §8003(b), the court ruled that in the absence of surplus monies the consent of the referee and plaintiff to an additional fee combined with an order of the court will serve to grant the award. (Presumably the court meant that the agreement substituted for a delineation of the extra services otherwise needed to support the order.)

This then led to an important ruling about additional referees' fees in the face of a surplus. For every dollar of further fee to the referee, the surplus available to claimants is reduced. In light of this, and after confirming that a referee must obtain judicial approval for any payment to sell (auction and closing) above \$500, where there are surplus monies, a notice of motion for additional fees must be served upon all parties entitled pursuant to RPAPL §1361 to claim against surplus.

Conclusion

The judge in the US. Mortgage case correctly opined that the custom of referees asking for more money and mortgagees agreeing to pay it has escaped review and that the

issue was unsettled. Of course it was unsettled for the very reason that it escaped review. It was, until now, under the judicial radar. While, upon reflection, the conclusion was perhaps obvious, all this is quite obscure (but at the same time very important) and rather desperately merited official scrutiny.

This exposure and clarification should be helpful to referees. Yes, they may very well be entitled to further fees in many cases. The way to obtain those sums is to make a motion after the sale. At the same time, it will be a basis for besieged mortgagees to make this very suggestion to referees who might not be familiar with the holdings, thereby deflecting demands for more money as a condition of going forward. The reason: statute and case law say so.

1. US Mortgage v. Almeida, 8 Misc.3d 694, 799 N.Y.S.2d 386 (Sup. Ct. 2005); Wells Fargo Bank Minnesota v. Davis, 8 Misc.3d 561, 797 N.Y.S.2d 868 (Sup. Ct. 2005).

2. CPLR §8003(a):

Generally. A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead.

3. CPLR §8003(b):

Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper.

4. Hewig v. Kleinman, 282 A.D.1001, 125 N.Y.S.2d 712 (4th Dept. 1953).

5. Major Capital Corp. v. 4487 Third Avenue Corp., 15 Misc.2d 1052, 182 N.Y.S.2d 848 (Sup. Ct. 1959).

6. It is not uncommon practice for courts to stay only delivery of the referee's deed rather than conduct of the sale itself, particularly when the order to show cause is sought on the eve of the sale. Of course, stays can issue through the appeals process as well.

7. 8 Misc.3d 694, 799 N.Y.S.2d 386 (Sup. Ct. 2005).

8. The court also mentioned that Part 36 of the Rules of the Chief Judge requires filing a notice of appointment, certification of compliance and a statement of approval of compensation when the fees are anticipated to be more than \$550 (to both compute and sell) and a court may not approve more than the \$500 to sell unless these filings have been accomplished. (Rule 36.4)

9. 8 Misc.3d 561, 797 N.Y.S.2d 868 (Sup. Ct. 2005).

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V

Part 36 of the Rules of the Chief Judge

And

The Foreclosure Referee:

Appointment, Paperwork & Compensation

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**“[A]LL THIS IS QUITE OBSCURE
(BUT AT THE SAME TIME VERY IMPORTANT)”¹**

- Part 36 citation: 22 NYCRR 36.0, et seq.
- www.nycourts.gov/ip/gfs is the web site for Guardian & Fiduciary Services. The application for enrollment on the Part 36 list, information about Part 36 and updates may be obtained there.
- Appointment of Referees:
 - Part 36 applies to the appointment of referees, "other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity". 36.1(a) (9).
 - Part 36 applies to the referees in foreclosure actions; includes both the referee to compute and the referee to sell.
 - Foreclosure referees must be on the Part 36 list.
 - To enroll on the Part 36 list, applicant must submit application to Office of Court Administration. Applicant must be eligible and not be disqualified by reason of personal relationships, employment or political party office of self or relatives. Disqualifications are found at 36.2 (c).
 - Referee must be in compliance with the Part 36 limitations on compensation, i.e., the \$75,000 rule: referee may not accept a new compensated appointment if he/she was awarded a total of more than \$75,000 in aggregate Part 36 compensation in the prior calendar year. 36.2 (d) (2).
 - Foreclosure referees must be attorneys admitted to practice in New York courts. CPLR R 4312
 - There are 2 different referee appointments: Referee to Compute (RPAPL §1321) and Referee to Sell. (RPAPL §1351)
- Appointment of Guardians *ad Litem* (GAL) and Military Attorneys:
 - Part 36 applies to guardians *ad litem* appointed in foreclosure actions. 36.1(a)(2).
 - GALs must be on the list and eligible to accept the appointment.
 - Statutory authority for appointment of a GAL is found in CPLR §§ 1201, 1202, 1203.

- Compensation of GAL is found in CPLR § 1204². GAL must submit affidavit of services.
- Statutory authority for the appointment of Military Attorneys in foreclosure actions is governed by the New York State Soldiers' and Sailors' Civil Relief Act found in the New York Military Law § 303.
- Part 36 does not apply to the appointment of a Military Attorney.
- Military attorney does not have the power to waive any right of the person for whom he is appointed or bind him by his acts. Military Law § 303 (1)
- Appointment of Receivers.
 - Part 36 applies to receivers appointed in foreclosure actions. 36.1 (a) (8).
 - Part 36 also applies to those persons performing the following services for receivers (commonly known as "secondary appointees"): counsel, accountant, auctioneers, appraisers, property managers, real estate brokers. 36.1 (a) (10).
 - Those secondary appointees of a receiver also must be on the list (or the judge must file reasons for non-list appointment on form UCS-872.5). Judge must make the secondary appointment (i.e., issue a court order of appointment naming the appointee). 36.2(a).
 - Statutory authority for receiver appointment in foreclosure actions is found in RPAPL §1325 and CPLR Art 64. CPLR § 8004 governs commissions of receivers.
- Part 36 Paperwork
 - Usual Part 36 paperwork includes UCS-872 (Notice of Appointment and Certification of Compliance) and UCS-875 (Statement of Approval of Compensation).
 - Foreclosure referee is exempt from the Part 36 paperwork ONLY if total compensation from both the reference to compute and the reference to sell is not anticipated to exceed \$750. 36.4(d).
 - If combined total compensation for foreclosure referee exceeds \$750, forms UCS-872 and UCS-875 may be required. Fiduciary clerk in the county or district may be able to give advice.
 - 36.4 (d) does **NOT** raise the compensation of foreclosure referees; it merely affects the paper-work requirements of Part 36.

- Compensation of the referee to compute is governed by CPLR § 8003(a).³
 - Compensation for referee to compute is \$50 per day:
 - unless a different compensation is fixed by the court, or
 - unless a different compensation is fixed by the consent in writing of all parties not in default for failure to appear or plead.
 - Currently, many courts, in the order of reference, are ordering compensation in the amount of \$250 for the referee to compute.
 - For part 36 purposes, for the referee to compute, typically, the Order of Reference will be the “award of compensation.” If additional compensation is sought or approved, then a separate order approving the additional compensation is required.
 - CPLR 4321⁴ requires that the order of reference (or a stipulation for a reference) shall determine the basis and method of computing the referee’s fee and provide for his/ her payment. That is, the basis and method of computing the referee’s fees should be fixed in advance.
 - If more than the statutory compensation to compute (\$50 per day, per CPLR 8003(a)) is sought, referee must either apply to the court for a greater sum before his duties are undertaken, or secure agreement of the parties before or after the computation.
 - Courts have queried the fairness of the practice of the plaintiff-mortgagee proffering or “agreeing to” additional compensation for the referee. In the vast majority of foreclosure actions, referees are appointed upon the default of the owner, but it is the owner who will ultimately bear the additional fees paid to the referee, not the “consenting” or “agreeing” plaintiff who will pass such payments along as disbursements recoverable against the proceeds of sale or in a deficiency judgment against the defaulting property owner. See, *NYCTL 1998-2 Trust V Kahan*, 10/31/2005 N.Y.L.J. 19, (col. 3) (Kings Sup 2005) (Demarest, J).
 - If a court awards additional compensation to the referee to compute, per CPLR § 8003 (a), must the compensation order be made *in advance*?
 - Appellate Division, 2nd Judicial Department, has consistently held if referee is to be compensated at other than the statutory rate under CPLR 8003 (a), such compensation must be determined in advance.⁵
 - 1st, 3rd and 4th Departments have permitted courts to fix a greater compensation than the statutory rate at the conclusion of the reference.⁶

- Compensation of the referee to sell is governed by CPLR § 8003 (b).⁷
 - **Property must be sold for referee to be entitled to \$500.** According to the statute, if no sale actually takes place, there is no entitlement to the full \$500.
 - For Part 36 purposes, for the referee to sell, the award of compensation should be in the Order and Judgment of Foreclosure or in a separate order made after a motion by the referee.
 - **If the referee to sell received or retained compensation in excess of statutory rates (\$500 upon sale), court approval is mandatory (CPLR § 8003 [b]). Referee must obtain judicial approval in order to retain more than \$500 after the sale.** Best practice may be for referee to make a motion for additional fees and for court to issue order awarding those extra fees. All compensation, including compensation in excess of \$500 for the referee to sell, should be listed in the Report of Sale.
 - **If the property does not sell, the referee must obtain judicial approval in order to retain money in excess of the fees and disbursements allowed to a sheriff.** If there is no sale, the referee to sell is entitled to the same fees and disbursements as those allowed to a sheriff, per CPLR 8011.
 - Referee's fees, upon a sale, may not exceed \$500, unless the property sold for \$50,000 or more (CPLR 8003 (b)).
 - If the sale is cancelled, without sufficient notice:
 - It may be customary in some jurisdictions for plaintiff to proffer an additional fee to a referee for a sale which was cancelled without sufficient notice. It is problematic for the referee to retain this money without court approval.
 - The referee must obtain court approval in order to retain the \$500 fee for a sale which never takes place.
 - Additional compensation if sale is especially complicated:
 - Cases generally provide that additional compensation is to be awarded rarely; the referee must show unusual difficulties complexities or was required to perform unusual, i.e., "substantially exceeding the typical," services. High sale price is not a factor in difficulty of case.
 - Attending the closing
 - **The referee's fee to sell includes the closing. RPAPL § 1353.**

- Even though the fee to sell includes the closing, some referees request from the petitioner additional compensation to attend the closing or if the closing was complex or lengthy. Request for additional compensation must be made to the court.
- For interesting discussion of fees for referee to sell and the recommended guidelines of Bronx Justice Paul A. Victor, see *JP Morgan Chase v Pizzini*, 12 Misc.3d 520, 813 N.Y.S.2d 649, 2006 N.Y. Slip Op. 26130 (Supreme Court Bronx County, 2006)
- Referee or person acting on referee's behalf may not purchase property RPAPL 232; violation is a misdemeanor and purchase would be void.
- Surplus Money. Referee must pay surplus moneys into court within 5 days after the money has been received.
- Mortgage Foreclosure Referee is independent contractor; and, therefore, is not entitled to representation or indemnification by the New York Attorney General.
 - *O'Brien v. Spitzer*, 7 N.Y.3d 239, 851 N.E.2d 1195, 818 N.Y.S.2d 844 (Ct App 2006). Referee is not entitled to be represented by the Attorney General pursuant to Public Officer Law § 17(2)(a). A private lawyer appointed to serve as a referee in a mortgage foreclosure action is not a state employee, but rather is an independent contractor. Accordingly, that person is entitled to neither a defense by nor indemnification from the State should he be sued in his capacity as referee.
- Referee to sell must comply with bankruptcy stay.
 - See *In re Crawford*, 388 B.R. 506, 2008 WL 2278113 (Bkrtcy.S.D.N.Y.) where US Bankruptcy Court, S.D. held NYS foreclosure referee willfully violated automatic stay by conducting sale after notice of Chapter 13 filing. Court found referee liable for damages; but no liability for punitive damages due to lack of malice or bad faith.

¹ Bergman, *Referee Fees: Courts Clarify Issue of Extra Payment*, NYLJ, March 29, 2006, at 5, col. 2.

² CPLR § 1204 reads as follows: "Compensation of guardian *ad litem*. A court may allow a guardian *ad litem* a reasonable compensation for this services to be paid in whole or part by any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property. No order allowing compensation shall be made except on an affidavit of the guardian or his attorney showing the services rendered."

³ Subdivision (a) of CPLR § 8003 reads as follows: "Generally. A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead."

⁴ Subdivision (1) of CPLR 4321 reads as follows: "An order or a stipulation for a reference shall determine the basis and method of computing the referee's fees and provide for their payment. The court

may make an appropriate order for the payment of the reasonable expenses of the referee. Unless the court otherwise orders or the stipulation otherwise provides, such fees and expenses of the referee shall be taxed as costs.”

⁵ 2nd Department cases involving compensation of referees pursuant to CPLR 8003 (a):

Pittoni v Boyland 278 A.D.2d 396; 717 N.Y.S.2d 646; 2000 N.Y. App. Div. LEXIS 13277 (2nd Dept 2000) Issue was referee's compensation in an accounting action. Court held: where there is no stipulation by the parties, nor a specific rate set forth by the court in the order of reference, a referee's fee is limited to the statutory rate of \$ 50 per day, also citing *Matter of Charles F.*, 242 AD2d 297; *Scher v Apt*, 100 AD2d 582).

In re Popper 242 A.D.2d 297; 660 N.Y.S.2d 594; 1997 N.Y. App. Div. LEXIS 8260 (2nd Dept 1997). Citing *Majewski v Majewski*, 221 AD2d 420 and *Neuman v Syosset Hosp. Anesthesia Group*, 112 AD2d 1029, 2nd Department held that because the record did not contain any agreement concerning the referee's compensation which was made prior to the referee's performance of his duties, the referee's fee must be limited to the statutory fee of \$50 per day rather than the \$3,000 the referee requested.

Majewski v. Majewski A.D.2d 420; 633 N.Y.S.2d 1019; 1995 N.Y. App. Div. LEXIS 12046 (2nd Dept 1995). Supreme Court's order indicated the court would determine an appropriate fee for the referee upon referee's submitting an affidavit of services. 2nd Department approved the extra compensation for referee distinguishing this situation from that in *Scher v Apt* (100 AD2d 582), *Neuman v Syosset Hosp. Anesthesia Group* (112 AD2d 1029), and *Kolomick v Kolomick* (133 AD2d 69), where the court orders of reference were silent as to the Referees' compensation, thus limiting them to the statutory fee of \$50 per diem.

Scher v. Apt, 100 A.D.2d 582; 100 A.D.2d 582, 473 N.Y.S.2d 521, 1984 N.Y. App. Div. LEXIS 17560, (2nd Dept 1984). Issue was whether a referee can be awarded, upon completion of the reference, a fee which exceeds the statutory per diem rate of compensation when there is no stipulation by the parties and no specific rate set forth by the court in the order of reference. Appellate Division held that absent an order or stipulation with specific directions on the matter of referee's fees, referee's fee is set at the statutory rate.

⁶ 3rd Department case re CPLR 8003(a):

Blake Terrace Assoc v Sommers 176 A.D.2d 394; 574 N.Y.S.2d 101; 1991 N.Y. App. Div. LEXIS 11548 (3rd Dept 1991) “Under the circumstances of this case, it is our view that Supreme Court was free to exercise its discretion to fix a compensation different from that resulting from application of the statutory rate to nine days of work. While we recognize that the basis or method for computing the Referee's compensation is to be set forth in the order or stipulation of reference we agree with the Fourth Department that CPLR 8003 (a) authorizes the court to fix a fee fairly compensating the Referee even at the conclusion of the reference (see, *Matter of O'Dwyer v Robson*, 103 AD2d 1036; but see, *Kolomick v Kolomick*, 133 AD2d 69 (2d Dept); *Neuman v Syosset Hosp. Anesthesia Group*, 112 AD2d 1029 [2d Dept]; *Scher v Apt*, *supra* (2d Dept)). Given the complexity of the issues involved, the volume of testimony adduced at the hearing and the thoroughness of the Referee's report, we cannot conclude that a fee of \$ 2,300, amounting to roughly \$ 42 per hour, was excessive or unreasonable.

4th Department case re CPLR 8003(a):

O'Dwyer v. Robson, 103 A.D.2d 1036, 478 N.Y.S.2d 407, (4th Dept 1984) “...the statute [CPLR 3008(a)] which sets the statutory rate also authorizes the court to fix “a different compensation” and does not require that it be established before the referred matter is heard.”

1st Department case re CPLR 8003(a):

Garay v Soling 169 A.D.2d 616; 564 N.Y.S.2d 755; 1991 N.Y. App. Div. LEXIS 589 (1st Dept 1991), at 618, Court held: “Finally, though both parties urge that the award to the Referee, in the amount of \$ 20,000, was excessive and, in any event, beyond the statutory rate, we are of the view that the court properly confirmed the fee application. In this regard, we first note that while CPLR 8003 (a) provides for a statutory rate of \$ 50 compensation per day, it also allows for the court or the parties to set a Referee's fees beyond the statutory rate. (*Matter of O'Dwyer v Robson*, 103 AD2d 1036 [4th Dept 1984].) The provision authorizing the court to so fix a different, i.e., higher compensation does not require the compensation to be established before the referred matter is heard.”

⁷ Subdivision (b) of CPLR § 8003 reads as follows: "Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper."

PART 36 OF THE RULES OF THE CHIEF JUDGE: AN EXPLANATORY NOTE

Part 36 of the Rules of the Chief Judge creates a system that broadens the eligibility for appointment to a wide range of applicants well-trained in their category of appointment, establishes procedures that promote accountability and openness in the selection process, and insulates that process from appearances of favoritism, nepotism or politics.

1. APPLICABILITY

Part 36 governs ten categories of primary appointments and six categories of secondary appointments (§ 36.1 [a]), as set forth below.

A. GUARDIANS

Part 36 applies to guardians appointed for: 1) incapacitated persons pursuant to Mental Hygiene Law article 81; 2) minors pursuant to Surrogate's Court Procedure Act article 17 or Civil Practice Laws and Rules article 12; and 3) the mentally retarded or developmentally disabled pursuant to Surrogate's Court Procedure Act article 17-A (§ 36.1 [a][1]). If a person is appointed guardian upon a ward's nomination or a party's proposal, appointment is exempt from Part 36 (§ 36.1 [b][2][i]).

A guardianship where the appointee is a nonprofit institution, department of social services, or other public agency with legally recognized duties or interests is exempt from Part 36 (§ 36.1 [b][2][i], [iii]). Guardianships in proceedings for the termination of parental rights (see Social Services Law § 384-b, Surrogate's Court Procedure Act § 403-a, Family Ct. Act article 6) are also exempt, since only persons or entities authorized by law may be appointed guardian in such proceedings (§ 36.1 [b][2][i], [vi]).

B. GUARDIANS AD LITEM

Part 36 applies to guardians ad litem appointed under the general provisions of Surrogate's Court Procedure Act § 403 and Civil Practice Laws and Rules 1202, including guardians ad litem appointed to investigate and report to the court on particular issues (§ 36.1 [a][2]). Where a court appoints counsel or assistants to guardians ad litem, these appointees also are governed by the rules. If appointed a guardian ad litem upon the nomination of an infant of 14 years of age or over, the appointee is exempt (§ 36.1 [b][2][ii]). Similarly exempt is a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required (§ 36.1 [b][2][vii]).

C. LAW GUARDIANS

Privately paid law guardians who are appointed in domestic relations matters in those Departments of the Appellate Division where authorized are subject to the provisions of Part 36 (§ 36.1 [a][3]). Law guardians appointed and paid from public funds are exempt

(§ 36.1 [b][1]). (As a general rule, Part 36 applies only to appointees compensated at the expense of private parties, and not those compensated from public funds such as appointments pursuant to Family Court Act § 243, Surrogate's Court Procedure Act § 403-a, 407, Judiciary Law § 35, and County Law article 18-B.)

D. COURT EVALUATORS, ATTORNEYS FOR ALLEGED INCAPACITATED PERSONS, COURT EXAMINERS

In proceedings for the appointment of guardians for incapacitated persons pursuant to article 81 of the Mental Hygiene Law, the court may appoint an attorney for the alleged incapacitated person (Mental Hygiene Law § 81.10) or appoint a court evaluator as an independent witness to investigate and report to the court (Mental Hygiene Law § 81.09). These appointments are governed by Part 36 (§ 36.1 [a][4], [5]), except that a nonprofit institution appointed court evaluator is exempt (§ 36.1 [b][2][iii]). The Mental Hygiene Legal Service, which may serve as attorney for an alleged incapacitated person or court evaluator, is also exempt (§ 36.1 [b][1]).

If a guardian is appointed pursuant to article 81 of the Mental Hygiene Law, the court may also assign a court examiner to audit and report on accountings required to be filed in such guardianship proceedings (Mental Hygiene Law §§ 81.30, 81.31). Court examiners are designated by the Presiding Justice of each Department of the Appellate Division (Mental Hygiene Law § 81.32), and, upon designation, must comply with all the provisions of Part 36 (§§ 36.1 [a][6]; 36.3 [c]).

E. SUPPLEMENTAL NEEDS TRUSTEES

Supplemental needs trustees (see Omnibus Budget Reconciliation Act of 1993 (42 USC 1396p[d][4], EPTL § 7-1.12, SSL § 366 [2][b][2][iii], 18 NYCRR § 360-4.5) may be appointed in a number of contexts in Supreme Court or Surrogate's Court, e.g., in infants' compromise orders, or in proceedings under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law. When selected by the court and appointed by judgment or order, a supplemental needs trustee is subject to the provisions of Part 36 (§ 36.1 [a][7]), unless the appointee is a bank or trust company (§ 36.1 [b][2][iv]), or is appointed upon nomination by the beneficiary, or by the proponent, of the trust (§ 36.1 [b][2][i]).

F. RECEIVERS

Part 36 applies to receivers almost without exception (§ 36.1 [a][8]). In rare cases where the choice of receiver would be dictated by law, such an appointee would be exempt (§ 36.1 [b][2][vi]).

G. REFEREES

Referees are treated differently under Part 36 depending on the purpose for which they are appointed. Under articles 31 and 43 of the Civil Practice Laws and Rules, referees, sometimes called "special masters", are often used in a quasi-judicial capacity to

supervise discovery or conduct trials in civil actions or proceedings. No matter what their title, if referees are used to perform a judicial function, they are exempt from Part 36 (§ 36.1 [a][9]). Referees appointed for all other purposes are governed by the rules. These appointments are usually for the purpose of performing an act outside of court, e.g., conducting the sale of real property in a mortgage foreclosure action or supervising a labor union election.

Referees to compute the value of, and sell, real property in the ordinary mortgage foreclosure action, and who receive compensation of \$750 or less, are subject to all of the provisions of Part 36 preliminary to appointment, including the disqualification provisions of section 36.2 (c), the limitations based on compensation of section 36.2 (d), and list enrollment under section 36.3. Upon appointment, however, these referees are not required to file the notice of appointment or certification of compliance that all other Part 36 appointees must file (§ 36.4 [d]). They and the court are also excepted from filing a statement of approval of compensation pursuant to Judiciary Law § 35-a (1) (a) and 22 NYCRR § 26.1 (a) (see section 5.B. infra), because the \$750 total compensation results from two separate appointments which are below the statutory threshold of \$500 for each appointment (up to \$250 for computation; \$500 for sale).

H. SECONDARY APPOINTMENTS OF GUARDIANS AND RECEIVERS: COUNSEL, ACCOUNTANTS, APPRAISERS, AUCTIONEERS, PROPERTY MANAGERS, REAL ESTATE BROKERS

When a guardian or receiver subject to the provisions of Part 36 seeks to retain counsel, or an accountant, appraiser, auctioneer, property manager or real estate broker, the retained professional becomes a Part 36 appointee (§ 36.1[a][10]). The guardian or receiver must request that the judge appoint such a professional (§ 36.2 [a]), and the professional must comply with all the provisions of Part 36, including those governing list enrollment (§ 36.3), disqualification and limitation based on compensation (§ 36.2), and all filing requirements (§ 36.4).

I. PUBLIC ADMINISTRATOR AND COUNSEL TO PUBLIC ADMINISTRATOR

Certain sections of Part 36 apply to the appointment of a Public Administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator. Those sections include the disqualifications due to family relationship, employment, former employment, political party office or judicial campaign office found in section 36.2 (c) and the approval of compensation reporting requirements found in section 36.4(e).

2. APPROVED LISTS: APPLICATION, ENROLLMENT, USE

All persons or entities whose appointments are governed by Part 36 (§ 36.1 [a][1] – [10]), and who are not exempt under section 36.1 (b), must be enrolled on an approved list established by the Chief Administrator of the Courts (§ 36.3 [c]) from which all names for appointment must be selected (§ 36.2 [b][1]), except when good cause exists

to appoint outside the list (§ 36.2 [b][2]). In those exceptional circumstances, the court must make a finding of good cause, in writing, and file its finding with the fiduciary clerk, who has the duty of supervising the filing of all papers in the Part 36 appointment process (see §§ 36.2 [b][2]; 36.4 [a][1], [b][1]-[3]). A copy of the finding also will be sent to the Chief Administrator of the Courts (§ 36.2[b][2]). A person or entity not appointed from an appropriate list still must comply with all the other provisions of Part 36, e.g., the appointee must not be disqualified from appointment under section 36.2(c) or (d) and must file all Part 36 forms pursuant to section 36.4, but any education and training requirements may be waived (§ 36.2 [b][3]). At no time may a court appoint a person or entity removed from a list for cause (§ 36.2 [b][2]). (See § 36.3 [e] for the procedure for removal upon the Chief Administrator's determination of unsatisfactory performance or conduct incompatible with appointment from a list.)

To enroll on a list maintained by the Chief Administrator of the Courts, an applicant must have completed the required training for each category of appointment for which enrollment is requested (§ 36.3 [b]). Once all required training is completed, an application must be submitted on the application form promulgated by the Chief Administrator (UCS-870) (§ 36.3 [a]). Court examiners for proceedings under article 81 of the Mental Hygiene Law and privately paid law guardians in domestic relations actions first must be approved by the Appellate Division before being eligible for placement on a list.

Section 36.3 (d) provides for biennial re-registration, which will permit the Chief Administrator to keep all lists current.

3. DISQUALIFICATIONS

The following persons are disqualified from appointment (§ 36.2 [c]):

- a. a judge or housing judge of the Unified Court System, or a relative of, or a person related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship;
- b. a judicial hearing officer in a court in a county in which he or she serves as a judicial hearing officer;
- c. a full-time or part-time employee of the Unified Court System;
- d. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district where the relative is applying for appointment or 2) with statewide responsibilities;
- e. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;
- f. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section

- 36.2(c)(5) of the Rules of the Chief Judge; or the spouse, brother/sister, parent or child of such former judge;
- g. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;
 - h. a person convicted of a felony for which no certificate of relief from disabilities has been received;
 - i. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received; or
 - j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

The disqualifications for disbarred or suspended attorneys (see paragraph [g], supra) and convicted criminals (see paragraphs [h] and [i], supra) apply to any appointments under section 36.1 (a), even if otherwise exempted under the rules pursuant to section 36.1 (b).

Additionally, there are three disqualifications that do not limit list enrollment, but may render an enrollee disqualified from appointment due to the circumstances of a particular case. These disqualifications are: 1) receivers or guardians, or persons associated with the law firm of a receiver or guardian, are prohibited from being appointed counsel to the receiver or guardian (§ 36.2 [c][8]); 2) counsel to alleged incapacitated persons in Mental Hygiene Law article 81 proceedings are prohibited from being appointed guardian, or counsel to the guardian, for an incapacitated person they have represented (§ 36.2 [c][9]); and 3) court evaluators in Mental Hygiene Law article 81 proceedings are prohibited from being appointed guardian for an incapacitated person in a proceeding in which they served as court evaluator (§ 36.2 [c][10]). In the first and third of these disqualifications, exceptions may be made. If there is a compelling reason, such as savings to the estate of the receivership or guardianship, the receiver or guardian may be appointed counsel. Similarly, if there are extenuating circumstances, such as the unavailability of others to be appointed guardian and a familiarity and trust developed between court evaluator and incapacitated person, a court evaluator may be appointed guardian upon a written finding by the court of extenuating circumstances.

There is also a disqualification relating to judicial campaign activity. This does not prevent list enrollment, but limits appointment by a judge for whom the enrollee acted as campaign chair, coordinator, manager, treasurer or finance chair in a campaign for a judicial election that took place less than two years prior to the proposed appointment (§ 36.2 [c][4][ii]). If the candidate is a sitting judge, the disqualification also applies to a person who assumes any of the above roles during the campaign for judicial office. Included in this disqualification are the spouse, brother/sister, parent or child of the campaign official, or anyone associated with the campaign official's law firm.

4. LIMITATIONS ON APPOINTMENTS BASED UPON COMPENSATION

Subdivision (d) of section 36.2 establishes two additional disqualifications from appointment, not related to list eligibility, but based upon anticipated or previously awarded compensation. These restrictions do not limit compensation per se, but use compensation as a basis for determining availability for future appointment. There are no exceptions to the application of these limitations, unless the court determines the appointment is necessary to maintain continuity of representation of the same person or entity in further or subsequent proceedings.

A. THE \$15,000 RULE

Section 36.2 (d)(1) prohibits appointees from receiving more than one appointment in the same calendar year (i.e., January 1 to December 31) for which compensation in excess of \$15,000 is awarded in that calendar year or anticipated to be awarded in any calendar year. Two examples illustrate the rule. 1) If appointed as attorney for an alleged incapacitated person in 2003, and compensation of, for example, \$20,000 for that appointment is awarded or anticipated to be awarded in that same year, then the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of \$15,000 is anticipated either in 2003 or in any single future year. 2) If appointed as guardian in 2003, for which an annual commission of, for example, \$20,000 is anticipated to be awarded in the following year (2004), the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of \$15,000 is anticipated to be awarded either in 2003 or in any single future year.

B. THE \$75,000 RULE

Section 36.2 (d) (2) establishes a limitation on appointments based on an annual, aggregate amount of compensation. For calendar year 2007 and thereafter, if compensation is awarded in an aggregate amount of more than \$75,000 during any calendar year (no matter what year the appointment was made), the appointee will be ineligible for any compensated appointments during the next calendar year. It is the year of the award of compensation, and not the year of its actual receipt, that activates the application of the rule. Like its \$15,000 counterpart, the \$75,000 rule is a limitation on appointments, and not on compensation; nothing in the \$75,000 rule prevents a court's award, or an appointee's receipt, of total compensation exceeding \$75,000 in any calendar year. Excess compensation in one year simply prevents compensated appointments in the following year.

5. PROCEDURE AFTER APPOINTMENT

A. COMBINED NOTICE OF APPOINTMENT AND CERTIFICATION OF COMPLIANCE

Part 36 appointees must complete and file with the fiduciary clerk within 30 days of appointment a two-part form containing a notice of appointment and certification of compliance (§ 36.4 [a][1]), which will be sent to the appointee by the court immediately after appointment. If the appointee cannot certify qualification for appointment in the certification of compliance section of the combined form, or cannot accept appointment for any other reason, the appointee must immediately notify the court (§ 36.4 [a][4]).

The notice of appointment contains the date and nature of the appointment (§ 36.4 [a][2]), and the certification of compliance certifies that the appointee is not disqualified from service and is not otherwise precluded by any limitation based on compensation (§ 36.4 [a][3][i]; see § 36.2 [c], [d]). The appointee must list all appointments received during the current calendar year (§ 36.4 [a][3][ii]), report the amount of compensation awarded for each (§ 36.4 [a][3][ii][B]), or, if not awarded, the total amount of compensation anticipated for each (§ 36.4 [a][3][ii][C][i]), and separately identify appointments for which compensation is anticipated to exceed \$15,000 in any calendar year (§ 36.4 [a][3][ii][C][ii]). The appointee must also list all appointments for which compensation was awarded in the year immediately preceding the current calendar year (§ 36.4 [a][3][ii]) and report the amount awarded for each (§ 36.4 [a][3][ii][B]). For all appointments, the name of the appointing judge must be given (§ 36.4 [a][3][ii][A]).

There are two exceptions to this procedure. Although exempt from the application of Part 36 (see § 36.1 [b][3]), uncompensated appointees must still file the combined notice and certification form, but need only complete the notice of appointment section of the form (§ 36.4 [a][1]). This will allow uncompensated fiduciary activity to be recorded and appropriately recognized. The other exception applies to referees to compute the value of, and sell, real property. Although subject to the application and list process of Part 36 (see § 36.1 [a][9]), referees to compute and sell are relieved from the obligation to file the combined notice and certification form for appointments where total compensation is not anticipated to exceed \$750 (§ 36.4 [d]).

B. APPROVAL OF COMPENSATION

Judges who approve compensation of more than \$500 are required to file a statement of approval of compensation with the Office of Court Administration pursuant to Judiciary Law § 35-a (1)(a) and 22 NYCRR Part 26. Whenever a court is requested to approve compensation in excess of \$500 for a Part 36 appointee, a statement of approval of compensation on a form promulgated by the Chief Administrator of the Courts must be submitted for signature to the approving judge. The statement must contain a confirmation signed by the fiduciary clerk that the combined notice of appointment and certification of compliance form was filed (§ 36.4 [b][1]). No judge may approve compensation of more than \$500 without this statement and the signed

confirmation of the fiduciary clerk (§ 36.4 [b][2]). Additionally, every approval of compensation in excess of \$5000 must contain the judge's written statement of the reasons for such approval (§ 36.4 [b][3]). After signing the order awarding compensation and the statement of approval of compensation, the judge must file a copy of the order and the original statement with the fiduciary clerk. The fiduciary clerk will then forward the statement of approval of compensation to the Office of Court Administration for entry of the amount of compensation in its database under the name of the appointee. This will keep the database current for periodic publication under section 36.5.

The rules cite the standard for judicial approval of compensation, viz., fair value for all services rendered that are necessary to the performance of the appointee's duties (§36.4 [b][4]). This determination remains in the sound discretion of the court and depends on the factual circumstances of each case.

6. REPORTING LAW FIRM COMPENSATION

Section 36.4 (c) obligates law firms to report, in writing, to the Chief Administrator of the Courts whenever total compensation in a single calendar year is \$50,000 or more for Part 36 appointments of law firm members, associates or employees. The report of compensation received by law firms is to be filed on form UCS-876 on or before March 31st following the calendar year reported.

The reporting of law firm compensation is for informational purposes only. Limitations based on compensation apply only to the individual appointee, not the firm, and the appointment and compensation of one person in the firm are only considered in certifying the availability of that individual for appointment and do not affect the availability for appointment of any other person in the firm.

7. PUBLICATION

The notice of appointment and certification of compliance, statement of approval of compensation, and report of compensation received by law firms, filed pursuant to section 36.4, are public records, and the names of appointees and of appointing judges, and the amounts of approved compensation, are subject to periodic publication by the Chief Administrator of the Courts (§36.5).

JP Morgan Chase Bank v Pizzini
12 Misc.3d 520, 813 N.Y.S.2d 649,
2006 N.Y. Slip Op. 26130 (Bronx Sup Ct 2006)

OPINION OF THE COURT

Paul A. Victor, J.

Issue Presented

This proceeding raises a recurring issue concerning the payment of referee's fees arising out of mortgage foreclosure proceedings. The issue has evoked conflicting approaches by the trial courts, and judicial responses which are still developing. Although it has become almost commonplace for referees to seek and obtain payment in excess of the \$500 fee which is set forth in CPLR 8003 (b), the issue as to the appropriate methodology to compensate referees has only recently begun to receive the attention of the courts. (See Bergman, Real Estate Update, *Referee Fees: Courts Clarify Issue of Extra Payment*, NYLJ, Mar. 29, 2006, at 5, col 2.) Related issues were previously considered by this court in U.S. Mtge. v Almeida (8 Misc 3d 694 [Sup Ct, Bronx County 2005]). The issue then presented concerned the court's power and authority in a mortgage foreclosure proceeding to approve payment in excess of \$500 to a referee appointed to sell property. The payment sought in this case (as distinguished from the payment in *U.S. Mtge. v Almeida, supra*) is an additional \$500 sought to compensate the referee as a result of, among other things, the need to conduct a separate "sit down" closing of title in the office of the referee. The court is, as it was in *U.S. Mtge. v Almeida (supra)*, hopeful of providing some guidance to the bench and bar in a legal arena in which the decisional law is still in a state of flux and **2 conflict. [FN1]

The Parties

This mortgage foreclosure action was brought by plaintiff JP Morgan Chase Bank to foreclose a mortgage secured by a lien *522 on a condominium. The mortgagor, Frank Pizzini, was named as a defendant, as was the condominium board of managers, i.e., the Board of Managers of Parkchester South Condominium, Inc. Defendant Parkchester has filed a lien for unpaid common charges. The remaining defendants are judgment debtors with filed judgments.

Background and Procedural History

In due course the condominium unit was sold at a public auction by the court appointed referee, for a total amount of \$63,500, resulting in a surplus reported to be \$6,110.15. The report of sale was filed with the County Clerk on April 22, 2005. Parkchester, which filed a claim against the surplus for common charges, [FN2] then brought the instant motion for an order confirming the referee's report of sale, and for an order appointing a referee to ascertain and compute the claims against the surplus funds. The motion,

which was served on plaintiff and the mortgagor's attorney, was submitted without any opposition.

Upon reviewing the unopposed motion papers and the attached report of sale, the court noted that the referee had in fact paid himself \$1,000. The report indicated that the referee included a charge in the amount of \$500 for "Referee's Fee." The report shows that the referee calculated the amount due to the plaintiff by subtracting the amounts due for disbursements from the proceeds of the sale, arriving at a total amount due to the plaintiff. After calculating the amount due to the plaintiff, the referee then, without any explanation in the report, paid himself an additional \$500, reflected in the report as "Referee's Closing Fee."

This court, upon discovering that the referee had in fact received \$1,000 for his services in connection with the sale, set the matter down for a hearing and a full explication of the propriety of the payment of the additional fees.

The Hearing Testimony

The hearing testimony indicated that in fact the payment of the additional \$500 to the referee was a point of contention between plaintiff's attorney and the referee to sell, and that due to the plaintiff's attorney's refusal to consent to the payment, it was finally "determined" that the referee would take the extra \$523 payment from the surplus after calculating the total amount due to the plaintiff.

As explained at the hearing, if the property is sold to the mortgagee, the transfer of title is usually accomplished by mailing the appropriate documents, which are prepared and forwarded by the seller's attorney, to the referee. After the documents are signed by the referee, the documents are returned by mail. The referee stated that these services are considered to be part of the sale, and no extra payment is sought. However, as explained by the referee, when property is purchased by a third party, it is necessary to hold a closing approximately one month after the sale. The closing may take place at the referee's office, in which event use will be made of the referee's copy machine, fax, telephones, and other office equipment. In the alternative, the closing may take place at the office of plaintiff's attorney, or another location, in which event the referee will be required to travel to and from his or her office to the place of closing. According to the referee, in the present case the additional payment of \$500 was sought because the property was purchased by a third party, and consequently it was necessary, in order to transfer title, to conduct a closing at the referee's office. The closing took approximately two hours to complete.

The referee stated that the custom of charging an additional fee for the closing was commonplace, whereas, according to the plaintiff's attorney, while the practice was not unheard of, the vast majority of referees did not impose any additional charge for conducting the closing. In addition, the plaintiff's attorney stated that he refused to consent to the extra payment, as he had no authority to do so, and no extra payment had been authorized by the court.

At the hearing, it was agreed, however, by the plaintiff's counsel and the referee, as well as by counsel for the defendant Parkchester, that the additional amount of \$500 for the sit-down closing was a fair and reasonable fee for the time expended by the referee, and for the services rendered. Plaintiff's only objection to payment at the time of the closing was that there was no prior guidance from the court that the fee was reasonable or authorized.

The court was hopeful that some methodology could be adopted to avoid similar disagreements in the future, and to provide guidance to the bar as to the quantum of referee's fees, as well as practices and procedures which the court would approve. The court accordingly sought input as to the practice of *524 charging an additional fee for canceled sales, although that issue was not directly presented on the instant motion. All counsel and the referee agreed that if the referee was not given prior notice and appeared on the scheduled date and the sale is canceled, a fee of \$500 would be appropriate. They also agreed that in the event a scheduled sale was canceled with less than 48 hours' notice to the referee, it would be fair and reasonable for the referee to seek an additional fee, albeit less than \$500. There was a general consensus that a \$250 fee would be fair and reasonable for a canceled sale if notice of cancellation was given without at least 48 hours' advance notice. However, counsel for the plaintiff again emphasized that the problem with charging such additional fees (apart from the amounts requested) is the absence of prior guidance from the court which would indicate that any such payment would be considered appropriate or reasonable.

Law Regarding Compensation of Referees to Sell

CPLR 8003 provides the mechanism for payment of the fees of a referee appointed to compute (CPLR 8003 [a]) or to sell (CPLR 8003 [b]) real property pursuant to a judgment of foreclosure. That section states:

"(a) Generally. A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead.

"(b) Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or **4 application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. *A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold *525 for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper.*" (CPLR 8003 [emphasis added].)

In *U.S. Mtge. v Almeida (supra)*, this court was primarily concerned with a situation in which additional fees were being sought for adjourned or canceled sales. The court reached a number of conclusions, including: (1) that CPLR 8003 (b) limits the compensation of the referee to sell at \$500, unless the court finds that additional compensation is proper; (2) that the plaintiff and the referee may agree to additional compensation for a referee in a foreclosure action, but such compensation must be both reasonable and voluntarily paid; [FN3] (3) that in the event there is no prior court approval and there is no voluntary agreement to pay additional compensation, the referee must go forward with the sale and then seek additional compensation by way of an application to the court; (4) that the application for and the awarding of additional compensation must await the conclusion of the sale, as the power of the court to award additional compensation is, as stated in CPLR 8003 (b), dependent on the sale of the property in an amount of \$50,000 or more; [FN4] and (5) that in view of the mandate of section 36.4 (b) (2) of the Rules of the Chief Judge (22 NYCRR), referees who receive *526 **5 compensation in excess of \$500 for a sale (whether pursuant to court order or by stipulation) must comply with section 36.4 and file the appropriate forms.

Subsequent to this court's decision in *U.S. Mtge.*, other courts have reached various conclusions as to the proper methodology to be applied when determining the compensation to be paid to referees pursuant to CPLR 8003. In a case with facts similar to those presented here, *Wells Fargo Bank Minn. N.A. v Davis* (8 Misc 3d 561 [Sup Ct, Kings County 2005, Kramer, J.]), the court held that a referee appointed to sell property in a foreclosure proceeding is entitled to no more than \$500 unless the court gives prior approval to the additional compensation. In that case, Justice Kramer, on a motion to confirm the report of sale and to appoint a referee in the surplus proceeding, discovered that the referee retained or received the sum of \$1,250. The court ordered the return of all funds in excess of \$500. The court held that since the retention of any amount above \$500 would affect the amount of the surplus, no additional fee could be paid unless a motion for additional fees was brought on notice to all persons entitled to notice of the surplus proceeding pursuant to RPAPL 1361.

Despite the foregoing, the same justice, in *Mortgage Elec. Registration Sys., Inc. v Victor* (9 Misc 3d 327 [Sup Ct, Kings County 2005]), specifically addressed the issue of adjourned and canceled sales which had been raised in *U.S. Mtge. v Almeida (supra)*. Justice Kramer held that a referee to sell is entitled to the authorized fee of \$500 plus \$250 for each adjournment and cancellation of a sale. However, Justice Kramer concluded that the payments for canceled sales were not made pursuant to CPLR 8003 (b), which appears to limit the referee's compensation to \$500. Justice Kramer reasoned that presale compensation should and could be paid to the referee under CPLR 8003 (a). He stated that,

"[m]oreover, this court holds that the language of 8003 (b) cannot be read to prevent payments in excess of \$500 made to referees as part of their per diem work prior to the sale because such reading would lead to a highly illogical and inequitable result. If any and all payments to referees are conditioned upon the sale of the property and cannot

exceed \$500 unless the property sells for more than \$50,000, then there are many occasions where a referee would be working for hours or even days *527 without compensation. This would certainly happen where, for example, the sale has been rescheduled several times and then never actually takes place because a forbearance agreement had been reached or the property refinanced or sold." (*Mortgage Elec. Registration Sys., Inc. v Victor*, 9 Misc 3d 327, 330-331 [Sup Ct, Kings County 2005]; but see *NYCTL 1998-2 Trust v Kahan*, 9 Misc 3d 1119[A], 2005 NY Slip Op 51677[U] [Sup Ct, Kings County, 2005, Demarest, J.] [declining to follow the holding in *Mortgage Elec. Registration Sys., Inc. v Victor*, and holding that CPLR 8003 (b) imposes a \$500 limit on the compensation to a referee to sell, which may not be exceeded unless the property is sold for \$50,000 or more; and holding that where no sale occurred due to a settlement, the provisions of CPLR 8003 (a) may be applied in tandem together with the more explicit fee provisions of CPLR 8003 (b) for actual specific services rendered, but the whole amount being subject to the \$500 limit].)

Discussion**6

As noted above, Justice Kramer has held that CPLR 8003 (a) may be construed to govern the compensation for a referee with respect to canceled sales. Certainly, the "sale" may be parsed into its component parts, and thus it may be tempting to consider that CPLR 8003 (a) might apply to the "presale" cancellations or postsale closings. This court notes, however, that the duties of a referee appointed to sell (as opposed to a referee to compute) encompass all of the preauction and postauction activities required to transfer title, and thus all of those activities are part and parcel of the compensation for the sale. While the court certainly sympathizes with its colleagues and calls for legislative action or the adoption of a suitable court rule to clarify the issue, it must adhere to the legal maxim that the more specific language (of CPLR 8003 (b)) controls over the more general language (of CPLR 8003 (a)). The statute explicitly states that the fee of a referee appointed to sell "cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper" (CPLR 8003 (b)); and this specific direction must be taken as controlling with respect to all of the activities encompassed by the appointment to sell real property.

*528 In the present case, the property in fact sold for in excess of \$50,000, i.e., \$63,500. There is, therefore, no impediment to this court's awarding of an additional fee. The court also notes that the only party with a filed claim to the surplus fund (Parkchester) has brought the present application and voiced no objection to the additional fee. Moreover, the surplus is sufficient to pay the lien of the condominium for common charges as well as the filed judgments. In view of the agreement of the parties that \$500 is a proper fee for a third-party closing, the court approves of the fee, subject to compliance with the aforesaid section 36.4.

This court notes that it has heard no countervailing authority questioning the propriety of additional fees in routine cases for canceled sales, or for third-party closings--save that there is considerable confusion when such fees are demanded, either because the

amounts are excessive, or because those requests were not approved by the court. The court will therefore set forth the guidelines it will apply on future applications.

With respect to sales, the court will approve a fee of \$250 for each sale which is scheduled and canceled with less than 48 hours' notice to the referee (so long as the property is sold for an amount in excess of \$50,000). If the referee appears for a sale without prior notice that it has been canceled, an additional fee of \$500 for the new scheduled sale date will be approved (so long as the property is sold for an amount in excess of \$50,000). Payment may be accepted by the referee subject to such future order which the court may make in approving the fee at the time at which the referee's report is submitted for confirmation. However, attendance at the new scheduled sale may not be made contingent upon prepayment of the referee's fee. In the event the property is bid on by the mortgagee, the court will consider the property to have been sold in an amount equal to the amount of the outstanding mortgage (not just the amount bid by said mortgagee) such that the referee's acceptance of a fee in excess of \$500 will not violate CPLR 8003 (b) so long as the indebtedness exceeds \$50,000. In cases in which the property is purchased by a third party and the referee is required to attend a closing subsequent to the auction of the property, the court will approve an additional fee of \$500 for the closing of title, so long as the property is sold for an amount in excess of \$50,000. The referee must comply with part 36 of the Rules of the Chief Judge (22 NYCRR) in the event the total compensation for all of the above services exceeds \$500 for the sale. As noted above, the referee's acceptance of these additional amounts is subject to § 529 the approval of the court upon the § 7 confirmation of the sale. At that time the court will consider any objections to an enhanced fee as well as any request by the referee for further fees which the referee claims to be fair and proper.

At the hearing it was called to the court's attention by the referee that the need of the referee to make a separate motion would involve additional time, effort and resources. Therefore, in order to avoid the need for a separate motion, this court will accept an affidavit submitted by the referee in support of, or in opposition to, the motion, which said affidavit may be delivered to the court at the time of submission of the motion together with an affidavit of service upon all parties who are entitled to notice. In future applications, the following language (if not already included by counsel for plaintiff) will be appended by this court to judgments appointing the referee to sell:

"For any scheduled sale canceled on less than 48 hours notice to the referee, the referee shall be entitled to an additional \$250.00 for each said scheduled sale, subject to the approval of the court at the time of the confirmation of the sale pursuant to CPLR 8003 (b). In the event the referee attends a sale which is canceled without prior notice to the referee, the referee shall be entitled to an additional \$500 for attending a re-scheduled sale, subject to the approval of the court at the time of the confirmation of the sale pursuant to CPLR 8003 (b). For a third party closing, the referee shall be entitled to an additional fee of \$500, subject to the approval of the court at the time of the confirmation of the sale pursuant to CPLR 8003 (b). All parties may address the court

as to the reasonableness of such fees, including the adequacy or inadequacy thereof, on the motion to confirm the report of sale or by separate motion."

FOOTNOTES

FN1. In *U.S. Mtge. v Almeida* (*supra*), the court noted the prevalent practice in many counties for referees to seek and obtain additional compensation of \$500 *per scheduled sale*, and for plaintiff mortgagees to voluntarily pay such compensation, without court approval.

FN2. The condominium development states that it is the only claimant to the surplus funds.

FN3. In *Almeida* (8 Misc 3d at 697), this court stated "It is settled that the plaintiff may agree to pay additional compensation to a referee in a foreclosure action. (*National Bank of N. Am. v New Paltz Growers*, 89 AD2d 647 [3d Dept 1982].)" That statement was based on the language in *National Bank of N. Am. v New Paltz Growers* (*supra*) dealing with compensation for a referee to compute. That Court held, "[i]f a referee is dissatisfied with and unwilling to accept the statutory fees, and the parties, of their own volition, have failed to agree and stipulate to an acceptable fee, his course of action is to seek relief from the court and not from the parties." (at 648 [emphasis added].) This Court only meant to state that the plaintiff *and the other parties* may agree to enhanced compensation. It was not meant to indicate that a referee might unilaterally demand additional or excessive fees or that an attorney for a plaintiff might unilaterally agree to pay the referee any amount of compensation without court approval (recognizing that a plaintiff might well agree to pay such a fee rather than incur additional delay by making a motion). Clearly the amount of compensation to the referee will ultimately be reflected in the amount of the deficiency judgment or the surplus, and thus the rights of all parties must be protected from unilateral arrangements.

FN4. This court noted that as to whether the sale price exceeded \$50,000, some experts, based on ancient cases (see 2 Bergman, *New York Mortgage Foreclosures* § 27.03 [2] ["Referee's Fee to Sell"]), had stated that the purchase price is the amount bid. The court stated, "This court is not prepared to follow such a rule, which seems manifestly unjust, and is prepared to receive argument on the subject in an appropriate case." (*U.S. Mtge. v Almeida*, 8 Misc 3d at 698 n 1.)



PART 36. APPOINTMENTS BY THE COURT

§ 36.0 PREAMBLE

Public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach. Accordingly, these rules are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.

The rules cannot be written in a way that foresees every situation in which they should be applied. Therefore, the appointment of trained and competent persons, and the avoidance of factors unrelated to the merit of the appointments or the value of the work performed are the fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

§ 36.1 APPLICATION

(a) Except as set forth in subdivision (b), this Part shall apply to the following appointments made by any judge or justice of the Unified Court System:

- (1) guardians;
- (2) guardians ad litem, including guardians ad litem appointed to investigate and report to the court on particular issues, and their counsel and assistants;
- (3) law guardians who are not paid from public funds, in those judicial departments where their appointments are authorized;
- (4) court evaluators;
- (5) attorneys for alleged incapacitated persons;
- (6) court examiners;
- (7) supplemental needs trustees;
- (8) receivers;
- (9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);
- (10) the following persons or entities performing services for guardians or receivers:
 - (i) counsel
 - (ii) accountants
 - (iii) auctioneers
 - (iv) appraisers
 - (v) property managers
 - (vi) real estate brokers
- (11) a public administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator, except that only sections 36.2(c) and 36.4(e) of this Part shall apply, and that section 36.2(c) shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

(b) Except for sections 36.2(c)(6) and 36.2(c)(7), this Part shall not apply to:

- (1) appointments of law guardians pursuant to section 243 of the Family Court Act, guardians ad litem pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;
- (2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:
 - (i) a guardian who is a relative of (A) the subject of the guardianship proceeding or (B) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;
 - (ii) a guardian ad litem nominated by an infant of 14 years of age or over;
 - (iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;
 - (iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;
 - (v) except as set forth in section 36.1(a)(11), a public official vested with the powers of an administrator;
 - (vi) a person or institution whose appointment is required by law;
 - (vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.
- (3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(a) of this Part.

§ 36.2 APPOINTMENTS

- (a) **Appointments by the judge.** All appointments of the persons or entities set forth in section 36.1, including those persons or entities set forth in section 36.1(a)(10) who perform services for guardians or receivers, shall be made by the judge authorized by law to make the appointment. In making appointments of persons or entities to perform services for guardians or receivers, the appointing judge may consider the recommendation of the guardian or receiver.
- (b) **Use of lists.**
- (1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.
 - (2) An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person or entity that has been removed from a list pursuant to section 36.3(e).
 - (3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.
- (c) **Disqualifications from appointment.**
- (1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship.
 - (2) No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.
 - (3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the state.
 - (4) (i) No person who is the chair or executive director, or their equivalent, of a state or county political party, or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.
(ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.
 - (5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:
 - (i) The jurisdiction of a judge of the Court of Appeals shall be statewide.
 - (ii) The jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served.
 - (iii) The jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served.
 - (iv) With respect to all other judges, the jurisdiction shall be the principal county within which the judge served.
 - (6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.
 - (7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.

- (8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.
 - (9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.
 - (10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.
- (d) Limitations on appointments based upon compensation.**
- (1) No person or entity shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of \$15,000.
 - (2) If a person or entity has been awarded more than an aggregate of \$75,000 in compensation by all courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during the next calendar year.
 - (3) For purposes of this Part, the term "compensation" shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.
 - (4) These limitations shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings.

§ 36.3 PROCEDURE FOR APPOINTMENT

- (a) Application for appointment.** The Chief Administrator shall provide for the application by persons or entities seeking appointments pursuant to this Part on such forms as shall be promulgated by the Chief Administrator. The forms shall contain such information as is necessary to establish that the applicant meets the qualifications for the appointments covered by this Part and to apprise the appointing judge of the applicant's background.
- (b) Qualifications for appointment.** The Chief Administrator shall establish requirements of education and training for placement on the list of available applicants. These requirements shall consist, as appropriate, of substantive issues pertaining to each category of appointment — including applicable law, procedures, and ethics — as well as explications of the rules and procedures implementing the process established by this Part. Education and training courses and programs shall meet the requirements of these rules only if certified by the Chief Administrator. Attorney participants in these education and training courses and programs may be eligible for continuing legal education credit in accordance with the requirements of the Continuing Legal Education Board.
- (c) Establishment of lists.** The Chief Administrator shall establish separate lists of qualified applicants for each category of appointment, and shall make available such information as will enable the appointing judge to be apprised of the background of each applicant. The Chief Administrator may establish more than one list for the same appointment category where appropriate to apprise the appointing judge of applicants who have substantial experience in that category. Pursuant to section 81.32(b) of the Mental Hygiene Law, the Presiding Justice of the appropriate Appellate Division shall designate the qualified applicants on the lists of court examiners established by the Chief Administrator.
- (d) Reregistration.** The Chief Administrator shall establish a procedure requiring that each person or entity on a list reregister every two years in order to remain on the list.
- (e) Removal from list.** The Chief Administrator may remove any person or entity from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A person or entity may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.

§ 36.4 PROCEDURE AFTER APPOINTMENT

- (a) Notice of appointment and certification of compliance.**
- (1) Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee

who accepts an appointment without compensation need not complete the certification of compliance portion of the form.

- (2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.
 - (3) The certification of compliance shall include:
 - (i) a statement that the appointment is in compliance with sections 36.2(c) and (d); and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain (A) the name of the judge who made each appointment, (B) the compensation awarded, and (C) where compensation remains to be awarded, (i) the compensation anticipated to be awarded and (ii) separate identification of those appointments for which compensation of \$15,000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.
 - (4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.
- (b) Approval of compensation.**
- (1) Upon seeking approval of compensation of more than \$500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance.
 - (2) A judge shall not approve compensation of more than \$500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.
 - (3) Each approval of compensation of \$5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.
 - (4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.
- (c) Reporting of compensation received by law firms.** A law firm whose members, associates and employees have had a total of \$50,000 or more in compensation approved in a single calendar year for appointments made pursuant to this Part shall report such amounts on a form promulgated by the Chief Administrator.
- (d) Exception.** The procedure set forth in this section shall not apply to the appointment of a referee to sell real property and a referee to compute whose compensation for such appointments is not anticipated to exceed \$750.
- (e) Approval and Reporting of Compensation Received by Counsel to the Public Administrator.**
- (1) A judge shall not approve compensation to counsel to the public administrator in excess of the fee schedule promulgated by the administrative board of the public administrator under SCPA 1128 unless accompanied by the judge's statement, in writing, of the reasons therefor, and by the appointee's affidavit of legal services under SCPA 1108 setting forth in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined.
 - (2) Any approval of compensation in excess of the fee schedule promulgated by the administrative board of the public administrator shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be accompanied by a copy of the order approving compensation, the judge's written statement, and the counsel's affidavit of legal services, which records shall be published as determined by the Chief Administrator.
 - (3) Each approval of compensation of \$5,000 or more to counsel shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be published as determined by the Chief Administrator.

§ 36.5 PUBLICATION OF APPOINTMENTS.

- (a) All forms filed pursuant to section 36.4 shall be public records.
- (b) The Chief Administrator shall arrange for the periodic publication of the names of all persons and entities appointed by each appointing judge, and the compensation approved for each appointee.

W

MAUREEN O'CONNELL
NASSAU COUNTY CLERK



OFFICE OF THE COUNTY CLERK

240 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501-4249
516-571-2660
FAX 516-742-4099
WWW.NASSAUCOUNTYNY.GOV/AGENCIES/CLERK/

Fall 2008

Greetings:

As a court appointed referee, you will find several occasions on which you will transact business at the Office of the County Clerk. I am pleased to provide you with this sample forms packet to assist you in the discharge of your duties. Your responsibilities as referee will require you to file papers in our Court Receiving Department, located in Room 108, and the referee's deed and attendant papers will be recorded in our Land Recordings Department, located in Room 105.

I would like to take this opportunity to recognize the contributions of the law firm of Steven J. Baum, P.C., who graciously provided the annexed templates. I am confident these templates will be a useful and instructive resource for you as referee. In addition, I am providing important information regarding your completion of the transfer forms that must accompany all deed filings.

As you may know, the Clerk's Office offers a variety of services to assist the courts, legal professionals and the public, and our knowledgeable staff is always available to assist you as you fulfill your statutory obligations.

Very truly yours,

MAUREEN O'CONNELL
Nassau County Clerk

MAUREEN O'CONNELL
NASSAU COUNTY CLERK



OFFICE OF THE COUNTY CLERK
240 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501-4249
TELEPHONE: 516-571-2661
FAX: 516-742-4099

Dear Counselor:

Pursuant to CPLR Rule 4313, enclosed please find a copy of a duly entered order appointing you to serve as referee in the matter.

As you know, Section 1354(4) of the RPAPL requires that surplus money be paid to the Nassau County Treasurer within five (5) days of receipt. The Treasurer requires a certified copy of the judgment of foreclosure and sale be submitted with the payment. You can obtain a certified copy of the judgment from this office upon payment of the statutory fee.

Further, your report of sale must be filed with the County Clerk within thirty (30) days of conveyance unless such time is extended by the Court. See, RPAPL § 1355.

When completing form TP-584 at time of conveyance, the defaulting mortgagor's name, address and social security number should be used on form TP-584. When it is impossible to obtain all such information, you should complete form TP-584 with the best information available.

I hope this information will be of assistance to you in the performance of your duties as referee.

Sincerely,

Maureen O'Connell
MAUREEN O'CONNELL
Nassau County Clerk

Maureen O'Connell
NASSAU COUNTY CLERK



OFFICE OF THE COUNTY CLERK

240 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501-4249
TELEPHONE: 516 571-1442
FAX: 516 571-2537
COURT RECORDS

Fall 2008

PLEASE NOTE:

Attached are sample documents* for foreclosure proceedings necessary to complete any foreclosure action (pleadings, deeds, mortgage recordings, bank documents and affidavits of service are *not* included).

The information that has been highlighted in the sample Judgment of Foreclosure & Sale is required in order for this Judgment to be entered by the County Clerk's Office. The sample of the Referee's Report of Sale has been redacted as to the parties & attorney names, addresses & SBL of the foreclosed premises.

Attached for your reference are:

- Order of Reference
- Referee's Oath & Computation of Amount Due
- Judgment of Foreclosure & Sale with Affirmations & Affidavits
- Referee's Report of Sale

*sample templates are provided courtesy of Steven J. Baum, P.C., Attorneys at Law - Thank you!

At an IAS Term, Part _____ of the Supreme Court of the State of New York, County of NASSAU held at the County Courthouse thereof, 100 Supreme Court Drive, Mineola, New York, on the _____ day of _____, 20_____.

PRESENT: HON. _____

-----X

Plaintiff,

vs.

ORDER OF REFERENCE IN MORTGAGE FORECLOSURE

INDEX NO.:

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

Upon the Summons and Complaint and Notice of Pendency filed herein, and due proof that all Defendants having been duly served and upon the attached affidavit of mailing reflecting compliance with CPLR 3215(g)(3),

And upon proof that all Defendants time to answer has expired, Defendants _____ are all now in default,

And upon the affirmation of _____, Esq., attorney with _____, Plaintiff's counsel, dated the _____ day of _____, 20_____ and the Affidavit of Merit of _____, the _____ of _____ duly sworn to _____ the _____ day of _____ 2008, setting forth the prior proceedings and the various facts which entitle Plaintiff to the relief prayed for;

NOW, on motion of _____, by _____, Esq., attorneys for Plaintiff, it is hereby

ORDERED, that the motion is hereby granted; and it is further,

ORDERED, that _____, Esq. with an address of

is hereby appointed Referee to ascertain and compute the amount due except for attorney's fees upon the bond/note and mortgage being foreclosed in this action, and to determine whether the mortgaged premises can be sold in parcels and the Referee to report to the court with all convenient speed; and it is further

ORDERED, that, if required, said Referee take testimony pursuant to RPAPL § 1321, and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that the address of the Plaintiff be deleted from the caption and that the caption be amended to reflect the deletion; and it is further

ORDERED, that, the caption shall be amended by substituting _____, as (a) party Defendant(s) in place of "John Doe"; all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED, that pursuant to CPLR 8003(a)(the statutory fee of \$50.00)(in the discretion of the court, a fee of \$ _____), shall be paid to the Referee for the computation stage and upon the filing of his/her report; and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that the caption shall read as follows:

STATE OF NEW YORK

SUPREME COURT: COUNTY OF NASSAU

-----X

Plaintiff,

INDEX NO.:

vs.

Mortgaged Premises:

SBL#

Defendant(s).

-----X

ENTER:

ENTER DATE: _____

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NASSAU

-----X

AFFIRMATION OF REGULARITY

INDEX NO.:

Mortgaged Premises:

Plaintiff,

vs.

SBL #:

Defendant(s).

-----X

_____, Esq., the undersigned, an attorney admitted to practice in the Courts of this State, affirms that he is the attorney of record for the Plaintiff in the above captioned action, and further affirms as follows:

1. This action was brought to foreclose a mortgage executed by _____ dated the _____ day of _____, 20__, and recorded in the office of the Clerk of the County of NASSAU on the ____ day of _____, 20__ at Liber _____ of Mortgages at Page ____.

2. The Court's attention is called to the following submitted documents:

<u>Document</u>	<u>Tab</u>
Affirmation of Regularity	A
Affidavit of Merit	B
Note	C
Mortgage	D
Assignment	E
Lis Pendens	F
Summons & Complaint	G
Affidavits of Service	H
Notices of Appearance	I

3. The Notice of Pendency and Summons and Complaint filed in this action are in the form prescribed by statute and contain, as this affirmant believes, all the particulars required by law to be stated in such documents.

4. This action was filed on the ____ day of _____, 20__ in the NASSAU County Clerk's Office, that being the County in which the mortgaged premises are situated.

5. The Summons and Complaint served in this action upon the Defendants shows the basis of the venue, the index number assigned and the date of filing with the Clerk of the Court.

6. PLEASE BE ADVISED THAT A SETTLEMENT CONFERENCE IS NOT REQUIRED.

7. Counsel for plaintiff provided the process server the Summons and Complaint, printed on white paper, together with the Notice required by RPAPL § 1303, printed on blue paper. As can be seen from the affidavit of service attached hereto, the process server effected service upon the mortgagor(s) with a compliant copy of the notification pursuant to RPAPL § 1303. An exact photocopy of said Notice is attached hereto, evidencing that the title of the Notice is in bold, 20-point font, the text of the Notice is in bold, 14-point font, it was on its own page, and it was served with the Summons and Complaint.
8. The mortgagor(s) was served with additional notice of the Summons in compliance with CPLR 3215(g)(3). The affidavit of service by mail is attached hereto.
9. All of said Defendants are of full age (or if they were not, a guardian has been appointed and papers submitted herewith showing said appointment). None of the Defendants are in the armed services of the United States of America (or if they were, a guardian has been appointed and papers submitted herewith showing said appointment).
10. None of the Defendants are of unsound mind and none of the Defendants, who have not appeared, are absentees.
11. A Tenant was found at the premises, to wit: _____, Affirmant requests that said tenant be substituted as a party Defendant in place of "John Doe", and that the caption of the foreclosure action be amended to reflect the substitution of said party.
12. Your affirmant further says that more than the legally required time period has elapsed since the due service of the Summons and Complaint herein upon all of the Defendants. Defendant _____ was served on the 12th day of August, 2008, and the time to answer expired on the 21st day of September, 2008, Defendant is now in default; Defendant _____ was served on the 12th day of August, 2008, and the time to answer expired on the 21st day of September, 2008, Defendant is now in default; Defendant _____ was served on the 8th day of August, 2008, and the time to answer expired on the 28th day of August, 2008, Defendant is now in default; Defendant _____ was served on the 8th day of August, 2008, and the time to answer expired on the 28th day of August, 2008, Defendant is now in default; Defendant _____ was personally served on the 8th day of August, 2008, and the time to answer expired on the 28th day of August, 2008, Defendant is now in default; Defendant _____ was served on the 7th day of August, 2008, and the time to answer expired on the 27th day of August, 2008, Defendant is now in default; Defendant _____ was served on the 7th day of August, 2008, and the time to answer expired on the 6th day of October, 2008, Defendant is now in default.
13. That the address of the Plaintiff be deleted from the caption and that the caption be amended to reflect the deletion.
14. That Defendants _____ have not appeared or answered and are in default.
15. No previous application has been made for this or like relief.

WHEREFORE, your affirmant prays for an order of this Court:

- A) Appointing a Referee to determine the amount due and ascertain whether the premises can be sold in parcels;
- B) Adding _____ (tenant) as a party Defendant to this action in place of "John Doe" and amending of the caption of said action to reflect the same;
- C) That the address of the Plaintiff be deleted from the caption and that the caption be amended to reflect the deletion;
- D) Deeming all non-appearing and non-answering Defendants in default; and
- E) Such other and further relief as the Court may deem just and proper.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

DATED:

_____, Esq.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NASSAU

-----X

AFFIDAVIT OF MERIT AND
AMOUNT DUE

INDEX NO.:

Mortgaged Premises:

SBL #:

Plaintiff,

vs.

Defendant(s).

-----X

STATE OF)
COUNTY OF) SS.:
CITY OF)

_____, being duly sworn, deposes and says:

1. That deponent is the _____ of _____.
2. Your deponent has reviewed the books and records of the Plaintiff, as well as the Complaint herein. Based upon personal knowledge, I hereby attest to and verify the truth of the matters asserted in the Complaint.
3. Upon review of the books and records kept in the regular course of business by this institution, I confirm that there is in fact a default under the terms of conditions of the loan documents. The last payment made was applied to the monthly payment due the 10th day of August, 2005. As such, the loan is now due for monthly payments commencing with the payment due on the 10th day of September, 2005. Because of said default, Plaintiff elected to accelerate the loan. As set forth in the Complaint, at the time of commencement there was due and owing the principal balance of \$144,807.18, plus 6.25% interest from the 10th day of August, 2005, together with: This loan has a positive escrow balance of \$0.00.

Plaintiff has advanced:

\$0.00	for property inspections;
\$0.00	for maintenance of premises.

Plaintiff is due:

\$0.00	for late charges;
\$0.00	for non-sufficient funds charged.

4. This action was brought to foreclose a mortgage executed by _____ dated the ____ day of _____, 20__, and recorded in the office of the Clerk of the County of NASSAU on the ____ day of _____, 20__ at Liber _____ of Mortgages at Page _____ in the original principal amount of \$153,800.00. The mortgaged premises is located at _____.
5. Deponent has reviewed the original note, mortgage, and if applicable, assignments of mortgage, kept in the regular course of business by this institution. Deponent finds the same to be in proper form, duly executed and notarized where applicable, and mortgage tax due paid thereon.

6. Deponent confirms that the required notice of default was sent timely, in accordance with the provisions of the Note and Mortgage herein, and that the same was in proper form.
7. In addition to the sums set forth in the Complaint, Plaintiff may advance, in order to protect its security interest, additional monies for the payment of taxes, insurance and maintenance of the premises, which accrue and are expended by virtue of Defendants default. Said amounts will be provided to the Referee and substantiated by appropriate evidence.
8. Deponent has been advised by its counsel that all parties who are necessary to this action have been served and:
 - a) their time to answer has expired, or;
 - b) have answered, in which case said answer has been dismissed by summary judgment motion, or;
 - c) have posted a notice of appearance or limited notice of appearance.
9. Deponent has reviewed the legal description of the property and has determined that the mortgaged premises consists of a single parcel and should be sold as such.
10. Deponent makes this affidavit knowing that the Referee in this matter and the Court appointing the same will rely on the truth and veracity of the statements contained herein.

BANK Name

By: _____
 Title: _____

Sworn to before me this _____ day of _____, 20_____.

 Notary Public

TO BE COMPLETED, IN ADDITION TO JURAT (ABOVE), IF EXECUTING OUTSIDE OF NEW YORK STATE

STATE OF _____)
 County of _____)

On the _____ day of _____, in the year of 20_____ before me, the undersigned, personally appeared _____ the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she resides in _____ (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she knows _____ to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said _____ execute the same; and that said witness at the time subscribed his/her name as a witness thereto.

 (Signature and office of individual taking proof.)

STATE OF NEW YORK
SUPREME COURT: COUNTY OF

-----X

REFEREE'S OATH

Plaintiff,

INDEX NO.:

vs.

Mortgaged Premises:

Defendant(s).

SBL #:

-----X

STATE OF NEW YORK) SS:
COUNTY OF NASSAU)

I, _____, the Referee, appointed by an Order of this Court, made and entered in the above captioned action, and bearing date the ___ day of _____, 2008, to ascertain and compute the amount due to the Plaintiff for principal, interest and other charges due upon the bond/note and mortgage upon which this action was brought, and to examine and report whether the mortgaged premises can be sold in parcels, do solemnly swear, that I will faithfully and fairly determine the questions so referred to me, and make a just and true report thereon according to the best of my understanding and as the said Order requires.

Subscribed and sworn to before me this
_____ day of _____, 20_____

Referee

Notary Public

STATE OF NEW YORK
SUPREME COURT: COUNTY OF

-----X

Plaintiff,

vs.

REPORT OF AMOUNT DUE

INDEX NO.:

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

TO THE SUPREME COURT:

In pursuance of an Order of this Court, and entered in the above captioned action and dated the _____ day of _____, 2008, whereby it was referred to the undersigned as Referee to ascertain and compute the amount due to the Plaintiff by virtue of the bond/note and mortgage upon which this action was brought, and also to examine and report whether the mortgaged premises can be sold in parcels.

I, _____ Esq., the Referee in the said Order named, do report, that before proceeding to hear the testimony I was first duly sworn to determine the questions referred to me, and to make a just and true report thereon, according to the best of my understanding; that I have computed and ascertained the amount due to the Plaintiff upon the said bond/note and mortgage and that I find, and accordingly report, that there is due to the Plaintiff on the said bond/note and mortgage, as of the _____ day of _____, 2008 interest was computed to in my report, the sum of \$ _____.

Schedule A, hereunto annexed, contains a schedule of the documentary evidence introduced before me, and shows the amounts due for principal, interest and other amounts now due the Plaintiff.

I have made inquiry as to the advisability of selling the mortgaged premises in parcels, and find accordingly that the mortgaged premises should be sold in one parcel.

DATED: _____

Referee

SCHEDULE A

ABSTRACT OF DOCUMENTARY EVIDENCE

- Copy of Summons and Complaint filed on _____, 2008 in the _____ County Clerk's Office.
- Affidavit of Merit and Amount Due
- Affirmation of Regularity
- Note and Mortgage

STATEMENT

Principal of bond/note and mortgage unpaid \$

Interest thereon from 00/00/0000 up to and including
00/00/00 (___ days) at rate of ___% percent per annum \$

Interest Calculation

\$ _____ (Principal) x ___% (Interest) = \$ _____ (yearly interest) / 365 days
= \$ _____ (per diem) x _____ days (date from interest begin up to and including interest end)
= \$ _____ (interest due)

Plus: Late Charges \$

Plus: Maintenance of Premises \$

Plus: Non-sufficient funds charged \$

Plus: Property Inspections \$

Plus: Taxes and/or Insurance \$

TOTAL..... \$

DATED: _____

Referee

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NASSAU

-----X

AFFIDAVIT OF MERIT AND
AMOUNT DUE

INDEX NO.:

Mortgaged Premises:

SBL #:

Plaintiff,

vs.

Defendant(s).

-----X

STATE OF)
COUNTY OF : SS.:
CITY OF)

_____, being duly sworn, deposes and says:

1. That deponent is the _____ of _____.
2. Your deponent has reviewed the books and records of the Plaintiff, as well as the Complaint herein. Based upon personal knowledge, I hereby attest to and verify the truth of the matters asserted in the Complaint.
3. Upon review of the books and records kept in the regular course of business by this institution, I confirm that there is in fact a default under the terms of conditions of the loan documents. The last payment made was applied to the monthly payment due the 10th day of August, 2005. As such, the loan is now due for monthly payments commencing with the payment due on the 10th day of September, 2005. Because of said default, Plaintiff elected to accelerate the loan. As set forth in the Complaint, at the time of commencement there was due and owing the principal balance of \$144,807.18, plus 6.25% interest from the 10th day of August, 2005, together with: This loan has a positive escrow balance of \$0.00.

Plaintiff has advanced:

\$0.00 for property inspections;
\$0.00 for maintenance of premises.

Plaintiff is due:

\$0.00 for late charges;
\$0.00 for non-sufficient funds charged.

4. This action was brought to foreclose a mortgage executed by _____ dated the ____ day of _____, 20__, and recorded in the office of the Clerk of the County of NASSAU on the ____ day of _____, 20__ at Liber _____ of Mortgages at Page _____ in the original principal amount of \$153,800.00. The mortgaged premises is located at _____.
5. Deponent has reviewed the original note, mortgage, and if applicable, assignments of mortgage, kept in the regular course of business by this institution. Deponent finds the same to be in proper form, duly executed and notarized where applicable, and mortgage tax due paid thereon.

6. Deponent confirms that the required notice of default was sent timely, in accordance with the provisions of the Note and Mortgage herein, and that the same was in proper form.
7. In addition to the sums set forth in the Complaint, Plaintiff may advance, in order to protect its security interest, additional monies for the payment of taxes, insurance and maintenance of the premises, which accrue and are expended by virtue of Defendants default. Said amounts will be provided to the Referee and substantiated by appropriate evidence.
8. Deponent has been advised by its counsel that all parties who are necessary to this action have been served and:
 - a) their time to answer has expired, or;
 - b) have answered, in which case said answer has been dismissed by summary judgment motion, or;
 - c) have posted a notice of appearance or limited notice of appearance.
9. Deponent has reviewed the legal description of the property and has determined that the mortgaged premises consists of a single parcel and should be sold as such.
10. Deponent makes this affidavit knowing that the Referee in this matter and the Court appointing the same will rely on the truth and veracity of the statements contained herein.

BANK Name

By: _____
 Title: _____

Sworn to before me this _____ day of _____, 20_____.

 Notary Public

TO BE COMPLETED, IN ADDITION TO JURAT (ABOVE), IF EXECUTING OUTSIDE OF NEW YORK STATE

STATE OF _____)
 County of _____)

On the _____ day of _____, in the year of 20_____ before me, the undersigned, personally appeared _____ the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she resides in _____ (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she knows _____ to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said _____ execute the same; and that said witness at the time subscribed his/her name as a witness thereto.

 (Signature and office of individual taking proof.)

At an IAS Term, Part _____ of the Supreme Court of the State of New York, County of NASSAU held at the County Courthouse thereof, 100 Supreme Court Drive, Mineola, New York, on the _____ day of _____, 20_____.

PRESENT: HON. _____
JUSTICE OF THE SUPREME COURT

-----X

**JUDGMENT OF FORECLOSURE
AND SALE**

Plaintiff,

INDEX NO.:

vs.

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

On the Summons, Complaint and Notice of Pendency of Action duly filed in this action on the ____ day of _____, 2008, and all proceedings thereon, and on reading and filing the Affirmation of Regularity of _____, by _____, Esq., dated the ____ day of _____, 2008, and the Affirmation for Execution of Judgment of Foreclosure and Sale, by _____, Esq., dated the ____ day of _____, 2008, showing that each of the Defendants herein have been duly served with the Summons and Complaint in this action, or have voluntarily appeared by their respective attorneys, and stating that more than the legally required number of days had elapsed since said Defendants were so served and/or appeared; and that none of the Defendants had served any answer to said Complaint, nor had their time to do so been extended or, if they had served an answer, it was dismissed by summary judgment or stipulation of the parties, and upon the attached affidavit of mailing reflecting compliance with CPLR 3215(g)(3)(iii); and that the Complaint herein and Notice of Pendency of this action containing all the particulars required to be stated therein was duly filed in the Office of the Clerk of the County of NASSAU on the ____ day of _____, 2008, and an Order of Reference having been duly executed where a Referee was appointed to compute the amount due to the Plaintiff upon the bond/note and mortgage set forth in the Complaint and said Referee having examined and reported whether the mortgaged premises can be sold in parcels,

AND, on reading and filing the report of _____ ESQ., the Referee named in said Order of Reference, by which Report, bearing date the _____ day of _____, 2008, it appears that the sum of \$ _____ was due thereon at the date computed to in said Report and that the mortgaged premises cannot be sold in parcels.

NOW, upon proof of due notice of this application upon all parties who had not waived the same,

ON MOTION of _____, attorney for the Plaintiff, it is

ORDERED, ADJUDGED AND DECREED, that the motion is hereby granted without opposition; and it is further

ORDERED, ADJUDGED AND DECREED, that the said Report of the said Referee be, and the same is hereby in all respects ratified and confirmed; and it is further

ORDERED, ADJUDGED AND DECREED, that the mortgaged premises, as described in the Complaint in this action be sold at public auction at the Calendar Control Part (CCP) Courtroom of the Supreme Court, 100 Supreme Court Drive Mineola, NY 11501**on Tuesday at 11:30am** by and under the direction of _____ ESQ., Fiduciary Number _____ who is hereby appointed Referee for that purpose; that the said Referee give public notice of the time and place of such sale according to law and the practice of this Court, in an official publication, to wit: The _____; or in any publication in compliance with RPAPL § 231; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee at the time of sale may accept a written bid from the Plaintiff or the Plaintiff's attorneys, just as though the Plaintiff were physically present to submit said bid; and it is further

ORDERED, ADJUDGED AND DECREED, that the premises be sold in "as is" condition defined as the condition the premises are in as of the date of sale and continuing through the date of closing, and that said sale shall be subject to:

- (a) Rights of the public and others in and to any part of the mortgaged premises that lies within the bounds of any street, alley, or highway; restrictions and easements of record;
- (b) Any state of facts that an accurate, currently dated survey might disclose;
- (c) Rights of tenants, occupants or squatters, if any. It shall be the responsibility of the Purchaser to

evict or remove any parties in possession of premises being foreclosed. There shall be no pro-rata adjustment in favor of the purchaser for any rents that are paid for a period after the date of the foreclosure sale.

(d) The right of redemption of the United States of America, if any;

ORDERED, ADJUDGED AND DECREED, that the Plaintiff or any other parties to this action may become the purchaser or purchasers at such sale; that in case the Plaintiff shall become the purchaser at the said sale, it shall not be required to make any deposit thereon; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee conducting the sale shall pay out of the proceeds of sale all taxes, assessments, sewer rents and water rates which are liens upon the property at time of sale. Purchaser shall be responsible for interest due on any real property tax liens accruing after the first day of the month following the foreclosure sale; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee then take the remaining proceeds of sale and deposit them in his/her own name as Referee in his/her IOLA account or other separate account _____, and in addition to executing a deed to the purchaser(s) of the premises sold, shall thereafter make the following payments and his/her checks drawn for that purpose:

FIRST: The statutory fees of said Referee, _____ ESQ., for conducting the sale of \$500.00 as and for his/her fee for conducting the sale, pursuant to CPLR 8003.

SECOND: The Referee shall pay the costs of advertising/posting as listed on bills presented to and certified by the Referee to be correct, duplicate copies of which shall be annexed to the report of sale when filed.

THIRD: Said Referee shall also pay to the Plaintiff or its attorney the following:

Costs and Disbursements. \$ _____ adjudged to the Plaintiff for costs and disbursements in this action, to be taxed by the clerk and inserted herein, with interest at the legal rate thereon from the date of entry hereof.

Additional Allowance. \$0.00 is hereby awarded to the Plaintiff in addition to costs with interest at the legal rate thereon from the date of entry hereof.

Amount Due per Referee's Report. \$ _____, said amount so reported due as aforesaid together with interest at the rate in the note and mortgage thereon from the date computed to in said Report until the date of entry of this judgment, with interest at the statutory rate thereon until the date of transfer of the Referee's Deed, or so much of the purchase money as will the same, and that he/she take a receipt for said payment and file it with his/her report of sale.

Attorneys Fees. \$ _____ is hereby awarded to the Plaintiff as reasonable legal fees herein, with legal interest from the date of entry of judgment,

Plaintiff, may, after entry of this judgment, add to the amount due any and all advances made by Plaintiff for inspection fees, maintenance charges, taxes, insurance premiums or other advances necessary to preserve the property, whether or not said advances were made prior to or after entry of judgment, so long as said charges were not included in the Referee's Report, and the Referee be provided with receipts for said expenditures, all together with interest thereon pursuant to the note and mortgage, from the date of the expense until the date of entry of this Judgment, then with interest at the legal rate until the date of transfer of the Referee's Deed.

FOURTH: That in case the Plaintiff be the purchaser of said mortgaged premises at said sale, said Referee shall not require the Plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the Plaintiff a Deed of the premises sold upon the payment to said Referee of the amounts specified above in items marked "FIRST" and "SECOND"; That the balance of the amount bid, after deducting the amounts paid by the Plaintiff, for Referee's fees, and advertising expenses, shall be allowed to the Plaintiff and applied by said Referee upon the amounts due to the Plaintiff as specified above in item marked "THIRD"; that if after applying the balance of the amount bid, there shall be a surplus over and above said amounts due to the Plaintiff, the Plaintiff shall pay the same to said Referee, who shall deposit the funds in accordance with paragraph "FIFTH" below.

FIFTH: The Referee shall take receipts for the money so paid out by him/her and file the same with his/her report of sale, and that he/she deposit the surplus money, if any, with the NASSAU County Treasurer within five (5) days after the same shall be received and be ascertainable, to the credit of this action, to be withdrawn only upon the written order of this Court, signed by a Justice of this Court; that the Referee make his/her report of such sale under oath showing the disposition of the proceeds of the sale accompanied by the

vouchers of the person to whom the payments were made and file it with the Clerk of the Court within thirty (30) days of completing the sale, and executing the proper conveyance to the purchaser. If the proceeds of such sale be insufficient to pay the amount reported due the Plaintiff with interest and costs as aforesaid, the Plaintiff may recover of the Defendant(s) _____ the whole deficiency or so much thereof as the Court may determine to be just and equitable of the mortgage debt remaining unsatisfied after the sale of the mortgaged premises and the application of the proceeds thereof, provided a motion for a deficiency judgment shall be made as prescribed by Section 1371 of the Real Property Actions and Proceeding Law within the time limited therein, and the amount thereof is determined and awarded by an order of this Court as provided for in said action; and it is further

ORDERED, ADJUDGED AND DECREED, that the purchaser or purchasers at such sale be let into possession on producing the Referee's Deed; and it is further

ORDERED, ADJUDGED AND DECREED, that each and all of the Defendants in this action and all persons claiming under them, or any or either of them, after the filing of such Notice of Pendency of this action, be and they hereby are, barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof; and it is further

ORDERED, ADJUDGED AND DECREED, that the liens of the Plaintiff other than the mortgage or mortgages that are the subject matter of this action also be foreclosed herein as though the Plaintiff was named as a party Defendant, specifically reserving to the Plaintiff its right to share in any surplus monies as a result of such position as a lien creditor; and it is further

ORDERED, ADJUDGED AND DECREED, that by accepting this appointment, the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR, Part 36), including, but not limited to, §36.2(c) ("Disqualification from appointment") and §36.2(d) ("Limitations on appointments based upon compensation") and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is further

ORDERED, ADJUDGED AND DECREED, that pursuant to CPLR 8003(b), absent application to the court, further court order, and compliance with Part 36 of the Rules of the Chief Judge, the Referee shall not demand, accept or receive more than the statutory \$500.00 otherwise payable to the Referee for the foreclosure

sale stage, regardless of adjournment, delay or stay of the sale; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge.

ORDERED, ADJUDGED AND DECREED, that the Referee appointed to sell herein be served with a signed copy of this Judgment of Foreclosure and Sale with notice of entry; and it is further

ORDERED, ADJUDGED AND DECREED, that the Referee must submit the Notice of Sale to the Motion Support Office, in the Supreme Court, Room 152 at least ten (10) days prior to the date of auction; and it is further

That a description of the said mortgaged premises hereinbefore mentioned, is annexed hereto as Schedule A - Legal Description.

Dated: _____
Mineola, New York

ENTER,

HON.
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NASSAU

-----X

Plaintiff,

vs.

COSTS OF PLAINTIFF

INDEX NO.:

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

COSTS

Costs before Note of Issue - CPLR 8201(1)	\$200.00
Allowance by statute - CPLR 8302(a) (b)	
First \$200.00 at 10%	\$20.00
Next \$800.00 at 5%	\$40.00
Next \$2000.00 at 2%	\$40.00
Next \$5000.00 at 1%	\$50.00
	\$150.00
Additional allowance - CPLR 8302(d)	\$50.00
Costs on motion - CPLR 8303(a) (1)	\$0.00

FEES AND DISBURSEMENTS

Fee for index number - CPLR 8018(a)	\$0.00
Referee's fee to compute, per order of the court - CPLR 8003(a) .	\$0.00
Paid for searches - CPLR 8301(a) (10)	\$0.00
Serving copy of Summons and Complaint - CPLR 8001(c)(1), 8301(d) .	\$0.00
Reproduction costs - CPLR 8301(a)(12)	\$0.00
Fees for publication of Summons - CPLR 8301(a)(3)	\$0.00
Certified copies of papers - CPLR 8301(a)(4)	\$0.00
Request for judicial intervention	\$0.00
Clerk's fee for filing of Notice of Pendency - CPLR 8018(e), 8021(12)	\$0.00
Skip trace fees	\$0.00
Motion fees	\$0.00
Note of Issue	\$0.00
Total	\$0.00

-----X

Plaintiff,

vs.

ATTORNEY AFFIRMATION

INDEX NO.:

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

_____, Esq., pursuant to CPLR 2106 and under penalties of perjury affirms as follows:

1. I am an attorney at law licensed to practice in the State of New York with _____, and the attorney for the Plaintiff in the above referenced action.
2. This affirmation is made in support of this court granting reasonable attorneys fees as allowed for in paragraph _____ of the mortgage being foreclosed.
3. A flat fee of approximately \$ _____ for an uncontested foreclosure action is customarily paid to _____ by its client. Our flat legal fee is based on attorney time at a rate of \$175.00 per hour, and paralegal time at a rate of \$125.00 per hour. Litigation, orders to show cause, opposition to the judgment, etc., normally result in additional legal fees being paid.
4. Since _____ is usually paid a flat legal fee, individual time sheets for each file are not kept. On average a total time of twelve (12) hours is spent through out the foreclosure action, and five (5) hours for post judgment activity. Attached hereto is a summary of the work performed for each step of the foreclosure action. Actual time spent may vary depending on complexity of the file, correspondence with mortgagors or their attorney, title issues, and the like. Affirmant asserts the requested fees are fair and reasonable.

AFFIRMANT HEREBY REQUESTS THIS COURT APPROVE THE FOLLOWING LEGAL FEES FOR THIS ACTION (TOTAL APPEARS AT THE END OF THIS AFFIRMATION)

\$ _____ **Basic legal fees for this foreclosure action. Plus, those fees that are marked with an "x" below.**

\$ _____ **Motion for Summary Judgment.** Review of answer, contact client, preparation of client affidavit, attorney affidavit, attach documentation to motion. Schedule motion, send out notice, appear in court if necessary. Obtain order, file and give notice of entry.

\$ _____ **Bankruptcy fees.** Due to mortgagor's filing bankruptcy, affirmant's firm lifted the stay in bankruptcy by motion. These fees are also flat fees paid by the firm's clients. The fee covers one or more of the following: filing proof of claim (chapter 13), motion to lift stay, court appearance, contacting client with hearing results, drafting and filing of order.

7. In compliance with CPLR 3215(g)(3)(iii) an additional copy of the Summons filed in this action was mailed to the defendants as prescribed by law. Attached hereto at Exhibit D is a copy of the Affidavit of Service by Mail.
8. PLEASE BE ADVISED THAT A VOLUNTARY SETTLEMENT CONFERENCE IS NOT REQUIRED.
9. No previous application for this or like relief has been made.

WHEREFORE, your affirmant prays that this Court execute the Judgment of Foreclosure and Sale, as attached hereto, and for such other and further relief as to this Court may deem just and proper.

Dated: _____
Amherst, New York

_____, Esq.

_____, P.C. by _____, Esq., an attorney at law licensed to practice in the State of New York, and attorney for the plaintiff in this action hereby certifies that to the best of his information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this pleadings, affidavit (or motion if applicable), or the contentions contained herein are not frivolous as defined in 22 N.Y.C.R.R. 130 1.1(c).

_____, Esq.

-----X

**AFFIRMATION FOR EXECUTION
OF JUDGMENT OF FORECLOSURE
AND SALE**

Plaintiff,

INDEX NO.:

vs.

Mortgaged Premises:

SBL #:

Defendant(s).

-----X

_____, Esq., pursuant to CPLR 2106 and under penalties of perjury affirms as follows:

1. That I am an attorney at law licensed to practice in the State of New York, and the attorney for Plaintiff, _____, in the above referenced action.
2. That I hereby repeat and reallege all statements made in the Affirmation of Regularity, dated the ___th day of _____, 2008, which is attached hereto and incorporated by reference herein as Exhibit "B".
3. That since the execution of said affirmation, this Court appointed _____ ESQ., as Referee by Order dated the ___ day of _____, 2008, in this foreclosure action, as appears in more detail on the Order of Reference attached hereto.
4. That on the ___ day of _____, 2008 said Referee executed his/her Oath and Report of Amount Due, and attached hereto.
5. That as of the ___ day of _____, 2008 the date interest was computed to in said Referee's Report, there was due and owing to the Plaintiff the sum of \$ _____.
6. That there have been no additions or deletions of Defendants with the exception of _____, _____, who were substituted for JOHN DOE as party Defendant(s) in this action more fully seen on the Order of Reference.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NASSAU

-----X

REFEREE'S REPORT OF SALE

INDEX NO.:

Plaintiff,

Mortgaged Premises:

vs.

SBL #:

Defendant(s).

-----X

TO THE SUPREME COURT:

I, _____ Esq., the Referee appointed by the Judgment entered in this action the 17th day of June, 2008, to make the sale of the mortgaged premises therein described, do respectfully report as follows:

FIRST: That I caused due notice of the sale of the said premises held by me at public auction on the 9th day of September, 2008, in NASSAU County at the Calendar Control Part (CCP) Courtroom of the Supreme Court, 100 Supreme Court Drive Mineola, NY 11501**on Tuesday at 11:30am**, as will fully appear by the affidavits of publication and posting.

SECOND: That at the time and place of sale, I attended in person, and offered the said mortgaged premises for sale to the highest bidder, and sold the same to the Plaintiff,

for the sum of

\$500.00 that being the highest sum bid. No deposit was received.

THIRD: That since the bid of the Plaintiff was not in excess of the amount due, payment of the ten percent deposit and further payments were not required, in accordance with the provisions of the Judgment of _____ Foreclosure and Sale.

FOURTH: That I have received from the Plaintiff fees and expenses on the sale the sum of \$500.00.

FIFTH: That I have allowed to the attorneys for the Plaintiff out of the purchase money for publication and posting expenses the sum of \$489.60.

SIXTH: That I have allowed to the attorneys for the Plaintiff the sum of \$1,119.00 for the costs and additional allowance, if any, awarded to the Plaintiff by said Judgment.

SEVENTH: That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the mortgaged premises sold.

EIGHTH: That there remains no surplus amount.

Annexed hereto and made a part of this my report, is a statement showing the several items aforesaid and the mode of computation of the deficiency.

All of which is respectfully submitted.

DATED: _____

REFEREE'

STATEMENT OF SALE

Amount of Sales Price \$500.00

Disbursed as Follows:

Referee's Fee	\$500.00
Advertising Expenses	\$489.60
Plaintiff's Costs and Allowances	\$1,119.00
Escrow and Other Costs Advanced	\$14,487.37
Total	\$16,595.97

Balance available for distribution from sale **(\$0.00)**

Less: Inspections/BPO \$363.96

Less: Taxes \$5,608.88

Total Proceeds **(\$0.00)**

COMPUTATION OF DEFICIENCY OR SURPLUS

Amount Due Plaintiff per Judgment \$307,980.63

Attorney Fees \$1,800.00

Additional interest up to but not including date of judgment \$4,486.01

Interest from date of judgment to date of sale and/or delivery of deed \$6,454.94

Total due Plaintiff \$320,721.58

Paid to Plaintiff from sale proceeds **(\$0.00)**

Deficiency arising from sale proceeds **\$342,790.39**

DATED: 9/23/08

Court Index No: *

Blumme, M 9/9/08

16220/07

TERMS OF SALE

The real property located at _____ 3 will be sold under the direction of Michele Bencivinni, Esq., the Referee, pursuant to the following terms:

FIRST: A ten percent deposit of the amount of the winning bid ("purchase price") must be paid in cash or certified funds to the Referee at the time and place of sale for which a receipt will be given. Full credit will be given for any amount in excess of 10 percent.

SECOND: The Referee may accept a written bid from the Plaintiff or the Plaintiff's attorneys, which will be the opening bid as if Plaintiff appeared in person. If Plaintiff is the highest bidder the Referee is not required to collect the 10 percent deposit.

THIRD: The highest bidder ("Purchaser") will, at the time and place of sale, sign the memorandum of sale annexed to the end of these terms. The Purchaser acknowledges that these terms are a binding contract and that Purchaser has read these terms and consents to each and every one, as indicated by Purchaser's signature on the Memorandum of Sale, unless Plaintiff is the Purchaser in which case is signature is not required.

FOURTH: The balance of the purchase price must be paid to the Referee at 33 E Main Street East Islip, NY 11730-2501, or other location of the Referee's choosing, on or before the 9th day of October, 2008, when the Referee's Deed will be ready. Time is of the essence with respect to the closing date and the failure of Purchaser to appear ready, willing and able to pay the balance of the purchase price, at the time and place set forth herein will be a material default under these terms of sale, with no further notice being required from the Referee or Plaintiff's counsel, subjecting the Purchaser to forfeiture of the deposit or resale as specified below. Nothing herein shall prevent the purchaser from closing prior to the date set forth herein.

FIFTH: An adjournment of the closing date stated in paragraph FOURTH above, for any reason including but not limited to title clearance, shall be at the sole discretion of Plaintiff, and must be in writing. Time is of the essence with respect to any adjourned date. Any closing after the date set forth in paragraph FOURTH above, even with the consent of Plaintiff, shall be subject to interest at the rate of nine percent (9%) per annum on the entire purchase price from the date set forth in paragraph FOURTH above until the transfer of the Referee's deed, unless the delay is solely the fault of the Plaintiff or Referee. Purchaser shall pay all costs, fees, taxes, assessments and expenses incurred by any party in connection with the adjourned closing.

SIXTH: Neither the Referee nor the Plaintiff is required to send any further notice to the Purchaser of the closing date; and if the Purchaser neglects to call at the time and place above specified to pay the balance of the purchase price and receive the deed, the Purchaser will be in material default of these terms.

SEVENTH: The Referee conducting the sale shall pay out of the sale proceeds those items required by Real Property Actions and Proceedings Law Section 1354, including taxes, assessments, and water rates that are liens upon the property at the time of sale. All taxes, assessments, water rates and other municipal liens which become liens after the sale, are the sole responsibility of the Purchaser. The Purchaser shall be liable for any and all interest due on any tax, assessment, water, municipal or emergency repair liens accruing after the 30th day following the sale. In the event, that the Plaintiff advanced monies for any taxes, assessments, water charges, sewer rents or insurance covering a period which is later in time than the foreclosure sale date, Purchaser herein agrees to adjust and reimburse Plaintiff for such advances.

EIGHTH: The Purchaser agrees that this sale is "as is" and subject to the following items, which are neither valid exceptions to clear title nor valid reasons to adjourn the closing:

(a) Rights of the public and others in and to any part of the mortgaged premises that lies within the bounds of any street, alley, or highway; restrictions and easements of record.

(b) Any state of facts that an accurate survey might disclose, including reapportionment of tax lots or changes to the section, block and lot subsequent to the filing of the Notice of Pendency. Plaintiff is not required to provide a survey.

(c) Rights of Tenants, occupants or squatters, if any. Plaintiff makes no representations as to the occupancy status of the property. It shall be the responsibility of the Purchaser to evict or remove any parties in possession of premises. There shall be no adjustment for rents after the date of sale.

(d) Prior mortgages, liens or encumbrances, whether or not provided for in the judgment.

(e) The right of redemption of the United States of America.

(f) Any rights pursuant to CPLR sections 317, 2003 and 5015 or any appeal of the underlying action.

(g) Any building and zoning regulations, restrictions, ordinances and amendments thereto of the municipality, state, or federal government, or any agency, bureau, commission or department with jurisdiction over the property, and any violations or notices of violations issues by same, including, but not limited to code violations, emergency repair liens, 7A Administrators, reapportionment of lot lines, or vault charges.

(h) Any orders or requirements issued by any governmental entity having jurisdiction against or affecting said premises and violations of the same, including but not limited to any type of Notice of Pendency filed by same.

(i) Any bankruptcy in which there is no automatic stay, pursuant to 11 USC section 362 (c)(4)(A). Plaintiff has no duty or obligation to obtain a comfort order pursuant to 11 USC Section 362 (c)(4)(A)(ii).

(j) Any Hazardous Materials in the premises including, but not limited to, flammable explosives, radioactive materials, hazardous wastes, asbestos or any material containing asbestos, and toxic substances.

(k) Other conditions in the judgment to the extent that these terms do not contradict or vary any express and overt provisions of said judgment.

NINTH: The premises are being sold in "as is" condition, defined as the physical condition and state of title of the premises on the day of sale, notwithstanding the condition of same on the day of closing. Neither the Referee or the Plaintiff have made any representations as to the physical condition, state of title, rents, leases, expenses, operation or any other matter or thing affecting or relating to the premises, and the Purchaser hereby expressly acknowledges that no representations have been made. There is no obligation or legal right to provide the Purchaser access to the property.

TENTH: All expenses of closing, including but not limited to Plaintiff's closing attorney's fees, title insurance, transfer taxes, deed recordation costs, and preparation fees for transfer documents shall be paid by the Purchaser.

ELEVENTH: In case the purchaser shall fail to comply with any of the above conditions of sale, Plaintiff may:

(a) In its discretion charge purchaser interest at the rate of nine percent (9%) per annum on the entire purchase price from the date set forth in paragraph FOURTH above until the transfer of the Referee's deed. Said interest may be charged regardless of any adjournment of the closing, or

~~(b) Place the property for resale under the direction of said Referee, without application to the Court, unless the plaintiff's attorneys shall elect to make such application, or~~

(c) Sell the premises to the second highest bidder, in the discretion of the Referee.

In the event of resale, Purchaser shall be held liable for the difference between the amount received upon resale and the amount of purchaser's successful bid, plus the costs, expenses and attorney's fees occurring as a result of said resale. Purchaser's deposit shall be applied to said deficiency, with any overage refunded to said purchaser. Purchaser shall be liable for any remaining deficiency.

Should plaintiff be the successful bidder at said resale, purchaser agrees to forfeit its entire deposit as liquidated damages. Such forfeiture shall not be a waiver of any rights of plaintiff to seek and obtain other damages as allowed for by law.

TWELFTH: If Purchaser is unable to obtain clear title, excluding the matters contained in Paragraph EIGHTH above, Purchaser agrees to allow Plaintiff or its counsel to arrange for a title policy, which will be an ALTA policy issued at standard premiums, subject to customary exceptions. Purchaser agrees to pay for the cost of said policy(ies).

THIRTEENTH: Notwithstanding any provision contained herein to the contrary, in the event that clear title is unable to be conveyed for any reason, other than the matters contained in Paragraph EIGHTH above, the Purchaser's sole remedy shall be a return of the deposit, and the Purchaser shall have no further rights against either the Referee or the Plaintiff.

FOURTEENTH: Neither the Referee or the Plaintiff shall be liable for nor bound by any verbal or written statements, representations, promises, or guaranty, real estate broker's commissions or information pertaining to the premises furnished by any third party, real estate broker, agent or their employee. Neither the Referee nor the Plaintiff is liable for any express or implied warranties, guaranties, promises or statements of any kind relating in any manner to the premises. All understandings and agreements heretofore had between the parties are merged in these Terms of Sale, which fully and completely express their agreement. These Terms of Sale cannot be changed, terminated or waived orally. These Terms of Sale shall be binding on the Purchaser(s) and any heirs, successors and assigns thereof.

FIFTEENTH: Any errors or omissions in computing apportionments or allocation of closing shall be corrected and reimbursements issued as necessary. This provision shall survive the closing and delivery of the Referee's Deed.

SIXTEENTH: The successful bid shall be subject to any arrangement made prior to the sale between the Plaintiff and the defendant borrower(s) for the reinstatement, payoff, modification or workout of the delinquent note and mortgage which are at this time unknown to the Referee. If any such arrangement was made, the sale shall be deemed null and void and any deposit promptly refunded to the high bidder, without recourse against the Referee, the Plaintiff, the Plaintiff's attorneys agents and/or assigns or the Defendant.

SOLD TO THE PLAINTIFF IN THE AMOUNT OF \$500.00

NOTICE OF SALE

SUPREME COURT - COUNTY OF NASSAU

Plaintiff,
AGAINST
Defendant(s)

Pursuant to a judgment of foreclosure and sale duly dated 6/13/2008

I, the undersigned Referee will sell at public auction at the

calendar control part (CCP) of the Supreme Court, 100 Supreme Court Drive, Mineola, New York

on 9/9/2008 at 11:30 AM premises known as

All that certain plot piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being

at Elmont, in the Town of Hempstead, County of Nassau and State of New York

Section, Block and L Approximate amount of judgment

\$307,980.63 plus interest and costs Premises will be sold subject

to provisions of filed Judgment Index #

Referee

Dated: 8/5/2008

MAUREEN O'CONNELL
NASSAU COUNTY CLERK



OFFICE OF THE COUNTY CLERK

240 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501-4249
516-571-2660
FAX 516-742-4099

WWW.NASSAUCOUNTYNY.GOV/AGENCIES/CLERK/

Fall 2008

**IMPORTANT FILING INFORMATION
FOR REFEREE'S DEED**

In accordance with a directive of the New York State Department of Taxation & Finance, please be advised of the following:

On the deed to be filed, the Referee is the Grantor. However, the Referee may not be listed as the Grantor on the TP-584. For purposes of completing the TP-584, the Grantor must be the defaulting party and the names, addresses and social security numbers must be of the defaulting party. In the event this information is not available, attach a statement to that effect to the TP584, include your name and capacity (*i.e.*, referee, title agent, or attorney) and that the missing information is not available.

The TP-584 must be completed in its entirety. Schedule C of the TP-584 should only be signed by the GRANTEE. With regard to Schedule D of the TP-584, the Referee must sign only Part II (Exempt of non-resident) and the middle box must be checked off.

The RP-5217 must be completely filled out and the Referee must sign as the Seller.



Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax

Recording office time stamp

See Form TP-584-I, Instructions for Form TP-584, before completing this form. Please print or type.

Schedule A — Information relating to conveyance

<input type="checkbox"/> Individual <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Estate/Trust <input type="checkbox"/> Other	Grantor/Transferor	Name (if individual: last, first, middle initial)	Social security number
	Mailing address	Social security number	
	City State ZIP code	Federal employer ident. number	
	Grantee/Transferee	Name (if individual: last, first, middle initial)	Social security number
<input type="checkbox"/> Individual <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Estate/Trust <input type="checkbox"/> Other	Mailing address	Social security number	
	City State ZIP code	Federal employer ident. number	

Location and description of property conveyed

Tax map designation			Address	City/village	Town	County
Section	Block	Lot				

Type of property conveyed (check applicable box)

1 <input type="checkbox"/> One- to three-family house 2 <input type="checkbox"/> Residential cooperative 3 <input type="checkbox"/> Residential condominium 4 <input type="checkbox"/> Vacant land	5 <input type="checkbox"/> Commercial/Industrial 6 <input type="checkbox"/> Apartment building 7 <input type="checkbox"/> Office building 8 <input type="checkbox"/> Other _____	Date of conveyance <table style="width: 100%; border: 1px solid black;"> <tr> <td style="width: 33%; border: 1px solid black;"> </td> <td style="width: 33%; border: 1px solid black;"> </td> <td style="width: 33%; border: 1px solid black;"> </td> </tr> <tr> <td style="font-size: small;">month</td> <td style="font-size: small;">day</td> <td style="font-size: small;">year</td> </tr> </table>				month	day	year	Percentage of real property conveyed which is residential real property _____% <i>(see instructions)</i>
month	day	year							

Condition of conveyance (check all that apply)

- | | | |
|--|--|--|
| a. <input type="checkbox"/> Conveyance of fee interest

b. <input type="checkbox"/> Acquisition of a controlling interest (state percentage acquired _____%)

c. <input type="checkbox"/> Transfer of a controlling interest (state percentage transferred _____%)

d. <input type="checkbox"/> Conveyance to cooperative housing corporation

e. <input type="checkbox"/> Conveyance pursuant to or in lieu of foreclosure or enforcement of security interest (attach Form TP-584.1, Schedule E) | f. <input type="checkbox"/> Conveyance which consists of a mere change of identify or form of ownership or organization (attach Form TP-584.1, Schedule F)

g. <input type="checkbox"/> Conveyance for which credit for tax previously paid will be claimed (attach Form TP-584.1, Schedule G)

h. <input type="checkbox"/> Conveyance of cooperative apartment(s)

i. <input type="checkbox"/> Syndication

j. <input type="checkbox"/> Conveyance of air rights or development rights

k. <input type="checkbox"/> Contract assignment | l. <input type="checkbox"/> Option assignment or surrender

m. <input type="checkbox"/> Leasehold assignment or surrender

n. <input type="checkbox"/> Leasehold grant

o. <input type="checkbox"/> Conveyance of an easement

p. <input type="checkbox"/> Conveyance for which exemption from transfer tax claimed (complete Schedule B, Part III)

q. <input type="checkbox"/> Conveyance of property partly within and partly outside the state

r. <input type="checkbox"/> Other (describe) _____ |
|--|--|--|

For recording officer's use	Amount received Schedule B., Part I \$ _____ Schedule B., Part II \$ _____	Date received	Transaction number
-----------------------------	--	---------------	--------------------

Schedule B — Real estate transfer tax return (Tax Law, Article 31)

Part I — Computation of tax due

- 1 Enter amount of consideration for the conveyance (if you are claiming a total exemption from tax, check the exemption claimed box, enter consideration and proceed to Part III) **Exemption claimed**
- 2 Continuing lien deduction (see instructions if property is taken subject to mortgage or lien)
- 3 Taxable consideration (subtract line 2 from line 1)
- 4 Tax: \$2 for each \$500, or fractional part thereof, of consideration on line 3
- 5 Amount of credit claimed (see instructions and attach Form TP-584.1, Schedule G)
- 6 Total tax due* (subtract line 5 from line 4)

1.		
2.		
3.		
4.		
5.		
6.		

Part II — Computation of additional tax due on the conveyance of residential real property for \$1 million or more

- 1 Enter amount of consideration for conveyance (from Part I, line 1)
- 2 Taxable consideration (multiply line 1 by the percentage of the premises which is residential real property, as shown in Schedule A) ...
- 3 Total additional transfer tax due* (multiply line 2 by 1% (.01))

1.		
2.		
3.		

Part III — Explanation of exemption claimed on Part I, line 1 (check any boxes that apply)

The conveyance of real property is exempt from the real estate transfer tax for the following reason:

- a. Conveyance is to the United Nations, the United States of America, the state of New York, or any of their instrumentalities, agencies, or political subdivisions (or any public corporation, including a public corporation created pursuant to agreement or compact with another state or Canada)..... a
- b. Conveyance is to secure a debt or other obligation..... b
- c. Conveyance is without additional consideration to confirm, correct, modify, or supplement a prior conveyance..... c
- d. Conveyance of real property is without consideration and not in connection with a sale, including conveyances conveying realty as bona fide gifts..... d
- e. Conveyance is given in connection with a tax sale..... e
- f. Conveyance is a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. (This exemption cannot be claimed for a conveyance to a cooperative housing corporation of real property comprising the cooperative dwelling or dwellings.) Attach Form TP-584.1, Schedule F..... f
- g. Conveyance consists of deed of partition..... g
- h. Conveyance is given pursuant to the federal Bankruptcy Act..... h
- i. Conveyance consists of the execution of a contract to sell real property, without the use or occupancy of such property, or the granting of an option to purchase real property, without the use or occupancy of such property..... i
- j. Conveyance of an option or contract to purchase real property with the use or occupancy of such property where the consideration is less than \$200,000 and such property was used solely by the grantor as the grantor's personal residence and consists of a one-, two-, or three-family house, an individual residential condominium unit, or the sale of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold covering an individual residential cooperative apartment..... j
- k. Conveyance is not a conveyance within the meaning of Tax Law, Article 31, section 1401(e) (attach documents supporting such claim)..... k
- l. Other (attach explanation)..... l

*Please make check(s) payable to the county clerk where the recording is to take place. If the recording is to take place in New York City, make check(s) payable to the **NYC Department of Finance**. If a recording is not required, send this return and your check(s) made payable to the **NYS Department of Taxation and Finance**, directly to the NYS Tax Department, RETT Return Processing, PO Box 5045, Albany NY 12205-5045.

Schedule C — Credit Line Mortgage Certificate (Tax Law, Article 11)

Complete the following only if the interest being transferred is a fee simple interest.

I (we) certify that: (check the appropriate box)

1. The real property being sold or transferred is not subject to an outstanding credit line mortgage.
2. The real property being sold or transferred is subject to an outstanding credit line mortgage. However, an exemption from the tax is claimed for the following reason:
 - The transfer of real property is a transfer of a fee simple interest to a person or persons who held a fee simple interest in the real property (whether as a joint tenant, a tenant in common or otherwise) immediately before the transfer.
 - The transfer of real property is (A) to a person or persons related by blood, marriage or adoption to the original obligor or to one or more of the original obligors or (B) to a person or entity where 50% or more of the beneficial interest in such real property after the transfer is held by the transferor or such related person or persons (as in the case of a transfer to a trustee for the benefit of a minor or the transfer to a trust for the benefit of the transferor).
 - The transfer of real property is a transfer to a trustee in bankruptcy, a receiver, assignee, or other officer of a court.
 - The maximum principal amount secured by the credit line mortgage is \$3,000,000 or more, and the real property being sold or transferred is **not** principally improved nor will it be improved by a one- to six-family owner-occupied residence or dwelling.

Please note: for purposes of determining whether the maximum principal amount secured is \$3,000,000 or more as described above, the amounts secured by two or more credit line mortgages may be aggregated under certain circumstances. See TSB-M-96(6)-R for more information regarding these aggregation requirements.

Other (attach detailed explanation).

3. The real property being transferred is presently subject to an outstanding credit line mortgage. However, no tax is due for the following reason:
 - A certificate of discharge of the credit line mortgage is being offered at the time of recording the deed.
 - A check has been drawn payable for transmission to the credit line mortgagee or his agent for the balance due, and a satisfaction of such mortgage will be recorded as soon as it is available.
4. The real property being transferred is subject to an outstanding credit line mortgage recorded in _____ (insert liber and page or reel or other identification of the mortgage). The maximum principal amount of debt or obligation secured by the mortgage is _____. No exemption from tax is claimed and the tax of _____ is being paid herewith. (Make check payable to county clerk where deed will be recorded or, if the recording is to take place in New York City, make check payable to the **NYC Department of Finance**.)

Signature (both the grantor(s) and grantee(s) must sign)

The undersigned certify that the above information contained in schedules A, B, and C, including any return, certification, schedule, or attachment, is to the best of his/her knowledge, true and complete, and authorize the person(s) submitting such form on their behalf to receive a copy for purposes of recording the deed or other instrument effecting the conveyance.

SHOULD NOT SIGN HERE, COMPLETE SCHEDULE B PART II ON REVERSE SIDE →

Grantor signature	Title	Grantee signature	Title
Grantor signature	Title	Grantee signature	Title

Reminder: Did you complete all of the required information in Schedules A, B, and C? Are you required to complete Schedule D? If you checked e, f, or g in Schedule A, did you complete Form TP-584.1? Have you attached your check(s) made payable to the county clerk where recording will take place or, if the recording is in New York City, to the **NYC Department of Finance**? If no recording is required, send your check(s), made payable to the **Department of Taxation and Finance**, directly to the NYS Tax Department, RETT Return Processing, PO Box 5045, Albany NY 12205-5045.

Schedule D - Certification of exemption from the payment of estimated personal income tax (Tax Law, Article 22, section 663)

Complete the following only if a fee simple interest or a cooperative unit is being transferred by an individual or estate or trust.

Part I - New York State residents

If you are a New York State resident transferor(s)/seller(s) listed in Schedule A of Form TP-584 (or an attachment to Form TP-584), you must sign the certification below. If one or more transferors/sellers of the real property or cooperative unit is a resident of New York State, **each** resident transferor/seller must sign in the space provided. If more space is needed, please photocopy this Schedule D and submit as many schedules as necessary to accommodate all resident transferors/sellers.

Certification of resident transferor(s)/seller(s)

This is to certify that at the time of the sale or transfer of the real property or cooperative unit, the transferor(s)/seller(s) as signed below was a resident of New York State, and therefore is not required to pay estimated personal income tax under Tax Law, section 663(a) upon the sale or transfer of this real property or cooperative unit.

Signature	Print full name	Date
Signature	Print full name	Date
Signature	Print full name	Date
Signature	Print full name	Date

Note: A resident of New York State may still be required to pay estimated tax under Tax Law, section 685(c), but not as a condition of recording a deed.

Part II - Nonresidents of New York State

If you are a nonresident of New York State listed as a transferor/seller in Schedule A of Form TP-584 (or an attachment to Form TP-584) but are not required to pay estimated personal income tax because one of the exemptions below applies under Tax Law, section 663(c), check the box of the appropriate exemption below. If any one of the exemptions below applies to the transferor(s)/seller(s), that transferor(s)/seller(s) is not required to pay estimated personal income tax to New York State under Tax Law, section 663. **Each** nonresident transferor/seller who qualifies under one of the exemptions below must sign in the space provided. If more space is needed, please photocopy this Schedule D and submit as many schedules as necessary to accommodate all nonresident transferors/sellers.

If none of these exemption statements apply, you must complete Form IT-2663, *Nonresident Real Property Estimated Income Tax Payment Form*, or Form IT-2664, *Nonresident Cooperative Unit Estimated Income Tax Payment Form*. For more information, see *Payment of estimated personal income tax*, on page 1 of Form TP-584-I.

Exemption for nonresident transferor(s)/seller(s)

This is to certify that at the time of the sale or transfer of the real property or cooperative unit, the transferor(s)/seller(s) (grantor) of this real property or cooperative unit was a nonresident of New York State, but is not required to pay estimated personal income tax under Tax Law, section 663 due to one of the following exemptions:

- The real property or cooperative unit being sold or transferred qualifies in total as the transferor's/seller's principal residence (within the meaning of Internal Revenue Code, section 121) from _____ Date to _____ Date (see instructions).
- The transferor/seller is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure, or in lieu of foreclosure with no additional consideration.
- The transferor or transferee is an agency or authority of the United States of America, an agency or authority of the state of New York, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or a private mortgage insurance company.

Signature	Print full name	Date
Signature	Print full name	Date
Signature	Print full name	Date
Signature	Print full name	Date

FOR COUNTY USE ONLY

C1. SWIS Code _____
C2. Date Deed Recorded _____
Month / Day / Year
C3. Book _____ C4. Page _____



REAL PROPERTY TRANSFER REPORT

STATE OF NEW YORK
STATE BOARD OF REAL PROPERTY SERVICES

RP - 5217

RP-5217 Rev 3/97

PROPERTY INFORMATION

1. Property Location: STREET NUMBER, STREET NAME, CITY OR TOWN, VILLAGE, ZIP CODE
2. Buyer Name: LAST NAME / COMPANY, FIRST NAME
3. Tax Billing Address: Indicate where future Tax Bills are to be sent if other than buyer address (at bottom of form). LAST NAME / COMPANY, FIRST NAME, STREET NUMBER AND STREET NAME, CITY OR TOWN, STATE, ZIP CODE
4. Indicate the number of Assessment Roll parcels transferred on the deed: # of Parcels OR Part of a Parcel. (Only if Part of a Parcel) Check as they apply: 4A. Planning Board with Subdivision Authority Exists, 4B. Subdivision Approval was Required for Transfer, 4C. Parcel Approved for Subdivision with Map Provided
5. Deed Property Size: FRONT FEET, DEPTH, ACRES
6. Seller Name: LAST NAME / COMPANY, FIRST NAME
7. Check the box below which most accurately describes the use of the property at the time of sale: A. One Family Residential, B. 2 or 3 Family Residential, C. Residential-Vacant Land, D. Non-Residential Vacant Land, E. Agricultural, F. Commercial, G. Apartment, H. Entertainment / Amusement, I. Community Service, J. Industrial, K. Public Service, L. Forest. Check the boxes below as they apply: 8. Ownership Type is Condominium, 9. New Construction on Vacant Land, 10A. Property Located within an Agricultural District, 10B. Buyer received a disclosure notice indicating that the property is in an Agricultural District

SALE INFORMATION

11. Sale Contract Date: Month / Day / Year
12. Date of Sale / Transfer: Month / Day / Year
13. Full Sale Price: _____
(Full Sale Price is the total amount paid for the property including personal property. This payment may be in the form of cash, other property or goods, or the assumption of mortgages or other obligations.) Please round to the nearest whole dollar amount.
14. Indicate the value of personal property included in the sale: _____
15. Check one or more of these conditions as applicable to transfer: A. Sale Between Relatives or Former Relatives, B. Sale Between Related Companies or Partners in Business, C. One of the Buyers is also a Seller, D. Buyer or Seller is Government Agency or Lending Institution, E. Deed Type not Warranty or Bargain and Sale (Specify Below), F. Sale of Fractional or Less than Fee Interest (Specify Below), G. Significant Change in Property Between Taxable Status and Sale Dates, H. Sale of Business is Included in Sale Price, I. Other Unusual Factors Affecting Sale Price (Specify Below), J. None

ASSESSMENT INFORMATION - Data should reflect the latest Final Assessment Roll and Tax Bill

16. Year of Assessment Roll from which information taken: _____
17. Total Assessed Value (of all parcels in transfer): _____
18. Property Class: _____
19. School District Name: _____
20. Tax Map Identifier(s) / Roll Identifier(s) (If more than four, attach sheet with additional identifier(s))

CERTIFICATION

I certify that all of the items of information entered on this form are true and correct (to the best of my knowledge and belief) and I understand that the making of any willful false statement of material fact herein will subject me to the provisions of the penal law relative to the making and filing of false instruments.

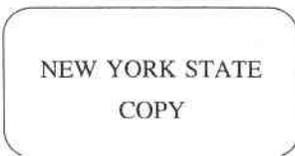
BUYER

BUYER SIGNATURE _____ DATE _____
STREET NUMBER _____ STREET NAME (AFTER SALE) _____
CITY OR TOWN _____ STATE _____ ZIP CODE _____

SELLER

BUYER'S ATTORNEY

LAST NAME _____ FIRST NAME _____
AREA CODE _____ TELEPHONE NUMBER _____



X

Keeping up with the latest reforms in foreclosure litigation

It is difficult to pick up a newspaper or watch the news without being bombarded with stories about the housing crisis, the credit crisis, or Wall Street bailouts. It seems that every day new legislation is proposed to help stabilize the housing and mortgage markets or to increase regulation. In fact, an alarming number of homeowners are having trouble making their mortgage payment, leading to escalating foreclosures. According to the Empire Justice Center, Nassau and Suffolk counties are two of the top three counties in New York State with subprime mortgages that are 30 or more days late.¹ As more and more clients call their attorneys for advice, today's practitioner must stay current on new statutes that affect the industry.

On August 5, 2008, Governor Paterson signed into law comprehensive reforms that significantly change foreclosure litigation in the State of New York. What follows is a primer to help practitioners stay current.

Section 1304 of the Real Property Actions and Procedure Law (RPAPL) is a new section that substantially alters the ability of a lender to foreclose on many residential properties. Under the law, a lender seeking to commence an action to foreclose against a high cost, subprime, or non-traditional loan,² must provide the homeowner with a notice that they are at risk of losing their home. The lender must further notify the homeowner of the number of days they are in default, the amount owed to cure the default, how to contact the lender, and that the lender may take action if the matter is not resolved within ninety (90) days. The notice must be in 14-point type, must be served by certified or registered mail to the subject property and the last known address of the homeowner, and provide information for at least five (5) HUD-certified housing counselors serving the borrower's

region. For purposes of the statute, the notice is considered given on the date of mailing and requires the lender to provide the notice at least 90 days prior to commencing an action. As the effective date of the statute is September 1, 2008, which effectively places a moratorium on many foreclosure actions until December 1, 2008. A few important notes: as failure to provide the applicable notice may be used as a defense to an action, it would behoove plaintiff's attorneys to make certain their clients comply with the notice provision and for defense attorneys to allege failure to comply as an affirmative defense. Also, the notice requirement does not apply to a) homeowners who no longer occupy the premises as their primary residence or b) to borrowers who have applied for bankruptcy protection.



Peter Goodman

Section 1303 of RPAPL, as amended, requires a new notice to be delivered with the summons and complaint served in a foreclosure proceeding on 1-4 family owner occupied dwellings. The notice essentially provides information to the defendant homeowner on rescue scams, the possibility of loss of the home, and information where they can receive assistance, including the telephone number and website address for the New York State Department of Banking. The actual language of the notice can be copied right out of the statute and must be on its own page in a color different than that of the summons and complaint. It must be entitled "Help for Homeowners in Foreclosure" in bold 20-point type with the document's body in 14-point bold type.

Section 1302 of RPAPL, as amended, requires the plaintiff-lender of a high-cost or subprime loan to make an affirmative allegation that at time the proceeding was commenced, the plaintiff is the owner and holder of the

LUNCH WITH THE



L-R: Marian C. Rice, Treasurer; 1st Vice-President; Hon. Arthur Marano, Administrative Judge, Ct. Appellate I

Visit our new,

The complete NCBA website is available. To gain access to all sections of our new website, members-only restricted areas, every visitor will need to register by creating a new account. Your login information from our old website will transfer to the new website. Non-members for seminars and events must follow the same process to create an account as well. Non-members will not have access to certain areas of the website.

All you need to register is your email address and Member ID # (which can be found on your NCBA membership card).

Registering is simple:

- Log on to www.nassaubar.org
- Go to "For Our Members" and click on "Create a New Account"
- Provide your email address (that we will use to send you our newsletter) or Member ID # (which can be found on your Membership ID card) and click "I Agree"
- Next, create a User Name and Password and click "Finish"
- You're not done just yet! You will need to verify your account in order to complete the registration and activate your account.

The next time you visit our website at www.nassaubar.org, just click on "New Members" and enter the Username and Password you chose, and you'll have full access to our new NCBA website!

Remember: To gain access to all of our new website, you must register (visiting only) by creating a new user

FORECLOSURE ...

Continued From Page 1

subject mortgage and note, or has been delegated the authority to institute a foreclosure action by said owner; and has complied with all provisions of Section 595(a) of the Banking Law (which regulates actions of mortgage brokers/bankers). Section 6-1 or 6-m (defines high cost and subprime loans) of the Banking Law, and Section 1304 of RPAPL (as discussed herein). As the statute provides that the allegation must be proven "to the satisfaction of the Court before entry of judgment or otherwise," it is critical to obtain and review all Assignments of Mortgage when prosecuting or defending an action in foreclosure.

Perhaps the most significant legislative change is the addition of a new section of the CPLR (Section 3408), effective September 1, 2008 which requires mandatory settlement conferences in residential foreclosure actions to be held within sixty (60) days after proof of service is filed with the County Clerk. However, the statute does not apply to all

"These are clearly trying times. The New York State Legislature should be commended for attempting to mitigate foreclosure actions by offering more opportunities for homeowners to save their homes."

foreclosure actions, but rather only to those involving high cost, subprime, or non-traditional loans consummated between January 1, 2003 and September 1, 2008 where the defendant is a resident of the subject premises. Additionally, for foreclosure actions initiated prior to September 1, 2008 where a final order of judgment has not yet issued, the statute requires the Court to request that the plaintiff identify qualifying loans and in the event the loan qualifies, to notify the defendant of the right to request a conference which must be held as soon as practicable.

CPLR Section 3408 is the legislature's strongest attempt to force the parties to resolve the matter prior to foreclosure. According to the statute, its purpose is:

1. To discuss relative rights and obligations of the parties under the mortgage loan documents.

2. To determine whether the parties can reach a mutual agreement to help the defendant avoid losing the home.

3. To evaluate the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to.

4. Whatever other purposes the Court deems appropriate.

The statute also requires the plaintiff to appear in person or by Counsel. If the plaintiff appears by counsel, it requires counsel to be fully authorized to dispose of the case and allows the plaintiff lender to have a representative attend the conference by telephone or video-conference. When a defendant-homeowner appears pro se, the statute specifically mandates that the Court deem such defendant to have made a motion to proceed as a poor person under CPLR Section 1101 and if the Court determines that such permission should be granted, it shall adjourn the conference until counsel can be obtained. CPLR Section 2408 indicates a strong

desire on behalf of the New York State Legislature to help prevent foreclosure, the statute needs to be amended to address additional issues. The statute attempts to provide counsel for all homeowners appearing at a settlement conference, but does not indicate where a defendant qualifying as a poor person will be able to obtain counsel in such a situation. It also begs the question as to how a defendant homeowner qualifying as a poor person will be able to afford to retain their home in the first place. The Legislature's clear intent is to force lenders into a workout solution with the homeowner. However, the high volume of defaults in the current housing market makes it unlikely that the plaintiffs or their attorneys will be able to appear in Court fully able to dispose of the case. In fact, the plaintiff probably will have little or no information as to the financial ability of the homeowner at that time. Therefore, defendants' Counsel would be well-advised to exchange a complete financial profile of the homeowner with the plaintiff mortgage lender in advance of the conference and to have the name and telephone number of the lender's loss mitigation department available at the conference.

Governor Paterson's new bill provides sweeping changes to existing laws affecting foreclosure that amends and/or adds sections to the Banking Law, the General Obligations Law, the Penal Law, the CPLR, the Real Property Law and the RPAPL. Among other things, the new laws regulate actions of mortgage bankers and brokers and re-define both predatory lending practices and mortgage fraud. One notable new section is Real Property Laws 265-B (amended) which regulates "Distressed Property Consulting Contracts." An important cautionary note is that many new companies are offering to help homeowners in distress find a workout solution. While many of these companies operate ethically, some operate solely to scam money out of already cash-strapped homeowners. Therefore, the new law requires "distressed property consultants" offering to help homeowners obtain a workout solution with their lender to provide the homeowner with a contract containing a five (5) day right of rescission and prohibits such a company from charging any fees until the company has fully performed its obligations under the contract. Violations of the new law may result in compensatory damages and up to a \$10,000 fine per offense. Notably and specifically excluded from the definition of a "distressed property consultant" are attorneys, mortgage brokers/bankers, not for profit housing corporations, and governmental organizations.

These are clearly trying times. The New York State Legislature should be commended for attempting to mitigate foreclosure actions by offering more opportunities for homeowners to save their homes. Recent federal statutes such as the Economic Recovery Act of 2008 (effective October 1, 2008) and the Debt Relief Act of 2007 (effective December, 2007) also attempt to help these same homeowners. However, it is too early to determine whether these actions will exacerbate the foreclosure crisis by tying up additional resources in extended legal proceedings or provide meaningful solutions to liquidity starved lending institutions and homeowners in distress.

Peter J. Goodman, Esq., is a member of the NCBA's Mortgage Foreclosure Task Force and a sole practitioner specializing in real estate and litigation. He has offices in Garden City and Melville.

1. See *Curbing the Mortgage Meltdown*, Empire Justice Center, Rev. Aug 5, 2008.
2. See Banking Law s6-L, RPAPL s1304(5)(E), respectively for a definition of those terms.

Edwin J. Mulhern, Esq.

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I certify that the statements made by me above are correct and complete. Deena R. Ehrlich, Executive Director Nassau County Bar Association

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NASSAU COUNTY FORECLOSURE AUCTION RULES

1. Notices of Sales must be submitted to the Clerk's Office in to Clerk's Office in Room 152 **at least ten (10) days prior** to the date of an Auction.
2. Terms of Sale must be posted outside of the Calendar Control Part (CCP) Courtroom prior to 11:15 a.m. on the date of the Auction.
3. All Court Appointed Referees, Bank Representatives and Plaintiffs (or agents of the plaintiffs) must be present at 11:15 a.m. in the Calendar Control Part (CCP) Courtroom, check in with the Clerk in charge upon arrival, and **remain in the Courtroom** until the conclusion of business for the day or unless the Clerk of the Court directs otherwise.
4. Court Appointed Referees must accept either: (a) Cash, (b) Certified check or (c) Bank Check.
5. Sales will not be deemed final until all scheduled Auctions have been completed and the Clerk in charge announces the conclusion of business for the day.
6. *Should any Court Appointed Referee not be present in the Courtroom at the time of the Sale - The Presiding Judge of the Foreclosure Part reserves the right to appoint a substitute Referee for all remaining purposes.

BIDDING

1. All successful bidders must have proof of identification (ID) and state his or her name and address on the record. In addition, the bidder must comply with the terms of sale, including payment (usually 10%), by cash, certified check or bank check.
2. Any successful bidder, who after the Court Appointed Auction but prior to the transfer of the ten (10%) deposit, decides not to finalize the sale due to new information received after the Auction, must inform the Court Appointed Referee immediately. If the transaction is not completed, the property will be placed for Auction prior to the conclusion of business for the day.

IMPROPER BIDS

1. If any participant improperly bids on a property and causes the property to be returned to the Auction calendar, the Court, in its discretion, reserves the right, after consultation with the Presiding Judge of the Foreclosure Part, to bar the participant from bidding at future Auctions in Nassau County for a period to be determined by the Court or impose any further sanctions the Court deems appropriate.