

June 24, 2020

Hon. Lawrence Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, New York 10004

Re: Resumption of Court Activity in Residential Foreclosure Cases in the New York City Supreme Courts

Dear Judge Marks:

On behalf of Legal Services NYC and its constituents Bronx Legal Services, Brooklyn Legal Services, Queens Legal Services and Staten Island Legal Services, as well as other legal services providers representing homeowners in foreclosure cases in New York City, including Brooklyn Bar Association Volunteer Lawyers Project, Brooklyn Legal Services Corp. A, CAMBA Legal Services, Inc., City Bar Justice Center, DC 37 Municipal Employees Legal Services, Grow Brooklyn, Inc., JASA/Legal Services for Elder Justice, The Legal Aid Society, Mobilization for Justice, New York Legal Assistance Group, Queens County Bar Association Volunteer Lawyers Project and Teamsters Local 237 Legal Services Plan, we write concerning the resumption of activity in residential foreclosure actions in the Supreme Courts in New York City.¹

We believe that as activity in foreclosure cases begins to resume, the courts have a unique opportunity to address the longstanding systemic issues that we have discussed. We also wish to highlight challenges and concerns which are unique to the foreclosure docket, and to recommend certain practices which we believe will ensure that the judicial process is administered efficiently and fairly, with consistency in all courts adjudicating foreclosure actions, while also protecting the health and safety of judges, court staff, litigants and counsel.

Given the well-documented severity of the pandemic and associated economic impact on New York City's low- and moderate-income communities of color, which also bear the brunt of the economic dislocation associated with the pandemic as they did during the foreclosure crisis,

¹ We also write by way of follow-up to my November 19, 2019 letter and our January 9, 2020 meeting, during which we discussed general concerns about adjudication of foreclosure cases arising in the context of the judiciary's emphasis on expediting cases in order to meet "Standards and Goals" benchmarks. We also follow up on the April 15, 2020 letter from New Yorkers for Responsible Lending ("NYRL"), which expressed concerns about the expansion of virtual activity in the courts and the impact on unrepresented litigants without access to technology in all categories of cases.

Jacob Inwald, Director of Foreclosure Prevention
Legal Services NYC, Legal Support Unit
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
Raun J. Rasmussen, Executive Director, Susan L. Kohlmann, Board Chair

it is especially important that the judiciary plan for resumption of foreclosure activity deliberately and with sensitivity to the particular needs of the litigants in these cases.

While the foreclosure process, regrettably, has often been exploited by predatory lenders, abusive mortgage servicers and gentrifying investors to extract wealth from New York City's communities of color, we respectfully suggest that in the present climate of greater consciousness of the racial and economic disparities that pervade our society it is crucial that the particular needs of the defendants in foreclosure cases—both those who are represented and those who are not—be taken into account as the courts resume of activity in foreclosure actions. The courts must devise practices that minimize health risks while allowing for efficient and fair handling of these cases consistent with New York's strong consumer protections and policies designed to promote home-saving solutions as we anticipate a significant spike in foreclosure filings as moratoriums end and forbearance agreements expire in the coming months.

We outline below challenges, concerns and recommendations pertaining to the settlement conference phase of foreclosure actions, the litigation (discovery and motion practice) phases, and the final phases, post judgment of foreclosure and sale.

1. CPLR 3408 Settlement Conferences

As the courts plan for the resumption of settlement conferences, creative solutions that can replicate the clinics and other interventions that have successfully connected homeowners appearing at settlement conferences with legal services are needed. If that is not done, the gains New York has made in transforming the judicial foreclosure process from a "rubber-stamp" proceeding in which homeowners do not participate into one where homeowners are connected to legal services and where home-saving solutions are negotiated will be lost.

The COVID-19 pandemic, its devastating economic impact on homeowners and its disproportionate toll on black and brown families further underscores the importance of 3408 Conferences and the need for them to resume once state- and federally-imposed moratoriums expire. However, any plans to resume 3408 conferences must prioritize the health and safety of court personnel, litigants and their counsel over the pressure to return to operations at pre-COVID-19 norms and levels. Public health considerations demand that a virtual format, whether by videoconferencing platforms such as the Skype for Business presently in use, phone, or some other remote format be adopted by the courts. As organizations that provide legal assistance to homeowners across New York City, we urge the judiciary to consider and incorporate the following recommendations as it plans for remote 3408 conferences.

Virtual Pre-Settlement Conferences

To ensure that homeowners, especially seniors and other vulnerable defendants, can effectively participate and access legal resources without being exposed to the risks that trips to the courthouse pose, we recommend that the courts schedule a virtual pre-settlement conference that requires the appearance only of defendants before a presiding referee prior to the scheduling of the first formal 3408 conference.

At the pre-settlement conference, the referee would explain to *pro se* defendants the purpose of the 3408 conferences, their rights during the process, including their statutory right to serve and file an answer 30 days after the first 3408 conference is held. The referee would also provide the homeowner with materials, including the *pro se* answer form and accompanying instructions, the Consumer Bill of Rights mandated by RPAPL § 1303 (3-a), and a list of names and contact information for legal service providers serving the county in which the court is situated.

Virtual Clinics and Court Tabling

An important function of the pre-settlement conference would be to connect *pro se* defendants to legal service providers early on, for advice, a discussion of their options, assistance with the *pro se* answer and possible limited scope representation during the settlement conferences. The court should allow legal service providers to be available to *pro se* defendants on a stand-by basis, either to participate in the pre-settlement conference or connect with the homeowner afterwards by conducting a virtual clinic following the conference.

First 3408 Conference

A 3408 conference would be scheduled within six weeks after the pre-settlement conference, again with legal service providers (on a rotating basis where conferences are held on multiple days of the week) available to staff a “virtual” table and appear as a friend of the court as needed. (If no answer had been served and filed, defendants’ statutory right to serve and file an answer within thirty days of the first conference would run from the first formal settlement conference, and not from the pre-settlement conference appearance.)

Conference Notices

At present, the means by which defendants receive notice of 3408 conferences varies from one courthouse to another, with some even delegating to *plaintiffs* the statutory obligation to provide notice of the conferences to defendants. We recommend adoption of a uniform notice to advise all foreclosure defendants of the pre-settlement conference and the subsequent 3408 conferences. This notice should be written in plain English and translated into other languages used in the county in which the court is situated. The notice should explain the purpose of the pre-settlement conference and 3408 conferences, and should provide contact information for legal service providers serving the county. The notice should further inform the defendant about different options for participating in the conferences, whether by telephone, Skype for Business, or another videoconference platform. The notice should include a telephone number for the defendant to contact the court to arrange for the defendant’s participation in conferences via one of the available technologies

Before 3408 conferences resume, a similar notice informing the defendant of options for participating virtually should be sent to defendants who were already participating in settlement conferences before March 16, 2020. To avoid confusion, these notices should be sent out by the

court, and this duty to provide defendants with notices of these conferences should never be delegated to plaintiffs' counsel.

Access to the Courts

If a *pro se* foreclosure defendant appears at the courthouse for a pre-settlement conference or 3408 conference that is scheduled to be conducted virtually, the court should not turn the defendant away or deem the defendant to be in default, but should provide the foreclosure defendant with a sanitized space and equipment, as well as masks and hand sanitizer, to enable the defendant safely to participate virtually by telephone or videoconference at the courthouse.

No Defaults

Considering the COVID-19 pandemic, the realities of the digital divide, and other challenges that make it difficult for many *pro se* defendants to participate remotely, no defendant should be defaulted for not appearing at the pre-settlement conference or the first 3408 conference. The court in these instances should send out follow-up letters with a phone number that the defendant can call to request a new date and arrange for virtual participation.

Protecting Vulnerable Defendants

If the court becomes aware that any foreclosure defendant is unable to represent his or her interest or is unable to participate meaningfully in 3408 conferences, such as because of a disability or a lack of capacity, the court should consider appropriate steps, which may include providing a reasonable accommodation, appointing guardian ad litem, contacting APS, and/or contacting one of the legal services providers for evaluation of such defendant's needs

2. Post Settlement Conference Phase: Discovery and Motion Practice/IAS Parts

The same concerns implicated in the 3408 conference phase of foreclosure cases are equally applicable after 3408 conferences are terminated and motion practice (and/or further conferences) commence in the IAS part, whether the foreclosure defendant is represented or not.

Pro Se Homeowners

We are particularly concerned about *pro se* homeowners' ability to participate in their cases after conferences end. It is essential that they can access the court virtually for appearance dates on motions, that they be able to obtain timely service of court filings and notices, especially those in e-filed cases, and that they be permitted to participate in discovery, and that they be afforded the opportunity to connect with legal services providers before any return date or deadline.

Aside from the legal prohibitions on mandating e-filing for unrepresented parties (which are applicable to both the ECF e-filing system or any temporary systems such as EDDS), there are very real concerns about the impact on access to legal services if *pro se* litigants are required to use electronic filing, because many litigants are able to connect with legal service providers through legal clinics provided in courthouses or through referrals from clerks' offices and *pro se* desks. Even if *pro se* homeowners obtained attorney assistance to file a single motion electronically, they would likely not want to opt in to receiving all future court papers via electronic means, even though front-line courthouse staff might encourage them to do so.

However, requiring *pro se* litigants to appear in person to file their papers in the county clerk's office or to appear for a return date or calendar call while the health crisis persists would force these litigants to choose between protecting their health and preserving their legal rights—especially for those litigants who are elderly, have underlying health conditions, or care for others who may have compromised immune systems. Therefore, the following suggestions below together with notices sent by the Court to all *pro se* homeowners would help to alleviate these concerns and ensure that *pro se* homeowners are not adversely affected by the pandemic. These suggestions should be implemented on a city-wide basis to ensure consistency throughout the five boroughs.

Adjournment of Motions and Discovery with *Pro Se* Defendants

The Courts should continue to further adjourn all motions on the calendars with *pro se* defendants until safe in-person access to the courts and to legal services providers are once again fully available. Discovery deadlines for the unrepresented should also be adjourned indefinitely.

No Defaults

As with 3408 conferences, no *pro se* defendant should be defaulted for not appearing at a motion or conference appearance. The court in these instances should send out follow-up notices with a phone number where the defendant can request a new date and inform the court of the way they can participate.

Referrals to Legal Services Providers

To ensure that these protections are adequately in place, the courts should include in all notices sent out to *pro se* homeowners a list of legal service providers with their contact information so that they can be connected to an attorney, be able to request an adjournment if the court does not adjourn all motions for *pro se* homeowners, file oppositions, and make other new filings.

Emergency Filings of Orders to Show Cause

A system should be devised to permit *pro se* homeowners to present orders to show cause (either virtually or through the clerk's office with safe social distancing) for emergency applications. The court could set up computer kiosks in public areas for *pro se* homeowners to

use for filing papers and/or participating in virtual appearances. However, court personnel would need to maintain the kiosks and be able to assist homeowners safely using the safety protocols during this pandemic.

Signed orders to show cause should have reasonable service requirements. For example, a *pro se* homeowner cannot be expected to personally serve or fax a signed order to show cause during the pandemic. The court should also provide *pro se* litigants filing OSCs with the list of legal services providers serving the county.

Represented Homeowners

In cases where foreclosure litigants are represented by counsel, all motions should be filed electronically using the e-file system, and all appearances should be virtual. The court should also make every effort to conference cases where a settlement may be feasible and should return cases to the 3408 conference part, if necessary, to facilitate negotiations between the parties.

For cases in which either party has served discovery demands, the court should hold both preliminary and compliance conferences setting forth discovery deadlines. Because most attorneys are continuing to work remotely, with limited ability to conduct face-to-face meetings with their clients and access physical files, the court should grant substantial adjournments upon request to provide enough time for the parties to obtain documents properly demanded by the opposing party. The court should also entertain discovery motions if a party fails to comply with reasonable discovery deadlines. All depositions should be conducted electronically or adjourned until the parties can meet safely in person while practicing social distancing.

3. Post Foreclosure Judgment Phase Issues

As with proceedings before judgment is entered, we anticipate the need for enhanced procedural safeguards for litigants—particularly self-represented litigants—whose foreclosure cases have gone to judgment. Post-judgment procedures implicate issues of access, process, and safety, whether the defendant is seeking to stay a sale, to obtain accurate and timely information about an auction conducted in compliance with laws and rules, or to move for disbursement of surplus funds post-auction. Indeed, the prospect of reopening the courts post-pandemic affords a valuable opportunity to consider improvements to existing practices and procedures to make them fairer, more transparent, and more equitable.

Auctions

The challenges for *pro se* litigants presented by the pandemic, as detailed above, will compound the existing irregularities and deficiencies in the auction process and in the information available about scheduled auctions, which were described in our November 19, 2019 letter and discussed during our January 9, 2020 meeting. As we discussed, lack of uniformity across the judicial system only exacerbates these issues, which include a lack of adequate notice

of scheduled sales, and undue advantages held by professional bidders, particularly those representing investors and their agents, over ordinary non-professional aspiring homebuyers.

Accordingly, we urge that auctions be suspended until the courts can issue uniform rules and improve procedures in notice and access. In addition, we recommend that the following new approaches be considered:

- All *pro se* homeowner defendants against whom a foreclosure judgment has been entered should automatically be referred to a free legal services provider for advice.
- Following the abatement of the crisis, auctions should not be scheduled for a period of several weeks, to permit *pro se* defendants to seek out legal services.
- OCA should require each court to create and maintain an easily accessible website listing all scheduled sales and terms of sale by date, along with the court's auction rules in English and other languages used in the county.
- Each courthouse must ensure that *pro se* defendants have meaningful access to the courts and the assistance of the Help Center/Office for the Self-Represented for orders to show cause as needed.
- All *pro se* homeowner defendants who have sought a stay of sale by way of an emergency order to show cause should be referred to a free legal services provider for advice. If the *pro se* application is procedurally defective but not clearly substantively inadequate, the application should be held in abeyance and the court should stay the sale until the homeowner has an opportunity to consult with a legal services provider.
- A procedure by which people may participate in auctions remotely as an alternative to in-person participation, and potentially as a replacement to in-person auctions, with supports to allow those without access to adequate technology to participate in bidding, should be implemented.

Surplus motions

The statutory right to secure surplus funds owed to the homeowner after a foreclosure is an important one that ameliorates, at least in part, the stripping of equity from New York's gentrifying neighborhoods that flow from foreclosures, but, is one that is exercised in shockingly few cases.² The judiciary should not be an accomplice to this equity-stripping and should take proactive steps to ensure that homeowners have meaningful access to their surplus remedy. The process of moving for confirmation of the referee's report of sale and disbursement of surplus funds post-auction is complex, and homeowners are frequently not informed, or not timely informed, about their right to seek surplus funds from the sale. These problems will become more significant, particularly *for pro se* defendants, when auctions resume. Moreover, struggling families, in the current economic climate, will be more in need of access to the surplus funds to

² A recent examination revealed that between January 1, 2016 and November 30, 2019 there was more than \$71 million in surplus funds from foreclosure auctions just in the Kings County Clerk's Office, a substantial percentage of which will not be returned to defendants by way of surplus motions because of the difficulty of accessing the process for seeking recovery of surplus funds or lack of information about its availability altogether.

which they are entitled than ever, and it therefore behooves the judiciary to take steps to make the right to surplus funds meaningful and not merely theoretical.

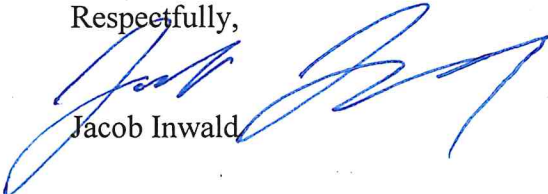
It is crucial to provide homeowners in foreclosure better notice about the surplus funds remedy, ideally before entry of judgment of foreclosure and sale, but at a minimum in the form of a notice from the Court immediately upon auction of the property, including the referee's report of the auction, notifying the homeowner of their right to seek any surplus, and providing contact information for local legal services helping with such applications.

The surplus motion process varies somewhat from court to court—an issue in itself—but typically entails an in-person trip to the Clerk's Office to obtain certain documents generated in connection with the auction; then submission of an application to the Department of Finance for proof of the surplus funds on deposit; and then submission of the motion to the court. This byzantine procedure is made more troublesome still by the fact that the intricacies often trip up the courts charged with adjudicating these motions, necessitating successive motions which likely causes many defendants to give up entirely.

We propose that the process be streamlined and simplified. At the very least, it should be possible for the defendant to obtain the required documents from court through means other than an in-person visit, and for the Department of Finance to process a bare-bones application by accessing supporting documents from its own files and/or from online court resources. Moreover, homeowner defendants should be afforded plain-language notice (in English and other languages used in the county) of the potential availability of surplus funds post-sale when the case is commenced and at regular intervals in the course of the foreclosure case—particularly if and when foreclosure settlement conference proceedings are terminated, and after the grant of an order of reference and after grant of a motion for judgment of foreclosure and sale.

We are cognizant of the many challenges the current health crisis has presented to the judiciary, and we applaud the herculean efforts to transition to virtual appearances for essential matters practically overnight, and the subsequent efforts to resume activity in non-essential matters. The courts' residential foreclosure docket, which presented numerous challenges and areas for improvement even before the current health crisis, presents a unique set of challenges and risks as activity resumes in New York City's crowded courtrooms. We hope you will consider these concerns and recommendations seriously, and we would be happy to discuss these issues with Your Honor at your convenience.

Respectfully,


Jacob Inwald

Enclosure

cc: Hon. Janet DiFiore

Hon. Sherry Klein Heitler
Attorney General Letitia James
New York City Public Advocate Jumaane D. Williams
Senator Brad Hoylman, Chair, Committee on Judiciary
Assemblyman Jeffrey Dinowitz, Chair, Committee on Judiciary
Rose Marie Cantanno (New York Legal Assistance Group)
Tamara del Carmen (Brooklyn Legal Services Corp. A)
Michael Corcoran (Grow Brooklyn, Inc.)
Donna Dougherty (JASA/Legal Services for Elder Justice)
Oda Friedheim (The Legal Aid Society)
Rachel Geballe (Brooklyn Legal Services)
K. Scott Kohanowski (City Bar Justice Center)
Alexis Lorenzo (Bronx Legal Services)
Sara Manaugh (Staten Island Legal Services)
Patrick T. Pyronneau (CAMBA Legal Services, Inc.)
Joseph Rebella (Mobilization for Justice)
Franklin Romeo (Queens Legal Services)
Mary E. Sheridan (Teamsters Local 237 Legal Services Plan)
Mark Weliky (Queens County Bar Association Volunteer Lawyers Project)
William Whelan (DC 37 Municipal Employees Legal Services)
Peter White (Brooklyn Bar Association Volunteer Lawyers Project)