

Memorandum in Support

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

PCAJ #1

June 18, 2013

S. 4530-A
A. 5582-A

By: Senator Klein
By: M. of A. Weinstein

Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to residential foreclosure actions

THE PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE SUPPORTS THIS LEGISLATION

This bill addresses what has become a problem in the foreclosure process – a “shadow inventory” or “shadow docket” of foreclosure cases which have been filed with courts’ clerks and usually served on the homeowner, but no Request for Judicial Intervention (RJI) is filed by the plaintiff. The cases get stuck and, most importantly, are not moving forward into the mandatory settlement conference process. (See New York State Unified Court System, *2011 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*, at 4, available at <http://www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf>.)

There are thousands of foreclosure cases statewide that are sitting in this legal limbo, many for two years or more. It is harming homeowners and making it more difficult and less likely that they will ultimately be able to get a loan modification or other workout to preserve their homes. A homeowner who may have been able to afford a loan modification when the foreclosure case was filed and if a timely settlement conference was held, will be much less likely to do so a year or two later when the case may be brought to conference because the interest and fees are added to the principal balance.

The “shadow docket” started back in October 2010 when in response to the robo-signing scandal, the media uncovered foreclosure cases filed based on false affidavits that were robo-signed by parties who never examined the loan. Foreclosure cases were being wrongfully filed. In response to the robo-signing scandal Chief Judge Lippman prescribed an attorney affirmation that all attorneys must sign and file at the time the RJI is filed in residential home loan cases.

The affirmation requires the lawyers, based on their communications as well as their own inspection and inquiries to “*affirm that, to the best of my knowledge, information, and belief, the*

Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law.”

This bill would move the affirmation filing requirement date from the RJI filing date to the date of commencement of the action. OCA has agreed to replace the attorney affirmation rule if this bill becomes law. The new filing requirement would move cases more quickly through the process. New York has the longest foreclosure process in the country – some have reported experiencing a process as long as 900 days. These delays are overwhelmingly caused by plaintiffs’ failure to timely prosecute these cases.

The bill’s required “Certificate of Merit” also addresses concerns that have been raised about the affirmation. The bill would require that a lawyer review the case and consult with his or her client to determine that *“there is a reasonable basis for the commencement of such action and that that plaintiff is currently the creditor entitled to enforce rights under such documents.”* The Certificate of Merit also must have attached a copy of the mortgage note and any endorsements or other documents to verify the plaintiff’s standing. The bill would also require proof of service to be filed within 20 days of service.

Allowing cases to languish on a “shadow docket” is harmful to homeowners. Once a homeowner falls three months behind, the servicer typically will stop accepting any payments. Servicers are most willing to work with borrowers either prior to the initiation of a lawsuit or, of course, once the case gets to the settlement conference stage – but the limbo time period is the most problematic because many servicers simply advise the homeowner that the case is in foreclosure without further discussing possible settlement.

Filing but failing to prosecute foreclosure cases also harms communities. The “shadow docket” surely includes many properties that are vacant and should be moved quickly through the foreclosure process and put back onto the market, a prospect that is much less likely if those properties are sitting in this legal limbo for extended periods.

Requiring the filing of the Certificate of Merit at the initiation of the case, rather than at the time of filing the RJI, seems like a simple solution.

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Based on the foregoing, the New York State Bar Association’s President’s Committee on Access to Justice **SUPPORTS** this legislation.

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Chair of the Committee: Hon. George H. Lowe