# Steps for the Lender

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Traps and Pitfalls to be Avoided:

1. Address New RPAPL 1308, 1309 & 1310: The Zombie Home Statute. Coming to your neighborhood December 2016 courtesy of the New York State Legislature. The legislation is attached to the materials.

    a. 1308 imposes an inspection and maintenance obligation on first lien holders who are fortunate enough to have liens on "abandoned or vacant" (as defined in New RPAPL 1309) one to four family residential real estate. First and most importantly, the obligations arise when a loan is delinquent - -i.e. in default- - not when the secured lender commences a foreclosure action or actually obtains title. Once a loan is delinquent, if the secured lender has a property inspection right (which is included in virtually all residential mortgages), within 90 days of the delinquency the lender (or agent) must inspect the premises and then conduct inspections every 25-35 days. If the lender has a "reasonable basis" to believe that the property is "abandoned or vacant", there is an obligation to secure and maintain the property. What does all of this mean? Go into the bank inspection business. Review the key provisions of 1308

    b. 1309 establishes procedures to try to expedite a foreclosure where the property is abandoned or vacant. Review the key provisions of 1309

    c. 1310 creates another cottage industry where the DFS will hire a consultant to create and maintain an abandoned home database. This legislation imposes obligations on lenders to provide the data. Look at key provisions of 1310.

2. Before commencing the action:

a. Review the documents and the loan file. All things flow from this review: statute of limitations, satisfaction of conditions precedent, standing and the NYCRR §202.12 Attorney Affirmation.

b. Identify any unique attributes to the loan such as reverse mortgage, high cost home loan, sub prime loan as these may trigger additional obligations and defenses.

c. Foreclosure search to identify all potential defendants

d. Confirm role of plaintiff; holder of note or servicer

e. Review servicing agreement or syndication documents for authority to prosecute and settle

f. Determine if client has possession of the original note with all allonges and endorsements in proper order, *i.e.* firmly affixed so as to make it a part of the instrument (NYUCC §3-202) and/or which adequately describes the note. *Indymac Bank FSB v. Garcia*, 957 NYS2d 365 (Suffolk Co. Sup. Ct 2010); *In re Escobar*, 457 B.R. 229, 241 (Bankr. EDNY 2011). In New York, the Note controls the issue of standing. The holder of the Note has standing and the mortgage is merely incident to the note. Under New York law:

> [i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder *or* assignee of the subject mortgage *and* the holder *or* assignee of the underlying note at the time the action is commenced. (emphasis added).

*U.S. Bank, N.A. v. Cange*, 96 A.D.3d at 826, 947 N.Y.S.2d at 524 (affirming trial court's order denying defendant's motion to dismiss foreclosure action for lack of standing where the uncontroverted evidence established that the plaintiff was in the possession of the original note

at the time the action was commenced and at the time of the hearing and that the mortgage passed to plaintiff incident to the note); *Alderazi*, 951 N.Y.S.2d at 900 (reversing trial court's denial of plaintiff's motion for order of reference where plaintiff submitted the mortgage, note, and evidence of mortgagor's default); *Deutsche Bank National Trust Co. v. Rivas,* 95 A.D.3d at 1061-62 (reversing trial court's granting of defendant's motion to dismiss foreclosure action on the grounds of lack of standing because there was a question of fact as to whether plaintiff was holder of note); *Bank of New York v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, 537 (mortgage follows the note and holder of duly indorsed note has standing). *See also U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 579, 580 (2d Dep't 2009) (same); *Rossrock Fund II v. Osborne,* 82 A.D.3d 737, 737, 918 N.Y.S.2d 514, 515 (2d Dep't 2011) (plaintiff meets its *prima facie* burden of demonstrating entitlement to judgment as a matter of law through the production of the mortgage, the unpaid note and evidence of default); *U.S. Bank, N.A. v. Squadron VCD, LLC*, 2011 WL 4582484, at *7 (S.D.N.Y. Oct. 4, 2011) (holding that plaintiff satisfied prima facie case of foreclosure where plaintiff was holder of note and note was validly assigned to plaintiff); *Aurora Loan Services v. Sadek,* 809 F.Supp.2d 235, 240 (S.D.N.Y. Aug. 22, 2011) (holder of note and mortgage had standing to bring foreclosure action); *In re Gorman,* 2011 WL 5117846, at *4 (Bankr. E.D.N.Y. Oct. 27, 2011) (party in possession of a duly negotiated note and the mortgage, even without a written assignment of the mortgage, has standing to enforce the mortgage); *Deutsche Bank Nat'l Trust v. Pietranico,* 928 N.Y.S.2d at 830 (possession of a duly indorsed note alone confers standing upon the holder to enforce the mortgage in a foreclosure proceeding because "[t]he holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose"); *U.S. Bank, NA. v. Flynn*, 27 Misc. 3d 802, 803, 897 N.Y.S.2d 855, 856 (Sup. Ct. Suffolk Cty. 2010) ("It is well established

that a plaintiff who seeks summary judgment on its claims for foreclosure and sale establishes a prima facie case for such relief by production of copies of the mortgage, the unpaid note and evidence of a default under the terms thereof.").

The "holder" of a negotiable instrument under New York law is defined as:

> a person who is in possession of a document of title or an instrument or an investment certificated security drawn, issued or indorsed to him or to his order or to bearer or in blank.

N.Y.U.C.C. §1-201(20); *Bank of New York v. Asati, Inc.*, 1991 WL 322989 at *2 (Sup. Ct. N.Y. Cty. July 8, 1991) (under section 1-201(20) of the Uniform Commercial Code, a party is a "holder" if it is in possession of the instrument and the instrument was drawn, issued or indorsed to it or to its order or to bearer or in blank).

Negotiation of a negotiable instrument to a holder is accomplished as follows:

- a negotiable instrument payable to the order of a specified payee is negotiated to a person who becomes a holder by delivery along with an indorsement firmly affixed thereto in favor of the transferee; and
- a negotiable instrument payable to bearer or payable to the order of a specific payee which is indorsed in blank becomes payable to bearer when it is negotiated to a person who becomes a holder by delivery alone.

N.Y.U.C.C. §3-202(1). Further, N.Y.U.C.C. §3-204(1) and (2) explicitly provide that an indorsement in blank specifies no particular indorsee and an instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone.

g. Identify a contact at the Bank for purposes of CPLR §3408 proceedings.

h. Confirm compliance with the pre-filing notice requirements under RPAPL §§1304 and 1306

i. Is there a recorded mortgage and assignment of mortgage:

    i. NY Tax Law §258 provides that the mortgage is not admissible into evidence unless the mortgage recording tax is paid. The statute does not state that the tax must be paid before the action is commenced and there is no statute expressly stating that the mortgage must be recorded and the tax must be paid before an action can be commenced. While it may be unsettled as to whether the recording and tax payment is a condition precedent or a curable defect that can be cured prior to entry of a judgment enforcing the rights of the mortgagee, the better practice is to have the mortgage recorded before the action is filed. *In re Benjamin* 2012 WL 1676996 (N.D.N.Y. 2012). N.Y. cases have held that the tax is for the privilege of recording the mortgage not a tax on the property; and thus arguably a toll to be paid before the mortgage can be enforced in court. *Silberblatt v. Tax Commission of State of N.Y.* 5 N.y.2d 635 (1959). *Hudson Valley Federal Credit Union v. NYS Dep't of Taxation,* 906 N.Y.S.2d 680 (N.Y. Sup. 2010). Further, as the mortgage is almost always attached to the complaint and the recommended form of complaint contains an allegation that the mortgage has been recorded and NYCRR 202.12 requires that the

mortgage be brought to the settlement conference, there is an argument that the mortgage can be disregarded if it is not recorded. Finally, unless recorded, the mortgage will not be enforceable against BFP transferees. NY RPL §291. This includes a trustee in bankruptcy which will be treated as a hypothetical lien creditor capable of avoiding the lien for the benefit of unsecured creditors.

ii. Unlike the mortgage, recording the assignment can be accomplished during the case with less risk. There is no requirement under N.Y. that an assignment of mortgage be recorded. RPL 290(a) and 291. A conveyance ***may*** be recorded in the land records where the property is situated, and any conveyance not recorded is void as against a subsequent B.F.P. for value who acquires from the same transferor as the unrecorded conveyance.

iii. The formal written assignment of a mortgage to the plaintiff is not a pre-requisite to the commencement of the action. For standing, there needs to be a negotiation of the Note and the intent to transfer the security as incident to the note. The assignment only needs to be recorded prior to the issuance of the referee's deed. RPAPL 1353(2), which provides:

> Before a deed is executed to the purchaser, the plaintiff shall file the mortgage and any assignment not shown to have been lost or destroyed in the office of the clerk, unless it is in a form which can be recorded; in which case it shall be recorded in the counties where the lands are situated; the

> expense of filing or recording and entry shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the time of filing.

j. Determine if there is a statute of limitations issue:

   i. The statute of limitations to enforce a defaulted mortgage is 6 years. CPLR 213(4). Thus, any payment default more than 6 years old may be subject to a SOL defense. Once the mortgage is accelerated, the 6 year period begins to run for the entire obligation. *Saini v. Cinelli Enters*., 289 A.D.2d 770, 771, 733 N.Y.S.2d 824 (2001), *lv. denied* 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835 (2002) ("[t]he [s]tatute of [l]imitations in a mortgage foreclosure action begins to run six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage has been accelerated by a demand or an action is brought).

   ii. Look at the default history and for any acceleration notices.

   iii. Not all mortgages require a formal notice of acceleration before the action can be commenced. Read the documents.

   iv. Calendar any applicable SOL and the date 90 days prior to that date (with appropriate reminders) and advise the client of same for future reference. In most cases, once the action is commenced the SOL issue is no longer pertinent; however, with all of the traps and pitfalls in N.Y. foreclosure practice it is not uncommon for actions to be dismissed, either sua sponte by a Judge, or upon motion, or

voluntarily to correct pre-filing notice or other issues. In those cases, the dismissal can come years after the commencement and the SOL becomes an issue. The ability to start over is found in either CPLR 205 or 3217.

v. NEW LEGISLATION; Before commencing any new action, compliance with RPAPL 1304 and 1306 is required. Thus you must add 90 days to the process or subtract 90 days from how long you thought you had. As you are probably aware the legislature has seen fit to amend the 90 day notice provision in Section 1303 which becomes effective on or around December 31, 2016. The form of the notice is available on the State website. The changes will create the potential for even more litigation and traps for the unwary. Most notably (i) the language changed from "If this matter is not resolved" to "If you have not taken any action to resolve this matter" - - WHAT DOES THAT EVEN MEAN??--; (ii) while only one 90 day notice per 12 months is required, now a new notice is required for each new delinquency- - so the savy borrower can perpetually remain 89 days in arrears.

vi. Proof of Service of 90 Day Notices: Recent decisions reaffirm that proof of service upon the Banking Department via affidavit is critical to demonstrate compliance with notice procedures. Article 13 of the NYRPAPL (and in particular Sections 1303, 1304 and 1306) requires service of a 90 day pre-foreclosure notice, Help for

Homeowner Notice upon the homeowner and with the New York State Department of Finance. It is now clear that compliance with these notice requirements is a condition precedent to the commencement of an action and cannot be waived, even if the borrower defaults or actually participates in the pre-foreclosure loan modification settlement process. *Deutsche Bank Nat Trust Co., v. Spanos*, 102 A.D.3d 909 (2d Dep't 2013); *Bank of America v. Rexnik*, 2015 WL 591830 (Sup Ct Kings Feb 2015). Also attached is an opinion letter from the New York State Dep't of Finance regarding the filing of notices with the State.

vii. Voluntary dismissal is covered by CPLR 3217. There is no automatic extension of the SOL. The new action must be timely commenced under CPLR 213(4). Before agreeing to a voluntary dismissal, determine if the SOL is less than 90 days into the future. If it is, you will need a tolling agreement or a waiver or need to consider other options.

viii. If the case is dismissed by order of the Court, other than for lack of personal jurisdiction, CPLR 205 (a) gives you the longer of the SOL or 6 months from dismissal to start a new action. However, the required 90 day notices eat into that time, so you must act quickly.

k. Prepare notice of Pendency and calendar three years from the filing with appropriate reminders to file a new notice prior to the three year period. Notice of Pendency is controlled by the CPLR and the RPAPL.

i. CPLR 6501 provides for the filing of a notice of pendency to put the world on notice of any action relating to or affecting the real property such that any conveyance of the property after the filing of the notice will be bound by the outcome of the proceedings as if made a party even if the right to the conveyance (i.e. the contract) receded the filing of the notice of pendency and the person was not formally named and served. *In re DLJ Capital Inc. v. Windsor,* 910 N.Y.S. 2d 160 (2d Dep't 2010)( It is axiomatic that a person whose conveyance or encumbrance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he were a party ( *see* CPLR 6501; *see also Goldstein v. Gold,* 106 A.D.2d 100, 483 N.Y.S.2d 375, *affd.*66 N.Y.2d 624, 495 N.Y.S.2d 32, 485 N.E.2d 239). A person holding an interest that accrued prior to the filing of a notice of pendency, but not recorded until after the filing of the notice, is still so bound ( *see generally Polish Natl. Alliance of Brooklyn, v. White Eagle Hall Co.,* 98 A.D.2d 400, 404, 470 N.Y.S.2d 642). Thus, in order to cut off a prior lien, such as a mortgage, the purchaser or encumbrancer must have no knowledge of the outstanding lien and must win the race to the recording

office ( *see Goldstein v. Gold*, 106 A.D.2d at 101–102, 483 N.Y.S.2d 375). Here, since a satisfaction of mortgage had been recorded with respect to Novastar's mortgage on the 115 property, there was no prior mortgage on that property that the Herzbergs had to cut off. The filing of the notice of pendency did not create a lien or any rights that did not already exist in the 115 property; it only provided constructive notice of a claim by the plaintiff.)

ii. CPLR 6513 provides that a notice is effective for 3 years from the date of filing, but that court, for good cause shown can extend the duration for an additional 3 years.

iii. CPLR 6516 permits the filing of successive notices of pendency in connection with mortgage foreclosure actions in order to comply with RPAPL 1331, even if the prior notice of pendency had been cancelled or expired.

iv. Thus, the effect of the Notice of Pendency under the CPLR is that a filed Notice of Pendency will bind all parties whose rights arose after filing and prior to expiration to the outcome of the action (*Pacific Lime Inc. v. Lowenberg Corp*., 431 NYS2d 190 (3d Dep't 1980)); but will not bind parties whose rights arise after the expiration of the notice of pendency and who record such rights prior to the recording of a new notice of pendency. *Polish Natl. Alliance of Brooklyn, v. White Eagle Hall Co*., 98 A.D.2d 400,

404, 470 N.Y.S.2d 642) Once it expires, the notice of pendency is a nullity as to rights which are recorded after expiration.

v. RPAPL 1331 requires that a notice of pendency be filed at least 20 days prior to the entry of a judgment directing a sale in a foreclosure action. This statute has been interpreted to be a statutory pre-requisite essential to the action, rather than an added privilege afforded litigants. *Horowitz v. Griggs,* 76 N.Y.S. 2d 860 (2d Dep't 2003). As such, rather than requiring a motion for an order authorizing an extension, the plaintiff has a right to file a successive notice of pendency even after the prior notice expired. *Campbell v. Smith,* 768 NYS 2d 182 (1st Dep't 2003) (after the expiration of the first notice of pendency the plaintiff filed a second notice). The Court held:

> The unique facts presented exempt this case from the rule articulated in *Matter of Sakow,* 97 N.Y.2d 436, 741 N.Y.S.2d 175, 767 N.E.2d 666. In*Sakow,* the Court of Appeals prohibited a plaintiff from filing a notice of pendency after a previous one concerning the same cause of action had expired. Recognizing that CPLR article 65 has created a privilege whereby a party who files a notice of pendency can effectively restrain the alienability of property, the Court of Appeals required exacting compliance with the three-year statutory time limit for requesting an extension, upon a showing of good cause therefor ( *id.* at 442, 741 N.Y.S.2d 175, 767 N.E.2d 666).
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> By contrast to *Sakow,* here the recorded mortgage itself gives notice of an encumbrance on the property, and the concerns regarding the notice of pendency restricting the alienability of the property are eliminated. Further, pursuant to RPAPL article 13, plaintiff was required to file a notice of pendency at least 20 days before the entry of final judgment. The notice of pendency thus alerts the public that the mortgage will be merged into the judgment of foreclosure. Because compliance with the required filing is a prerequisite to a cause of action under RPAPL article 13,

plaintiff may file a successive notice of pendency for the specific purpose of prosecuting this mortgage foreclosure action to final judgment ( *see Wasserman v. Harriman,* 234 A.D.2d 596, 651 N.Y.S.2d 620, *appeal dismissed* 89 N.Y.2d 1086, 659 N.Y.S.2d 860, 681 N.E.2d 1307; *Slutsky v. Blooming Grove Inn,* 147 A.D.2d 208, 213, 542 N.Y.S.2d 721).

vi. NYRPAPL §1353(3) gives effect to the filed Notice of Pendency in the foreclosure action:

> The conveyance vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it were executed by the mortgagor and mortgagee, and, except as provided in section 1315 and subdivision 2 of section 1341, is an entire bar against each of them and against each party to the action who was duly summoned and every person claiming from, through or under a party by title accruing after the filing of the notice of the pendency of the action.

vii. Although successive notices of pendency may be filed, the careful plaintiff does not want any gaps wherein a party may be able to record some new interest in the property which may be exempted from the effect of the foreclosure judgment and sale.

3. After commencing the action: Mandatory Mediation CPLR 3408. Also recently amended (see attached)

a. File an RJI within 20 days of the filing of proof of service to commence the 3408 process, which is to be scheduled within 60 days following the filing of the proof of service;

b. Send out your RMA forms asap so that the first meeting is productive

c. Have all of your loan documents and relevant loan history and be able to contact your client. Amendments in 3408(e) now mandate, rather than suggests the documents to be brought to the settlement conference.

d. 3408 (f) attempts to quantify good faith by referring to the case law standard "totality of the circumstances". *See e.g., Wells Fargo Bank v. Miller,* 26 N.Y.S.3d 176 (App Div. 2d Dep't 2016). Both sides must be prepared to entertain in good faith discussions for a loan modification. Neither good faith nor bad faith is defined- - you know it when you see it. *U.S. Bank N.A. v. Sarmiento,* 991 NYS2d 68 (2d Dep't 2014) and *Bank of New York v. Castillo,* 120 A.D. 3d 598 (2d Dep't 2014). Under these and similar decisions, a lender must follow its policies and any mandates it may have under HAMP or otherwise to consider a party for a loan modification. In *Sarmiento,* the second department rejected the argument that good faith is an absence of common low bad faith and that the court should consider only whether the party acted deliberately or recklessly in a manner that evinced gross disregard of, or conscious or knowing indifference to, another's rights. The court held:

> Therefore, we hold that the issue of whether a party failed to negotiate in "good faith" within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution. We reject the plaintiff's contention that, in order to establish a party's lack of good faith pursuant to CPLR 3408(f), there must be a showing of gross disregard of, or conscious or knowing indifference to, another's rights. Such a determination would permit a party to obfuscate, delay, and prevent CPLR 3408 settlement negotiations by acting negligently, but just short of deliberately, e.g., by carelessly providing

misinformation and contradictory responses to inquiries, and by losing documentation. Our determination is consistent with the purpose of the statute, which provides that parties must negotiate in "good faith" in an effort to resolve the action, and that such resolution could include, "if possible," a loan modification (CPLR 3408[f]; *see Wells Fargo Bank, N.A. v. Meyers,* 108 A.D.3d at 11, 18, 20, 23, 966 N.Y.S.2d 108; *Wells Fargo Bank, N.A. v. Van Dyke,* 101 A.D.3d 638, 958 N.Y.S.2d 331 [the defendants did not demonstrate that the plaintiff failed to act in good faith because nothing in CPLR 3408 requires a plaintiff to make the exact settlement offer desired by the defendants]; *HSBC Bank USA v. McKenna,* 37 Misc.3d 885, 952 N.Y.S.2d 746 [Sup.Ct., Kings County] [the plaintiff failed to act in good faith based upon, inter alia, a referee's finding that the plaintiff rejected an all-cash short sale offer] ).

Where a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution.

e. Perhaps to address the award of excessive sanctions, 3408 (j) and (k) address sanctions for failure to negotiate in good faith. *See, e.g., LaSalle Bank v. Dono,* 24 N.Y.S. 3d 827 (App Div 2d Dep't 2016) (sanction permanently tolling all interest and costs from the commencement of the 3408 process was excessive and reduced to disallowing interest, costs and fees during for the period of the 3408 process); *IndyMac Bank, F.S.B. v. Yano–Haroski,* 78 A.D.3d 895, 912 N.Y.S.2d 239(reversed the sanction of cancellation of the note and mortgage based on the plaintiff's failure to negotiate in good faith as required by CPLR 3408(f)); *Wells Fargo Bank, N.A. v. Meyers,* 108 A.D.3d 9, 966 N.Y.S.2d 108 (2d Dep't 2014) (remedy imposed by the Supreme Court-compelling the plaintiff to

permanently abide by the terms of a HAMP trial loan modification-was "unauthorized and inappropriate.)" But there is a catch all " Award any other relief that the court deems just and proper."

f. Before moving for summary judgment, revisit the pre-requisites for filing the action, including standing and notices.