

JEFFREY ARLEN SPINNER
Attorney & Counsellor At Law
18 Three Village Lane
East Setauket, New York 11733-1319
Tel. (631) 676-7346 Cell (203) 298-2929
retjcc@gmail.com

Admitted To Practice Law

Connecticut (JD of Hartford-New Britain)
New York (App. Div. 2nd Dept.)
U.S. District Courts (Conn. & NY)

Former Public Positions (Retired)

Judge, County Court Of Suffolk County NY
Acting Justice, NYS Supreme Court
Acting Judge, NYS Family Court

February 19, 2019

The Honorable Velmanette Montgomery
Senator, 25th District
30 Third Avenue
Brooklyn, New York 11217
Via electronic mail to cubas@nysenate.gov

Dear Senator Montgomery:

I would first like to take this opportunity to express my deepest gratitude for your gracious invitation to speak at the Legislative Office Building this past Saturday. I felt truly humbled in that venue and I hope that my remarks were of some assistance to all who were in attendance.

As I had discussed on Saturday, it is my firm belief that certain portions of New York's law would benefit from some amendment. Such changes would be beneficial to homeowners who are facing foreclosure and would "level the playing field," as it were.

The provisions of CPLR 3408 were codified by the Chapter 472 of the Laws of 2008 and were amended by Chapter 507 of the Laws of 2009. As you know, CPLR 3408 requires the Supreme Court to convene a settlement conference within 60 days of the filing of proof of service in a residential mortgage foreclosure action. Subsection (f) imposes an obligation of good faith upon the parties in terms of negotiation in efforts to reach an amicable resolution. However, I perceive two deficiencies in the statute. The first is that it does not define "good faith," instead leaving that issue to the courts. With that being said, the Appellate Division, Second Department, in an extremely thoughtful opinion by Justice John Leventhal, began to address and to define that portion of the statute [see *U.S. Bank N.A. v. Sarmiento*, 121 AD 3d 187, 991 NYS 2d 68 (2014)]. However, an amendment to the statute which defines the good faith standard would be extremely helpful. The second issue is one wherein the statute is silent as to what sanctions would be appropriate where the court finds that there exists a lack of good faith in the negotiation process. The trial courts have imposed such sanctions as abatement of loan interest and costs and denial of counsel fees where a lack of good faith is demonstrated [see *LaSalle Bank N.A. v. Dono* 45 Misc 3d 537, 994 NYS 2d 266 (Supreme Court, Suffolk County, Spinner J. 2014), modified and affirmed 135 AD 3d 827, 24 NYS 3d 144 (2nd Dept. 2016)]. The lack of enumeration of permissible sanctions when a violation of the statute is found leaves the trial judge in the position of using his or her creativity and good sense in fashioning an appropriate remedy, which is not always upheld on appeal.

The Honorable Velmanette Montgomery
February 19, 2019
Page Two

Another fundamental area which, in my humble opinion, could benefit from legislative attention is the interplay between default after service and the Mandatory Residential Mortgage Foreclosure Settlement Conference that is mandated by CPLR 3408. When a party defendant is served with process in accordance with CPLR 308, he or she must appear, move or answer within 20 days or within 30 days after proof of service is filed, depending upon the method of service. In my estimation, this creates a serious and substantial issue because the CPLR 3408 conference is typically held between 45 and 60 days following service of initial process. In the event that the defendant fails to appear, answer or move within the statutory time frame (which is not uncommon), the defendant will find himself or herself in default by the time of the settlement conference. The substantial pitfall in such a scenario is that if the defendant is in default or appearance or pleading, he or she has also forever lost the right to interpose any defense to the foreclosure action that he or she may be entitled to otherwise assert. Such defenses can include a challenge to the plaintiff's standing, payment and procedural irregularities, to name but a few. In my humble estimation, a statutory amendment that would extend the period of time in which to appear or plead, perhaps to 10 or 15 days following the first settlement conference, would help to address this issue.

As to the upcoming appearance at Brooklyn Boro Hall on March 15, 2019, what time do you wish for me to be present there? Is there anything in particular that you wish for me to address at that time?

Thank you for taking the time to read this letter together with its attendant suggestions. I am very much looking forward to again seeing you at Brooklyn Boro Hall.

Yours respectfully,

Jeffrey Arlen Spinner

JEFFREY ARLEN SPINNER

JAS:uwf/encl.