SENATE, No. 2269



STATE OF NEW JERSEY

217th LEGISLATURE



INTRODUCED MAY 23, 2016

Sponsored by:

Senator PATRICK J. DIEGNAN, JR.

District 18 (Middlesex)

SYNOPSIS

Revises residential property mortgage foreclosure process.

CURRENT VERSION OF TEXT

As introduced.



An Act concerning foreclosure of residential properties, amending and supplementing P.L.1995, c.244, supplementing chapter 50 of Title 2A of the New Jersey Statutes, and making an appropriation.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 3 of P.L.1995, c.244 (C.2A:50-55) is amended to read as follows:

3. As used in this act:

"Commissioner" means the Commissioner of Community Affairs.

"Deed in lieu of foreclosure" means a voluntary, knowing and uncoerced conveyance by the residential mortgage debtor to the residential mortgage lender of all claim, interest and estate in the property subject to the mortgage. In order for a conveyance to be voluntary, the debtor shall have received notice of, and been fully apprised of the debtor's rights as specified in section 4 of this act. For purposes of this act, "voluntarily surrendered" has the same meaning as "deed in lieu of foreclosure."

“Foreclosure Mediation Program” or “mediation program” means the New Jersey Judiciary’s Foreclosure Mediation Program as authorized by the Supreme Court of New Jersey.

“Foreclosure prevention assistance” means the provision of payments on behalf of a debtor to a servicer on an eligible mortgage secured by real estate, and the training of counselors and other foreclosure prevention providers.

"Immediate family" means the debtor, the debtor's spouse, or the mother, father, sister, brother or child of the debtor or debtor's spouse.

“Loan modification agreement” means the waiver, modification or variation of any material term of a residential mortgage loan, that changes the interest, forbears or forgives the payment of principal or interest, or extends the final maturity date of the loan.

“Loss mitigation option” means an alternative to foreclosure, including a loan modification agreement, a deed in lieu of foreclosure, and a short sale.

“Nonprofit foreclosure assistance provider” or “provider” means a corporation organized under the provisions of the "New Jersey Nonprofit Corporation Act," which provides foreclosure prevention assistance.

"Non-residential mortgage" means a mortgage, security interest or the like which is not a residential mortgage. If a mortgage document includes separate tracts or properties, those portions of the mortgage document covering the non-residential tracts or properties shall be a non-residential mortgage.

"Obligation" means a promissory note, bond or other similar evidence of a duty to pay.

"Office" means the Office of Foreclosure within the Administrative Office of the Courts.

"Residential mortgage" means a mortgage, security interest or the like, in which the security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence. This act shall apply to all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated.

"Residential mortgage debtor" or "debtor" means any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage, including any successor in interest to a residential mortgage debtor.

"Residential mortgage lender" or "lender" means any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned.

“Servicer” means the person, corporation or other entity responsible for servicing a residential mortgage loan, including a residential mortgage lender who makes or holds a loan if the lender also services the loan.

“Servicing” means managing the mortgage loan account on a daily basis, including collecting and crediting periodic loan payments, managing escrow accounts, or enforcing the terms of the mortgage or note.

“Short sale” means the sale of real property in which the lender or servicer agrees to release the lien that is secured by a residential mortgage on the property upon receipt of a lesser amount than is owed on the mortgage.

(cf: P.L.1995, c.244, s.3)

2. (New section) a. A servicer that files and serves, pursuant to the “Fair Foreclosure Act,” P.L.1995, c.244 (C.2A:50-53 et al.), a summons and complaint of foreclosure on a residential mortgage loan, shall initiate a process to consider loss mitigation options through the Foreclosure Mediation Program by:

(1) submitting a request for mediation to the court, in accordance with the court rules, procedures, and guidelines adopted by the Superior Court for the mediation program;

(2) establishing a single point of contact and providing the debtor with one or more direct means for communication with the single point of contact;

(3) providing the debtor with all of the following:

(a) a current mortgage loan payment history in a format that includes at least five years of payment history, that is plain and readily understandable by the general public, and that lists all payments, charges, credits, and fees, with specific details as to each;

(b) an accurate and specific month-by-month itemization of the amounts needed to cure the default;

(c) an accurate statement of the amount due to pay off the mortgage loan in full;

(d) a copy of the mortgage and all assignments of the mortgage;

(e) a copy of the note with all endorsements and allonges, including a certification setting forth the date of endorsement;

(f) a complete list of items that the debtor must supply to the servicer in order for the servicer to process an application for each type of loss mitigation option administered by the servicer; and

(g) a copy of the request for mediation submitted to the court; and

(4) provide the debtor with information about the availability of foreclosure prevention assistance from the State, pursuant to P.L.       , c. (C. ) (pending before the Legislature as this bill).

b. The servicer shall:

(1) make reasonable and good faith efforts to engage in appropriate loss mitigation options during the mediation program; and

(2) ensure that the single point of contact shall be responsible for and have sufficient authority to perform all of the following functions with respect to loss mitigation options:

(a) communicate the process by which a debtor may apply for an available loss mitigation option and the deadlines for any required submissions of applications or documentation to be considered for the option;

(b) coordinate receipt of all applications and documentation associated with an available loss mitigation option and notify the debtor of any missing items necessary for consideration for the option;

(c) maintain access to sufficient current information and appropriate personnel as necessary to timely, accurately, and adequately inform the debtor on an ongoing basis of the current status of a loss mitigation option for which the debtor is being considered;

(d) ensure that a debtor is considered for all loss mitigation options administered by the servicer;

(e) maintain access to individuals with the ability and authority to approve loss mitigation options, suspend foreclosure proceedings, or dismiss foreclosure complaints, as appropriate; and

(f) ensure that all notices provided to a debtor pursuant to the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill) shall be in plain language that is clear and conspicuous and readily understandable by the general public.

3. (New section) a. In the event that a debtor fails to provide all of the items required by section 2 of P.L. , c. (C. ) (pending before the Legislature as this bill) for consideration of loss mitigation options for the mediation program, the servicer shall be entitled to proceed with the foreclosure action.

b. (1) If a debtor and servicer enter into a loan modification agreement as a loss mitigation option pursuant to the mediation program, the agreement shall provide for a trial period during which payment for a set amount of principal and interest shall be made by the debtor each month for three months. If the debtor fails to make all three payments during the trial period, the servicer shall be entitled to proceed with the foreclosure action.

(2) If the debtor makes all three payments during the loan modification trial period, the servicer shall provide the debtor the option of entering into a final loan modification agreement and, upon entering that agreement, the servicer shall dismiss the foreclosure action.

(3) If the debtor fails to make a payment under the terms of the final modification agreement, and the debtor contests the default under the modification agreement, the servicer may bring an action to foreclose pursuant to the “Fair Foreclosure Act,” P.L.1995, c.244 (C.2A:50-53 et al.).

c. Within 30 days of a denial of any loss mitigation option pursuant to the mediation program a servicer shall provide the debtor with:

(1) the appraisal or other opinion or analysis regarding the fair market value of the property most recently relied upon by the servicer;

(2) an explanation for the denial of a loss mitigation option in sufficient detail for a reasonable person to understand why the option was denied; and

(3) the portion or excerpt of the pooling and servicing agreement or other agreement relating to the residential mortgage loan that limits or prohibits the servicer from implementing a loss mitigation option, if the servicer claims a loss mitigation option cannot be implemented due solely to those prohibitions or limitations, and the documentation or detailing of the efforts of the servicer to obtain a waiver of the limitations.

4. (New section) a. A motion by a servicer seeking a final judgment of foreclosure, pursuant to R.4:64-1 et seq. of the Rules Governing the Courts of the State of New Jersey, in a foreclosure action shall not be accepted by the court unless it is accompanied by an affidavit by the servicer stating that the servicer has:

(1) contacted the debtor, or has attempted with due diligence to contact the debtor for consideration of loss mitigation options through the mediation program, consistent with the provisions of this section;

(2) made reasonable and good faith efforts to participate in the mediation program and engage in appropriate loss mitigation options; and

(3) otherwise substantially complied with the provisions of P.L.     , c. (C. ) (pending before the Legislature as this bill).

b. In a manner consistent with the Rules Governing the Courts of the State of New Jersey, any interested party may present a defense in response to the foreclosure action within a time frame to be determined by the court, provided the defense is accompanied by an affidavit stating that the defense is not made solely for the purpose of delaying the relief requested pursuant to the foreclosure action.

c. Upon a finding that a servicer has acted in bad faith in its efforts to participate in mediation and engage in loss mitigation, or has violated any of the provisions of this section, the court, in addition to any sanction in accordance with R.1:4-8 of the Rules Governing the Courts of the State of New Jersey, may:

(1) Prohibit the servicer’s collection of legal fees or expenses;

(2) Impose a civil penalty of not more than $5,000 on the servicer; and

(3) Stay foreclosure proceedings until the servicer resumes settlement negotiations in good faith.

d. Nothing in this section shall be construed to affect the rights of a tenant to possession of a leasehold interest under the anti-eviction act, P.L.1974, c.49 (C.2A:18-61.1 et seq.), the “New Jersey Foreclosure Fairness Act,” P.L.2009, c.296 (C.2A:50-69 et seq.), or any other applicable law.

5. (New section) a. Upon failure to perform any obligation of a residential mortgage by a residential mortgage debtor and before any servicer may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the servicer shall provide the court in which the action is to be brought with a signed affidavit that provides that the servicer has a bond or note secured by a mortgage on the residential property at least 30 days in advance of the foreclosure action.

b. Any servicer who violates this section is subject, upon order of the court, to a civil penalty of not more than $1,000 for the first offense and not more than $2,500 for the second and each subsequent offense. Any penalty imposed under this section may be recovered with costs in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

6. (New section) a. Except as provided in subsection b. of this section, in any foreclosure action in which the servicer does not prevail, the court shall order the servicer to pay reasonable court costs and attorney’s fees incurred by the debtor in defending against the foreclosure action.

b. A court shall not order the servicer to make payments pursuant to subsection a. of this section if:

(1) the action ends in a stipulation of dismissal entered into by the parties, a motion to dismiss without prejudice to facilitate settlement, or successful mediation of the foreclosure action; or

(2) the court finds specific circumstances that would make those payments unjust.

7. (New section) The Legislature finds and declares:

a. The citizens of New Jersey with homes in danger of being foreclosed upon risk losing their homes and are faced with a complicated and confusing legal process that can be very difficult for an individual to navigate.

b. It is in the best interests of the State to establish a foreclosure prevention fund and to protect its citizens by entering into contracts with nonprofit foreclosure assistance providers to advocate on the behalf of those faced with foreclosure and to help these citizens navigate the process of loan modification.

c. When the commissioner selects nonprofit foreclosure assistance providers pursuant to P.L. , c. (C. ) (pending before the Legislature as this bill), and when those providers select their administrators and employees, those selections should be made to ensure the greatest benefit to the citizens of New Jersey who are facing foreclosure of their homes.

8. (New section) a. Within the limit of funds available in the New Jersey Foreclosure Prevention Fund, the commissioner is authorized to enter into contracts with nonprofit foreclosure assistance providers to provide foreclosure prevention assistance. The contracts shall be entered into after appropriate findings by the commissioner. The commissioner shall give preference to applications involving two or more nonprofit corporations when evaluating contract applications for the provision of foreclosure prevention assistance and shall, to the extent feasible, attempt to award contracts in a manner that ensures that every homeowner in the State has access or reasonable access to at least one nonprofit foreclosure assistance provider.

b. Prior to entering into a contract with an existing provider, the commissioner shall have made a finding that the provider is in good standing and that there is a need for proposed assistance activities based on the documented submission of the provider.

c. A contract entered into pursuant to this section with a provider shall be limited in duration to a period of one year, but may be renewed, extended, or succeeded at the discretion of the commissioner.

d. Prior to renewing, extending, or succeeding a contract with a provider the commissioner shall determine that:

(1) the provider has substantially completed the foreclosure prevention assistance specified in the contract;

(2) the provider has received the sums and funds specified in this section; and

(3) the assistance carried out by the provider pursuant to its contract has resulted in a significant impact on the needs of the at risk existing and potential homeowners in the service area.

e. Prior to terminating a contract or making a determination not to renew a contract, the commissioner shall:

(1) determine that: (a) the provider is in violation of the terms and conditions of the contract; (b) funds provided pursuant to the contract are being expended in a manner not consistent with the terms or provisions of P.L. , c. (C. ) (pending before the Legislature as this bill); or (c) the significant need in the service area no longer exists or all available funds have been expended; and

(2) provide the provider with written notice, at least 45 days in advance, of its intent to terminate or not renew the contract and provide the provider with the opportunity to appear and be heard before the commissioner with respect to the reasons for the proposed termination or non-renewal.

f. The commissioner may temporarily withhold payments and may elect not to enter into a succeeding contract with any nonprofit foreclosure assistance provider if the provider is not in compliance with the contract or has without good cause failed to submit the documentation required under the contract.

g. The commissioner shall establish eligibility criteria for use by the nonprofit prevention assistance provider. That criteria shall, based on the debtor’s application for assistance, consider:

(1) need for assistance, including whether the debtor has insufficient household income or net worth to correct the existing delinquency or delinquencies within a reasonable period of time and make full mortgage payments and whether any other federal, State, local, or private sources of assistance exist that would be available to the debtor and would provide adequate assistance to the debtor to retain ownership of the home; and

(2) if there is a reasonable prospect that a loan modification agreement may be reached so that the debtor will be able to resume mortgage payments within a reasonable amount of time after the beginning of the period for which assistance payments are provided under P.L. , c. (C. ) (pending before the Legislature as this bill) and pay the mortgage in full by its maturity date or by a later date agreed to by the servicer for completing mortgage payments.

9. (New section) a. No assistance may be provided under P.L.       , c. (C. ) (pending before the Legislature as this bill) unless all of the following are established:

(1) the debtor’s loan is secured by a residential mortgage;

(2) the nonprofit foreclosure assistance provider has determined that the debtor is in need of mortgage counseling or assistance in engaging the servicer in the development of loan modifications or any other steps taken by a servicer with a debtor to resolve the problem of delinquent payments;

(3) the debtor has applied to the provider for assistance on an application form prescribed by the commissioner for this use which includes a financial statement disclosing all assets and liabilities of the debtor, whether held singly or jointly, and all household income regardless of source. Any debtor who intentionally misrepresents any financial information in conjunction with the filing of an application for assistance may be denied assistance;

(4) the servicer is not prevented by law from foreclosing upon the mortgage;

(5) the provider has determined, based on the debtor’s financial statement, that the debtor has insufficient household income or net worth to correct the delinquency within a reasonable period of time and make full mortgage payments;

(6) except for the current delinquency, the debtor shall have had a reasonably favorable residential mortgage credit history; and

(7) the debtor meets any other procedural requirements established by the commissioner.

b. Upon a determination that the conditions of eligibility described in subsection a. of this section have been met by a debtor and money is available in the New Jersey Foreclosure Prevention Fund, the debtor shall be eligible for the mortgage foreclosure assistance.

10. (New section) The commissioner shall establish a system by which the commissioner shall make, upon the recommendation of a participating nonprofit foreclosure assistance provider, payments to servicers who hold a residential mortgage on behalf of the debtor when those payments are in support of a negotiated settlement that allow a homeowner to remain in the homeowner’s home and when the servicer has in concessions matched the amount of the authorized payments. In no instance shall payments to servicers exceed the total amount of the three monthly payments owed by the homeowner before the date the homeowner applied for assistance under P.L. , c. (C. ) (pending before the Legislature as this bill).

11. (New section) a. Each contract entered into with a nonprofit foreclosure assistance provider shall provide payment to the provider for foreclosure prevention assistance.

b. Payments shall be made by the commissioner to the provider not less frequently than semiannually at or prior to the commencement of the contract, to compensate the provider for the assistance which it undertakes to provide.

12. (New section) The commissioner shall submit a report to the Legislature within one year of the effective date of P.L. , c.     (C. ) (pending before the Legislature as this bill), and annually thereafter, on the implementation of P.L. , c.    (C.      ) (pending before the Legislature as this bill). The report shall include, but not be limited to, the specific foreclosure prevention assistance provided by the provider and the number of persons and households served by each provider.

13. (New section) In coordination with Department of Banking and Insurance and the Division of Consumer Affairs in the Department of Law and Public Safety, the commissioner shall undertake outreach activities directed at eligible homeowners within this State. The outreach activities shall be conducted in English and Spanish, and shall contain a notice that other languages may be available upon request. Outreach activities shall include, but not be limited to:

a. The production and broadcast of public service announcements using electronic media to inform the general public of the availability of financial assistance through the New Jersey Foreclosure Prevention Fund. The public service announcements shall state the amount of financial assistance that may be available, who qualifies, and where the financial assistance may be obtained;

b. The establishment and maintenance of a toll-free telephone number to provide information on the New Jersey Foreclosure Prevention Fund and respond to consumer’s questions regarding the fund; and

c. The inclusion of a description on the internet websites maintained by the commissioner, the Department of Banking and Insurance, and the Division of Consumer Affairs of the New Jersey Foreclosure Prevention Fund. The description shall include the address and phone number of each nonprofit foreclosure assistance provider.

14. (New section) There is hereby established a special fund to be known as the New Jersey Foreclosure Prevention Fund. The New Jersey Foreclosure Prevention Fund shall consist of moneys appropriated to it from the general fund. Moneys from the fund shall be expended in accordance with P.L. , c.        (C.      ) (pending before the Legislature as this bill) and the regulations promulgated pursuant to P.L. , c.        (C.      ) (pending before the Legislature as this bill).

15. (New section) A conflict or inconsistency between P.L.        , c. (C. ) (pending before the Legislature as this bill) and federal law, including any mortgage servicing rules or other regulations promulgated by the Consumer Financial Protection Bureau, should be construed in favor of protecting the borrower’s interests and rights, to the extent that P.L. , c.   (C.      ) (pending before the Legislature as this bill) is not in violation of federal law.

16. This act shall take effect on the 90th day next following enactment.

STATEMENT

This bill revises New Jersey’s “Fair Foreclosure Act,” P.L.1995, c.244 (C.2A:50-53 et seq.), to require mortgage loan servicers to initiate a process to consider loss mitigation options through the New Jersey Judiciary Foreclosure Mediation Program under certain circumstances and to establish the New Jersey Foreclosure Prevention Fund.

While the “Fair Foreclosure Act” currently requires lenders to adhere to certain homeowner protection provisions during the foreclosure process, this bill expands homeowner protections to include mediation with respect to loss mitigation options and places certain responsibilities for participation on debtors, and both lenders and servicers, as defined in the bill, since servicers more typically manage mortgage loan accounts on a daily basis on behalf of lenders.

The bill requires a servicer who files a summons and complaint of foreclosure on a residential mortgage loan to initiate a process to assess the debtor’s financial situation and appropriate loss mitigation options through the New Jersey Judiciary’s Foreclosure Mediation Program. The bill defines “loss mitigation option” to mean an alternative to foreclosure, including a loan modification, a deed in lieu of foreclosure, and a short sale. Under these circumstances, the servicer must: (1) submit a request for mediation to the court; (2) establish a single point of contact with the debtor; (3) provide the debtor with certain information regarding the mortgage loan; and (4) provide the debtor with information about the availability of foreclosure prevention assistance from the State.

The bill also requires the servicer to: (1) make reasonable and good faith efforts to engage in appropriate loss mitigation options; and (2) ensure that the single point of contact shall be responsible for and have sufficient authority to perform certain functions.

Under the bill, if a debtor and servicer enter into a loan modification agreement as a loss mitigation option pursuant to the mediation program, the agreement shall provide for a trial period during which payment for a set amount of principal and interest shall be made by the debtor each month for three months. If the debtor fails to make all three payments during the trial period, the servicer shall be entitled to proceed with the foreclosure action.

The bill also requires a servicer, within 30 days of a denial of any loss mitigation option pursuant to the mediation, to provide the debtor with certain information pertaining to the reasons for the denial.

Pursuant to the bill, a motion by a servicer seeking a final judgment of foreclosure, pursuant to R.4:64-1 et seq. of the Rules Governing the Courts of the State of New Jersey, shall not be accepted by the court unless it is accompanied by an affidavit by the servicer stating that the servicer has made certain efforts to participate in the mediation program and engage in appropriate loss mitigation options. The bill provides for certain penalties, including prohibition of the servicer’s collection of legal fees, a civil penalty of not more than $5,000, and a stay of foreclosure proceedings, which may be assessed by the court upon a finding that a servicer has acted in bad faith in its efforts to participate in mediation and engage in loss mitigation.

The bill also provides that, upon failure to perform any obligation of a residential mortgage by a residential mortgage debtor and before any servicer may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the servicer must provide the court in which the action is to be brought with a signed affidavit that provides that the servicer has a bond or note secured by a mortgage on the residential property at least 30 days in advance of the foreclosure action. A servicer that violates those requirements is subject to a civil penalty of not more $1,000 for the first offense and not more than $2,500 for the second and each subsequent offense.

The bill provides that, in any foreclosure action in which the servicer does not prevail, the court shall order the servicer to pay reasonable court costs and attorney’s fees incurred by debtor in defending against the foreclosure action, unless the action ends in a stipulation of dismissal entered into by the parties, a motion to dismiss without prejudice to facilitate settlement, or successful mediation of the foreclosure action, or the court finds specific circumstances that would make that payment unjust.

The bill establishes a special fund to be known as the New Jersey Foreclosure Prevention Fund. The New Jersey Foreclosure Prevention Fund shall consist of moneys appropriated to it from the general fund.

The bill provides that, within the limit of funds available in the New Jersey Foreclosure Prevention Fund, the Commissioner of Community Affairs is authorized to enter into contracts with nonprofit foreclosure assistance providers to provide foreclosure prevention assistance.

The bill requires, prior to renewing, extending, or succeeding a contract with a nonprofit foreclosure assistance provider the commissioner shall determine that: (1) the provider shall have substantially completed the foreclosure prevention assistance specified in the contract; (2) the provider shall have received the sums and funds specified in this section; and (3) the assistance carried out by the provider pursuant to its contract shall have resulted in a significant impact on the needs of the at risk existing and potential homeowners.

Under the bill, prior to terminating a contract or making a determination not to renew a contract, the commissioner shall: (1) determine that the provider is in violation of the terms and conditions of the contract or the bill; and (2) provide the provider with written notice, at least 45 days in advance, of its intent to terminate or not renew the contract and provide the provider with the opportunity to appear and be heard before the commissioner.

The bill requires the commissioner to establish eligibility criteria for use by the nonprofit foreclosure prevention assistance provider. That criteria shall, based on the debtor’s application for assistance, consider: (1) the need for assistance, including whether the debtor has insufficient household income or net worth to correct the existing delinquency; and (2) if there is a reasonable prospect that a loan modification agreement may be reached so that the debtor will be able to resume mortgage payments within a reasonable amount of time.

In order for assistance to be provided under the bill, the debtor must supply certain information and meet certain criteria, and certain steps must be taken by the nonprofit foreclosure assistance provider. Upon a determination that the conditions of eligibility have been met by a debtor and money is available in the New Jersey Foreclosure Prevention Fund, the debtor is eligible for the assistance.

The bill establishes a system to make, upon the recommendation of a participating nonprofit foreclosure assistance provider, payments to servicers on behalf of debtors, when these payments are in support of a negotiated settlement allowing a homeowner to remain in the homeowner’s home and when the servicer has, in concessions, matched the amount of the authorized payments, with certain limitations.

The bill requires, in coordination with Department of Banking and Insurance and the Division of Consumer Affairs, the Commissioner of Community Affairs to undertake certain educational outreach activities directed at eligible homeowners within this State.