



FINANCIAL RESTRUCTURING & BANKRUPTCY DEPARTMENT

ALERT

NEW JERSEY ADOPTS MEDIATION PROGRAM TO AVERT LOSS OF HOMES TO BANK FORECLOSURE

By Michael J. Viscount

To address “an unprecedented increase in mortgage foreclosures, and negative financial and social impact on many New Jersey communities, due to social dislocation, declining housing values, neighborhood blight, homelessness, and a general decline in neighborhood morale and safety,” all three branches of the state government in late 2008 joined in implementing emergency measures that became known as the Residential Mortgage Foreclosure Mediation Program (FMP). A recent decision by the Appellate Division of New Jersey’s Superior Court is instructive in its examination of the mediation program and how it works. See *U.S. Bank National Association v. Williams*, 2010 N.J. Super., LEXIS 175, decided August 25, 2010 (herein called “*Williams*”).

According to *Williams*, a joint effort instituted by the New Jersey Judiciary, Office of the Attorney General, Public Advocate, Department of Banking and Insurance, New Jersey Housing and Mortgage Finance Agency and Legal Services of New Jersey, the FMP is designed to apply to foreclosure actions that have not gone to sheriff’s sale. When the trial court has entered the foreclosure judgment and the writ of execution has been issued but the sheriff’s sale has not been held, homeowners are required to file a motion seeking an order staying the sheriff’s sale and directing the case to mediation. Courts were directed to encourage mediation in all foreclosure cases and, specifically, utilize the FMP whenever a

homeowner files opposition in a foreclosure proceeding. Lenders must serve information and instructions to homeowners to participate in the program with the summons and complaint. A second notice describing the mediation program is mailed to the homeowner 60 days after the complaint by the Administrative Office of the Courts. Finally, the lender must provide a notice of mediation attached to the notice of motion for judgment with the proof of amount due. Even in situations where mediation is not mandated, homeowners may nonetheless request to participate in the program up until the date of the sheriff’s sale. Importantly for lenders, participation in the program does not prevent lenders from continuing with foreclosure proceedings, except for staying the sheriff’s sale while mediation is pending.

Initially, a homeowner who sought bankruptcy relief was not eligible to participate in the FMP. In 2009, the Bankruptcy Court recognized the benefits of the program and adopted a vicinage order permitting lenders to participate even though the homeowner had filed for bankruptcy protection. Under the General Order applicable in New Jersey bankruptcy cases, participation in the FMP’s mediation program does not violate the automatic stay.

Homeowners qualify for the FMP if (1) they are the owner-occupant of a one- to three-family residential property; (2) the property is their primary residence; and (3) they are the borrower on the mortgage loan being

foreclosed. Eligible homeowners have access to housing counselors, attorneys and court-trained mediators in an effort to resolve foreclosure actions by proposing workout and payment arrangements that accommodate the circumstances of distressed borrowers and the financial interests of lenders. While a homeowner is not required to employ the assistance of a housing counselor or attorney, it is clear these advisors may attend the mediation session and provide the homeowner with assistance in completing the required paperwork. The services of the mediator and the housing counselor are free. Single-person households with income up to \$50,000 qualify for free legal representation, as do two-or-more person households with incomes up to \$100,000. If a homeowner qualifies for free legal assistance, the housing counselor refers them to the appropriate attorney in the county where they reside.

Represented homeowners receive the following services from their appointed attorneys: (1) a personal meeting between the client and assigned attorney in the client's home county; (2) review by the attorney of the client's Foreclosure Mediation and Financial Worksheet and all supporting documentation; (3) review by the attorney of any other financial or otherwise relevant

documents, including but not limited to the mortgage and note being foreclosed upon; (4) review by the attorney of the housing counselor's proposed workout for that client; and (5) attorney representation of the client prior to and at the mediation session, if a mediation session occurs, to work out new mortgage terms or other agreements with the lender acceptable to the client.

Under the FMP's mediation program, the main factor affecting the likelihood of achieving a loan workout is affordability (i.e., the homeowner's ability to satisfy the modified obligation). Before mediation, a homeowner submits the designated worksheet and a workout proposal, usually completed with the assistance of the housing counselor, showing the homeowner's income and expenses. Financial documentation must be attached to the worksheet, including the last filed federal tax return, proof of income, bank statements for the prior two months and, if self-employed, a copy of the profit and loss statements for the past six months.

For any issues regarding mortgage foreclosure and collateral recovery in New Jersey and Pennsylvania, please contact Michael Viscount at 609.572.2227 or mviscount@foxrothschild.com or any member of our [Financial Restructuring & Bankruptcy Department](#).

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