

2008 Crisis Offers Lessons For Oncoming Foreclosure Wave

By **Christopher Gorman** (January 18, 2022)

In the wake of the 2008 financial crisis, practitioners in the area of mortgage foreclosure litigation saw just how inundated the courts could become with a large volume of foreclosure filings.

In the years following the financial crisis, tens of thousands of foreclosure filings flooded the courts. The courts in many instances were not well-equipped to deal with this volume of foreclosure litigation that had not previously been seen in recent memory.

Now, as we face the lifting of the New York foreclosure moratorium covering many foreclosure actions that was enacted nearly two years ago in the wake of the COVID-19 pandemic, courts and practitioners are faced with uncertainty about the volume of foreclosure litigation that looms on the horizon.



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Given the dearth of foreclosure filings over the 2020 and 2021 calendar years in comparison to normal years, it seems inevitable that there will be a substantial influx of foreclosure filings.

Add to that the financial implications that arose in the wake of the COVID-19 pandemic, some of which have been temporarily brushed under the rug through the passage of legislation and other government action intended to bolster the economy. We could be on the verge of a large number of foreclosure filings since the New York moratorium lifted on Jan. 15.

The hope is that the court system can learn lessons from the handling of a substantial volume of foreclosure filings in the wake of the 2008 financial crisis and implement those lessons today and going forward to respond to what seems destined to be the latest wave of foreclosure filings.

This article highlights some measures both courts and practitioners alike can implement in order to avoid a repeat of what we saw in the world of foreclosure litigation in the years following the 2008 financial crisis, in order to ensure that this next wave of foreclosures can be addressed as efficiently and expeditiously as possible.

Suggested Procedures and Strategies for Foreclosure Litigation

Early Settlement Intervention

New York Civil Practice Law and Rule 3408(f) was enacted in the wake of the 2008 financial crisis and was intended to foster early settlements of residential foreclosure cases. Rule 3408(f) states, among other things, that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure or any other loss mitigation, if possible."

Rule 3408(f), while certainly passed with noble intentions, has had little practical impact in terms of forcing parties involved in residential foreclosure litigation to come to the bargaining table early on to reach a settlement. Courts, generally speaking, have been loath to strictly enforce the requirements of Rule 3408(f), which in turn has given parties leeway

to not push early settlement negotiations too hard.

Courts should be prepared to enforce Rule 3408(f) against both lenders and borrowers to ensure that every avenue aimed at resolution is exhausted as early as possible in every case covered by the statute.

In addition, too many courts view Rule 3408(f) as only being directed at working toward loan modifications, as opposed to other potential settlement structures — e.g., discounted payoff agreements. Because loan modifications will not work in every instance to resolve residential foreclosure cases, both courts and practitioners should not hesitate to rely upon Rule 3408(f) to push creative resolutions dependent upon the facts and circumstances of each case.

Prompt Adjudication of Receiver Applications

In commercial foreclosure cases, usually the first motion filed by a lender is to seek the appointment of a receiver to collect the rents generated by the subject property. These motions are significant in the context of commercial foreclosure cases, as is determining who will control the collection of rents while the case is pending.

If the receiver is appointed, the lender knows that it has the ability to collect rent, while the borrower knows that it is losing the revenue stream being generated by the property. In contrast, if the motion to appoint a receiver is denied, the lender knows that it will be facing an uphill, lengthy foreclosure battle before it sees any revenue generated from the property and thus, the lender may be more willing to consider settlement options.

In commercial cases, promptly adjudicating receiver applications can give both sides to a case a quick sense for what they may be facing in any particular case and cause the parties to take a new look very early on at the prospects and benefits of resolution.

Quick Disposition of Uncontested Foreclosure Actions

In the wake of the 2008 financial crisis and the ensuing foreclosure litigation, one of the things that clogged up court dockets the most was the pendency of thousands of pending foreclosure actions that were not being contested by the borrower.

For instance, the borrower would default in the case, the lender would move for a default judgment and the appointment of a referee, and that motion would not get adjudicated for many months — sometimes years — for no apparent reason.

The uncontested foreclosure actions, however, are the low hanging fruit when it comes to clearing dockets. These cases should be identified early, and these uncontested proceedings should be disposed of as expeditiously as possible in order to ensure the orderly flow and movement of cases on a docket, while at the same time avoiding the clogging of dockets with cases that can be moved with virtually no resistance.

Quick Disposition of Dispositive Motions in Contested Foreclosure Cases

This item is, simply put, easier said than done. But prompt decisions on dispositive motions are, generally speaking, needed in order to move foreclosure cases forward.

If the borrower files a motion to dismiss on a dispositive issue that the lender obviously failed to satisfy, the quick dismissal of that action can be used to clear the docket and

require parties to reconsider settlement positions given the inevitable delays associated with a dismissal.

Similarly, prompt adjudication of lender summary judgment motions, whether those motions are granted or denied, ensures that foreclosure cases will not linger at the summary judgment stage. One of the more effective means of ensuring prompt adjudications of dispositive motions arises where courts conference the matter on or immediately following the return date of the motion, hold oral argument on any outstanding issues, and promptly at the conference issue a written decision or read a decision into the record.

This approach ensures quick adjudication and that motions are decided while all issues of import remain fresh in the minds of the court, rather than having motion papers sit in chambers for months (or longer) without adjudication.

Enforcement of the Rule Against Successive Summary Judgment Motions

Frequently, in foreclosure litigation, a lender files a motion for summary judgment that is denied because of the lender's failure to meet some technical rule or requirement. In the wake of the foreclosure litigation ensuing from the 2008 financial crisis, lenders would in some cases file three or four summary judgment motions until they got it right, corrected previously noted deficiencies and were awarded summary judgment.

However, multiple summary judgment motions clogged up court dockets for years while those motions were being sifted through.

In recent years, many courts, including the New York Supreme Court Appellate Division, Second Department, have imposed strict requirements on the filing of successive summary judgment motions, including that in order for a successive summary judgment motion to even be considered it must be based upon new evidence — i.e., evidence that was not available to the movant at the time of the filing of the prior motion through the exercise of due diligence.

By not permitting parties multiple bites at the summary judgment apple where no good cause is shown, courts will ensure that foreclosure cases do not get bogged down indefinitely at the dispositive motion stage.

Tighter Control Over Referee Appointments

Many times, in foreclosure cases, after the lender is awarded summary judgment and a referee appointed, a case can languish while the parties wait for the appointed referee to issue a report detailing the amounts owing. Without that report from the referee, the lender cannot move forward with a motion for judgment of foreclosure and sale, which is, generally speaking, the final step in a foreclosure case.

Referees, however, can in some instances be difficult to track down or not entirely focused on quickly turning around the review and signature on referee reports, leaving foreclosure cases hanging in the lurch. Other times, even after being awarded summary judgment, counsel for the lender does not proceed diligently to get reports to referees for review.

The most effective way to ensure that lender counsel and referees are not allowing cases to languish at the referee appointment stage is by imposing deadlines in orders appointing a referee to ensure that the referees' reports are prepared, submitted to the referee and

finalized in a timely manner — e.g., requiring that 60 days from the date of entry of the order appointing a referee, the referee's report be signed or a motion for judgment of foreclosure and sale on the basis of such a report filed.

Dedicated Trial Parts for Foreclosure Cases

In counties where there is particular foreclosure volume, assigning judges to dedicated foreclosure parts for the purposes of trying cases can be an effective way to resolve or adjudicate foreclosure cases. In many counties there are parts dedicated to handling cases in a single subject matter area.

Oftentimes, because foreclosure actions involve bench trials, judges with busy dockets find it difficult to take the time needed to schedule and hear trials on foreclosure matters, particularly where there is high volume. What then happens is cases languish on the docket awaiting a trial date.

A dedicated foreclosure trial part can ensure that foreclosure cases that cannot be resolved by way of dispositive motion are heard and tried expeditiously. And, with trials looming, more foreclosure cases are likely to settle, thereby clearing dockets along the way without courts having to expend the substantial resources associated with conducting a bench trial.

Conclusion and Analysis

Nobody — neither courts nor practitioners — knows for certain what awaits on the other side of the lifting of the foreclosure moratorium. The only certainty — particularly given the ongoing nature of the pandemic — is that there are going to be challenges in adjudicating a large volume of foreclosure cases.

The procedures suggested above are all aimed at a single goal — getting cases resolved or where possible, adjudicated, so that dockets can be cleared as soon as possible. This is certainly easier said than done.

However, by implementing some of the procedures suggested, it is possible that the court system can fare better this time around than it did in facing the substantial challenges that arose from the massive wave of foreclosure litigation that ensued in the wake of the 2008 financial crisis.

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