

and close out. If this situation arises, there is a record with the court of the post-petition delinquency in the response to the NFCP, so is it safe to proceed with collection activity once the bankruptcy case is closed. Rule 3002.1 requirements are not waived if a motion for relief from stay is filed and granted in the Northern District of Ohio; therefore, trustees will still issue a NFCP, and creditors are required to respond even if relief from stay has been granted.

Prior to the enactment of Rule 3002.1, it was routine practice to file a motion to deem the mortgage current prior to discharge. Some trustees and debtors continue to file motions

to deem current in addition to the NFCP. A response must be filed to these motions, even if a response is filed to the NFCP to protect creditors' interests. It is interesting to note that Judge Whipple in the Northern District of Ohio has decreed that motions to deem current are not necessary and should not be filed as they are in direct conflict with Rule 3002.1. Therefore, in Ohio, there is split authority on whether or not motions to deem current can continue to be filed.

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States: *New York*

LENDERS BEWARE OF THE MISUSE OF NEW YORK CPLR 3216 BY BORROWERS' COUNSEL

By: *Joshua I. Gornitsky – Houser & Allison, APC*

There has been a growing trend within the consumer bar toward the improper use of New York CPLR § 3216 to extend and obstruct the prosecution of foreclosure actions. This article will explain the strategy being used and how to address it with the Court.

Section 3216 states that:

“where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.” CPLR 3216(a).

In order for a borrower to move for dismissal pursuant to this section, the action must have been joined at least one year previously and the moving party must have served, via certified mail, a notice demanding the plaintiff resume prosecution of the action within 90 days by filing a Note of Issue or face dismissal. A Note of Issue certifies that a case's discovery phase has been completed and it is ready for trial.

Despite being fully aware that a matter is being assigned to mandatory settlement conferences, a borrower will nonetheless serve a 90-day notice on the lender. It is difficult for a plaintiff/lender to comply with such a notice, as they are required to

have a case move through conferences before continuing the action. In fact, Courts impose a stay on the matter while in conferences, and a matter can stay in conferences for much longer than 90 days while the parties attempt to reach a resolution.

Once a matter is released from conferences, the borrower will immediately make a motion for dismissal pursuant to 3216, alleging that their previous 90-day notice is still valid and that because the lender has failed to file Note of Issue, the case warrants dismissal.

It is important that lenders are aware of how to protect themselves from this misuse of Section 3216. A lender can challenge the motion based on improper service of the 90-day demand or the motion itself. Yet, even if the borrower serves everything properly, a lender can oppose the ensuing motion to dismiss under Section 3216 by asking the Court, pursuant to its powers under CPLR 2004 (which allows the court to grant extensions of time for good cause, which participation in mandatory conferences should be), to extend its time to file Note of Issue and comply with the previous demand. The most effective means of preventing such an attack is by simply asking the Court for an extension of time to file Note of Issue once the 90-day notice is received but before it expires. By being vigilant, a lender can render the borrower's improper use of Section 3216 harmless. ☒

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