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Testimony of Frank D'Alessandro, Esq.

For Pine Tree Legal Assistance

In Regard to Proposed Committee Amendment to LD 1389 Part B, C and G

Before the Joint Standing Committee on Judiciary
regarding testimony provided to the Committee on March 5, 2014

Good afternoon Senator Valentino, Representative Priest and members of the Joint Standing Committee on the Judiciary. My name is Frank D'Alessandro and I am the Regional Directing Attorney for Southern Maine for Pine Tree Legal Assistance. I am grateful for the opportunity to share with you my comments in regard to the proposed committee amendment to LD 1389.

I have been asked to share the expertise of Pine Tree Legal Assistance on these issues and I am speaking today on behalf of Pine Tree Legal Assistance. Since 1967 Pine Tree Legal Assistance has provided free legal services to low-income people throughout the State of Maine. In 2013, Pine Tree Legal Assistance provided legal services to Maine families and individuals in 11,828 cases, over 420 of which involved foreclosure actions.

INTRODUCTION

In response to the dramatic increase in the number of foreclosures in the State of Maine the Maine State Legislature implemented 14 M.R.S. § 6321-A(12) to provide for mediation for all owner-occupied 1 to 4 unit residential properties. To implement the requirements of the new statute, the Court adopted M.R.Civ.P. 93.

In an attempt to identify the impact of the amendments to the foreclosure statute to and court rules that provided for mediation in foreclosure cases, Pine Tree Legal Assistance, in conjunction with Boston University Law School conducted an audit of 426 cases in District Courts located in Springvale, Biddeford, Portland and Lewiston. The audit was conducted in March, August, and September 2012.

The major findings of the audit were as follows:

1. The average number of days between the date of default and the filing of the foreclosure complaint was 377 days.
2. Of the 426 foreclosure case reviewed in the audit an answer was filed in 202 cases, while no answer was filed in 224 cases.

3. Of the 426 cases audited, at the time of the audit:

a. A mediation was held in 102 cases.

b. A motion to dismiss was filed in 130 cases. (The Plaintiff waited an average of 244 days before filing the motion to dismiss).

c. A request for judgment was filed in 77 cases. (The Plaintiff waited an average of 255 before filing the motion for summary judgment).

4. In the 222 cases in which no answer was filed, at the time of the audit:

a. A motion to dismiss was filed in 66 cases. (The Plaintiff waited an average of 199 days before filing the motion to dismiss).

b. A request for judgment was filed in 42 cases. (The Plaintiff waited an average of 210 days before filing the motion for summary judgment.)

5. In 211 of the foreclosure cases filed, the Plaintiff had taken no action to prosecute the foreclosure case.

a. 112 of these cases involved cases in which no answer had been filed by the Defendant.

b. These cases had been inactive for an average number of 343 days from the date the Complaint was filed until the date of the audit.

This data did not show that mediation was a factor in the delays which may occur in the foreclosure process. For example, in cases in which no answer was filed, the Plaintiffs waited on average 210 days before requesting a judgment. In all cases audited, the Plaintiff waited on average 255 days before requesting a judgment. In more than half of the cases in which the Plaintiff took no action, the Defendant had filed no answer and no mediation had been held. Finally, the audit showed that the Plaintiff waits on average more than a year between the time a homeowner defaults before it files a Complaint for foreclosure.

In short, the audit of 426 foreclosure cases filed in Maine District Courts showed that delay in the prosecution of foreclosure cases is at least as much the result of the decisions made by Plaintiffs in prosecuting the cases as any consequence of the availability of mediations in Maine Courts.

In our experience delay results largely because existing rules are not adequately followed or enforced, and because of the decisions made by Plaintiffs in prosecuting cases.

For example:

1. Failure to comply with the existing provisions of M.R.Civ.P. 93.

M.R.Civ.P. 93(c) (4) requires that the Plaintiff attach to its complaint correct and current forms that the plaintiff will use in considering or developing alternatives to foreclosure. It is our overwhelming experience that these required forms are not

included with the summons and complaint being served upon the homeowner. Since servicers will not start an analysis of a homeowner's request for modification without the correct forms being completed, enforcing this one existing requirement already contained in the court rules provides a very straight forward solution to the problem of not having the forms early enough in the process.

At the very least, before the mediation process is modified, Plaintiffs should be required to comply with this provision over an extended length of time to ascertain how actual compliance with the rule will affect outcomes.

2. Failure to comply with the provisions of M.R.Civ.P. 55 in order to obtain a default judgment.

Of the 426 cases audited by Pine Tree Legal Assistance, Defendant homeowners failed to file an answer or request mediation in 222 cases. At the time of the audit the Plaintiff had requested a judgment in 66 of the 222 cases in which no answer had been filed. In those 66 cases the Plaintiff waited an average of 210 days before requesting judgment.

In addition, at the time of the audit, in 112 of the cases in which no answer or request for mediation had been filed, the plaintiff had taken no action at all. At the time of the audit the Plaintiff had taken no action in these cases for a period of over 300 days.

M.R.Civ.P. 55(a) (1) sets forth what a Plaintiff in a foreclosure action must provide in order to obtain a default judgment:

No default or default judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed, and (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage.

The requirements set forth in M.R.Civ.P. 55(a) (1) are straight forward. The Plaintiffs repeated decisions in foreclosure actions not to exercise this option is not a reason to change the mediation process

ABANDONED PROPERTY

As a result of the observed delays in foreclosure cases occurring even when the Defendant has failed to file an answer, it is unclear to Pine Tree Legal Assistance what

impact, if any, will result from the addition of a provision specifically designed to cover cases in which a home has been abandoned.

To begin with, attorneys at Pine Tree Legal Assistance have repeatedly been contacted by clients who we represent in actively litigated foreclosure cases, who call us to say that a person employed by the foreclosing plaintiff showed up at their home to advise the homeowner (who was living in the property) that the property had been abandoned. As a result of our experience any addition of a provision dealing with abandoned property must be carefully tailored to insure that the property has actually been abandoned. This is especially important in a rural State like Maine where the expectations for home maintenance may vary greatly between different areas of the State. We are especially concerned about the changing of locks with no homeowner attempt to gain access to the property being evidence of abandonment. We often hear from homeowners that they believe they have no right to try to enter the property once the locks have been changed. We also hear from homeowners that the locks were changed when they were still living in the home or temporarily away from the home.

Also, if the goal is to speed up the process, any addition of a provision designed specifically to deal with abandoned property needs to include a provision whereby the defendant homeowner can file a request to consent to judgment at which time the plaintiff would immediately become the owner of the property and responsible for the property's upkeep.

Finally, we are very concerned with foreclosing plaintiff's actions in prosecuting cases that involve apartment buildings. At Pine Tree Legal Assistance we often see cases in which apartment buildings are abandoned by their owners and where the foreclosing plaintiff refuses to take responsibility to manage the building. To the extent that the goal of a provision to deal with abandoned property is to ensure the safety and proper maintenance of housing, any provision dealing with abandoned property needs to allow any occupant of the building in a foreclosure, standing to intervene in the foreclosure action to seek an order that, upon a showing that the property has been abandoned by the owner, would require the foreclosing plaintiff to immediately take possession and responsibility for managing the property.

In order to apply to conditions resulting from apartment buildings abandoned by landlords Pine Tree Legal Assistance suggests the following changes to Part B of the proposed amendments:

1. 6326(1)(A) should be expanded to apply to all foreclosure actions.
2. 6326(1)(B)(4) should be added:

The mortgagor has filed a motion with the court requesting that judgment be entered in favor of the plaintiff.

3. 6326(1)(C) should be added:

In any foreclosure action involving a building involving units rented to bonafide tenants any such bonafide tenant shall have standing in the foreclosure action to present evidence of abandonment as described in subsection 2 and may request a determination pursuant to subsection 3 that the mortgaged premises have been abandoned.

PRE-FORECLOSURE MEDIATION

Any pre-foreclosure mediation cannot take the place of the existing judicial foreclosure mediation program and cannot take resources away from the program. This program must utilize a housing counselor provided at the servicer's expense. This program is voluntary on the part of the homeowner. In addition, any pre-foreclosure mediation program must include a duty of good faith and fair dealing.

The servicer duty of good faith and fair dealing in a pre-foreclosure mediation must include the following requirements:

1. Servicer has a duty of good faith and faith dealing in its communication, transactions, and course of dealings with each borrower in connection with the servicing of the borrower's mortgage loan;
2. The servicer must offer loan modification and other loss mitigation options in accordance with HAMP guidelines, directives developed by the United States Treasury, and any other applicable loss mitigation guidelines;
3. A violation of this section shall constitute a violation of the Maine Unfair Trade Practices Act.