



## **Fighting Foreclosure: Subprime Borrowers Battle (and Beat) Lenders in Court**

**Amanda Stutt**

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In response to the subprime mortgage foreclosure crisis sweeping New York City, the highest court in the State is finding new ways to provide homeowners with legal advice and representation if they are faced with foreclosure.

A series of startling court decisions nationwide have ruled against subprime lenders attempting to foreclose on borrowers after failing to legally establish ownership of the loans in question because they had been 'transferred' multiple times.

New York Chief Justice Judith Kaye has now called for a special Foreclosure Court to deal solely with foreclosure cases in Queens -- where, the [New York Post](#) reports, the number of foreclosures has increased 81 percent in just one year. The Court will serve as an alternative dispute process -- advising homeowners of legal options by proactively sending notices to homes under threat of foreclosure.

### **"Reaching out" to homeowners**

Judge Kaye is concerned about New Yorkers losing their homes in "record numbers," and wants borrowers to know that legal representation is available. "We are hoping people will reach out... and get counsel," she told the Voice.

Judge Kaye said since January 2005, foreclosure filings have increased 150% statewide. "Queens has over 15,000 new foreclosures pending...they are overwhelmingly defaults... but we don't know who the people are -- we don't see a profile," she said.

Nationwide, court initiatives similar to the Queens project are helping borrowers in default who may not know what to do.

Judge Kaye said the Court initiative "has begun in the sense that we have sent out notices to people who have pending foreclosures."

Supreme Court documents issued to homeowners state, "Under the law, you are entitled to a Conference with you and your lender to see if your case can be resolved".

Through state-enacted legislation, these "Court Conferences" will be held to advise borrowers of their legal rights, and provide them a bridge to legal representation during foreclosure proceedings.

"We are trying to locate pro-bono lawyers to identify and train... to raise consciousness of the need to help. We are in sync with courts in Ohio and Pennsylvania trying to get to the homeowner. We are on the right track. The Federal reserve is working with us. I think this is the best of the profession -- lawyers helping people," Judge Kaye said.

The Court Conferences are set to begin in December.

### **"If the paperwork is garbage I deny it"**

More and more Judges have demonstrated they are not willing to foreclose on a mortgage when they can't determine where it originated, or who actually owns the loan.

Brooklyn Supreme Court Judge Arthur Schack, who sees plenty of defaulted subprime loans in his courtroom, believes the Queens project "is an attempt to help people. If it can help save peoples' homes -- more power to it" he said.

Schack estimates that of approximately "Seven to eight thousand foreclosures in the past year in King's County alone -- 80 to 90 percent are subprime and in minority neighborhoods. It's the bulk of what we get," he said.

In a recent *National Law Journal* article Shack said, "I deny more foreclosures than I approve... I want to see all the paperwork before I approve it. If the paperwork is garbage, I deny it. If you're going to take away someone's home, it should be done properly."

Schack recently ruled in a foreclosure suit brought by Wells Fargo that the bank "lacks the standing to foreclose" because it "failed to establish ownership of the mortgage."

### **The foreclosure "killer"**

Florida Jacksonville Legal Aid Attorney April Charney is known nationwide as the "foreclosure killer." She travels the country teaching lawyers how to fight foreclosure in court -- and win.

Charney said Judge Schack "is setting the bar high for other judges. His court is only [being] accessed by persons with legitimate claims to bring to court. There is an obligation to make sure the paperwork is appropriate."

Charney is making sure Schack's opinions "are getting well read all over the country."

Charney said it is important that lawyers and judges are trained to deal with the new legal issues arising out of the legal revelations about subprime loan transfers.

"It seems to be a no-brainer that a judge should make sure the [foreclosure] has a legal claim."

She said what resulted from the "transferring" of loans is there is now "no ownership" of loans.

"I don't understand why lawyers didn't check to see if the paperwork is valid" she said. "Law firms have been sued over debt collection... and foreclosure firms have been sued in active litigation," she said.

Charney explained where it went wrong: Mortgage loans were originated by brokers and lenders to fill up mortgage "pools." The pools were then sold off to investment banking firms that have trustees acting on behalf of the banks.

"When it became apparent that millions of subprime mortgage loans were not viable because they were no longer affordable to the borrower, the trustee comes in to file a foreclosure, but they can't prove they own the loans," Charney said. "The originating lenders were not transferring the loans until the mortgage had already gone into foreclosure -- the paperwork hadn't been moving."

When a subprime mortgage goes into default and the trustee acting for the bank goes to file a foreclosure, often it turn out that ownership of the loan cannot be established. Over and over, these foreclosures are not standing up in court.

"The task of defending foreclosures largely falls upon legal aid attorneys, because most of the big firms are conflicted out because they represent the banks," Charney said.

### **Loans "fraudulently induced"**

Catherine Austin Fitts, former Assistant Secretary of Housing and Urban Development, adds a new twist: She believes that borrowers can fight foreclosure because "most mortgages issued in this country from 1996 on were fraudulently induced."

Fitts said in cases of fraudulently induced loans lenders "knew they were issuing mortgages that were not affordable to the borrower," and the borrower "may not owe the money back because they essentially failed to disclose something about [the borrowers]' financial situation that they knew and the borrower didn't."

Josh Zinner, co-director of NEDAP, New York Economic Development Advocacy Project, was formerly director of the Foreclosure Prevention Project at South Brooklyn legal services where he defended hundreds of foreclosure cases that were the results of subprime mortgage loans.

He said that after the recent spate of publicity subprime garnered, courts are becoming more open to hearing about abuses in the lending system.

This is good news for subprime borrowers who are in danger of foreclosure because "borrowers who had legal representation had a much better chance of saving their homes," said Zinner.

There has been a "quantum leap in the last year -- judges' attitudes are changing significantly. The bottom line is that as judges become more aware, they'll see it in a different light," he said.

Zinner recounted stories of clients who were approached by brokers knocking on their front door. Brokers were reportedly so motivated by the "Yield Spread Premium fee" they collected for bringing in loans to a lender at the highest possible subprime rate that they would go door-to-door in low-income neighborhoods, convincing unprepared borrowers that they qualified for mortgage loans.

"People were made promises. Many borrowers were 'bait and switched' into loans they couldn't afford."

"It's fraudulent inducement," he said.

### **Foreclosure cases thrown out of court**

In a recent Supreme Court case in Saratoga, New York, Judge Thomas Nolan denied Deutsche Bank's foreclosure action against a borrower because the Bank offered "no evidence that it took physical delivery of the note and mortgage before commencing this action."

As recently as August 19, a Massachusetts bankruptcy court denied Deutsche Bank National Trust's motion and ordered counsel to the debtor "to submit an application for compensation."

In Ohio, Chief Justice Thomas Moyer issued a plea for lawyers to defend foreclosure cases.

Lenders have reportedly abandoned foreclosure action after courts have demanded to see original mortgage notes, and as judges see the substandard structure of paperwork of many subprime loans going into foreclosure, there have been more rulings in favor of the borrowers, not the lenders.

Also in Ohio, a rash of foreclosure cases brought by mortgage investors were dismissed by Judges. According to court documents, Federal Judge Christopher Boyko dismissed 14 foreclosure cases filed by Deutsche Bank in 2007, ruling that "the plaintiff had failed to establish that they had a standing to bring the lawsuits."

And in the largest consumer protection settlement in the history of the Federal Trade Commission, in 2002, the California Supreme Court ordered Citigroup and the Citifinancial credit Company to "establish a \$215 million redress fund for subprime borrowers" after the plaintiffs filed a class action lawsuit for "violation of the Consumer Remedies Act, Unfair, unlawful and fraudulent business practices... Fraud, Fraudulent Concealment and Deceit and unjust enrichment."

All of this bodes well for the Court Conferences the Queens pilot project has planned -- and for homeowners facing foreclosure.

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