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ADKT 435

IN THE MATTER OF THE ADOPTION OF RULES FOR
FORECLOSURE MEDIATION

FILED

JUN 22 2009

INTRODUCTION AND COMMENTARY

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CLERK OF SUPREME COURT
BY S. Young
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There is no doubt that AB 149 is a laudable legislative goal to assist a certain class of debtors and lenders to reach a workable agreement to solve or alleviate the hardships that a large number of Nevadans have encountered during the current global financial crisis, perhaps through no fault of their own.

AB 149 requires that there be mutual cooperation between lender and debtor, however because the disparity in financial positions between lender and debtor such cooperation maybe very difficult to attain. Said financial disparity creates a significant advantage for the lender. He/she has the resources to hire a lawyer or a team of lawyers to represent his/her interests while the debtor finds himself/herself before a tribunal because he/she cannot meet his/her financial obligations for many reasons, lost job, got demoted, employer moved the business to a foreign country, close production of the product and etc., in most cases reasons beyond his/her control.

A lay debtor that appears in propria persona will be overwhelmed with legalese which, with a few exceptions, he/she does not understand, other papers with fine, very fine print that Mr and Mrs Layperson and even many lawyers cannot read and instantly comprehend will be served. The debtor that is dealing with the upmost "good faith" and that is doing his best to meet her obligations will NOT get a fair and just hearing.

COMMENTARY ON THE RULES

RULE 1 (c) "mandatory" should be replaced with "voluntary"

Comment: A basic principle of Mediation is that the parties agreed to the process rather than have it imposed on them. The program will be more effective if the parties felt they were participating at their own free will. Such factor will be a

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substantial factor or incentive for the parties to deal in "good faith".

RULE 3(c) 1 (a) and (b) should be modified to read only that; "trained and experience mediator".

NOTE: This does NOT and should NOT be read as meaning that all Judges should be excluded from the program. In my view, "THERE SHOULD ALWAYS BE AN EXPERIENCED JUDGE AVAILABLE TELEPHONICALLY OR BY ANY OTHER MEANS FOR CONSULTATION ON MATTERS BEYOND THE EXPERTISE OF THE MEDIATOR,"

Comment: Impartiality and neutrality and the appearance thereof are critical aspects of the mediation process. In America there is skepticism about the legal profession. In order to maintain the highest degree of credibility and the integrity of the program the legal profession should NOT be given preferential treatment in participation.

RULE 5 (a)(2) "or granting relief from a stay of foreclosure" should be deleted.

Comment: If party has filed for Bankruptcy when he/she knew or should have known that mediation was available he/she should not be allowed to file for the mediation program unless a motion to withdraw the Bankruptcy action has been filed and granted.

RULE 12(a) "A total of four hours to present and conclude the mediation..."

Comment: Based on my experience it is my opinion that four (4) hours is a very short time. The complexity of the issues and potential issues that can be raised, the volume of papers to be examined, the emotional state of mind of the parties, specifically the debtor, the potential aftermath of the agreement or nonagreement on the parties are matters that should be considered. Perhaps, six(6) to eight(8) hours of continuous or truncated negotiations would produce a workable and acceptable agreement. NOTE: There will be cases that will be settled in a lesser time.

RULE 14. Fees

Comment: It is understandable that Mediators need to be compensated for their time and efforts, however to impose a mandatory \$200.00 fee on a debtor that is making a reasonable responsible effort to meet his obligations at a time when he/she is NOT able to pay for food or medicine is an additional burden contrary

to our system of justice and fair play.

RESPECTFULLY SUBMITTED THIS 22 DAY OF JUNE 2009.

A handwritten signature in cursive script, appearing to read "Bernard T. Santos".

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