[*1]

BAC Home Loans Servicing v Westervelt
2010 NY Slip Op 51992(U)
Decided on November 18, 2010
Supreme Court, Dutchess County
Pagones, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 18, 2010

Supreme Court, Dutchess County

BAC Home Loans Servicing, Plaintiff,

against

Shelly Westervelt and THOMAS WESTERVELT, Defendants

2455/10

LISA GORDON, ESQ.

FRANKEL LAMBERT, WEISS,

WEISMAN & GORDON, LLP

Attorneys for Plaintiff

20 West Main Street

Bay Shore, New York 11706

James D. Pagones, J.

In this foreclosure action, the court, pursuant to CPLR 3408, directed the parties to appear for a settlement conference in the Foreclosure Part of the Supreme Court on September 22, 2010. Plaintiff's counsel, by letter dated August 26, 2010, had sent a loss mitigation package to the homeowners to complete prior to the conference date.

On September 22, 2010, plaintiff appeared by local counsel, and the home owner was self-represented at the settlement conference which was conducted by a court attorney-

referee.[FN1] [*2]The homeowner explained that the co-defendant was her ex-husband, and he was not on the note, mortgage or deed, and, therefore, should not be a party to the lawsuit or involved in the loss/mitigation process. The homeowner stated that she had submitted numerous loss mitigation packages to plaintiff in order to apply for a loan modification and that plaintiff had indicated to her that her application was under review. However, local counsel reported that plaintiff required yet another loss mitigation package. The homeowner replied that the most recent application packet had been mailed to plaintiff's attorney certified mail, return receipt requested, the law firm had confirmed receipt of the modification packet, and the firm had forwarded the application to plaintiff. Local counsel then called plaintiff and was advised that, contrary to the update plaintiff had given her, plaintiff had in fact received the application packet, and the bank was reviewing the homeowner for a forbearance plan.

There were many discrepancies between the parties regarding income and expenses, how income and expenses should be allocated given the parties' divorce, and who was a proper defendant in the foreclosure action. Accordingly, the court attorney-referee adjourned the conference without a date, and on October 1, 2010, this court issued an order directing that a member or associate of plaintiff's firm appear with a bank representative "fully familiar with the file and with authority to settle" at the next settlement conference scheduled for November 10, 2010 at 2:30 p.m. It was the only case scheduled that afternoon in order to give the parties sufficient time to address the many issues which arose at the prior conference. The order also provided that adjournments were only granted with leave of the court and that failure to comply with the order "may result in sanctions." The order was mailed to plaintiff's counsel and the homeowner in accordance with the standard procedure of this court's chambers. The order was not returned to court as undeliverable in any way.

On or about October 27, 2010, an attorney from plaintiff's firm left a message for the court attorney-referee that she was calling about this file. No specific reason was given. The court attorney-referee returned the call on October 29, 2010 and left the attorney a message on her voice mail. No one from the plaintiff's counsel's office ever called back.

On November 10,2010, the self-represented homeowner appeared, but plaintiff and plaintiff's counsel defaulted in appearance. At this conference, the homeowner advised the court attorney-referee that on or about October 8, 2010, she had received a letter informing her that she had not qualified to participate in the government's Home Affordable Modification Program (HAMP) because her verified income was too high. The homeowner explained to the court attorney-referee that she had called plaintiff to explain that the figures used to calculate her income were incorrect, but plaintiff refused to consider the homeowner's objection, despite the 30-day period in which a homeowner may challenge the basis of denial under HAMP guidelines.

The court attorney-referee again adjourned the conference without a date. Later that afternoon, this court's principal court attorney contacted Lisa Gordon of the plaintiff's counsel's office to inquire as to her failure to appear. Ms. Gordon advised that she was not aware of the conference and that she "had been playing telephone tag" with the referee.

Pursuant to 22 NYCRR 202.27(b), if a plaintiff fails to appear at a scheduled conference, this court may note the default on the record and dismiss plaintiff's action. While dismissal of this action is technically warranted due to plaintiff's default, dismissal would inure to the

[*3]detriment of the homeowner, not plaintiff. Indeed, dismissal would unnecessarily delay the modification application process thus exacerbating the homeowner's frustration, anxiety and uncertainly about whether she will eventually lose her home, and, further, during the time it would take for plaintiff to re-commence the action, arrears, including interest, fees, and penalties would continue to accrue, plunging the homeowner even further into plaintiff's debt. Thus, this court declines to impose this remedy for plaintiff's default.

22 NYCRR 130-2.1(a) provides that "the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action ... to be heard before a designated court." In determining "without good cause" and the measure of sanctions or costs, the court must consider all "attendant" circumstances (*see* 22 NYCRR 130-2.1[b]).

This court finds counsel's explanation inadequate (*see* 22 NYCRR 130-2.1[b][1]). The order was mailed well in advance of the conference date to both plaintiff's counsel and the homeowner. In general, "the law presumes that a letter properly addressed, stamped and mailed has been duly delivered to the addressee [and] ... there is a presumption of receipt which flows from the fact of mailing" (*DeFeo v Merchant*, 115 Misc 2d 286, 288 [Ct 1982]; *accord Trusts and Guarantee Co. v Barnhardt*, 270 NY 350, 352 [1936]). Plaintiff's counsel's address was correct, the order mailed in accordance with the standard practice in this court's chambers, and the order was not returned to the court as undeliverable. Therefore, the order is presumed to have been delivered.[FN2] Moreover, the homeowner received the order in the mail and appeared at the conference. In any event, even if the order had not been delivered, the September 22, 2010 conference had been adjourned without a date, an attorney from plaintiff's firm called the court attorney-referee about the case about a month later, but never followed up after the call was returned.

The court further finds that the notice of the time and date of the scheduled appearance was adequate (22 NYCRR 130-2.1[b][2]); counsel did not notify the court or the homeowner in [*4]advance that plaintiff would not be appearing (22 NYCRR 130-2.1[b][3]); and substitute counsel did not appear nor did counsel submit an affidavit of actual engagement (22 NYCRR 130-2.1[b][4] and [5]). As a result of plaintiff and counsel's failure to appear, the court was unable to conduct the mandated conference at which the homeowner did appear and the homeowner was required to expend valuable time without any constructive purpose. In addition, as long as the modification process is adjourned and prolonged, the homeowner continues to fall deeper and deeper into arrears.

22 NYCRR §130-2.1(d) permits the court to impose sanctions and award costs, *sua sponte*, "after a reasonable opportunity to be heard." The court will schedule a hearing at the next conference to determine the issue of sanctions against Frankel, Lambert, Weiss, Weisman & Gordon, LLP.

Moreover, as particular to foreclosure actions, this court has the power to and indeed the affirmative obligation under the New York Code of Rules and Regulations to ensure that the parties are acting in good faith (*see* 22 NYCRR 212.12-a[c][4]). In the wake of a national

banking crisis resulting from years of wide-spread predatory lending practices involving sub-prime, high cost and non-traditional home loans, New York enacted sweeping new legislation effective August 2008 in an effort to stave off the alarming surge of mortgage foreclosures upon homeowners (L 2008, ch 472, amended L 2009, ch 507, eff. Feb. 13, 2010). As a result of this new legislation, the CPLR and the Uniform Civil Rules for the Supreme and County Courts were amended to provide for mandatory settlement conferences in residential foreclosure actions involving certain types of mortgage loans. The purpose of these conferences is for the parties to try to resolve the matter without litigation which "would have the immediate salutary effect of restoring the homeowner to his home" (*Aames Funding Corp. v Dudley*, NYLJ, Dec 7, 2009, at 42, col 3 [Sup Ct, Kings County, Kramer, J.]), thereby avoiding "[d]elays in the foreclosure context [which would] inevitably leave viable properties in a virtually ownerless limbo state and create the potential for a landscape filled with vacant, decaying edifices which could well invite further foreclosures and decreasing property values" (*Mtge. Electronic Registration Sys. Inc., v Lizima*, 15 Misc 3d 1118[A] (Sup. Ct. Kings County 2007).

Consequently, 22 NYCRR 202.12-a(c)(4) requires that:

[t]he parties shall engage in settlement discussions in good faith to reach a mutually agreeable resolution, including a loan modification if possible. The

court shall ensure that each party fulfills its obligation to negotiate in good faith... .

(*see also* CPLR R3408 [mandatory conference for the purpose of holding settlement discussions pertaining to respective rights of the parties including a determination whether the parties can reach mutually agreeable resolution to help homeowner avoid losing his or her home]). At the settlement conference counsel must be fully authorized to dispose of the case and plaintiff's representative may attend telephonically (*see* CPLR R3408).

Not surprisingly, in the wake of this new legislation, decisions are beginning to emerge in which the courts are finding that the banks have engaged in discriminatory, unconscionable, and onerous lending practices and are now negotiating settlements of these oppressive loans in bad faith. In particular, one court, upon finding that the bank's conduct "has been and is inequitable, unconscionable, vexatious and opprobrious," vacated the judgment of foreclosure and canceled [*5]the entire mortgage obligation (*see IndyMac Bank v Yano-Horoski*, 26 Misc 3d 717 [Sup. Ct, Suffolk County 2009]) and in another case, upon finding that the bank's conduct was "shockingly inequitable" and in bad faith, the same court forever barred the bank from collecting claimed interest accrued on the loan from the date of default and any claimed legal fees and expenses; fixed the mortgage obligation to be no more than the principal balance, and awarded exemplary damages in the amount of $100,000 (*see Emigrant Mtge. Co., Inc. v Corcione*, NYLJ, Apr. 21, 2010, at 25 col 3 [Sup. Ct, Suffolk County, Spinner, J.). In another case, the court fashioned an equitable remedy when the parties reach an impasse in settlement negotiations. The bank had agreed to a modification lowering the mortgage payment to $3,000 per month, but the homeowners sought to pay $2,000 per month. The court, concerned with "discriminatory lending practices" and the fact that "the mortgage was granted to a minority buyer for the purchase of property in a minority area" which would eventually call for an interest rate exceeding 9%, found a rebuttable presumption of discriminatory lending practice and froze the interest rate at a maximum of 9%. In addition, the court ordered the homeowners to make a

deposit into the court of $10,000 to avoid foreclosure and ordered the parties to split the $1,000 difference in the mortgage payment gap (*see Aames, supra*).

Accordingly, the court, sua sponte, finds that the Bank has not acted in good faith in negotiating a settlement with this homeowner. Indeed, the homeowner's representation that plaintiff inexplicably refused to re-examine her income - which the bank must do under HAMP directives - stands uncontradicted. Further, in the face of counsel's inadequate excuse for defaulting in appearance and failing to follow up with the court attorney referee, counsel still categorically refuses to comply with the spirit of the statute and work towards a modification with this homeowner, even though the homeowner earns income to sustain a modified payment. This court is hard-pressed to comprehend why plaintiff would rather seize the property in foreclosure than work out a loan modification, as required by statute, with a homeowner who is gainfully employed.

The Bank elected to pursue an equitable remedy (*see Bieber v Goldberg*, 133 App Div 207, 210 [2d Dep't 1909]; *see also IndyMac, supra*]), and "the very commencement of this action by Plaintiff invokes the Court's equity jurisdiction" (*IndyMac, supra*, 26 Misc 3d at 723). In addition, the court seeks to ensure that the primary statutory goal of keeping homeowners in their homes (*see* CPLR R3408[a]) and the concomitant obligation of ensuring that the parties act in good faith (*see* 22 NYCRR 202.12-a(c)(4) are met. Toward that end, this court has the power to impose an equitable remedy commensurate with the Bank's bad faith regarding this loan modification (*see e.g. Aaems Funding Corp., supra; IndyMac, supra; M & T Mtge. Corp. v Foy*, 20 Misc 3d 274 [Sup. Ct, Kings County 2008]).

Based on the foregoing, it is hereby

ORDERED that the law firm of Frankel Lambert, Weiss, Weisman & Gordon, LLP shall appear at a hearing to be scheduled to show cause why it should not be sanctioned in an amount to be determined by the court pursuant to 22 NYCRR §130-2.1; and it is further

ORDERED that plaintiff is barred from collecting any arrears incurred from October 8, 2010 (the date the homeowner received the HAMP denial) until the date the homeowner is given a **final** determination on her loan modification application, after review and determination of **all** possible modifications for which the homeowner may be eligible and the case is released from [*6]the settlement part;

ORDERED that plaintiff is barred from collecting any interest incurred from October 8, 2010 until the date of a final loan modification determination and the case is released from the settlement part; and it is further

ORDERED that any unpaid late fees are waived from October 8, 2010; and it is further

ORDERED that any loan modification fees are to be either waived or refunded to the homeowner; and it is further;

ORDERED that any attorneys' fees claimed to have been incurred from the date of the default until the date of this order are not to be included in the calculation of the homeowners' modified mortgage payment or otherwise imposed on the homeowners, but, rather, any request for attorneys fees is hereby severed and to be submitted to the court for separate, independent

review as to their reasonableness; and it is further

ORDERED that the parties appear for a further conference in the Foreclosure Settlement Part of the Dutchess County Supreme Court, 10 Market Street, Poughkeepsie, New York on **December 20, 2010** at **12 p.m.**; and it is further

ORDERED that a bank representative fully familiar with the file and with full authority to settle the matter appear at the next conference, and it is further

ORDERED that Frankel Lambert, Weiss, Weisman & Gordon, LLP is directed to appear at the next conference by either a member of the firm or an associate of the firm. Local Counsel may not appear at this conference. Appearing counsel must be fully authorized to dispose of the case as required by statute (see CPLR 3408[c]).

Adjournments are only granted with leave of court.

Failure of plaintiff to comply with this order may result in further sanctions, including discharge of the underlying mortgage obligation, exemplary damages and loss of the privilege of appearing by local counsel in all foreclosure settlement conferences conducted in Dutchess County.

This constitutes the decision and order of the court.

Dated: November 18, 2010

Poughkeepsie, New York

ENTER

Hon. James D. Pagones, A.J.S.C.

111710 decision & order

Footnotes

Footnote 1: At the onset, the court notes the inherent inequity in the settlement process in the foreclosure part. Indeed, all plaintiffs are represented by counsel, and the homeowners are mostly self-represented and largely unaware of their legal rights including possible defenses to the action.

Footnote 2: The court notes that on numerous occasions during the settlement conferences, homeowners have, among other ways, faxed, emailed, mailed by certified mail, return receipt requested, mailed in envelopes provided by the bank, mailed by federal express or overnight delivery, modification applications, financial documents, updated pay stubs and bank statement, which the banks invariably claim they never received despite contradictory proof that the documents were sent and even received. Although the banks have consistently refused to accept proof of delivery and receipt, making homeowner re-send the documents, in many instances on multiple occasions, the court finds it interesting that plaintiff's counsel requests that the court excuse its default in appearance by accepting counsel's bald assertion, in the face of overwhelming support to the contrary, that the order was not received.

Return to Decision List