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SHORT FORM ORDER INDEX NO.: 0018852/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

CONFERENCE DATE: 5/23/2011

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AURORA LOAN SERVICES, LLC.,

Plaintiff,

-against-

DAVID M. DUNNING a/k/a DAVID DUNNING, ANDREA J. DUNNING a/k/a ANDREA DUNNING, BANKERS TRUST COMPANY, AS CUSTODIAN, DOMENIC CAPOBIANCO, MASTER FINANCIAL, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LEHMAN BROTHERS BANK, FSB,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants or premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises),

Defendants.

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KNUCKLES, KOMOSINSKI & ELLIOTT, LLP
Attys. for Plaintiff
565 Taxter Road, Suite 590
Elmsford, NY 10523

ROBERT A. CARROZZO, ESQ.
Atty. for Defendants
David M. Dunning a/k/a David Dunning
Andrea J. Dunning a/k/a Andrea Dunning
1111 Route 110, Suite 224
Farmingdale, NY 11735

Defendants, David M. Dunning, also known as David Dunning, and Andrea J. Dunning, also known as Andrea Dunning, moved by notice of motion dated June 6, 2011 for an order tolling the computation of interest, imposing sanctions upon plaintiff for its alleged failure to negotiate in good faith, and scheduling a further foreclosure conference. By order of this Court dated October 28, 2011, a foreclosure conference

was scheduled for November 30, 2011, and additional conferences were held on January 11, 2012, March 14, 2012, April 11, 2012, and May 2, 2012. By order of the Court dated May 4, 2012, the defendants' motion, which was held in abeyance while settlement conferences were being held pursuant to 22 NYCRR §202.12-a(c)(7), was reinstated to the motion calendar for May 23, 2012 , and the parties were advised that additional affidavits and documentary evidence could be submitted for the Court's consideration. The parties were also directed to appear for a final conference on May 23, 2012, at which time plaintiff was directed to "produce complete copies of all pleadings, the underlying note and mortgage, and all assignments and *mesne* assignments." In addition, plaintiff was directed to appear at the conference with an account manager "and file containing all documents set forth in 22 NYCRR § 202.12-a(c)(7)(i), as well as copies of payment records, forbearance agreements and loan workout agreements." No additional documents were submitted to the Court for consideration in connection with this motion.

Plaintiff commenced this action in foreclosure by the filing of a summons and complaint and notice of pendency on May 20, 2010. It is alleged in the complaint that the Dunnings executed and delivered a note and mortgage in the principal amount of $488,000.00 on December 23, 2005, and that the plaintiff is the owner and holder of the note and mortgage by assignment. It is also alleged that the defendants defaulted on the note by failing to make the monthly payment due February 1, 2010. According to the filed affidavits of service of Thomas Burke dated May 28, 2010, service was effected on David Dunning and on Andrea Dunning by serving "Willian Dunning (son)", described as "50 to 59 years of age, 150 to 174 lbs, 5-8 to 5-11ft, male, grey hair, white skin" on May 26, 2010. The defendants Dunning filed and served an answer to the complaint with counterclaims dated June 12, 2010. Plaintiff served its reply to the defendants' counterclaims with twenty-one affirmative defenses. In addition, plaintiff served a combined demand for a bill of particulars and disclosure of witness information, expert witness information, specified documents and for depositions.

According to the computerized records of the Suffolk County Clerk, an assignment of mortgage from "Mortgage Electronic Registration Systems Inc. / Lehman Brothers Bank FSB" to Aurora Loan Services LLC was filed on May 28, 2010. The record also indicates that a subsequent assignment of mortgage from Aurora Loan Services LLC to Aurora Bank FSB was filed on February 28, 2012.

Following the commencement of this action, the matter was scheduled for a foreclosure conference, initially scheduled for July 27, 2010. The Dunnings submitted an application for a loan modification to Aurora, and on September 16, 2011 Aurora agreed to a trial modification, requiring six monthly payments from 10/1/2010 through 3/1/2011 in the amount of $3,117.95. The Dunnings signed the forbearance agreement and returned it along with their first payment on or about September 28, 2010. At a court conference held on September 28, 2010, the court was advised that the Dunnings

had been approved for the six-month trial modification with monthly payments of $3,117.92.

By letter dated November 9, 2010, Aurora acknowledged receipt of "several payments" in accordance with the foreclosure alternative option plan and made the following promise: "Based on your performance under the payment arrangement, we would like to offer you a more permanent foreclosure alternative option." Additional financial information was requested.

Another court conference was held on February 10, 2011, at which time plaintiff indicated that additional financial information was needed for the final loan modification. By letter dated March 23, 2011 from Aurora, however, the Dunnings were advised that their request for a foreclosure alternative option was denied for the following reason: "We did not receive your signed loan workout agreement."

Although Aurora based its denial of a loan modification on the alleged failure of the Dunnings to return a signed agreement, the undisputed evidence before this Court reveals that Aurora was mistaken and that, in fact, it had received the signed agreement. By letter dated May 12, 2011 and May 13, 2011 from Aurora to "American Consultants", Aurora acknowledged that it received the signed agreement from the Dunnings on September 29th and it also acknowledged that the Dunnings had made all payments due under the terms of the agreement. In its letter, however, Aurora stated that the Dunnings were not eligible for a loan modification under the federal Home Affordable Mortgage Program (HAMP) because their housing-to-income ratio (HTI) was under 31%. Nevertheless, Aurora also represented in its letter the following: "At this time, we would be willing to consider Mr. and Mrs. Dunning for a Traditional Modification, however, with an HTI under 31%, the only modification we would be able to offer would be the same terms as their current loan and add all outstanding arrearages to the current unpaid principal balance." No amount was given, however, for the proposed monthly loan payment. Moreover, no documentation whatsoever has been submitted to this Court tending to substantiate that a written loan modification was offered at that time to the Dunnings or to their attorney. In addition, the letter noted that "Aurora Loan Services is also willing to assist Mr. and Mrs. Dunning in exploring other loss mitigation options available, including a short sale of the property."

Approximately three days after Aurora sent its letter to American Consultants, a conference was held before the court on May 16, 2011. According to the affirmation dated July 25, 2011 of former plaintiff's counsel, Alicia Stillman, at the conference "the Court was advised that the Defendants' loan modification application was denied due to the Defendants' failure to submit the additional documents requested at the last conference." Such representation was not accurate. In fact, Aurora had acknowledged in its letter approximately three days earlier that it had received the signed agreement

on September 29th, and that it had sufficient financial records to deny a HAMP modification and to consider a traditional loan modification.

Another court conference was held on June 23, 2011 and, according to Stillman's affirmation, it was represented that the defendants allegedly had been offered a traditional loan modification to capitalize arrears at the same interest rate and term currently in effect. At the conference held on May 23, 2012 pursuant to Court order, however, neither the plaintiff's attorney nor Aurora's account manager were able to produce a copy of that offer, nor were they able to indicate any specifics about its terms. Mr. Dunning, who appeared at the conference and at earlier conferences, denied that he received such an offer.

Defendants then made their motion for the imposition of sanctions and other relief, returnable on July 27, 2011, and their motion was opposed by plaintiff. By order dated October 28, 2011, another foreclosure conference was scheduled for November 30, 2011. Successive conferences were held on January 11, 2012, March 14, 2012, April 11, 2012, May 2, 2012 and May 23, 2012. The conferences were adjourned numerous times based on plaintiff's representations that additional financial documentation was needed, and at the conferences the Dunnings expressed their frustration at the repeated requests by Aurora for documentation that they had already provided.

The parties to a residential foreclosure action "shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible (CPLR 3408[f]). The evidence presently before this Court establishes that Aurora's denial of a loan modification by letter dated March 23, 2011 was not warranted since the Dunnings had made timely payments under the terms of the forbearance agreement, and it was based on the erroneous claim that the Dunnings had failed to return a signed agreement. Accordingly, an issue has been raised whether Aurora failed to live up to its responsibility to act in good faith (*see* 22 NYCRR § 202.12-a [c] [4]; *see also* 3 NYCRR §419.11) when it proposed a loan workout with the Dunnings and accepted payments under the agreement, but failed to honor its promise of a permanent loan modification.

In addition to the foregoing, at the mandatory court conferences held pursuant to CPLR 3408(f), the Court "shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner" (22 NYCRR § 202.12-a[c][4]). Here, Aurora issued its letter in May 2011 indicating that it had sufficient information to offer the Dunnings a traditional loan modification, yet it failed to satisfy its obligation to extend its offer in writing to the Dunnings promptly (*see* 3 NYCRR §419.11[d]). Furthermore, Aurora's attorney at a court conference three days after the letter was issued misrepresented to the Court that the Dunnings' loan modification application had been denied due to their failure to produce

documents. In addition, even though the undisputed evidence before this Court reveals that Aurora had sufficient financial information to approve a loan modification as early as May 2011, its counsel continued to appear at subsequent court conferences and represent that more financial documentation was needed to evaluate the Dunnings' loan modification application. It was not until more than one year later at the court conference held on May 23, 2012, that Aurora indicated its willingness to offer the Dunnings a traditional loan modification with a monthly payment in excess of $4,700.00. Furthermore, both Aurora's account manager and its counsel refused to consider a modification based on the amount of arrears that existed in early 2011, when the last payment under the loan workout agreement was due and paid, and when Aurora acknowledged that the Dunnings were eligible for a loan modification. While it was represented by plaintiff at the court conference on May 23, 2012 that its loan modification proposal includes payment for over $80,000 in interest that accumulated during the year-long delay, both Aurora's account manager and its counsel refused to consider a negotiated reduction of the arrears. Such unwillingness raises issues whether Aurora and its counsel met their obligation to negotiate in good faith and to avoid delay. Sufficient evidence has been submitted to show that the statutorily-mandated court conference program was frustrated as a result of the inordinate delays caused by Aurora in failing to process the defendants' loan modification application promptly and efficiently, and by both Aurora as well as its attorneys in failing to maintain accurate records, in making inaccurate representations to the Court, in refusing to negotiate to reach a mutually agreeable resolution that would enable the Dunnings to remain in their home, and in failing to comply with the Court directive to produce all records relating to the mortgage at the court conference.

In view of the foregoing, it is hereby

ORDERED that a hearing will be held on June 6, 2012 at 10 AM to consider the imposition of sanctions against Aurora and against its counsel.

DATED: 25 May 2012

HON. JOHN J.J. JONES, JR.
J.S.C.

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