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Wells Fargo Bank, N.A. v Francis M. Ruggiero
2013 NY Slip Op 50871(U)
Decided on May 29, 2013
Supreme Court, Kings County
Lewis, J.
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Decided on May 29, 2013

Supreme Court, Kings County

Wells Fargo Bank, N.A. D/B/A America's Serving Company, Plaintiff,

against

Francis M. Ruggiero, Jr., Michael A. Ruggiero, et al., Defendants.

19322/07

Plaintiff Attorney:Roxanne Jones, Esq.

Frenkel Lambert

Defense Attorney:Michael Pontone, Esq.

Petroff Law

Yvonne Lewis, J.

This is a residential foreclosure action pertaining to 2798 Pitkin Avenue, Brooklyn, New York, which was referred to the mandatory Foreclosure Settlement Conference Part (hereinafter, "FSCP") pursuant to the dictates of Civil Procedure Law and Rules (CPLR) R3408.

The defendants, Francis and Michael Ruggiero, have moved this court to, [1] confirm the Report and Recommendation of Special Referee Deborah L. Goldstein, including the referee's recommendation for an order that the HAMP modification requested by the defendants be granted, and [2] grant dismissal of the underlying summons and complaint, or, in the alternative, permit the defendants leave to file a late answer. The Defendants concomitantly seek a finding of a lack of good faith on the part of the plaintiff and its counsel, as required by CPLR 3408(f), together with attorneys fees, costs and disbursements, and other relief as the court may [*2]deem proper.

The plaintiff, Wells Fargo Bank, N.A. d/b/a America's Serving Company (hereinafter, "ACS/Wells"), opposes the defendants' motion and seeks summary judgement to foreclose on the subject premises. ACS/ Wells argues that it has acted in good faith, that its action should not be dismissed, and that the defendants' request to file a late answer must be denied as they have failed to show excusable delay, lack of prejudice to the plaintiff, and a meritorious defense.

Francis and Michael Ruggiero refinanced their family home at 2798 Pitkin Avenue, Brooklyn, New York in September, 2006. They obtained a $440,000.00 adjustable rate mortgage from Fremont Investment & Loan with an initial interest rate of 8.9%. In 2007, the defendants defaulted on their monthly payments after suffering financial hardship when their tenant stopped paying the rent. Wells Fargo commenced this action on May 30, 2007. Pursuant to CPLR §3408, the matter was referred for a "mandatory conference" to essentially determine whether the parties could reach a mutually agreeable resolution to help the defendants avoid losing their home through loan modification, including but not limited to interest rate reductions, prolongation of repayment terms, and etc.

According to the plaintiff, the first settlement conference was scheduled for November 12, 2009. Plaintiff's counsel requested and was accorded an adjournment since there was a trial modification in place, apparently entailing November, 2009 and the two following months; the defendants made the first payment under the modification but failed to make the remaining two payments. The defendants did not appear on the adjourned date, January 28, 2010, whereupon the settlement conference was rescheduled for March 9, 2010. The defendants, appearing *pro se*, were present for the March 9, 2010 settlement conference as was the plaintiff, which appeared by its attorney Steven J. Baum, P.C.

At the March 9, 2010 conference, the parties indicated that the plaintiff had recently approved the defendants for a HAMP trial loan modification. The modification trial had payments due on March 1, April 1, and May 1 of 2010 in the amount of $2,061.50. The plaintiff indicated at the March 9th conference that "it required the following financial documentation to complete a final HAMP modification review: a.) signed and dated 4506-T (tax transcript release forms) for both Defendants, b.) current rental agreements with tenants [of] the mortgaged premises, with copies of checks or bank statements evidencing deposit of rental payments, c.) updated paystubs for both defendants, d.) 2008 and 2009 income tax returns for both Defendants, and e.) utility bill showing that the [*3] mortgaged premises is owner occupied." (*see Affirmation of Good Faith of Kevin C. Clor, Esq., ¶10, November 10, 2011*). The plaintiff indicated that the defendants had not provided said documents prior to the March 9th conference, whereupon the conference was adjourned to June 21, 2010, a date beyond the trial period.

At the June 21st conference, the defendants indicated that they had made all of the trial payments; Frances Ruggiero testified that he had completed and submitted the documents requested at the previous conference. The plaintiff required an updated workout package.[FN1] The plaintiff specifically requested that the following documents be updated before it could finalize the defendants' HAMP modification; to wit, updated bank statements, copies of leases, 2010 tax returns, together with another Form 4506T for tax year 2010. According to the referee's report, plaintiff's counsel suggested, at the June 21st conference, that the defendants be directed to continue to make monthly trial payments and the referee so directed. The plaintiff also noted that while the defendants had failed to appear on June 21, 2010 it had received the following items from them on June 24, 2010; namely, a hardship letter, credit report authorizations, financial worksheet, 2009 tax

returns, a driver's license and a T-Mobile bill. (*see Affirmation of Good Faith of Kevin C. Clor, Esq., ¶ 11-12, November 10, 2011*).

The court was given no basis whereby to determine whether these additional submissions were sufficient to enable the plaintiff to determine if the defendants met the guidelines for a loan modification. The parties' representations and or explanations of what transpired at the July 23, 2010 settlement conference and during the period up to November 9, 2010 are ambiguous at best. What appears to be clear is that on November 9th and 10th, 2010 the defendants again gave the following documents to the plaintiff: "a.) Monthly budget form (signed & dated); b.) Proposed HAMP waterfall; c.) RMA (signed and dated); d.) Hardship letter (signed & dated); e.) Earnings report for Frank Ruggiero (Periods ending October 14, 2010 and October 28, 2010); f.) Earnings report for Michael Ruggiero (Periods ending September 30, 2010 and October 14, 2010); g.) 4056-T for Francis & [*4]Lisa Marie Ruggiero (Signed and dated); h.) 4506-T for Michael Ruggiero (Signed & dated); i.) 2009 Federal Income tax return of Frank and Lisa Marie Ruggiero (Signed); j.) 2009 Federal income tax return of Michael Ruggiero (Signed); k.) Lease agreement (Term April 1, 2010 through November 1, 2011); and l.) Chase banking statement for Michael Ruggiero (September 14, 2010 to October 2010; July 14, 2010 to August 11, 2010; and August 12, 2010 to September 13, 2010).

At a settlement conference on November 30, 2010 the plaintiff advised the Special Referee that it had all the required financial documentation from the defendants and that the file was actively in review. Plaintiff's attorney indicated, however, that he was not then able to get in touch with the servicing representative from ASC/Wells regarding the status of the underwriting of the final modification. The referee noted that the plaintiff had a full workout package from the defendants as of November 12, 2010 but had failed to review it in a timely fashion and ASC/Wells was directed to escalate and complete its HAMP review on or before December 22, 2010. ASC/Wells was directed to present the trial or results of the review on January 4, 2011.

The plaintiff denied the defendants' application for a HAMP modification on December 23, 2010 because the premises was not owner occupied. Irrespective of this denial, at the settlement conference held on January 4, 2011, ASC/Wells offered the defendants a modification in the amount of a total monthly payment of $2,672.70 at an interest rate of 6.5%. This monthly payment was $611.20 more than the monthly payment

under the HAMP trial modification that had been offered and successfully executed for the period of March through May, 2010.

According to Kevin Clor, Esq there were additional settlement conferences on January 24, 2011, February 10, 2011, March 4, 2011, April 13th, May 25th, June 27th, July 6th, August 19th, October 12th and November 15, 2011. At the August 19, 2011 conference—-which according to the plaintiff was the fifteenth settlement conference—"the Plaintiff advised the Court that although the defendants completed a HAMP trial period in 2010 this was based on verbal income and the Defendants never provided verification....[and] that the Defendants would need to submit a complete updated financial package to be reviewed for a traditional modification." (*see Affirmation of Good Faith of Kevin C. Clor, Esq, ¶ 27, November 10, 2011*). At the October 12th conference the plaintiff apparently requested release from the settlement conference part so that it might proceed to foreclose on the premises. Referee Goldstein adjourned the proceeding to provide an opportunity to the parties to submit a pre-report position statement and for the preparation of the her report and recommendation to this Court. The [*5]plaintiff submitted *Kevin C. Clor's* Affirmation of Good Faith to support its position and the action was sent/returned to this part with the Report and Recommendation of Special Referee Goldstein on December 20, 2011.

Special Referee Deborah Goldstein recommended that the court issue "(1) an Order requiring Plaintiff to finalize Defendant's trial HAMP modification in accordance with Q 1222-01 and applicable federal HAMP guidelines, (2) an Order requiring the parties and counsel to appear before the IAS Court on a date certain for a hearing to determine whether "lack of good faith" sanctions should be issued against the Foreclosing Parties and the Baum Law Firm pursuant to CPLR 3408, 22NYCRR 130-1m et seq., §§753 and 754 of the Judiciary Law, 22 N.Y.C.R.R. §202.12-a (C)(4), (3) an Order requiring the parties and counsel to appear before the IAS Court on a date certain for a hearing to determine whether the named Plaintiff has a vested ownership interest in the Mortgage and Note to modify and/or foreclose on the subject Premises, (4) an Order barring Plaintiff from charging Defendant attorney's fees or other legal costs incurred as a result of this action, and (5) an Order tolling all interest accrued on the subject loan since March 2010, and barring further accrual of interest thereon until the parties enter into a loan modification agreement. (Citations omitted)."

In accordance with the Referee's recommendations, a "good faith hearing" was scheduled to determine whether sanctions should be imposed because the settlement conferences had proceeded without the good faith of the plaintiff. The defendants appeared *pro se*; plaintiff requested and was granted an adjournment to allow new counsel to take over its representation from Steve Baum's office. The Court signed an order adjourning the matter to February 8, 2012 and requiring the Ruggiero brothers to submit a complete financial package for review by 1/4/12 to the plaintiff, with a requirement that the Plaintiff must have a decision on the modification review on or before 2/8/12. There was no modification offer on February 8, 2012, although it appears that the plaintiff had the necessary information. Subsequently, there were several adjournments during which the plaintiff alleges that it considered a loss mitigation resolution for the defendants. The defendants obtained counsel and moved on May 30, 2012 for relief as noted at the onset of this writing. The good faith hearing commenced on October 15, 2012 and ended on February 20, 2013. On October 15, 2012, plaintiff's counsel informed the Court that her client would not, as of that date, make any loss mitigation offer to the defendants. The plaintiff was, however, willing to accept it for review "should the borrower put together an entire financial package —" [T. October 15, 2012 p. 3, l. 8-17]

[*6]The testimony at the good faith hearing which ensued established the following: (1) settlement conferencing began in this action in November, 2009; (2) on March 9, 2010, the parties agree that the plaintiff had approved the defendants for a HAMP trial modification in which the defendants were to make payments of $2,061.50 monthly for March, April and May, 2010; (3) the matter was adjourned to see if the defendants could successfully complete the trial, which they did; (4) on June 21, 2010, rather than the offer of a permanent modification the plaintiff required an updated workout package; (5) on July 23, 2010, the parties and the referee concur that the defendants had submitted the updated documents required by the plaintiff to the plaintiff's attorney. In addition, they had made a trial payment for June, 2010 and tendered the July, 2010 payment which ASC/Wells refused; (6) ASC/Wells' refusal is undisputed and unexplained, particularly in light of the fact that both the referee and plaintiff s counsel urged the defendants to continue making payments, yet Kevin C. Clor Esq.'s Affirmation of Good Faith indicates at No.13 that the defendants failed to submit the required financial documentation as instructed, a statement that is contradicted by his preceding paragraph (#12) and by the referee and the defendants' affidavits. It is also to be noted that Mr. Clor neither attended

any of the conferences nor indicated in his affirmation the source of his knowledge beyond the vague reference to the "firm's [Steven J. Baum, P.C.] file and communication with the Plaintiff;" (7) on November 30,2010, the plaintiff's counsel agreed that it had all of the necessary documents but was unable to inform the referee of the status of the modification. The referee issued a directive that the plaintiff escalate its determination and complete its review by December 22, 2010; (8) on December 23, 2010, the plaintiff denied the defendants HAMP relief for lack of proof of occupancy of the premises; (9) this denial was issued despite the fact that Courtney Williams, a senior loan adjuster at Wells Fargo, testified (see hearing transcript October 15, 2012 p. 49, l. 15-17]) that proof of occupancy had been received on or about June 1, 2010; (10) it is to be underscored that not only did the plaintiff make its written determination to deny the HAMP modification seven months after successful completion of the trial modification period by the defendants, it did so on a ground that was knowingly false and that it had known to be false for nearly six months; (11) hearing testimony reasonably established that in January and February, 2011 the defendants and the referee were on notice that the plaintiff had denied the final modification for lack of occupancy, yet the plaintiff nevertheless offered a final modification at $2,672.70 per month to the defendants; (12) despite the referee's a request for an [*7]explanation of the additional $611.20 per month more than the trial modification amount, which the defendants had successfully completed eight or nine months previously, none was forthcoming from the plaintiff and no modification was ever put into place; (13) in August, 2011 the plaintiff s attorney indicated that ASC/Wells believed it could have properly denied the defendants' 2010 HAMP application for lack of documentation or failure to verify income, but informed the referee that ASC/Wells required another trial period and the re-submission of a complete updated financial package to consider the defendants for a traditional modification; (14) following additional conferences and the solicitation of additional documents from the defendants, the plaintiff requested that the matter be transferred to an IAS part as there was no further progress being made in the mandatory FSCP.

The requirement for mandatory conferencing and good faith negotiation are set forth in CPLR §3408 which states *inter alia*: "a). . . In any residential foreclosure action . . .in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference . . .for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan

documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified . . . .(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." The parties to mandatory settlement conferencing are required to come to the Court in good faith, and they are required "*to negotiate in good faith* towards creation of a mutually satisfactory modification agreement" *(See Deutsche Bank Trust Company of America, as Trustee for Rali 2006OS10 v. Davis,* 32 Misc 3d 1210(A) [Sup. Ct. Kings Co. 2011 Kramer, J.]). It is the obligation of the parties to negotiate with an effort that would prevent the defendant from losing his, her, or their home.

As articulated in *HSBC Bank USA v. McKenna, 37 Misc.35 885* [Sup. Ct. Kings Co.2012 Battaglia, J]: "[g]enerally, "good faith" under New York law is a subjective concept, "necessitat[ing] examination of a state of mind." (See *Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 487 [1st Dept 2011], quoting *Coan v Estate of Chapin*, 156 AD2d 318, 319 [1st Dept 1989].) " Good Faith' is an intangible and abstract quality with no technical meaning or statutory definition." (*Adler v 720 Park Ave. Corp*., 87 AD2d 514, 515 [1st Dept 1982], quoting *Doyle v Gordon*, 158 NYS2d 248, 259 [Sup Ct, NY County 1954].) "It [*8]encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage." (*Doyle v Gordon*, 158 NYS2d at 259-260; see also UCC 1-201 [19] [" Good Faith' means honesty in fact in the conduct or transaction concerned"].) "Good faith is . . . lacking when there is a failure to deal honestly, fairly, and openly." (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006] [internal quotation marks and citation omitted]; see also *Southern Indus. v Jeremias*, 66 AD2d 178, 183 [2d Dept 1978].) "In New York, as elsewhere, good faith' connotes an actual state of mind—a state of mind motivated by proper motive." (*Polotti v Flemming*, 277 F2d 864, 868 [2d Cir 1960]). In the context of negotiations, the absence of agreement does not itself establish the lack of good faith. (*See Brookfield Indus. v Goldman*, 87 AD2d 752, 753 [1st Dept 1982].) (*HSBC v. McKenna*, 905,906) "Conduct such as providing conflicting information, refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations have been

held to constitute bad faith.' " (*Flagstar Bank, FSB v Walker*, 37 Misc 3d at 317 n 6; see also *One W. Bank, FSB v Greenhut*, 2012 NY Slip Op 51197[U] at 4-5.)

The Record before this Court, inclusive of affirmations by plaintiff counsel, the testimonies of Courtney Williams, and Francis and Michael Ruggiero, is replete with persuasive indicia of the plaintiff's lack of good faith, evidenced by conflicting information, a refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations, and sets forth, in no small measure, a failure to deal honestly, fairly, and openly. More to the point, it is irrefutable on the proofs adduced that the defendants, despite being subjected to 10 to 12 arbitrary submissions, successfully established their occupancy of the subject premises, successfully completed the plaintiff's trial HAMP period, and submitted all required documentation in order to accord themselves a modified loan agreement in the amount of $2,061.50 per month which the plaintiff, in turn, arbitrarily and capriciously increased by $611.20 under false pretenses, without any justifiable basis, and disingenuously denied.

“A foreclosure action is equitable in nature and triggers the equitable powers of the court (*see Notey v. Darien Constr. Corp.*, 41 NY2d 1055 [1977]; *Jamaica Sav. Bank v. M.S. Inv. Co.*, 274 NY 215 [1937]; *Mortgage Elec. Registration Sys., Inc. v. Horkan*, 68 AD3d 948 [2d Dept 2009]). "Once equity is invoked, the court's power is as broad as equity and justice require" (*Mortgage Elec. Registration Sys., Inc. v. Horkan*, at 948, quoting *Norstar Bank v. Morabito*, 201 AD2d 545 [2d Dept 1994]). While it would seem that the just remedy herein [*9]would be to simply compel the plaintiff to abide by the terms of the successful trial period set by it and completed by the defendants, this Court, in the exercise of its broad equitable powers, is mindful of the fact, as enunciated in the Appellant Division's recent decision in the matter of *Wells Fargo Bank, N.A. v. Meyers, 2013 NY Slip Op 03085, App. Div., May 1, 2013*, that a court cannot compel the parties to enter into a contract, much less rewrite or impose additional terms which the parties themselves have not mutually agreed upon.

Accordingly, the court finds that the imposition of an alternative remedy to address the plaintiff's wanton and flagrant violation of the dictates of CPLR 3408 (f) is in order. While it is apparent that the court cannot compel a party's good faith behavior, it can certainly impose sanctions for the deliberate disregard of legal mandates, particularly here where it is painfully obvious to the court that the plaintiff has acted wilfully and with

express intent to subvert a statutory scheme established for the beneficial purpose of helping mortgagors avoid the loss of their homes. In that vein, to simply impose a monetary penalty on the foreclosing plaintiff mortgagee without ever requiring a sincere effort on its part to abide by the statutory scheme would be to merely let the plaintiff mortgagee pay to avoid compliance; i.e., treat the imposition of a primary sanction as simply the "cost of doing business." This would be a disservice not only to the legislature that saw fit to enact this legislation, but also a disservice to the countless mortgagors who find themselves on the precipice of losing their homes under circumstances not entirely of their making. This court cannot in equity permit such a result without at least affording the defendants an authentic opportunity to avail themselves of the protective measures of CPLR R3408. The plaintiff, in turn, must know that if it continues its deliberate, convoluted acts of subversion that it may eventually face even more serious sanctions that would not be in their pecuniary interest.

It is therefore the order of the Court that the plaintiff be assessed as costs the forfeiture of all accrued attorney's fees or other legal costs incurred plus all interest accrued on the subject loan since November 12, 2009 (the first FSCP conference date) to the date of this order. The plaintiff is directed to make the mentioned costs computation and to submit the detailed results thereof and methodology employed to arrive at the final sum to the court for its review on notice to the defendants by their attorney within 30 days of this order. The plaintiff is also ordered pursuant to 22 NYCRR 130.1 to include in its computations the reasonable fees incurred by the defendants, as indicated by their attorneys' affirmation of legal services extending to March 5, 2013. The defendants' counsel must submit an updated affirmation of legal services to the plaintiff and to [*10] the Court by July 9, 2013.

The matter is adjourned to July 16, 2013 at 10:00 a.m., on which date this court will entertain arguments from the parties to determine by supplemental order herein the precise sum to be assessed as costs against the plaintiff and whether the costs should be paid outright or credited to the defendants in diminution of their debt to the plaintiff.

The matter shall thereafter be adjourned to August 23, 2013 at 10:00 a.m. for compliance with the full dictates of CPLR 3408, particularly subdivision (f) thereof. To that end, the defendants shall submit a new application within 30 days of this order; the plaintiff shall make its demand for any missing documents within 10 days thereof; the

defendants shall furnish those documents within the ensuing 10 days, whereupon the plaintiff shall conduct its review and decide if modification is in order in 30 days.

This constitutes the decision and order of this court.

ENTER FORTHWITH:

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yvonne lewis, J.S.C.

Footnotes

Footnote 1: A workout package typically consists of the following: (1) a Request for Modification Application ("RMA"), detailing the homeowner's income and expenses; (2) a Hardship Affidavit, which explains the reason for the homeowner's default; (3) an executed tax Form 4506T for the last two tax years, which authorizes the mortgage servicer to obtain the homeowner's tax transcripts fro the Internal Revenue Service ("IRS"); (4) signed and dated tax returns for the last two years; (5) proof of income for two consecutive months, which requires the submission of bank statements, pay stubs, pension statement, social security award letters, rental leases, profit and loss statement, contributions letter(s), etc...; and (6) a recent utility bill to serve as proof of residence. (Referee's Report and Recommendation fn.1).

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