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Deutsche Bank Natl. Trust Co. v Izraelov
2013 NY Slip Op 51482(U)
Decided on September 10, 2013
Supreme Court, Kings County
Battaglia, J.
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Decided on September 10, 2013

Supreme Court, Kings County

Deutsche Bank National Trust Company, AS TRUSTEE FOR HIS ASSET LOAN OBLIGATION TRUST 2007-1, 2929 Walden Avenue Depew, NY 14043, Plaintiff,

against

Tamara Izraelov, AVRAHAM IZRAELOV, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR HSBC MORTGAGE CORPORATION (USA), NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, THE BROOKLYN SAVINGS BANK, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.), Defendants.

5357/09

Plaintiff was represented by V.S. Vilkhu, Esq. of Fein, Such & Crane, LLP.

Jack M. Battaglia, J.

This mortgage foreclosure action was commenced on March 5, 2009; the mortgaged property is located at 1181 East 26th Street, Brooklyn; the mortgagors are defendants Tamara Izraelov and Avraham Israelov. After more than 20 appearances in the Foreclosure Settlement Conference Part from April 15, 2010 to March 21, 2003, on that latter date Special Referee Deborah Goldstein issued a Directive with attached report, referring the matter to this Court "for a bad faith hearing."

With a letter dated April 24, 2013, this Court invited all counsel who had participated in the settlement conference process to submit written comment on the Special Referee's report. Only Plaintiff accepted the Court's invitation. Pursuant to court rule (*see* Uniform Rules for Supreme Court and County Court §202.44[b]; 22 NYCRR §202.44[b]), since no party has moved to confirm or reject the report, the Court will make the determination on its own motion.

The context for the Special Referee's report is CPLR 3408, which mandates settlement conferences in residential foreclosure actions (*see* CPLR 3408[a]), at which "[b]oth the plaintiff and the defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (*see* CPLR 3408[f]). (*See, generally, Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9 [2d Dept 2013]; *HSBC Bank USA v McKenna*, 37 Misc 3d 885 [Sup Ct, Kings County 2012].) This action, however, together with the settlement conference process, was stayed from November 2010 until February 2012 while defendants/mortgagors Tamara Izraelov and Avraham Izraelov sought protection under the federal bankruptcy laws.

In her report, Special Referee Goldstein reviews the settlement conference proceedings in this action, providing copies of pertinent documents, correspondence, and her own directives to the parties. She concludes, "Plaintiff has failed to negotiate in good

faith and seemingly lacks standing to foreclose." Plaintiff disputes Special Referee Goldstein's finding of "bad faith," and challenges her authority to make any finding about standing.

A referee's authority is defined and limited by the order of reference, and if the referee exceeds that authority, the referee's report must be rejected. (*See Furman v Wells Fargo Home Mtge. Inc.*, 105 AD3d 807, 810-11 [2d Dept 2013].) "As a general rule, courts will not disturb the findings of a referee as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility." (*Last Time Beverage Corp. v F & V Distrib. Co., LLC*, 98 AD3d 947, 950 [2d Dept 2012]; *see also HSBC Bank USA v McKenna*, 37 Misc 3d at 894-95].)

Plaintiff's response to Special Referee Goldstein's report evidences some confusion and related concern about the place of standing, meaning entitlement to enforce the note and mortgage that are the basis of the foreclosure action (*see, generally*, *Bank of New York Mellon v Deane*, 2013 NY Slip Op 23224 [Sup Ct, Kings County, 2013]), in the settlement conference process mandated by CPLR 3408. Plaintiff adopts as its premise that, where a defendant in a foreclosure action fails to answer the complaint and does not make a pre-answer motion to dismiss the complaint, the defendant is deemed to have "waived the defense of lack of standing" (*see HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 817 [2d Dept 2013]), and concludes that a referee presiding over mandatory [*2] foreclosure settlement conferences, and even the court for that matter, is precluded from making any finding concerning the plaintiff's standing. (*See* Memorandum of Law and Attorney Affirmation ["Plaintiff's Response"] ¶¶ 2, 42-44.)

To the extent that Plaintiff contends that, where a defendant in a mortgage foreclosure action waives the defense of lack of standing, the court may not dismiss the action on that basis, this Court generally agrees, noting, however, that the waiver issue may not be so clear where the defendant has participated in settlement conference proceedings (*see Wells Fargo Bank v Butler*, 2013 NY Slip Op 23282 [Sup Ct, Kings County 2013].) The Court also agrees, as will appear from the discussion below, that a referee presiding over mandatory foreclosure settlement conference proceedings has not been authorized to determine that an action should be dismissed because the plaintiff lacks standing. But Special Referee Goldstein made no such determination, stating only that

"Plaintiff . . . seemingly lacks standing to foreclose," and the Court is not considering dismissal.

It does not follow, however, from a waiver of the defense of lack of standing that the question of standing has no place in the mandatory settlement conference process, or that the referee may not investigate or make findings on the question. CPLR 3408 mandates settlement conference proceedings "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 or other workout options may be agreed to, and for whatever other purposes the court deems appropriate." (*See* CPLR 3408 [a].) "At any conference . . . , the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case." (CPLR 3408 [c].) Among other documents, the plaintiff is directed to bring "the mortgage and note," and "[i]f the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note." (CPLR 3408 [e].) These statutory provisions were effective on February 13, 2010, *i.e.*, prior to the commencement in April 2010 of the settlement conference proceedings in this case.

Uniform Civil Rules for the Supreme Court and County Court with respect to mandatory settlement conference proceedings (*see* §202.12-a; 22 NYCRR §202.12-a) largely repeat the statutory requirements, and, although the rules envision "nonjudicial personnel assigned to conduct foreclosure conferences" (*see* §202.12-a[d]; 22 NYCRR §202.12-a[d]), they do not constitute or address an order of reference for that purpose.

In addition, the Justices of Kings County Supreme Court adopted Uniform Civil Term Rules in 2010 that include rules for the Foreclosure Settlement Conference Part. As originally adopted, the rules required, "Plaintiff's counsel must appear . . . with settlement authority and, in the Court's discretion, a direct contact number where a servicing agent with settlement authority can be reached and participate in settlement discussions before the Court." (*See* Part G, Foreclosure Settlement/Conference Part Rules, Rule 4.) The Kings County rules were amended in April 2012 to delete the reference to "the Court's discretion," and to require that Plaintiff's counsel appear "with [*3]settlement authority and/or a direct contact number where a servicing agent with settlement authority can be

reached and participate in settlement discussions before the Court" (*see* Part G, Foreclosure Settlement Part Rules, Rule 4.) Although the Kings County rules have been further amended, the quoted provision remains the same.

Although it appears that in Kings County referees have been presiding over mandatory foreclosure settlement conferences since 2008 when CPLR 3408 first became effective, there was no formal general order of reference until an Order of Reference to Hear and Determine dated June 1, 2011 of Hon. Sylvia O. Hinds-Radix, Administrative Judge for the Second Judicial District. Although designated an order of reference "to hear and determine," at least for present purposes the reference was effectively "to hear and report" (*see HSBC Bank USA v McKenna*, 37 Misc 3d at 891-94.) This is clarified by a Superceding Order of Reference to Hear and Report dated February 19, 2013 of Hon. Lawrence Knipel, Justice Hinds-Radix's successor as Administrative Judge. Both Orders repeat the purpose of the mandatory foreclosure settlement conference process as stated in CPLR 3408(a), *i.e.*, "settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents."

It is difficult to see any fair reading of the governing statute, rules, and order of reference that does not permit, if not require, a determination that the person(s) participating in the settlement conference process are "fully authorized to dispose of the case" (*see* CPLR 3408[c]) and include the "owner of the mortgage and note" or its agent (*see* CPLR 3408[e].) Nothing would be more useless, if not harmful to the statutory purpose "to help the defendant avoid losing his or her home," than settlement discussions with a person who does not have the legal right to make the modifications "or other workout options" envisioned by the statute (*see* CPLR 3408[a]; *see also* CPLR 3408[f]), or at least is authorized to do so by the person with that right, *i.e.*, a person with standing to enforce the note and mortgage.

Indeed, this case provides a perfect illustration of the consequences of settlement conference proceedings in which determination of fundamental questions of standing and authority to settle are frustrated. The action is based upon a Note and a Mortgage, each dated December 28, 2006, given to HSBC Mortgage Corporation (USA). A copy of the Note and a copy of the first page of the Mortgage are attached to Special Referee Goldstein's report, as well as a copy of an Assignment of Mortgage Electronic

Registration, Inc. ("MERS"), as nominee for HSBC Mortgage Corporation (USA), as assignor, and Plaintiff as assignee.

The Note shows a purported indorsement on behalf of HSBC Mortgage Corporation (USA), reading, "Pay to the order of, without recourse _____." Such an indorsement appears ineffective to negotiate the instrument. (*See* New York Uniform Commercial Code §§3-115, 3-204; *Nicholaras v Stewart*, 25 NYS2d 157, 159-60 [Sup Ct, Broome County]; Comment 2 to Revised UCC §3-111.) The Assignment of Mortgage does not purport to assign the underlying Note, nor does it appear that MERS had the power or authority to do so (*see Bank of New York v Silverberg*, 86 AD3d 274, 281-82 [2d Dept 2011]), and a transfer of a mortgage does not transfer the note (*see id.* at 280.) [*4]

Based solely upon the (incomplete) documents before the Court, it is at best unclear who is entitled to enforce the Note and Mortgage given to HSBC Mortgage Corporation (USA). Plaintiff's Response offers the following additional information:

"HSBC originated this loan and subsequently sold the loan to its affitiate HSBC Bank USA pursuant to a Master Mortgage Loan Purchase and Servicing Agreement dated May 1, 2006 . . . Thereafter pursuant to a Mortgage Loan Purchase agreement dated May 31, 2007 HSBC Bank USA sold the loan to an intermediate company, HIS Asset Securitization Corporation (HSI') which HSBC established for the sole purpose of securitizing mortgage loans. HIS then deposited the mortgage loan into a securitization trust which is governed y [*sic*] a Pooling and Servicing Agreement." (Plaintiff's Response ¶ 5c.)

Attached to Plaintiff's Response is the cover page of a Master Mortgage Loan Purchase Agreement ("Purchase Agreement") dated as of May 1, 2006 between HSBC Mortgage Corporation (USA) as "Seller and Servicer" and HSBC Bank USA, National Association as "Initial Purchaser"; and an unexecuted copy of an Assignment, Assumption and Recognition Agreement dated as of May 1, 2007 between HSBC Bank National Association as "Assignor," HSI Asset Securitization Corporation as "Assignee," Citimortgage, Inc. as "Master Servicer," and Plaintiff as "Trustee," which is marked on each page, "MBR & M Draft 5/22/07." Most importantly for present purposes, also attached is a single page, discussed below, that is apparently from the Purchase Agreement between the two HSBC entities (*see* Plaintiff's Response ¶ 5d.)

At various times during the settlement conference proceedings, the following persons and parties participated, either in person or otherwise: the law firm of Steven J. Baum, P.C., Plaintiff's original counsel of record; Fein Such & Crane LLP, Plaintiff's substitute counsel, appearing on occasion by "per diem counsel," Estrada & Tang, P.C.; representatives of "HSBC," presumably HSBC Mortgage Corporation (USA), the original mortgagee and then servicer, namely, a servicing representative, a loss mitigation specialist, and in-house legal counsel; Bryan Cave LLP, counsel to Citimortgage, designated sometimes "master servicer" and sometimes "investor"; and Anthony J. Auciello and Michael Drobenare, attorneys for the defendants/mortgagors.

Before providing a conference-by-conference description of the settlement conference proceedings, Special Referee Goldstein describes communications between HSBC and the mortgagors after their initial default but before the appearances in the Foreclosure Settlement Conference Part. These communications cannot be the basis of a violation of CPLR 3408(f), but they provide context to the settlement conference proceedings. (*See Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 17 [2d Dept 2013].) Most significant, is a letter dated September 4, 2009 from HSBC to mortgagor Tamara Izraelov, advising that her "request for a modification on the referenced loan has been approved," and setting out "the conditions and terms of this approval." During the settlement conference proceedings, HSBC took the position that the modification offer was a mistake because the applicable pooling and servicing agreement prohibited any modification. Plaintiff's Response does not address the 2009 modification offer. [*5]

As stated in Special Referee Goldstein's Directive of the same date, at a July 15, 2010 conference, "Plaintiff/HSBC refuse[d] to review defendant's HAMP application because a third party bank, Citimortgage, refuses to permit modifications." The "HAMP" reference is to the federal Home Affordable Modification Program "that arose out of the Emergency Economic Stabilization Act . . . of 2008 and the Helping Families Save Their Home Act . . . of May of 2009." (*See JPMorgan Chase Bank, National Association v Ilardo*, 36 Misc 3d 359, 366 [Sup Ct, Suffolk County 2012].) As Special Referee Goldstein saw it, the requirements of the HAMP were applicable, and, "If a servicer was restricted or prohibited from freely performing or taking the modification step, . . . documentation should show that it made reasonable efforts to seek a waiver from the applicable investor and whether the requested waiver was approved or denied." (*See* HAMP, "Q2301.")

At subsequent appearances, as evidenced by a further Directive dated September 13, 2010, Special Referee Goldstein attempted to obtain a copy of the contractual provision that purportedly precluded modification, the identification of the person(s) who could grant a waiver of any restriction on modification, and information about efforts to obtain a waiver. She was eventually provided with the page from the Purchase Agreement between the two HSBC entities that is attached to Plaintiff's Response, and which provides in pertinent part (as highlighted by Plaintiff):

"Servicer shall not permit any modification with respect to any Mortgage Loan that would change the Mortgage Interest Rate, defer or forgive the payment thereof or of any principal or interest payments, reduce the outstanding principal amount (except for actual payments of principal), make additional advances of additional principal or extend the final maturity date on such Mortgage Loan."

Although the point will be referred to below, the stated restriction was placed upon one HSBC entity as servicer of the loan for the apparent benefit of another HSBC entity as purchaser, and, although during the settlement conference proceedings it was asserted that the restriction benefits or burdens others, including Plaintiff, no documentation of that was even presented to Special Referee Goldstein, nor, despite the repetition of the assertions in Plaintiff's Response, is any provided now to this Court.

On November 12, 2010, HSBC wrote to Tamara Izraelov, stating that her "request for assistance cannot be approved" because "Investor Prohibits Modification."

After expiration of the automatic bankruptcy stay, settlement conference proceedings focused on conflicting assertions by HSBC and Citimortgage as to whether the purported restriction on modification had been waived. A letter dated July 2, 2012 from Citimortgage's counsel to Plaintiff's counsel "confirm[ed] that Citi agrees not to declare a breach of the [Pooling and Servicing Agreement dated May 1, 2007] if HSBC elects to modify the particular loan that is the subject of this action," but that should not be "construed as a waiver of any terms or conditions of the PSA." On February 28, 2013, however, HSBC wrote to Defendants' counsel, "The decision not to allow the loan to be modified is the investors [*sic*] policy," and identifying the "investor" as Citimortgage.

As summarized by Special Referee Goldstein, "HSBC, Citimortgage and Deutsche Bank [*6]seemed to be at odds regarding the waiver." Indeed, Plaintiff's Response states, "The parties remained at a stalemate over the waiver letter until the time the matter was released on March 21, 2013." (Plaintiff's Response ¶ 29.)

Plaintiff's Response does not challenge the history of the settlement conference proceedings as set forth above. Indeed, Plaintiff continues to maintain the position that "Plaintiff is contractually bound by its master servicer's contract not to modify this loan notwithstanding master servicer's letter to the contrary" (Plaintiff's Response ¶ 2); and "Plaintiff is hamstrung by a master servicer who will not provide explicit permission to modify the underlying loan" (*id*., ¶ 45.)

First, to the extent Plaintiff complains about the mortgagors' participation in the settlement conference process, "fail[ing] to tender documents in a timely fashion . . . further delaying the conference part and preventing Plaintiff from issuing a modification to stem their losses from a loan that has been in default for nearly *five* years" (*see* Plaintiff's Response ¶ 2), while asserting that "Plaintiff appeared ready, willing and able to negotiate at every conference" (*see id.* ¶ 36), the Court finds the complaints disingenuous at best. From almost the first conference, Plaintiff maintained, or acquiesced in its servicer's position, that the loan could not be modified because of contractual restrictions, notwithstanding the servicer's having previously invited and approved a modification. Similar mixed messages have been the basis, at least in part, of a plaintiff's failure to negotiate in good faith. (*See Wells Fargo Bank, N.A. v Meyers*, 30 Misc 3d 697, 700-01 [Sup Ct, Suffolk County 2010], *rev'd on other grounds* 108 AD3d 9.)

Also on a corollary issue, but an important one, at an early conference "Plaintiff advised that a [HAMP] review was not possible since the owner of the note did not participate in the HAMP program" (Plaintiff's Response ¶ 5b), and Plaintiff continues to contend that "any citation to HAMP provisions . . . are inapposite [in that] HAMP regulations only apply to HAMP participants of which Plaintiff is not" (*id*. ¶41.)

At least one court has held that "the best uniform standard for good faith' is compliance with Federal HAMP regulations" (*see Flagstar Bank, FSB v Walker*, 37 Misc 3d 312, 313 [Sup Ct, Kings County 2012]), and that "whether or not the loan qualifies for HAMP or not, the most appropriate benchmark for good faith are the HAMP

guidelines" (*see id*. at 316; *see also One W. Bank, FSB v Greenhut*, 36 Misc 3d 1205 [A], 2012 NY Slip Op 51197 [U] [Sup Ct, Westchester County 2012]; *HSBC Mtge. Corp. (USA) v Gigante*, 2011 NY Slip Op 33327 [U] [Sup Ct, Richmond County 2011].) In addition to contributing to uniformity, also a benchmark for justice, the HAMP program reflects the knowledge and judgment of complex markets and institutions that most judges do not have, and what the program requires is presumably a fair accommodation of the interest of lenders, homeowners, and others with an interest in enforcement of the mortgage.

What might be required by HAMP is neither the least that might be required by "good faith" negotiations, nor is it the most. It is certainly appropriate for a court or referee presiding over mandatory settlement conferences to request that a plaintiff review an application for a modification under HAMP guidelines or to otherwise provide information relevant to a HAMP review, such as [*7]that related to prohibitions or restrictions on modification asserted by the lender or servicer. A plaintiff's failure to comply based solely on an assertion that HAMP regulations or guidelines do not apply would, at the least, be material to whether the plaintiff is negotiating in good faith as required by CPLR 3408(f).

Here, although Plaintiff refused to review Defendants' HAMP application, as "memorialized" in Special Referee Goldstein's July 15, 2010 Directive, the reason given then and now is that, "[p]ursuant to the terms of the agreement between HSBC, Citibank and the Trustee, the servicer and master servicer (HSBC and Citibank, respectively) are not permitted to participate in HAMP modification or modify critical elements of the underlying loan without express permission" (Plaintiff's Response ¶ 5d.) Indeed, Plaintiff acknowledges that, "[o]n September 20, 2012, Defendant [*sic*] did submit a package for review which was . . . not reviewed because Plaintiff did not have a waiver letter from the master-servicer, Citibank, to proceed" (*id*. ¶ 26.) Plaintiff's refusal to accept the significance of the July 2, 2012 letter from Citibank's counsel, described above, will be addressed here in due course.

The courts have yet to fully articulate the effect that purported "investor" prohibitions or restrictions on loan modification might have on the plaintiff's duty to negotiate in good faith as required by CPLR 3408(f). The late Justice Herbert Kramer said, "There is only one standard for good faith under CPLR 3408," and "[t]hat standard exists regardless of

insurance regulations by [the Federal Housing Administration], or others and independent of investor restrictions." (*Flagstar Bank, FSB v Walker*, 37 Misc 3d at 313.) The foreclosure settlement conference mandated by CPLR 3408 is based upon "the relative rights and obligations of the parties under the mortgage loan documents" (*see* CPLR 3408 [a]), and an "investor" is not the party seeking to foreclose on the mortgage, and is not a party to the action at all (*see Wells Fargo Bank, N.A., v Meyers*, 30 Misc 3d at 701, *rev'd on other grounds* 108 AD3d 9.)

At the very least, however, a plaintiff who contends that it cannot agree to a loan modification or other arrangement that would allow a defendant to stay in his or her home because of an "investor" prohibition or restriction must provide the court or referee with suitable documentary evidence of the obstacle, and the court or referee may appropriately direct its production, as Special Referee Goldstein did in her Directives dated July 15, 2010 and September 13, 2010.

From what appears in the Special Referee's report and Plaintiff's Response, Plaintiff has provided only the single page described and quoted above, which does nothing more than to bind one HSBC entity for the benefit of another HSBC entity. Even assuming its authenticity and admissibility as evidence, there is no mention of Plaintiff, and it is not otherwise shown that Plaintiff is similarly restricted. Moreover, as shown above, there is no adequate showing as to entitlement to enforce the subject note and mortgage, which would be highly relevant, if not determinative, as to whom any prohibition or restriction would benefit and, therefore, who could waive its application in any particular action. [*8]

Assuming the prohibition or restriction to exist, and as Plaintiff appears to acknowledge by its assertion of compliance (Plaintiff's Response ¶ 45), the plaintiff has an obligation to proceed in good faith to obtain, what has been called, a "waiver" of the prohibition or restriction in the particular action. The court or referee may require the plaintiff to provide evidence of compliance, including requiring the documentation described in HAMP's so-called "Q2301," quoted above, as Special Referee Goldstein did in her two Directives. (*See One West Bank, FSB v Greenhut*, 2012 NY Slip Op 51197 [U] ["a court properly may inquire as to whether a foreclosure plaintiff's negotiation position follows written investor guidelines and whether such guidelines are reasonable"].) Further it should go without saying that, once a plaintiff has received a "waiver," the plaintiff must

proceed to negotiate in good faith as if the prohibition or restriction did not exist, or otherwise consistent with the waiver.

The Court will assume, for present purposes, that Plaintiff proceeded in good faith to obtain a "waiver" in this action of any prohibition or restriction that would otherwise apply to it, although there is scant evidence of that before the Court, and it appears that the greater effort was made by Special Referee Goldstein. Where Plaintiff fails woefully is in its refusal to accept the waiver when it was clearly offered.

It is worth quoting again the July 2, 2012 letter from Citimortgage's counsel to Plaintiff's counsel, "confirm[ing] that Citi agrees not to declare a breach of the [Pooling and Servicing Agreement] if HSBC elects to modify the particular loan that is the subject of this action," and stating further that the letter "should not be construed as a waiver of any terms and conditions" of the Agreement. Plaintiff asserts, "Given the fact that the letter simultaneously grants permission to modify the instant loan then concurrently forbids Plaintiff from modifying the loan, Plaintiff cannot proceed towards modification" (Plaintiff's Response ¶ 23); and, "Without a more explicit letter from [Citimortgage's attorney] Plaintiff is contractually not permitted to offer any modification relief to Defendant [*sic*]" (*id*. at 35.)

The Court is somewhat at a loss to understand Plaintiff's reading of the July 2, 2012 letter, which appears to the Court as clearly and appropriately allowing a modification of the subject loan in this action, while insisting on the continued applicability of the Agreement to loans subject to other actions. Plaintiff does not provide to the Court the "more explicit" approval it demands, nor does it provide any evidence that it has so advised counsel to Citimortgage.

In short, Plaintiff's refusal to proceed in itself violated its obligation to negotiate in good faith pursuant to CPLR 3408(f). This conclusion obviates the more difficult question of whether a plaintiff can be found to have failed to negotiate in good faith upon plaintiff's refusal to proceed after the "investor" has turned back the plaintiff's good faith efforts to avoid any prohibition or restriction. That question would better be resolved only upon participation of all those who would be affected by the answer.

Turning to the matter of remedy, in *Wells Fargo, N.A. v Meyers* (108 AD3d 9), the Second Department addressed for the first time the remedy that might be imposed for a plaintiff's failure to [*9]negotiate in good faith as required by CPLR 3408. After describing "a variety of alternatives" that had been imposed by other trial courts (*see id.* at 20-21), the court held that the remedy imposed by the trial court in the case before it, *i.e.*, "the imposition of the terms of the so-called original modification agreement proposed by the plaintiff and accepted by the defendants' . . . as the new, binding terms of the agreement between the defendants and Freddie Mac," was "unauthorized and inappropriate" (*see id.* at 21.) Beyond that, "the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case . . . [,] prudently and carefully select[ing] among available and authorized remedies, tailoring their application to the circumstances of the case." (*See id.* at 23.)

The key, of course, is to determine the "appropriate," "permissible," "authorized," and "available" remedies, but the court gave no more guidance. Evidencing its frustration with the absence of "guidance" from the Legislature or the Chief Administrator of the Courts (*see id.* at 20, 23), the court apparently believed that case-by-case development was best.

Prior to *Meyers*, this Court had considered the question (*see HSBC Bank USA v McKenna*, 37 Misc 3d at 912-16), and determined that the law generally applicable to foreclosure allowed the cancellation of interest as an appropriate remedy for the mortgagee's bad faith or other wrongful conduct (*see id.* at 913-14.) In the absence of further guidance from the appellate courts, this Court will adopt that remedy here. But, although in a proper case, cancellation of interest from the date of the mortgagor's default might be ordered (*see id.*), cancellation to the date of default will not be imposed here at this time.

It does seem appropriate, however, to cancel interest (as well as any other accrued fees or costs) back to the date of the July 15, 2010 conference, at which Plaintiff first asserted that it was precluded from offering any loan modification to Defendants. Plaintiff has yet to establish that it is entitled to enforce the note and mortgage, or to establish that it was precluded from offering any modification to Defendants. It is clear that, whoever might have been responsible for the delay caused by Plaintiff's continued maintenance of that position, it was not Defendants, and they should not require to bear the consequence

of the squabbling between Plaintiff and *its* servicer and/or *its* master servicer and/or *its* investors. On the other hand, Plaintiff cannot fairly be charged with the delay resulting from Defendants' petition for bankruptcy protection.

Moreover, since Plaintiff would not review Defendants' most recent application for a loan modification, mandatory settlement conference proceedings must continue. For better or worse, since this Court is precluded by administrative edict from referring this action back to the Foreclosure Settlement Conference Part, the proceedings must continue before this Court. No later than October 4, Plaintiff shall advise Defendants as to the information and documents it will require to consider Defendants' application for a loan modification, which shall be reviewed, at the least, according to HAMP. No later that November 1, Defendants shall provide Plaintiff with the required information and documents, or advise Plaintiff that they will no longer be seeking a modification. No later than December 6, Plaintiff shall advise Defendants of its determination on the application. [*10]

The report dated March 21, 2013 of Special Referee Deborah Goldstein is confirmed to the extent that Plaintiff is determined to have failed to negotiate in good faith as required by CPLR 3408. Interest accruing on the subject note and mortgage, as well as any fees or costs, shall be tolled from July 15, 2010 to November 1, 2013, except that there shall be no tolling from the date of the filing of Defendants' petition for bankruptcy protection to the date the petition was resolved or the automatic stay lifted, whichever was sooner.

The parties shall appear before this Court for a conference at 9:30 a.m. on December 9, 2013.

September 10, 2013_____

Jack M. Battaglia

Justice, Supreme Court

Return to Decision List