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U.S. Bank, N.A. v Shinaba
2013 NY Slip Op 51484(U)
Decided on July 31, 2013
Supreme Court, Bronx County
Torres, J.
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Decided on July 31, 2013

Supreme Court, Bronx County

U.S. Bank, N.A. AS SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A. AS SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-3, Plaintiff,

against

Jumoke Shinaba, AMERICAN GENERAL HOME EQUITY, INC., CYPRESS FINANCIAL RECOVERIES, LLC, DELTA FUNDING CORPORATION, DEUTSCHE BANK NATIONAL TRUST COMPANY F/K/A BANKERS TRUST COMPANY OF CALIFORNIA, N.A. AS TRUSTEE FOR UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF SEPTEMBER 26, 1997, DELTA FUNDING HOME EQUITY LOAN TRUST 1997-3, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, "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.

381917-09

Davidson Fink LLP, Rochester, New York (Chelsea Rackmyer, Esq., of counsel) for the plaintiff, and The Legal Aid Society, New York, New York (Oda Friedheim, Esq., of counsel) for the defendant.

Robert E. Torres, J.

Defendant Jumoke Shinaba's (Shinaba or the defendant) asks this court to determine whether the plaintiff U.S. Bank National Association (U.S. Bank or the plaintiff) as Successor Trustee by merger to several prior trusts as indicated in the caption, and its loan servicer, Bank of America (BOA), violated CPLR 3408 (f)'s "good faith" requirement when they processed her loan modification application. In an attempt to avert the foreclosure of her home, Shinaba applied for a loan modification in December 2009 under the federal Home Affordable Modification Program (HAMP).

HAMP was launched to alleviate the national foreclosure crisis by permitting qualified defaulting borrowers to modify their mortgage payments at lower rates, without discharging the underlying debt (*see* U.S. Dept. Of the Treasury, Supplemental Directive 09-01, available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf). Shinaba seeks an order directing U.S. Bank and BOA to negotiate in good faith; to properly evaluate her application; and to toll the interest on her loan from September 22, 2010 until the parties enter into a loan modification.

Shinaba alleges that the two entities violated the good faith provision of CPLR 3408 (f) by: (1) failing to offer her a HAMP loan modification even though she is eligible for

relief under the HAMP guidelines; (2) unduly delaying and failing to provide notification of her loan modification status; (3) routinely demanding documents she had previously submitted; (4) failing to conduct an NPV analysis; (5) failing to provide her with timely, accurate and consistent information about the status of her loan; (6) failing to offer her a reasonable superseding loss mitigation alternative; and (7) failing to comply with court orders directing the speedy review of her application. Shinaba alleges that, because of BOA's actions, she has suffered, and is threatened with substantial financial injury, including the loss of her home. Plaintiff and BOA oppose the motion, insisting that they negotiated in good faith to reach a mutually agreeable solution, but no resolution amenable to both parties was reached.

Having reviewed the motion, the papers submitted on the motion, and the applicable case law, the court hereby grants the defendant's motion for the reasons set forth below.

BACKGROUND

A. The HAMP Program [*2]

In February 2009, the United States Department of Treasury established HAMP, a foreclosure prevention program, under authority delegated to the agency by the Emergency Economic Stabilization Act of 2008 and the Troubled Asset relief Program (TARP)(see USC §§ 5201, 5211-5241). Loan servicers voluntarily enter the program by executing a Servicer Participation Agreement (SPA) with the Federal National Mortgage Association (Fannie Mae). These servicers are provided with financial incentive payments for each permanent mortage loan modification completed (*id.* at 23).[FN1]

A series of directives provide guidance to loan servicers implementing HAMP. These guidelines set forth basic eligibility criteria [FN2] and require the servicer to perform a net present value (NPV) evaluation, comparing the NPV of a modified loan to the NPV of an unmodified loan (Supplemental Directive [SD 09-01], at 4-5). Greatly simplified, the loan servicer is required to apply a series of calculations, the "Standard Modification Waterfall," in evaluating a potential loan modification that would lower the borrower's future payment to no greater than 31% of the borrower's gross monthly income (*see* SD 09-01 at 8-10). The Standard Modification Waterfall includes reducing the interest rate in increments of .125% down to the lowest interest rate of 2%, extending the term of the

loan, and forgiving principal (*id*. at 9-10). According to the guidelines, "[i]f the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed positive' and the servicer MUST offer the modification" (*id*. at 4). However, "[i]f the NPV result for no modification is greater than NPV result for the modification scenario, the modification result is deemed negative' and the servicer has the option of performing the modification at its discretion" (*id*.). [*3]

"Servicers must use a two-step process for HAMP modifications. Step One involves providing a Trial Period Plan outlining the terms of the trial period, and step two involves providing the borrower with an Agreement that outlines the terms of the final modification" (SD 09-01 at 14). Before June 1, 2010, loan servicers were allowed to rely on a borrower's unverified verbal representations when determining whether that borrower was eligible for a Trial Period Plan (TPP)(SD 09-01 at 6-7). Those guidelines were part of a decision to roll out HAMP very quickly. The U.S. Treasury changed this policy in 2010, however, to allow loan servicers to offer a trial modification only after reviewing a borrower's documented financial information (*see* Supplemental Directive [SD] 10-1]). **[FN3]**

Supplemental Directive 09-07 was issued by the U.S. Treasury on October 8, 2009, requiring that within thirty days of receiving a borrower's application and supporting documentation, servicers were to notify the borrower if he or she failed to qualify for trial period modification, and consider the borrower for another foreclosure prevention alternative. On November 3, 2009, the U.S. Treasury issued Supplemental Directive 09-08 (SD 09-08), which explicitly requires that servicers send notice to every borrower who was evaluated for HAMP and was not offered a trial period plan or an official modification, or who is at risk of losing eligibility for HAMP because he or she failed to provide the required financial documentation. SD 09-08 also includes Exhibit A which provides "model clauses for borrower

notices" detailing over twelve different reasons why borrowers might be denied (*id.* at A-1-4). The model clauses highlight the level of specificity that is deemed to be in compliance with the language requirements of HAMP (*id*. at A-1). Moreover, if a borrower is denied because the NPV of the transaction is negative, the notice to the borrower must include an explanation of the NPV test and a list of the inputs used, which

gives the borrower an opportunity to correct values that impact upon the servicer's analysis of the borrower's eligibility (*see* A-2).

A change to HAMP, that became effective on October 1, 2010, is the Principal Reduction Alternative (PRA), in which participating servicers are required to consider reducing principal balances as part of HAMP modifications for homeowners who owe at least 115% of the value of their home. Under the PRA, [*4]servicers have to run two NPV tests for borrowers: the first will be the standard NPV test, and the second will include principal reduction. If the NPV of the loan modification is higher under the test that includes principal reduction, loan servicers have the option of reducing the principal. However, they are not required to reduce the principal. If the principal is reduced, the amount of the principal reduction will initially be treated as principal forbearance; the forborne amount will then be forgiven in three equal amounts over three years as long as the borrower remains current on his or her mortgage payments (*see* Supplemental Directive 10-05).

B. Shinaba's Efforts to Participate in the HAMP Loan Modification Program

In March 2007, Shinaba entered into a $532,000 mortgage loan transaction with non-party First Franklin Financial Corporation (First Franklin) to refinance her first mortgage on her property located at 964 East 230th Street in Bronx County. It is a loan with an adjustable rate (Shinaba claims it is a subprime rate with a floor of 8.45%) and a balloon payment. This two-family house was purchased in 2005, and Shinaba raised her two children there. She still lives there with her 22-year old son. Shinaba contends that she took out the loan to make certain repairs to her home. At the time of the loan, she held two jobs, and was receiving rental income from her upstairs tenant.

After refinancing, Shinaba lost her part-time job as a car salesperson. She continued making her monthly $4,000 mortgage payments until February 2009. In May 2009, Shinaba was laid off from her social worker job, which she had held for over 10 years. Shortly thereafter, Shinaba struggled to make her monthly payments. Eventually, Shinaba could no longer make payments on the mortgage, and she defaulted on the loan. Shinaba maintains that as soon as she fell behind in her mortgage payments, she contacted First Franklin to obtain a loan modification. Beginning on December 9, 2009, she sought a loan modification by submitting her first HAMP application to First Franklin.

It is unclear when U.S. Bank took over the note and mortgage, and when BOA began servicing the loan. This foreclosure action was commenced on September 1, 2009 by U.S. Bank, and it was represented by the now defunct law firm of Steven J. Baum. On December 20, 2011, another firm, that usually hired per diem counsel for court appearances, was substituted, by consent, for the Baum firm (*see* plaintiff's affirmation in opposition, exhibit A). On March 11, 2010, the Legal Aid Society [*5]began representing Shinaba in the residential foreclosure part.

In April 2010, Shinaba was able to find work as a social worker at Abbott House, which provides child welfare services, including foster care, group homes, and adoptive placement to children and the developmentally delayed in New York City and Westchester. Subsequently, First Franklin offered her a HAMP Trial Period (TPP) which required her to make three payments of $1,522.72 each, with the first payment due on March 1, 2010, and the last payment due on May 1, 2010. The TPP was issued under the pre-June 1, 2010 HAMP guidelines. Under the original guidelines that were in effect when Shinaba applied for a modification, a loan servicer could initiate a TPP based on a borrower's undocumented representations about her finances (*see* SD 09—01 ("Servicers may use recent verbal [sic] financial information to prepare and offer a Trial Period Plan. Servicers are not required to verify financial information prior to the effective date of the trial period.").

The TPP Agreement stated, in pertinent part, that:

"If I am in compliance with this Trial Period Plan (the "Plan") and my representation in Section 1 continue to be true in all material aspects, the Servicer will provide me with a Home Affordable Agreement ("Modification Agreement"), as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note Secured by the Mortgage."

(*See* affidavit of Shinaba, exhibit A, TPP Plan, dated February 15, 2010, at 3, ¶ 3).

Shinaba accepted the offer, executed the TPP Agreement, returned the executed TPP Agreement along with supporting financial documentation, and timely made all three modified monthly payments as dictated by the TPP Agreement. Despite her performance, Shinaba received a denial letter, dated August 2, 2010, from First Franklin, stating that

Shinaba had failed to submit certain requested financial documentation (affidavit of Shinaba, exhibit B, Denial Letter). However, the letter failed to specify what documents were missing. Shinaba contends that she timely submitted all requested documentation, and that the bank failed to previously indicate that the financial information submitted by Shinaba was incorrect, incomplete or inconsistent with the information that led it to offer Shinaba a TPP Agreement in the first place. BOA requested that Shinaba resubmit the entire HAMP loan modification packet, which she did on August 26, 2010. [*6]

A mandatory settlement conference was scheduled pursuant to CPLR 3408 and the New York Uniform Civil Rules for the Supreme and County Courts 202.12—a (22 NYCRR 202.12—a). Based on the court records, the first settlement conference with U.S. Bank and BOA took place on August 24, 2010. Thereafter, Shinaba attended a settlement conference on September 22, 2010. On that day, Judge Howard Sherman wrote "all docs in Bank needs to complete review HAMP @30 days" and adjourned the matter to November 23, 2010.[FN4] On November 23, 2010, BOA requested a two-month adjournment until January 26, 2011 to finish reviewing Shinaba's loan modification application.

At the January 26, 2011 conference, BOA once again

represented to the court that it needed additional time to review Shinaba's application, and the matter was adjourned to March 4, 2011. As of March 4, 2011, no decision had been made on her HAMP application. The matter was adjourned to April 4, 2011.

Sometime in March 2011, Shinaba contacted BOA to check on the status of her application. She was asked by Terri Barrigan, a bank representative, to submit additional information to "research [her] account" (affidavit of Shinaba, at 6, ¶ 19).

Shinaba claims that after she met with her attorney after March 2011, she realized that she had mistakenly underrepresented her income on her application. To rectify the mistake, Shinaba submitted a new and corrected HAMP application on April 6, 2011 (*id.*). Subsequently, her attorney informed her that a BOA representative had contacted her, and advised her that a judgment by Shinaba's oil company against Shinaba needed to be satisfied. Shinaba had previously worked out a payment plan with the oil company. In

order to be considered for a HAMP modification, however, Shinaba satisfied the judgment with a lump sum payment of $1,550.

At the settlement conference held on April 12, 2011, the court noted "Def recently submitted updated docs. Bank is to expedite review." Instead of getting approval for a HAMP loan modification, however, on May 20, 2011, BOA offered her an "in-house" TPP, requiring three payments of $2,292.06 for July through September 2011, which she accepted (*see* exhibit E, TPP) and successfully completed. On or about August 15, 2011, Shinaba submitted another HAMP application after the bank deemed the earlier submission "stale." [*7]

Two months later, at the October 18, 2011 settlement conference, the court observed that her HAMP application was still under consideration. A month later, at the next settlement conference held on November 15, 2011, the court emphasized that the "Bank is to have HAMP decision by next cof, Bank reps to be available by phone" (*see* affidavit of Shinaba, exhibit C, Conference Orders). However, at the next conference date on December 6, 2011, the court noted "No decision made as yet on HAMP, Bank is to appear at next conf." At the December 21, 2011 conference date, no BOA representative, however, appeared. A per diem attorney for the new firm appeared, and stated that the case file had not yet been transferred to the new firm. The matter was adjourned to January 12, 2012.

Incredibly, after almost six months of waiting for a response on her HAMP application, at the following settlement conference date, a bank representative appeared and represented to the court that Shinaba had been denied HAMP. The bank representative then pulled out a letter dated March 11, 2011, which stated that Shinaba was denied a modification based on missing documents. Shinaba and her attorney informed the court that this letter was never received by any of them. Shinaba's attorney also pointed out that the letter was contradicted by the record maintained by the court, showing that all documents had been submitted and that it had been the plaintiff's attorney who had requested more time to review Shinaba's application. The conference order for that day states: "P's bank rep will attempt to generate a trad. Mod offer, mirroring HAMP, utilizing a balloon as part of the calculation (*see* exhibit C, Conference Orders). The court directed the bank to communicate its decision to Shinaba's counsel by February 1, 2012. The record further notes that "H/O's Esq. Still reserves w/o prej. to seek retro tolling of

int." (*id.*). However, on February 7, 2012, the lender's attorney represented that the "Bank needs 2 more weeks." As a result of the long delay, the court tolled interest payments from February 1, 2012 through February 28, 2012.

Plaintiff and BOA failed to comply with the court's directive. In fact, it was not until February 14, 2012, that BOA sent its offer, via Federal Express, of an in-house loan modification to Shinaba. The letter was dated February 8, 2012. Shinaba was informed that she had until February 23, 2012 to accept or reject the offer. The offer required payments for the first three years of $2,378.20 per month (this amount included the estimated escrow) (*see* affidavit of Shinaba, exhibit G, In-House Modification Offer). For Year Four, the total monthly payment would be $2,719.74. Starting in Year Five, and for the remaining loan term, the monthly payments would be $3,035.04. [*8]The proposal would have resulted in a loan modification with an initial annual interest rate of 2%, then 3% with the final rate being 3.875% and an extension of the amortization period to 40 years. A balloon payment would be due on 2037, the year at which her loan matured. The monthly payments were more than the monthly payment under the HAMP trial modification that had been successfully executed. Shinaba rejected the proposal at the February 28, 2012 settlement conference for fear that she would be placed at risk of defaulting again.

Shinaba contends that the loan modification offered to her fails to mirror HAMP. Furthermore, the proposed monthly payments are based on fully amortizing her entire unpaid principal balance, claimed by the plaintiff as $663,405.16, and allegedly inflated with the accrued interest caused by the plaintiff's delay.[FN5] Moreover, Shinaba contends that the monthly payments as proposed would consume in year four, and the remaining 35-year term of the loan, almost 60% of her income at $3,035.04 per month. Finally, Shinaba maintains that the offer fails to take into account that her mortgage is significantly "under water" as the New York City Department of Finance has estimated the market value of her home at $375,000; $288,000 less than what the plaintiff and BOA claim Shinaba owes.

A counteroffer was communicated by letter, dated March 9, 2012, to the plaintiff's attorney. The counteroffer proposed monthly payments of $1,750 for principal, interest, taxes and insurance (*see* exhibit I, Counteroffer Letter). It also requested that the plaintiff

consider a "HAMP-like" forbearance or partial principal write-down. Shinaba requested a response prior to the next settlement conference scheduled for March 28, 2012. In response to the counter offer, BOA sent a one-line form letter to Shinaba, simply stating "We are unable to accommodate your request for modification received on March 9, 2012"

(*see* exhibit J, BOA Rejection Letter). A hearing was scheduled before this court on May 15, 2012. On April 20, 2012, Shinaba filed her CPLR 3408 (f) motion. Shinaba alleges that BOA's actions were in violation of CPLR 3408 (f).

DISCUSSION

In assessing Shinaba's claim of alleged violations of HAMP and CPLR 3408 (f), the core issues for the court are: (1) whether [*9]there is a CPLR 3408 (f) "good faith" violation; and (2) if the alleged misconduct represents a good faith violation, whether an appropriate sanction is the tolling of interest on the mortgage loan. The court answers "yes" to both questions.

The New York State Legislature attempted to cope with the formidable increase in mortgage foreclosures by enacting a number of statutes that are known, in omnibus form, as the Subprime Residential Loan and Foreclosure Laws. The statutes included in the omnibus legislation are RPL 265-b, RPAPL 1302, 1303 and 1304, Banking Law 6-l, 6-m, 590-b and 595-599, GOL 5-301(3), and, relevant to this decision, CPLR 3408 (*see* 2008 NY Laws ch 472; *see also Wells Fargo Bank v Edsall, NA*,22 Misc 3d 1113 [A], 2009 NY Slip Op 50112 [U], *3 [Sup Ct, Suffolk County 2009]).

CPLR 3408 requires a mandatory settlement conference in every "residential foreclosure action" involving a home loan as defined in RPAPL 1304 "in which the defendant is a resident of the property subject to foreclosure" (CPLR 3408 [a]). Settlement conferences are required in order to, "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home" (CPLR 3408 [a]; *see also Wells Fargo Bank, N.A. v Meyers*, ___ AD3d ___ , 2013 NY Slip Op 03085, **5 [2d Dept 2013]). There is, however, no obligation on the part of a lender to modify the

terms of its mortgage loan after a default in payment (*see Graf v Hope Bldg. Corp.*, 254 NY 1, 4-5 [1930]; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638, 638 [1st Dept 2012]; *JP Morgan Chase Bank Natl. Assn. v Ilardo*, 36 Misc 3d 359, 373 [Sup Ct, Suffolk County 2012]).

The recent amendment of CPLR 3408 includes a new subdivision which provides, "Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (CPLR 3408 [f]).The "good faith" requirement of CPLR 3408 (f) was imposed to prevent one party to a mortgage contract from behaving in a manner that evades the spirit of the settlement conferences or denies the borrower the opportunity to reach a mutually acceptable solution. It is, therefore, the duty of each party to cooperate with the other to enable achievement of a reasonable resolution. The good faith requirement, as well, extends to the manner in which the lender employs its discretion in reviewing a borrower's loan modification application.

Additionally, 22 NYCRR 202.12-a (c) (4) provides, in part, that: "The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that [*10]conferences are not to be unduly delayed or subject to dilatory tactics so that the rights of both parties may be adjudicated in a timely manner."

The U.S. Treasury's own HAMP directive, as well, states that servicers must implement the program in compliance with state common law and statutes (*see* SD 09-01 ["Each servicer . . . must be aware of, and in full compliance with, all federal state,

and local laws (including statutes, regulations, ordinances,

administrative rules and orders that have the effect of

law, and judicial rulings and opinions) . . . ."")]).

The court in *Flagstar Bank, FSB v Walker* (37 Misc 3d 312, 318 [Sup Ct, Kings County 2012]) recently stated that the most appropriate benchmark for the "good faith" requirement is compliance with the HAMP guidelines. In *HSBC Bank USA v McKenna* (37 Misc 3d 885, 905-906 [Sup Ct, Kings County 2012]), the lower court analyzed the

meaning of "good faith," finding:

"Generally, 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 Finance 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 NYS 2d 248, 249 [Sup Ct, New York County 1954]). It 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* Uniform Commercial Code 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/ Commerical Servc., 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])."

Similarly, 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]). Ordinarily, a lack of good faith in CPLR Rule 3408 settlement conferences is determined from the conduct of the mortgagee/plaintiff. "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*, [*11]37 Misc 3d at 318; *see also Wells Fargo Bank, N.A. v Ruggiero*, 39 Misc 3d 1233 (A), *6 [Sup Ct, Kings County 2013]; *One W. Bank, FSB v Greenhut*, 36 Misc 3d 1205 (A), 2012 NY Slip Op 51197 [U], *4-5 [Sup Ct, Westchester Cty 2012]).

Plaintiff and BOA make several arguments that are unpersuasive. To begin, their reliance on *JP Morgan Chase v Illardo* is misplaced. Unlike the circumstances of this case, the defendants in *Illardo* sought to dismiss the foreclosure action, and direct the lender to convert a trial period modification into a permanent modification. Here, Shinaba is simply seeking to enforce the good faith requirement of CPLR 3048 (f) and 22 NYCRR 202.12-a (c)(4).

Next, the plaintiff and BOA assert that the note and mortgage are to be enforced as written (*see* plaintiffs'opposing affirmation, ¶¶ 7-8). That is certainly the lender's prerogative. The court agrees that banks that have negotiated loan agreements are entitled to enforce them to the letter, without being attacked for lack of good faith. However, Shinaba's motion to the court is not an appeal to the court to determine whether the plaintiff exercised rights expressly reserved in the loan agreement. The term "good faith" refers to not taking opportunistic advantage of Shinaba's weaker bargaining position.

Moreover, plaintiff's stance completely disregards the public policy behind federal and state foreclosure prevention statutes, programs and initiatives. HAMP is structured with several goals in mind: The first is to encourage banks to adopt uniform standards for modification. The second is to ensure that modifications for qualified borrowers are entered into. The fact is that mortgage servicers and federal, state and local governments incur thousands of dollars in expenses and costs to foreclose upon a home (*see generally* Jean Braucher, Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program, 52 Ariz L Rev 727, 748—53 (2010) (providing background on HAMP's features). Preventing a foreclosure from ever occurring is a cost effective approach, and it has the added benefit of preserving a family's home. In sum, none of those goals were met here.

Plaintiff and BOA's other assertion that Shinaba does not have an absolute right to a loan modification also misses the point. The court recognizes that the duty of good faith cannot be used to override explicit contractual terms. Therefore, a failure to modify an existing loan, in itself, does not constitute bad faith. However, the issue here is whether the [*12]plaintiff and BOA kept their promise, pursuant to CPLR 3408 (f), to negotiate in good faith. Once the parties agreed to participate in the scheduled settlement conferences, the plaintiff and BOA were obligated to deal "honestly, fairly and openly" with Shinaba. They have failed in this regard.

Nor does the court accept their argument that they demonstrated good faith during their review of Shinaba's loan modification application. To be sure, this is not the first time that BOA, as loan servicer, has faced allegations of bad faith. However, whether what happened to Shinaba is essentially part of a national effort by BOA to deny homeowners HAMP modifications is irrelevant to the resolution of Shinaba's CPLR 3408 (f) motion.

In this particular case, the plaintiff and BOA's dilatory, and dishonest, conduct is troubling. Shinaba has alleged facts that describe conduct that is not only a violation of HAMP, but is independently unjust. As noted, Shinaba applied for relief under HAMP in 2009, but she was never properly evaluated for that relief even after two years. To be clear, Shinaba was asked to attend 17 settlement conferences, submit multiple applications for HAMP review, timely comply with every request for financial information, and successfully complete two trial periods. Yet as evidenced by the record, BOA, for the most part, ignored her application and failed to make an accurate NPV calculation as to her HAMP eligibility. More importantly, despite unambiguous rules designed to protect the integrity of the loan modification process, they egregiously failed to comply with the rules regarding timely review and notice.

Good faith contemplates the necessity of open communication between the parties. It is obvious that the plaintiff and BOA provided conflicting information, made several misrepresentations that repeatedly offered Shinaba an answer within a specific time frame, disobeyed several court orders to speed up the review process and unduly delayed the review of Shinaba's HAMP loan modification application without a valid explanation, only to ultimately refuse to render any decision on her HAMP application, and instead, offer her an in-house modification with less than favorable terms. In essence, the in-house modification would have extended the term of the loan by ten years, added thousands of dollars in interest, and eaten over 60% of her monthly income. Lastly, both statute and court rules require a foreclosure plaintiff to appear at foreclosure settlement conference with counsel "fully authorized to dispose of the case" (CPLR 3408 [c], Uniform Rule § 202.12—a[c][3]). That never happened here. In the meantime, Shinaba waited anxiously for a determination while [*13]her late fees and interest payments kept rising. Certainly, there is nothing about this conduct that could reasonably be interpreted as giving rise to a basis of "good faith."

It is well-settled that a mortgage foreclosure is an equitable remedy (see *Notey v Darien Constr. Corp.*, 41 NY2d 1055, 1055 [1977]; *Mortgage Elec. Registration Systems, Inc. v Horkan*, 68 AD3d 948, 948 [2d Dept 2009]). Under CPLR 5001 (a), "in an action of an equitable nature, interest and the rate, and date from which it shall be computed shall be in the court's discretion." When a mortgagee has been found to breach the duty of good faith, New York courts have ordered that no interest be collected on the underlying loan,

either from the date of the mortgagee's breach or from the date of the mortgagor's default on the loan, including a bar on attorneys' fees and costs (*see e.g. BAC Home Loans Servicing v Westervelt*, 29 Misc 3d 1224 [A], 2010 NY Slip Op 51992 [U] [Sup Ct, Dutchess County 2010]; *Wells Fargo Bank, N.A. v Hughes*, 27 Misc 3d 628, 634 [Sup Ct, Erie County 2010]).

Equitable considerations warrant a finding that Shinaba should not be held liable for interest payments and other costs which occurred during the long and unexcused delay at issue. It is therefore the order of the court that the plaintiff be assessed as costs the forfeiture of all interest on the subject loan, late fees, plus accrued attorney's fees since October 22, 2010 (the date by which the review of Shinaba's application should have been completed) to the date this order is entered. Plaintiff is directed to make the mentioned costs computation and to submit the results and methodology employed to arrive at the final sum to the court for its review on notice to Shinaba, through her attorney, within 30 days of this order.

Notwithstanding the court's sanction, Shinaba must have a real opportunity to have her HAMP application properly reviewed by the plaintiff and BOA as per the HAMP guidelines and its applicable time frames. Therefore, the plaintiff and BOA are directed to provide a supportable answer on her HAMP loan modification at the next scheduled settlement conference. In the event that Shinaba is denied a permanent HAMP modification, the plaintiff and BOA are to give a full and detailed explanation as to the reason for the denial. If the modification is denied, then Shinaba is to be considered for PRA. And, if no answer is given on the next conference date, other sanctions, including exemplary damages will be considered. [*14]

CONCLUSION

ORDERED that the plaintiff and BOA are directed to re-open Shinaba's file and consider her for a HAMP modification taking into consideration their delay in reaching a decision; and it is further

ORDERED that plaintiff is barred from collecting any interest incurred from October 22, 2010, to the date that this order is entered; and it is further

ORDERED that unpaid late fees, if any, from October 22, 2010 until the date that this order is entered are forfeited by the plaintiff; 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 October 22, 2010 until the date this order is entered are not to be included in the calculation of the defendant-homeowner's modified mortgage payment or otherwise imposed on the homeowner, but, rather, any request for attorneys' fees is hereby severed and must be submitted to the court for a separate, independent review as to their reasonableness; and it is further

ORDERED that a bank representative fully familiar with the file and with full authority to settle the matter must appear at the next settlement conference and at all future settlement conferences until the case is released from the settlement part or until further order of the court; and it is further

ORDERED that the parties are to appear for a settlement conference in the Foreclosure Settlement Part on September __, 2013 at 10:00 a.m.

Dated: July 31, 2013

ENTER:

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ROBERT E. TORRES J.S.C.

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Footnotes

Footnote 1: Fannie Mae, acting as financial agent of the United States, compensates participating servicers who receive $1,000 for each completed modification, payable upon the borrower's successful completion of the 90-day trial period. Servicers may also receive additional payments for up to three years provided that they meet other requirements.

Footnote 2: Borrowers may be eligible for a loan modification under HAMP if the mortgage loan originated before January 1, 2009; if the mortgage has not been previously modified under HAMP; if the mortgage is secured by the borrower's primary residence; if the borrower has experienced financial hardship; if the borrower lacks the liquid assets to meet the monthly mortgage payments; and if the mortgage payments amount to more than 31% of the borrower's monthly income (*id.* at 2). These eligibility requirements, however, do not automatically qualify a borrower for a HAMP modification.

Footnote 3: The reason for the change was that loan servicers were converting trial modifications to permanent ones at a rate far below the U.S. Treasury's expectations.

Footnote 4: Copies of all conference orders were submitted as exhibit C as part of Shinaba's affidavit in support of the motion,

Footnote 5: Each day of delay allegedly costs Shinaba $120.00 in interest. A year of delay allegedly added over $40,000 in accrued interest to Shinaba's debt.

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