

JPMorgan Chase Bank, N.A. v Simmons

2013 NY Slip Op 32942(U)

November 20, 2013

Supreme Court, Greene County

Docket Number: 10/556

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 10-556
RJI NO. 19-10-5109

BONNIE R SIMMONS; CLIFFORD SIMMONS;
HEATHER A SIMMONS; CAZENOVIA COLLEGE;
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE; "JOHN DOES" and "JANE DOES", said
names being fictitious, parties intended being possible tenants
or occupants of premises, and corporations, other entities or
persons who claim, or may claim, an lien against the premises,

Defendants.

Supreme Court Greene County All Purpose Term, November 8, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Rosicki, Rosicki & Associates
Richard Fay, Esq.
Attorneys for Plaintiff
2 Harvester Avenue
Batavia, New York 14020

Tal G. Rappleyea, Esq.
Attorney for Defendant Clifford Simmons
4 Maple Lane, PO Box 793
Valatie, New York 12184

TERESI, J.:

Plaintiff commenced this proceeding to foreclose its mortgage on property located at 12229 State Route 23, Ashland, New York (hereinafter "the property") and owned, in part, by Clifford Simmons (hereinafter "Simmons"). On this record it is uncontested that neither

Simmons nor any other Defendants have served an answer.¹ Simmons has, however, appeared before this Court for a CPLR §3408 settlement conference.

Plaintiff now moves for a default judgment against all Defendants, the appointment of a referee to compute, and to amend the caption of the action. Simmons opposes the motion. Because Plaintiff failed to establish its compliance with CPLR §3408, its motion is denied without prejudice.

CPLR §3408(a) required this court to “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 or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.” In conjunction with such conference, CPLR §3408(f) requires “[b]oth the plaintiff and defendant [to] negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.”

On this record, Plaintiff failed to demonstrate that it complied with its CPLR §3408(f) obligation to “negotiate in good faith.”

This Court held the requisite CPLR §3408 settlement conference on August 12, 2010. Both Plaintiff and Simmons were represented by counsel. The attorneys informed this Court that Simmons was negotiating directly with Plaintiff, and that the parties needed additional time to

¹ Defendants Cazenovia College and New York State Department of Taxation and Finance both served only a notice of appearance.

pursue a mutually agreeable resolution. In response, this Court issued a 90 day stay.

After the stay expired, on December 3, 2010 this Court issued a letter to both attorneys seeking a status update. Simmons' attorney stated "Defendant Simmons and counsel believe matter to be settled since all 'workout' documents have been completed and executed. But no response has been received from Plaintiff." Plaintiff's attorney did not dispute such account. Rather, she stated: "following up with our client for affidavit in support as they are currently reviewing their procedures for executing same." Plaintiff never updated their status after "following up with [their] client," advised this Court that the parties' settlement negotiations had broken down, nor refuted Plaintiff's allegation that this matter had "settled."

Now, nearly three years later, Plaintiff makes the instant motion without explaining the circumstances surrounding the failed settlement negotiations. Instead, Plaintiff's motion asserts CPLR §3408 compliance by alleging only that "a conference was held on August 12, 2010 pursuant to the requirements under CPLR 3408. That Plaintiff requests that it be able to proceed with its action herein as a settlement was unable to be reached." Such conclusory statement does not establish Plaintiff's compliance with its CPLR §3408(f) obligation to "negotiate in good faith." Moreover, Plaintiff offered no excuse for their extensive delay.

In addition, Plaintiff failed to controvert Simmons' proof of Plaintiff's failure to negotiate in good faith. Simmons opposed Plaintiff's motion with an affidavit, in which he recounted his compliance with Plaintiff's mortgage modification requirements. He alleged that after the August 12, 2010 conference he "immediately completed and forwarded the required modification application documents to the Plaintiffs. After not hearing back from the Plaintiffs, I called them on the phone several times but... never received a return call." Plaintiff neither denies Simmons'

account nor offers an alternative explanation of the prior negotiations. Conspicuously absent from Plaintiff's submission is any justification for its rejection of Simmons' prior modification application. Instead, in reply Plaintiff alleges only that "Defendant was given a fair chance to seek a modification, under the court's supervision." Contrary to Plaintiff's assertion, their failure to respond to Simmons' modification application did not give him a "fair chance." Rather, such unexplained non-response constitutes a violation of CPLR §3408(f)'s obligation to "negotiate in good faith."

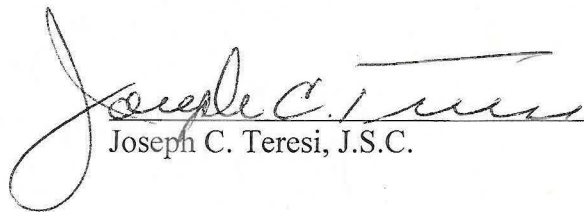
Moreover, it is uncontested that Plaintiff recently accepted, and is currently considering, Simmons' re-filed modification application.

Accordingly, Plaintiff's motion is denied without prejudice. Due to Plaintiff's demonstrated failure to negotiate in good faith in this action, a new foreclosure settlement conference must be held at the Albany County Courthouse, located at 16 Eagle Street, Albany, New York, on December 17, 2013 at 8:30 am.

This Decision and Order is being returned to the attorneys for Simmons. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
November 20, 2013


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, undated; Affirmation of Richard Fay, dated September 16, 2013; Affidavit of Darren Ollam, dated May 8, 2013, with attached unnumbered exhibits; Affirmation of Richard Fay, dated September 16, 2013; Affirmation of Richard Fay, dated September 16, 2013.
2. Affidavit of Clifford Simmons, dated October 22, 2013; Affirmation of Tal Rappleya, dated October 22, 2013, with attached Exhibits A-C.
3. Affirmation of Catherine Gran, dated October 26, 2013, with attached Exhibit A.