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Federal Natl. Mtge. Assn. v Singer
2015 NY Slip Op 51038(U)
Decided on July 15, 2015
Supreme Court, New York County
Moulton, J.
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Decided on July 15, 2015

Supreme Court, New York County

Federal National Mortgage Association, Plaintiff, —against-

against

Lawrence R. Singer a/k/a LAWRENCE SINGER, BONNIE J. SINGER a/k/a BONNIE SINGER, BOARD OF MANAGERS OF 4260 BROADWAY CONDOMINIUM, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR HOMEBRIDGE MORTGAGE BANKERS CO., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, UNITED STATES OF AMERICA ACTING THROUGH THE IRS and JOHN DOE, , Defendants. BANK OF AMERICA, N.A., Plaintiff, LAWRENCE SINGER, BONNIE SINGER, BOARD OF MANAGERS OF 4260 BROADWAY CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, and "JOHN DOE No.1" through "JOHN DOE #10", the last ten names bring fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint, Defendants.

BANK OF AMERICA, N.A., Plaintiff,

against

LAWRENCE SINGER, BONNIE SINGER, BOARD OF MANAGERS OF 4260 BROADWAY CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, and "JOHN DOE No.1" through "JOHN DOE #10", the last ten names bring fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint, Defendants.

850039/2011
Peter H. Moulton, J.

These two foreclosure actions encompass many of the faults that plague the current system of refinancing residential property that is in default and/or in foreclosure. In this age of securitized loans, governing documents cabin discretion and flexibility, leading to the absurd result here. Like so many homeowners in the wake of the 2008 financial crisis, Lawrence and Bonnie Singer, the defendants herein, have sought to climb out of default. They have been thwarted by unresponsive loan servicers, unprepared lawyers, boilerplate form letters, and the banks' or servicers' often-changing and repetitive demands for financial information. Unique to these actions, the Singers have been vexed by the banks' or servicers' refusal to consolidate two mortgages originally secured by two apartments now combined into one.

Before the court are two tolling motions that concern two separate mortgages held by a series of lenders on two contiguous condominium apartments, apartments 400 and 401 located at 160 Wadsworth Avenue, New York, New York 10033.[FN1] The apartments at issue were purchased separately by defendants Lawrence and Bonnie Singer (the Singers) in July 2003 and November 2004, respectively, and thereafter physically combined into *a single* condominium apartment now known only as Apt. 401. Action No. 1 seeks to foreclose on the mortgage on Apt. 400, while Action No. 2 seeks foreclosure on the mortgage secured by what was originally Apt. 401.

Both mortgages are now owed by Federal National Mortgage Association (Fannie Mae), but are apparently serviced by two separate servicers, Seterus, Inc. (Seterus) and Bank of America, N.A. (BOA).[FN2]

The Singers move in both actions for an order reducing the accrued compounded interest owed on both of the mortgages due to an alleged breach of a duty of good faith and fair dealing by the lenders and/or their agents in both actions. They rely on CPLR 3408, the federal Home Affordable Modification Program (also referred to as the Home Affordable Mortgage Program [HAMP]) guidelines, and the Business Conduct Rules, Banking Law Article 12-D, 3 NYCRR 419.2 and 419.11.

FACTS

On July 21, 2003, the Singers purchased Apt. 400 for $235,000. They put down $23,500, and financed the balance with a mortgage from Citi-Mortgage in the amount of $188,000 and a Citibank Home Equity Loan in the amount of $23,500, for a total debt of $211,500. In November 2004, the Singers refinanced their mortgage on Apt. 400 with Countrywide Financial Corp. (Countrywide), obtaining a mortgage in the amount of $204,000 and a home equity loan in the [*2]amount of $51,000, for a total principal debt of $255,000.

In March 2005, the Singers obtained a second Citibank Home Equity Line of Credit on Apt. 400 in the amount of $90,000, allegedly for "construction costs." On March 6, 2007, the Singers refinanced their mortgage on Apt. 400, along with the home equity loans, with Greenpoint Mortgage Funding, Inc. (Greenpoint) into a fixed rate loan at 7.375% interest for $310,000 (hereinafter, the 400-Mtge.). Greenpoint sold all of their mortgages to Countrywide/BOA in November 2008. The 400-Mtge., and its corresponding note, was assigned to plaintiff Fannie Mae by an assignment of mortgage executed on October 11, 2010.

The Singers acquired Apt. 401 on November 11, 2004. The purchase price was $220,000, and the Singers put down $22,440, and obtained a mortgage from Homebridge Mortgage Bankers Corp. in the amount of $201,960 (hereinafter, the 401-Mtge.). The 401-Mtge. was later purchased by Countrywide, which was acquired by BOA in July 2008. The 401-Mtge. is a 30-year convertible jumbo mortgage with an interest rate of 6.75% and required private mortgage insurance (PMI) of $252.45 a month. The 401-Mtge. was assigned from Mortgage Electronic Registration Systems, Inc. (MERS) to BOA on August 29, 2011. The mortgage was assigned from BOA to Fannie Mae on April 16, 2015.

Although the actual date of the construction work is not clear from the record, the Singers

combined the two contiguous apartments. The Singers allege, without challenge, that the closing for the March 2007 refinancing of the 400-Mtge. was held in their apartment, which had been physically combined by that time (Singer 5/9/14 Aff., ¶ 5). The undisputed documentary evidence establishes that the necessary paperwork to combine the two tax lots and to amend the condominium's offering plan was filed with the City of New York in September 2010. According to the architectural certification that was filed as part of the amendment to the condominium's offering plan, the wall that separated the two apartments was opened in two places and other substantial changes to the apartments' configuration were undertaken.

In or about the Spring of 2009, Bonnie Singer attempted to refinance the 401-Mtge. through Countrywide/BOA so that the two mortgages could be combined, a time when *both* loans were held by Countrywide/BOA. According to the Mortgage Loan Questionnaire the Singers submitted, the apartments were last appraised at $775,000 and the Singers requested a new loan in the amount of $515,000. This appraisal has not been submitted to the court and its date is uncertain. Although the details of this refinancing attempt are sketchy at best, it is undisputed that the Singers were denied refinancing at this time (*see* Singer 5/9/14 Aff., ¶¶ 6 and Ex. B attached thereto).

In December of 2009, the Singers asked a friend of theirs, Robert Feldman, Esq., for help in trying to obtain loan modifications on both mortgages from BOA (Singer 5/9/14 Aff., ¶ 8). Bonnie Singer avers that they could not get past the customer service department of BOA, who was insisting that the Singers made too much money for a modification since it was only considering each mortgage separately (*id.*). The Singers were told that they were not eligible for loss mitigation or modifications on either mortgage, because their monthly payment on each loan, standing alone did not exceed 31% of their combined gross income (*id.*). The undisputed evidence is that the Singers and Mr. Feldman made numerous unsuccessful attempts to contact BOA in December 2009 and January 2010 to avoid defaulting on their mortgages and to obtain a loan modification (*id.*, Ex. C).

In January of 2010, the Singers stopped making payments on both mortgages after draining all their cash resources (Singer 5/9/14 Aff. ¶ 9). Bonnie Singer avers that, immediately after their [*3]default, BOA's collection department wasted no time in harassing them for payment and they were able to talk to representatives on a daily basis, but not with anyone knowledgeable about securing a loan modification (Singer 5/9/14 Aff. ¶ 9). On January 14, 2010, Mr. Feldman wrote a letter to BOA in which he advised that the two apartments had been combined and the tax lots merged (*id.*, part of Ex. C). In this letter, Mr. Feldman also claimed that the interest rates on the

two loans were nearly usurious in the current market, and advised that the Singers could not afford to pay their monthly housing expenses, which amounted to approximately $5,000 when including both mortgages, maintenance, common charges, and taxes. Mr. Feldman further advised that Bonnie Singer had been unemployed since August 2009 and Larry Singer's private drama coach business was suffering due to the economic downturn. It appears that the only response that the Singers or Mr. Feldman ever received was three "form" letters dated February 5, March 10 and March 17, 2010 from BAC Home Loans Servicing, LP, a subsidiary of BOA, thanking Mr. Singer for his recent correspondence, and promising a complete response in 20 days (Singer 8/15/14 Supp. Aff., Exs. 1, 2 and 3).

In July of 2010, Mr. Feldman faxed another letter to BOA literally begging the bank to file a lis pendens "as soon as possible so we may go before a Court that is capable of understanding the simple fact that these loans represent ONE APARTMENT and that the monthly loan payments GREATLY exceed 31 percent of their gross income and that they DO qualify for a loan modification" (Singer 5/9/14 Aff., part of Ex. C). This same letter was faxed eight more times between July 7 and August 11, 2010 (*id.*). On August 11, 2010, Mr. Feldman wrote another letter, advising that he was getting "robo calls" on his cell phone every 24 hours, and demanded to speak only to an authorized underwriter or attorney (*id.*). This letter was faxed again on August 16, 2010 (*id.*). Bonnie Singer avers that, sometime in August 2010, BOA assigned an advocate named Joana Villataro and a negotiator named Ronnie Franklin (*id.; see also* letter dated September 13, 2010 from Mr. Feldman to BOA Negotiator Ronnie Franklin, submitted as part of Ex. C to Singer 5/9/14 Aff). She claims that, after Mr. Franklin verbally conveyed to Mr. Feldman that BOA agreed to merge the two loans, they submitted the necessary paperwork to merge and modify both mortgages, but that neither she nor Mr. Feldman ever heard back from BOA and that they were never sent a letter of denial. Bonnie Singer further avers that they were completely ignored by Countrywide/BOA for the duration of 2010 and 2011 (*id.* ¶ 11). Notably, Bonnie Singer submits no documentary proof that BOA ever agreed to "merge" both mortgages, nor does she offer any testimonial evidence from Mr. Feldman to support her statements.

BOA's counsel claims that BOA sent the Singers a letter on or about March 10, 2010 advising them that they may be eligible for HAMP (Burlingame 7/14/14 Affirm., ¶ 16). This letter is allegedly attached to counsel's affirmation in opposition as Exhibit E. However, the only March 10, 2010 letter attached as Exhibit E is a letter that has the same content as the form letter dated March 17, 2010, thanking Mr. Singer for his recent correspondence, and promising a complete response in 20 days. There is no evidence in the record that BOA offered the Singers an opportunity to apply for a HAMP modification in March of 2010, or that it was considered,

denied and the Singers' given written notification of the grounds for a denial.

However, BOA admits that, on November 5, 2010, it spoke to Mr. Feldman about the Singers' loan modification request (Burlingame 9/18/14 Supp. Affirm., Ex. A: Affidavit of Lorena P. Diaz sworn to on September 18, 2014 [Diaz Aff.], ¶ 4). According to Ms. Diaz, BOA's business [*4]records show that Mr. Feldman claimed to have already worked out a modification with Ronnie Franklin, but that BOA insisted that there was no way to provide the Singers with an affordable payment plan based on the mortgagors' deficit income of $5,864.00 per month and that they did not qualify and did not meet the guidelines for a loan modification (*id.*, ¶¶ 4-5).[FN3] Mr. Feldman was advised that BOA was removing the file from consideration of "traditional loan modification" based on the financial information provided, and the loan was returned to "normal servicing" (*id.*, ¶¶ 6, 7).

On June 14, 2011, the law firm of Stephen J. Baum, P.C. (the Baum firm) commenced Action No. 1 to foreclose on the 400-Mtge. The complaint reflects that the mortgaged premises is "160 Wadsworth Avenue, Part of Unit 401 f/k/a [formerly known as] Unit 400." The complaint further indicates that the property is "Block 2164 Part of Lot 1101 f/k/a Block 2164, Lot 1100." Thus, the complaint reflects the Singers' consistent position- - that they live in one apartment, not two. The Singers filed their Verified Answer and Counterclaims on August 31, 2011. On November 22, 2011 (three months later), the Baum firm filed a Request for Judicial Intervention (RJI) requesting the scheduling of a residential mortgage foreclosure settlement conference. Thereafter, the Baum firm was forced to close its doors after being blacklisted by Freddie Mac and Fannie Mae for allegedly engaging in faulty and fraudulent foreclosure practices. At some point the law firm of Rosicki & Associates P.C. (the Rosicki firm) was substituted as counsel for the Baum firm.[FN4] At that time, no legal action had been taken with respect to the 401-Mtge., although the Singers continued to receive monthly invoices regarding the 401-Mtge. with late fees adding up until January of 2012, when they stopped receiving any invoices from BOA (Singer 5/9/14 Aff. ¶¶ 12-14).

On January 26, 2012, the law firm of Frenkel Lambert Weiss & Gordon LLP (the Frenkel firm) sent the Singers a letter advising that they represented BOA, that the 401-Mtge. was in default, and that the outstanding balance was $230,175.20 (Singer 5/9/14 Aff., part of Ex. F). Bonnie Singer avers that they did not respond to the Frenkel firm's letter as they still hoped the mortgages could be merged thereby resolving all the default issues (*id.* ¶ 14). The firm did not file a foreclosure action until July 18, 2013 (discussed *infra*).

In March of 2012, the Singers started to represent themselves, *pro se*. The first of many mandatory settlement conferences was scheduled on March 14, 2012. Presumably due to the failure of the Rosicki firm to file a notice of appearance, written notice of the conference was sent to the Baum firm and there was no appearance for plaintiff Fannie Mae. The conference was adjourned to May 2, 2012, another month and one-half delay. Although both sides appeared, no progress was made. However, the parties discussed with the court mediator that one possible solution would be [*5]to "merge" or "recast" the two mortgages since the investor on both mortgages was Fannie Mae. The following day, May 3, 2012, Bonnie Singer wrote a letter to the Rosicki firm requesting that this be done (Singer 5/9/14 Aff., part of Ex. C).

The Rosicki firm did not respond. Two more court conferences were held on June 2, 2012 and July 12, 2012. Each time, a different attorney from the Rosicki firm would appear, without any knowledge of the case and without any settlement authority.[FN5] At this point the conference was adjourned to August 14, 2012, and my court attorney directed via email that the Rosicki firm email responses to the following queries: (1) would Fannie Mae agree to consolidate the mortgages and refinance since it owns both; (2) whether Seterus (the servicer of the 400-Mtge) could also service the 401-Mtge. so that only one servicer would be assigned to both mortgages; and (3) what documents were needed for the Singers to apply for a loan modification of the 400-Mtge.

Iyanna Grisson, Esq. of the Rosicki firm responded by email dated July 26, 2012, insisting that: (1) consolidation of the two loans was not an option, but without explaining why; (2) the servicer on the 401-Mtge. could not be changed to Seterus; and (3) insisting that Fannie Mae would be able to foreclose on Apt. 400 despite the physical combination of the two apartments. As for applying for a loan modification, the Singers were advised to complete and submit to Tammera Wells, a paralegal at the Rosicki firm, the attached modification package along with "copy of one month's most current paystubs, two month's most current bank statements; year-to-date P & L statement if self-employed, signed 2010 and 2011 tax returns signed and dated."

At that point, the court ordered the Singers to submit the required loan modification documents to the Rosicki firm by August 1, 2012, and that the latter advise of the need for additional documents no later than August 13, 2012. Although the Singers attempted to submit the requested documentation for a loan modification, their submission was initially deficient. For example, the 2010 tax return was not signed and the Rosicki firm claimed that the Singers did not submit a return for 2011 (disputed by Bonnie Singer). However, the Rosicki firm also began

to change the parameters of its requests. For example, although the July 16, 2012 email from Iyanna Grissom asked for "[t]wo months most current bank statements," on August 2nd, she was insisting that the Singers provide "most current and consecutive 3 months of bank statements for ALL accounts, personal and business, with income deposits circled and labeled; no online statements accepted." Likewise, no mention was made of the need to submit IRS Form 4506 in the earlier email, yet two weeks later, Ms. Grissom was insisting on these documents. On August 6, 2012, paralegal Tammera Wells confirmed that the documents received from the Singers had been sent to the lender on August 2 and 3, 2012 for review. Yet, by letter dated August 7, 2012, yet another paralegal at the Rosicki firm was demanding additional information be provided (some of which, like the IRS Form 4506, had clearly already been submitted by the Singers), and was asking that new forms be filled out (Singer 5/9/14 Aff., part of Ex. C). This same paralegal emailed Bonnie Singer on August 21, 2012, claiming that Fannie Mae was having "great difficulty" locating the 401-Mtge., even though the information is on Fannie Mae's website and on ACRIS.

By email dated August 2, 2012, the court directed the appearance of a Fannie Mae representative (in addition to Seterus) at the next court conference scheduled on August 14, 2012. Two days prior to the scheduled conference, the Rosicki firm advised the court that Fannie Mae was still determining "the best person to appear on this case based on the issues presented," and that no one was available for the conference scheduled on August 14th. More delay ensued. The court agreed to adjourn the matter to early September 2012, but despite diligent efforts on the part of my court attorney, the court could not get the parties and a Fannie Mae representative back in court until October 25, 2012.

In the meantime, no determination had been made by Fannie Mae on the loan modification requested by the Singers and, in early October 2012, the Rosicki firm began asking for "updated documents" so that the bank could complete its review of their loss mitigation application. The bank thus created another moving target. The Singers objected, claiming, and rightly so, that they submitted all of this documentation back in August and that they had been waiting for Fannie Mae to provide a date when one of its representatives could be available for a court conference. Finally, the court scheduled a conference on October 25, 2012 at 2:15 p.m. Edward Rugino, Esq. of the Rosicki firm responded that day, stating that the representative with whom he had worked had just left employment with Fannie Mae and that he was given the name of another contact at Fannie Mae, and that he was attempting to fix a date for the court appearance. Mr. Rugino also insisted that the financial documents Bonnie Singer produced in early August were now two months stale, and the underwriter needed the updated information to complete its review. Ever

mindful of the moving target problem, but striving to obtain an acceptable loan modification for the 400-Mtge., by email dated October 10, 2012, the court directed the Singers to provide the documents needed to update their application, but that the court stood firm on the October 25, 2012 conference.

Finally, by letter dated October 11, 2012, Seterus advised the Singers, that they "were unable to approve your request for a permanent loan modification under [HAMP], because your current payment . . . does not exceed 31% of your gross monthly income which is a requirement of the program" (Rugino 7/14/14 Affirm., Ex. B). Presumably, the calculation did not include the expenses of the mortgage which is the subject of Action No. 2. The letter goes on to say that the Singers might be eligible for a "Fannie Mae Loan Modification," and proposes a "Trial Period Plan," whereby three payments of $1,724.96 must be made by 11/1/12, 12/1/12 and 1/1/13. The letter states that the trial period payment is "approximately 24% of your total gross monthly income" of $10,802.00 based on documentation previously provided. The Singers promptly accepted this proposed trial plan and made the first required payment.

By email dated October 16, 2012, Edward Rugino of the Rosicki firm advised that Fannie Mae had finished researching the Singers' request (made more than five months earlier) to "merge" the two mortgages into a single mortgage loan.[FN6] Mr. Rugino advised that, per Fannie Mae, the request could not be granted since there are two separate mortgages encumbering two different parcels of real property, and that the only thing that could be done was to create an entirely new loan, [*6]but that Fannie Mae cannot issue new loans. "[T]he only way for the mortgagors to accomplish their desired result would be for [the] mortgagors to refinance the two mortgage loans with an authorized mortgage lender." Mr. Rugino also claimed that merging the two mortgages would create major liability-related problems since the two mortgages were purchased from a different seller. He further claimed that the Singers' action in combining the two apartments without notice or prior approval of either lender:

"was a breach and violation of both mortgage contracts, potentially compromising the security position of Fannie Mae in the properties and certainly complicating any foreclosure proceedings and subsequent disposition of the properties. The mortgage documents were intended to prevent such unilateral activity by the mortgagors and, as far as FNMA is concerned, it makes no sense for mortgagors to benefit from such activity performed in violation of both of the mortgage contracts, or for the court to condone such inappropriate activity."

Mr. Rugino's email went on to state that, while Fannie Mae cannot combine the two mortgages, it was willing to offer the Singers a trial payment plan for the 400-Mtge., the essential terms being:

"Loan Term: 322 months

Unpaid Principal Balance: $301,686.17

Balloon Amount: $0.00

Note Rate: 2.00%

Monthly Payment (PI): $1508.14

Monthly Tax & Insurance Payment: $202.90

Monthly HOA Payment: 869.45

Monthly Payment (PITIAS) $2594.41

Monthly MI Payment: $0.00

Trial First Payment Due Date: 11/01/2012"

Mr. Rugino's email clearly advises that the terms are subject to change upon completion of the

trial modification. Although Mr. Rugino insisted that this was not a HAMP modification, the 2% initial interest rate certainly mimicked HAMP.

On October 25, 2012, the court conducted yet another settlement conference. Christian Rudolph, a Portfolio Manager for Fannie Mae's National Servicing Organization attended the conference. Rather than contribute to the process, he merely deferred to Seterus on all matters. It was suggested that the Singers attempt a loan modification on the 401-Mtge. through the Frenkel firm and submit proof of the current modification that had just been worked out on the 400-Mtge.

On or about November 2, 2012, the Frenkel firm sent the Singers a loan modification application for completion (Burlingame Affirm. and Ex. G). By letter dated November 15, 2012, the Singers were notified by BOA that a dedicated Customer Relationship Manager by the name of Anne Lacava had been assigned to their loan (*id.*). Bonnie Singer alleges that she submitted all of the required documentation within 48 hours (Singer 5/9/14 Aff. ¶ 20). Indeed, by letter dated November 20, 2012, BOA sent a form letter regarding the 401-Mtge. acknowledging receipt of the Singers' loan modification request and promising a response when the necessary information was reviewed, which included proof that the Singers were already approved for a Fannie Mae trial modification (Burlingame 7/14/14 Affirm., ¶ 19 and Ex. G). Bonnie Singer avers that, even though [*7]BOA promised to expedite the process, they stopped responding in a few weeks and then never responded again until the Singers received a foreclosure notice in Action No. 2 (Singer 5/9/14 Aff. ¶ 20).

After BOA's November 20, 2012 letter, counsel asserts that (without reference to any documents or BOA's business records) "[a]lthough the Defendants provided many documents for the loan modification review, they still did not qualify for a loan modification" (*see* Burlingame 7/14/14 Affirm. ¶ 19). In counsel's supplemental affirmation, she attaches two "form letters" from BOA dated February 6 and 23, 2013 (Burlingame 9/18/14 Supp. Affirm., Exs. B & C thereto). The February 6, 2013 letter requested tax returns, pay stubs and HOA documentation, all of which had previously been requested by the Frenkel firm back in November 2012. The letter dated February 21, 2013 merely suggests that the Singers commence the loan modification application process all over again by submitting, for example, the same "Uniform Borrower Assistance Form" attached to the Frenkel firm's November 2, 2012 letter (*compare* Exs. G and and I to Burlingame 7/14/14 Affirm.). There is also no documentary support for counsel's unsupported claim that the Singers' HAMP application was denied on or about April 2, 2013 "for incomplete application." If it was, the Singers apparently were never notified of the same.

In the meantime, the Singers had made all three trial payments on the 400-Mtge. by December 18, 2012, and were anxiously awaiting the permanent loan modification papers from Seterus. On January 2, 2013, Seterus sent a letter to the Singers advising that they were pleased to offer them "a Loan Modification Agreement and Escrow Agreement." According to the proposed agreement, the Singers owed $374,811.61 as of that date as the "Unpaid Principal Balance" (Rugino Affirm., Ex. C thereto). The letter explained that the interest rate on the loan would be 2% interest for first 5 years, with initial monthly payments of $1,726.08, 3% for the 6th year, and 3.375% for the years 7-27, with an October 1, 2039 maturity date (*id.*). Although not broken down in the letter from Seterus, Mr. Rugino later advised by email in mid-February 2013 that $63,632.21 of the loan amount was accrued interest and $5,605.23 represented the escrow deficiency as of December 18, 2012.

By email dated January 15, 2013, Bonnie Singer objected to the permanent loan modification offered by Seterus and claimed it was not what had been agreed to in court and not what Fannie Mae's lawyer, Edward Rugino, had proposed via his October 16, 2012 email, which was a loan balance of only $301,686.17. The Singers also objected to the permanent loan modification being offered by Seterus, claiming that the escrow deficiency was incorrect and that the payment of real estate taxes on Apt. 400 should have ceased after the date the two units were combined. Seterus's investigation into the tax payments revealed that it had in fact been *erroneously* making tax payments on a *different unit* in the same complex commencing with the December 2011 payment, and the investigation also uncovered some other discrepancies (8/7/13 Burden Aff., attached to Iraci letter dated August 15, 2013). By letter dated October 28, 2013, Seterus advised the Singers that they were being offered a loan modification agreement on the same terms as the January 2013 proposed loan modification agreement, but that the new "Unpaid Principal Balance" was $380,281.61, of which $81,341.90 represented capitalized interest from their default through November 1, 2013 (Rugino Affirm., Ex. D thereto).[FN7]

In the meantime, for reasons which have never been explained to the court, it was not until July 18, 2013 that the Frenkel firm commenced Action No. 2 on BOA's behalf seeking foreclosure on Apt. 401.[FN8] At this point, the Singers retained legal counsel, and, on August 30, 2013, an answer was filed in Action No. 2 on the Singers' behalf by Paul Kerson, Esq. of the Law Offices of Leavitt & Kerson. On September 27, 2013, Mr. Kerson filed a motion in Action No. 2 (seq. no. 001) to consolidate the two foreclosure actions.[FN9]

At this point, the court ordered that a settlement conference be held in both actions, directing that representatives from both servicers attend the conference. An unsuccessful

conference was held on December 9, 2013, when counsel for BOA failed to appear. On January 1, 2014, Mr. Kerson sent a written proposal in response to Seterus's proposed loan modification agreement on the 400-Mtg., advising that the Singers were unwilling to pay the $81,000 in accrued interest, and Mr. Kerson proposed a total interest payment of $18,000. After numerous requests by my court attorney for a response from counsel for Fannie Mae, the court directed another conference on April 25, 2014 to be attended by both lenders with a representative with authority to settle. This was the last court conference on these matters, and thereafter the matters were adjourned without date. Counsel for the Singers advised that he intended to bring the instant motion to bar interest on both mortgages. Fannie Mae offered a loan modification on the 400-Mtge. whereby the Singers would pay $1,992.00 per month towards their mortgage arrears, but no interest would be tolled for delay. Counsel for BOA advised that the Singers were in the process of submitting yet another loan modification request, but claimed that their counsel had been advised that the loan application package was incomplete and that additional financial information was needed.

By letter dated April 28, 2014, counsel for the Singers attempted to accept Fannie Mae's offer, but with the proviso that the Singers have a right to offset any interest payments if they are reduced by the court in response to his planned motion to bar interest payments. By email dated May 6, 2014, Mr. Rugino advised that Fannie Mae:

"will be withdrawing its loan modification offer very soon unless accepted and brought current in the immediate future. FNMA further stated that, if mortgagor would like to pursue further litigation with regards to Tolling' of interest, that is their prerogative, but FNMA would not sign any affidavits or agreements pertaining to said anticipated litigation and the offered loan modification."

Thus, the Singers were presented with the dilemma of either agreeing to an amount that they did not believe was due and owing, in order to save the modification or, forego the modification in lieu of filing tolling motions. They choose to file the motions and accordingly any future attempts to obtain loan modifications ceased.

DISCUSSION

Before addressing the merits of the motions, the court notes that this motion was initially brought, by order to show cause, in Action No. 2 as motion sequence 002, but with a double caption. On July 30, 2014, as directed by my court attorney, counsel for the Singers attempted to e-file a copy of the order to show cause in Action No. 1 (*see* ECF Doc. 23), but the papers were "rejected returned for correction." By letter dated September 17, 2014, counsel for Fannie Mae objected to the fact that the signed order to show cause was never e-filed in Action No. 1 (*see* ECF Doc. 38). Nevertheless, counsel for Fannie Mae e-filed opposition papers to what he deemed an "unfiled motion," and the motion was fully briefed and argued before the court. Accordingly, since the court has the power to disregard such technical defects or irregularities (CPLR 2001), the motion is considered. The court directs the E-Filing Resource Center (Rm. 119A) to e-file a copy of the May 20, 2014 order to show cause in Action No. 1, under motion sequence no. 001, upon proof of payment of the appropriate motion fee by the Singers which shall be paid within 7 business days of today's date. Mr. Kearson, as an attorney who practices in New York County, should know how to file and e-file documents, and should not further disregard the directives of the court.**[FN10]**

Turning to the merits,3 NYCRR 419.2 establishes a "duty of good faith and fair dealing" by mortgage loan servicers in connection with their transactions with borrowers. This duty requires that servicers "make borrowers in default aware of loss mitigation options and services offered by the servicer in accordance with section 419.11" (3 NYCRR 419.2 [e]). This duty also requires servicers to "provide trained personnel and telephone facilities sufficient to respond promptly to borrower inquiries regarding their mortgage loans" (*id.*, 419.2 [f]), and to "pursue loss mitigation with the borrower whenever possible in accordance with section 419.11" (*id.*, 419.2 [g]). Part 419.11 creates an obligation on the part of servicers to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications as an alternative to foreclosure. Notably, section 419.11 (d) requires that servicers must complete their review of a borrower's eligibility for a loan modification or other loss mitigation options and advise the borrower or their representative of the determination in writing within 30 days of receiving all required documentation. Finally, section 419.11 (i) creates a good faith presumption on the part of servicers if they offer loan modifications in accordance with HAMP guidelines.

While these banking regulations create a duty on the part of lenders that arises once a default occurs, CPLR 3408 requires mandatory settlement conferences in certain mortgage foreclosure actions once a mortgage foreclosure action has been commenced. CPLR 3408 (a) and (f) read, in pertinent part, as follows:

"(a) In any residential foreclosure action involving a home loan . . . 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 [*8]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.

.....

(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."

To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408 (f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 203 [2d Dept 2014]). Following the adoption of CPLR 3408, the Chief Administrator of the Courts promulgated regulations setting forth the rules and procedures governing CPLR 3408 settlement conferences (*see* 22 NYCRR 202.12—a). This regulation requires that "[i]f the parties appear by counsel, such counsel must be fully authorized to dispose of the case" (22 NYCRR 202.12-a [c] [3]).

Fannie Mae argues that the Singers' request to toll interest from January 2010, the date of their default, is "drastic and draconian relief," and that a court of equity may not toll interest due on a mortgage in default out of sympathy for the homeowners. Likewise, BOA contends that the "stability of contract obligations must not be undermined by judicial sympathy," quoting *Emigrant Mtge. Co., Inc. v Fisher* (90 AD3d 823, 824 [2d Dept 2011] [internal quotation marks and citations omitted]). While is it true that a court may not "rewrite" the parties' agreement (*see e.g.*, *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 17 [2d Dept 2013]), it would be nonsensical for there to exist no suitable remedy for violations of CPLR 3408 (f), or for there to exist no suitable remedy where a plaintiff lacks good faith and files an action seeking equitable relief (such as in mortgage foreclosure cases). Foreclosure is an equitable remedy which triggers the equitable powers of the court (*Notey v Darien Constr. Corp.*, 41 NY2d 1055 [1977]; *Norwest Bank Minn., NA v E.M.V. Realty Corp.*, 94 AD3d 835, 836 [2d Dept 2012]).

To the contrary, courts are authorized to impose sanctions for violations of CPLR 3408 (f),

and one such sanction is the barring of interest on the loan for the period of time that the servicer acted in bad faith and unduly prolonged the foreclosure proceedings (*see U.S. Bank N.A. v Smith*, 123 AD3d 914 [2d Dept 2014] [mortgagee barred from collecting interest on mortgage for 9-month period]; *US Bank N.A. v Williams*, 121 AD3d 1098 [2d Dept 2014] [court canceled all interest accrued on the subject mortgage loan between the date of the initial settlement conference and the date that the parties agreed to a loan modification]; *US Bank N.A. v Sarmiento*, 121 AD3d at 200 [interest tolled from date mortgagor began placing $2,000 per month in an escrow fund, at the court's direction]; *see also Bank of America N.A. v Lucic*, 45 Misc 3d 916 [Sup Ct, NY County 2014]; *U.S. Bank, N.A. v Shinaba*, 40 Misc 3d 1239[A], 2013 NY Slip Op 51484[U] [Sup Ct, Bronx County 2013]; *Wells Fargo Bank, N.A. v Ruggiero*, 39 Misc 3d 1233[A], 2013 Slip Op 50871[U] [Sup Ct, Kings County 2013]; *Deutsche Bank Trust Co. of Am. v Davis*, 32 Misc 3d 1210[A], 2011 Slip Op 51238 [Sup Ct, Kings County 2011]). Because foreclosure is an equitable remedy which triggers the equitable powers of the court (*Notey*, 41 NY2d 1055 *supra*; *Norwest Bank Minn., NA*, 94 AD3d at 836, *supra*), courts have not hesitated to toll interest when it is an appropriate remedy for a [*9]mortgagee's unconscionable delay in prosecuting foreclosure actions (*see Dayan v York*, 51 AD3d 964 [2d Dept 2008]; *Danielowich v PBL Dev.*, 292 AD2d 414 [2d Dept 2002]; *Dollar Fed. Sav. & Loan Assn. v Herbert Kallen, Inc.*, 91 AD2d 601 [2d Dept 1982]; *South Shore Fed. Sav. & Loan Assn. v. Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]).

At least two courts have tolled interest back to the date of the borrower's default. In *Emigrant Mortg. Co. v Corcione* (28 Misc 3d 161 [Sup Ct, Suffolk County April 16, 2010]), in addition to assessing the bank $100,000 in exemplary damages for failing to act in good faith during the settlement conferences, the court also barred the bank from collecting any interest from the date of default in May 2008 to March 2010, noting that the bank offered no explanation for the 14-month delay between default and suit.**[FN11]** And in *HSBC Bank USA v McKenna* (37 Misc 3d 885 [Sup Ct, Kings County 2012]), the court found that the bank acted in bad faith in refusing to agree to a short sale of the mortgaged property and, as a consequence, could not recover interest from the date of the mortgagor's default.

Both Fannie Mae and BOA argue that, even if their servicers violated Part 419, these regulations do not provide the Singers with a private cause of action for any violations, and that the sole remedy is the imposition of fines and penalties on servicers by the Superintendent of the Banking Department, citing Banking Law § 595-b (1) and 3 NYCRR 418.10. Assuming that to be true, and mindful that communications between a loan servicer and the mortgagors after their initial default (but prior to an appearance in the settlement part) "cannot be the basis of a

violation of CPLR 3408(f)" (*Deutsche Bank Natl. Trust Co. v Izraelov*, 40 Misc 3d 1238[A], *4, 2013 Slip Op 51482[U] [Sup Ct, Kings County 2013], citing *Wells Fargo Bank, N.A.*, 108 AD3d at 17, *supra*), tolling interest prior to the settlement conference may be appropriate as a matter of equity.

Counsel for both lenders argues that the physical and legal combination of the two apartments by the Singers, without notice or prior approval by the lenders, was a breach of the mortgage contracts. This is not the case. Counsel has never identified what provision of each mortgage was violated. A full copy of the 400-Mtge. has never been filed with the court (*see* Rugino 7/14/14 Affirm., Ex. A [attaching only pages 1, 2 and 16 of the 400-Mtge.]). However, it appears to be the same form as the 401-Mtge. (i.e., "NEW YORK - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT - MERS Form 3033 1/01"). This mortgage, in section 7 (a) thereof, states only that the borrower may not "destroy, damage or harm the Property" or "allow the Property to deteriorate" (*see* Tarab 11/11/13 Affirm., Ex. A). There is no language that restricts a borrower from making physical improvements or structural changes to the premises or requires prior notice to, and approval by, the lender for such changes.[FN12] Thus, the Singers did not act in bad faith or in [*10]derogation of the mortgage in physically combining two contiguous apartments. In fact, it appears that the combination was legally permitted under the mortgages, without notice to, or prior approval of, the lenders. The Singers assert, without contradiction, that the value of Apt. 401 has substantially increased. There is no evidence or argument regarding how the property was destroyed, damaged, harmed or allowed to deteriorate.

Fannie Mae also argues that there is no basis to toll interest in Action No. 1 pursuant to CPLR 3408, because its servicer negotiated in good faith during the course of the CPLR 3408 conferences and because the Singers were offered a trial loan modification in October 2012 even though they did not qualify for HAMP. Fannie Mae also contends that, even though there was an inadvertent calculation error regarding the escrow amounts, the error was corrected and thereafter the Singers refused to accept the revised loan modification plan offered in October 2013 arguing over payment of the capitalization of accrued interest.

The court disagrees with plaintiffs' positive assessment of the negotiations. It is belied by the history recited above. To summarize:

Fannie Mae delayed filing of Action No. 1 (filed on June 14, 2011) 17 and 1/2 months after the date of default. Counsel then delayed filing the RJI for another three months after the answer was filed. The first settlement conference, scheduled on March 14, 2012, had to be rescheduled

to May 2, 2012 due to Fannie Mae's non-appearance, a one and one-half month delay. It took Fannie Mae and its counsel another five and 1/2 months to provide an explanation for why the two mortgages could not be merged or consolidated, and only after wasting time at two conferences in June and July attended by attorneys without knowledge of the case or settlement authority and only after my court attorney probed for answers. Thereafter, the Singers submitted the requested documentation for a loan modification of the 400-Mtge., despite confusing and conflicting requests by the Rosicki firm, by August 3, 2012. When that application became "stale," the court directed the Singers to update the information and, finally, after another two-month delay, Seterus offered the Singers a trial modification plan on or about October 11, 2012. When the Singers received the permanent loan modification papers from Seterus in January 2013, they objected to the

payment of $63,632.21 in accrued interest and the $5,605.23 accrued interest.[FN13] It took many months for Seterus to admit its mistake on the escrow deficiency, and only after much prodding by the court for status updates.[FN14] Seterus did not offer the Singers a new loan modification agreement until the [*11]very end of October 2013 — a whopping nine-month delay. Finally, it took Fannie Mae's counsel another five months to reject the Singers' January 1, 2014 counteroffer to pay $18,000 of the accrued interest.

Accordingly, the court holds that Fannie Mae and/or its counsel have acted in bad faith and have unreasonably delayed a resolution of this foreclosure action. As a result, interest should be tolled on the note and mortgage in the amount over and above 2% annually, for the period from September 30, 2011 (one month after Singers' filing of their answer in Action No. 1) through the date of this Decision and Order.[FN15]

Similarly, BOA contends that there is no basis to toll interest and asserts that it has negotiated with the Singers in good faith to offer them a loan modification on the 401-Mtge., both prior to and after the commencement of Action No. 2. BOA's counsel claims that: (1) there is no evidence that BOA acted in bad faith in denying the Singers' 2009 refinancing application, and that, in any event, it predated the enactment of Part 419; (2) the bank offered the Singers a HAMP loan modification in March 2010, but they did not qualify based on their finances; (3) the Frenkel firm sent the Singers a second loan modification application in November 2012, which was denied in April 2013 for incompleteness; (4) BOA did negotiate in good faith with the Singers during and since the initial CPLR 3408 conference in Action No. 2, first held on April 25, 2014; and (5) that, again due to the Singers' failure to complete the loan modification application process, their applications were denied on May 29, 2014.

Part 419 was not enacted until August 18, 2010, and did not become effective until October 1, 2010, thus these regulations were not in place when the Singers attempted to refinance the 401-Mtge. with BOA to consolidate the two loans. There is no evidence that BOA acted in bad faith in denying the 2009 refinancing application. According to the Singers' own profit and loss statement, as of December 2008, the Singers' total income was $106,071.76, and total expenses was $136,253.22 (Singer 5/9/14 Aff., part of Ex. B).[FN16]

However, the Singers and Mr. Feldman made repeated attempts to contact BOA, who held both mortgages at that time, to obtain loan modifications, but they were told in 2010 that their monthly mortgage payment, standing alone, did not exceed 31% of their combined gross income (the same claim made by Fannie Mae in rejecting the Singers' request for a HAMP modification in 2012). This was incorrect since, one of the four basic requirements for HAMP eligibility, is that "[t]he borrower's monthly mortgage payment (including principal, interest, taxes, insurance, and when applicable, association fees, existing escrow shortages) prior to the modification is greater than 31 percent of the borrower's verified monthly gross income" (*see* Making Home Affordable® Handbook for Servicers of Non—GSE Mortgages, Version 4.1, ch. 2, § 1.1.2 at 69 [HAMP Tier 1 Eligibility Criteria]). Indeed, according to "Exhibit A: Model Clauses for Borrower Notices," what is to be considered is the borrower's "currently monthly housing expense . . . on your first lien mortgage loan plus property taxes, . . ." (*id.*, Ex. A at 207). Since the 400-Mtge. and the 401-Mtge. are both "first liens" on the mortgaged premises, the monthly payments under both loans should have been considered in determining whether the Singers' "monthly housing expense" exceeded 31% of their gross monthly income. Although Fannie Mae's counsel argues that HAMP "expressly provide[s] for the modification of two mortgages separately when a property is encumbered by two different mortgages" (Rugino 7/14/14 Affirm ¶¶ 18, 20), his reference is to the Second Lien Modification Program, discussed in Chapter V of the Handbook which relates to *subordinate* loans (i.e., an equity loan, a HELOC or any "mortgage lien that would be in second lien position but for a tax lien, a mechanic's lien or other non-mortgage related lien that has priority"). It is beyond dispute that neither Fannie Mae nor BOA would take the position that its mortgage is subordinate to the other's mortgage.

Further, while BOA's counsel claims that the Singers were advised in March 2010 that they might be eligible for a HAMP modification of the 401-Mtge., no evidence to support that statement has been offered. The only evidence is that the Singers were considered for a traditional loan modification and, that Mr. Feldman was *orally* advised on November 5, 2010 that they had been denied based on their financial situation, and that their loan was "returned to normal servicing" (*see* Diaz Aff., ¶¶ 6, 7), even though it had been in default for over 10 months.

And for the next two years, the 401-Mtge. appears to have fallen into a black hole, despite the fact that my court attorney inquired about the status of BOA's foreclosure filing at nearly every conference with the Singers and the Rosicki firm. With the exception of sending a default letter in January 2012, BOA took no further action with respect to the 401-Mtge. until November 2012, when the Frenkel firm sent, *at the Singers' request*, a loan modification application. However, despite the Singers' good faith attempt to obtain a loan modification for the 401-Mtge. from BOA at that time, their request was never properly addressed, allowed to lapse and go stale, and then ignored. It was not until July 18, 2013, that the Frenkel firm commenced Action No. 2, creating another lengthy delay with interest at the [*12]rate of 6.75% racking up. And due to BOA's non-appearance at the December 9, 2013 scheduled conference due to "inclement weather and emergencies" (Burlingame 7/14/14 Affirm., ¶ 21), the first joint settlement conference in both actions could not be held until April 25, 2014. BOA failed to timely and properly process the Singers' 2010 request for a loan modification, refused to consider the Singers' total housing expenses and delayed commencement of the foreclosure action to the prejudice of the Singers, who had already been found eligible for a Fannie Mae loan modification in 2013 and 2014.

Based on the foregoing evidence, BOA did not act in good faith to explore loss mitigation options with the Singers from November 5, 2010 through the date of this Decision and Order, and that interest on the note and 401-Mtge. should be barred during that time on that portion of the interest rate over and above 2% annually. While this includes a period of time prior to the settlement conferences, it would be an absurd result if BOA, who delayed filing its mortgage foreclosure action by two years as compared to Fannie Mae, were to be penalized less than Fannie Mae, who engaged in the statutory process. Such a result would also create incentives for lenders to forestall filing foreclosure actions and frustrate the entire intent of the statutory process. A court in equity cannot countenance such a result.

CONCLUSION AND ORDER

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of defendants Lawrence and Bonnie Singer for an order forgiving interest owed by defendants on the notes and mortgages which are the subject of these actions is granted to following extent:

plaintiff Federal National Mortgage Association and its agents, successors and assigns are forever

barred, foreclosed and prohibited from demanding, collecting or attempting to collect, directly or indirectly, accrued interest on the note and mortgage that is the subject of *Federal National Mortgage Association v Singer, et al.*, Index No. 850039/11 (Action No. 1) which is over and above 2% annually for the period from September 30, 2011 through the date of this Decision and Order; and

plaintiff Bank of America, N.A. and its agents, successors and assigns are forever barred, foreclosed and prohibited from demanding, collecting or attempting to collect, directly or indirectly, accrued interest on the note and mortgage that is the subject of *Bank of America, N.A. v Singer, et al.*, Index No. 850200/13 (Action No. 2) which is over and above 2% annually for the period from November 5, 2010 through the date of this Decision and Order;

and it is further

ORDERED that the plaintiffs recalculate the amounts owed on each note and mortgage, in light of the court's barring of a portion of the interest, and notify the Singers and their counsel and the court of those amounts in writing within ten (10) business days of today's date; and it is further

ORDERED that after said ten (10) business days, plaintiffs in Action No. 1 and Action No. 2 are directed to reprocess the Singers for HAMP, Fannie Mae and/or any appropriate in-house loan modifications using the recalculated figures (and considering the expenses of both mortgages [*13]together as a whole); and it is further

ORDERED that within twenty (20) days, the parties shall contact the court to schedule a further CPLR 3408 conference; and it is further

ORDERED that the Singer's counsel shall serve a copy of this Decision and Order, with Notice of Entry, on counsel in Action No. 1 and Action No. 2 within seven (7) business days of today's date; and it is further

ORDERED that upon the Singer's counsel notification to the E-Filing Resource Center and payment of the appropriate motion fee with seven (7) business days of today's date, the E-Filing Resource Center (Rm. 119A) shall e-file a copy of the May 20, 2014 order to show cause in

Action No. 1, under motion sequence no. 001 (originally returned for correction).

This Constitutes the Decision and Order of the Court.

Dated: July 15, 2015

ENTER:

_____

J.S.C.

Footnotes

Footnote 1: In this decision, as well as in the case law, the term tolling interest is used interchangeably with, and is synonymous with, cancelling interest or barring the collection of interest.

Footnote 2: According to ACRIS (New York City's automated city register information system), BOA assigned the mortgage in Action No. 2 to Fannie Mae on April 16, 2015. Back in 2012, Fannie Mae's counsel had indicated to the court his belief that Fannie Mae owned the mortgages in Action No. 1 and Action No. 2. Accordingly, the court had understood that BOA was acting only as the servicer of the mortgage. To the extent that the understanding was incorrect, it had no impact on the settlement conferences or this decision.

Footnote 3: Ms. Diaz does not indicate the year in which the mortgagors had the deficit income of $5,864.00 per month. According to the Singers' own profit and loss statement, as of December 2008, the Singers' total income was $106,071.76, and total expenses was $136,253.22 (Singer 5/9/14 Aff., part of Ex. B [NYSCEF No. 27]). However, the phone conversation was in November, 2010. It would not be proper to base a 2010 loan modification determination on 2008 financial information.

Footnote 4: Formal substitution of counsel papers were never filed in Action No. 1 signaling a change in counsel for plaintiff Fannie Mae, but the Rosicki firm began appearing for plaintiff Fannie Mae sometime in March or April of 2012.

Footnote 5: Eventually Edward Rugino, Esq. of the Rosicki firm appeared. Of all the players in this matter, the court found him by far the most knowledgeable and responsive. It appears that

the bulk of his efforts were hampered by the servicer, Seterus. The court appreciates his involvement in this matter.

Footnote 6: The email uploaded as an attachment to this decision contains underlining which was inadvertently made by the court. My court attorney's computer does not have email extending back to 2012. Thus, the only copy is the underlined email that was in her file and uploaded herein.

Footnote 7: Once again, the capitalized interest amount was not specified in the communication from Seterus, but was provided by Mr. Rugino in an email dated August 24, 2013.

Footnote 8: Paragraphs 26 and 27 of the complaint seek reformation for an allegedly incorrect property description in the mortgage, stating "the deed and mortgage were intended to describe the same property identified . . . as Block 2164, Lot 1101."

Footnote 9: By Decision and Order dated July 8, 2015, the motion to consolidate was denied, with leave to renew upon letter application, after the cases are remanded out of the settlement part (should the matters not settle).

Footnote 10: For purposes of convenience, the court issues one Decision and Order for both actions (but issues separate "gray sheets" in the actions referencing this decision).

Footnote 11: This decision was vacated on rehearing when the parties reached an amicable and fair settlement (*Emigrant Mortg. Co., Inc. v Corcione*, 2010 NY Misc LEXIS 6933 [Sup Ct, Suffolk County Oct. 14, 2010]).

Footnote 12: Bonnie Singer avers that she and her husband always had every intention of refinancing and combine the two mortgages once the merger of the two tax lots was legally finalized (Singer 5/9/14 Aff. ¶ 5).

Footnote 13: Bonnie Singer objected to paying any accrued interest, claiming that it was not what was agreed to in court and was unfair, as she and her husband had been trying to get modifications since 2009. Contrary to her belief, neither Fannie Mae or its counsel ever agreed in court to waive the accrued interest on the 400-Mtge., and Mr. Rugino's October 16, 2012 email clearly stated that the "Unpaid Principal Balance" was "$301,686.17," not the outstanding loan balance, and thus Bonnie Singer's belief in this regard was unfounded.

Footnote 14: For example, in an email dated July 23, 2013, my court attorney advised Mr. Rugino: "The court has inquired several times about the status of the matter after our last conference on 4/22/13 and have gotten no response from plaintiff although you indicated that you will inquire and advise. If you cannot provide a detailed status by August 1, 2013, please

have your client submit [by mail] a detailed affidavit explaining the status of this matter by August 7, 2013." The following day, Mr. Rugino advised that he "understands" her frustration, but still had no response from Seterus.

Footnote 15: Although the majority of cases which bar interest do so for the entire amount of interest owed for a particular period (as opposed to a portion thereof), the court finds that the most equitable result here would be to bar that portion of the interest on the note and mortgage over and above 2% annually. This translates to the Singers paying an annual interest of 2%, which would mimic the loan modification finally offered by Fannie Mae to the Singers in 2013 and 2014 after much delay.

Footnote 16: The Singers also claim that they had contacted BOA in 2009 in regards to having the PMI removed "[a]s we had a perfect payment record with them for over two years" (Singer 5/9/14 Aff., ¶ 7). Bonnie Singer claims that BOA verbally refused, because one payment in January of 2009 was three days late (*id.*). She then claims that BOA promised to send them an application, but it was never received (*id.*). However, attached to her affidavit as part of exhibit B is a letter dated July 1, 2009 from BOA to Lawrence Singer thanking him for his recent inquiry to cancel the PMI on the 401-Mtge. This letter further advises that, in order to qualify, the loan-to-value ratio must be 75% or less, and gives directions on what they need to do to apply, one item being paying for and obtaining an appraisal from a BOA-approved appraiser. There is no evidence that the Singers ever followed through with this process.

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