NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4756-10T4

BAC HOME LOAN SERVICING, L.P.,

Plaintiff-Appellant,

v.

SYLVIA T. FICCO,

Defendant-Respondent.

Argued January 31, 2012 - Decided June 21, 2012

Before Judges Payne and Reisner.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity, Morris County, Docket No. F-24872-08.

Jeanette J. O'Donnell argued the cause for appellant (Powers Kirn, L.L.C., attorneys; Ms. O'Donnell, on the brief).

Richard H. Kotkin argued the cause for respondent.

PER CURIAM

In this residential foreclosure case, plaintiff BAC Home Loan Servicing, L.P. (formerly Countrywide Home Loans, Inc.) appeals from a February 25, 2011 order, granting a motion by defendant Sylvia T. Ficco to enforce a loan modification, and a

May 9, 2011 order denying plaintiff's motion for reconsideration.

We agree with Judge Stephan C. Hansbury that defendant mortgagor presented legally competent evidence that by letter dated March 30, 2010, plaintiff mortgagee approved her application for a loan modification, and that she accepted plaintiff's offer by continuing to make payments under the loan modification offered to her. We also agree with the trial judge that plaintiff failed to present legally competent evidence to support its claim that the March 30, 2010 letter granting the loan modification was sent in error. We therefore affirm the orders on appeal, substantially for the reasons stated by Judge Hansbury in the written statements he issued with those orders.

I

The relevant events can be summarized briefly as follows. In April 2007, defendant took out a home loan of nearly $600,000 secured by a thirty-year mortgage on her home. She defaulted and plaintiff filed a foreclosure complaint in June 2008. In October 2009, plaintiff accepted defendant's application for a loan modification. As part of that process, the parties entered into a Home Affordable Modification Trial Period Plan, and plaintiff sent defendant an October 12, 2009 letter encouraging her to "start your three-month trial period for your mortgage

loan modification." The documents in the record show that as part of that Plan, plaintiff represented to defendant that if she provided a list of requested financial information, and if that information was found acceptable, and she made her payments, she would be approved for a permanent loan modification. By letter dated March 30, 2010, plaintiff advised defendant that she had qualified for a permanent loan modification, and that she would shortly receive the Modification Agreement to sign. The letter "strongly encourage[d]" her to keep making her payments under the plan, which she faithfully did. Plaintiff cashed her payment checks.

Although defendant continued to make her payments, seven months later, on November 22, 2010, plaintiff changed its position and sent defendant a letter advising that she was not eligible for a loan modification after all. The letter did not mention any failure by defendant to submit information, sign documents, or otherwise cooperate in the modification process. Instead, the letter asserted that plaintiff's calculation of the "net present value of a modification" revealed that modifying the loan would not be "in the financial interest of the investor that owns your loan."

On November 23, 2010, defendant filed a motion to enforce the loan modification. Defendant's motion was supported by her

November 22, 2010 certification, attesting to plaintiff's offer of the loan modification and the March 30 letter, attesting that she had made "all of the required mortgage payments from November, 2009, to the present," and properly authenticating copies of all of her canceled checks for those payments. Plaintiff filed a two-page letter brief in opposition. The judge found that plaintiff failed to submit any legally competent evidence to support its opposition to defendant's motion, and that the letter from plaintiff's counsel was "uncertified hearsay." Noting that defendant had made all of her payments, pursuant to the March 30, 2010 letter telling her that she qualified for the loan modification, the judge held that plaintiff was bound by its March 30 offer and defendant's acceptance of that offer.

Plaintiff filed a motion for reconsideration, consisting of a brief with some unauthenticated documents attached. The trial judge denied the motion, noting once again the lack of competent evidence to support plaintiff's original motion opposition or its reconsideration motion. This appeal followed.

II

In its appeal, plaintiff contends that there was no enforceable loan modification because "there was never a meeting of the minds," primarily because the March 30 letter was sent

"in error." Alternatively, plaintiff argues that the trial period offer was conditional and not an enforceable offer until further documents were presented and signed; and plaintiff never offered defendant a "permanent loan modification." At oral argument of this appeal, plaintiff's counsel candidly admitted the obvious - the record contains no legally competent evidence to support plaintiff's central claim that the March 30 letter was sent in error. Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 544 (App. Div. 1986) ("Facts intended to be relied on which do not already appear of record and which are not judicially noticeable are required to be submitted to the court by way of affidavit or testimony" rather than by merely attaching them to a brief.) In fact, plaintiff did not properly authenticate any of the documents it submitted to the trial court. Ibid. Plaintiff also improperly submitted a reply brief to this court attaching documents it did not submit to the trial court and asserting arguments it did not make before the trial court. See R. 2:5-4(a); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973).

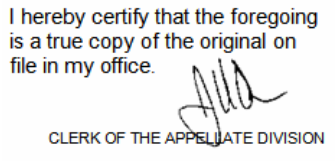
On this record, we find plaintiff's appellate arguments are without sufficient merit to warrant further discussion, beyond the following comments. R. 2:11-3(e)(1)(E). The March 30 letter constituted an offer, which defendant accepted. Whether we

consider this interchange as the modification of a contract or as the binding settlement of litigation, the result is the same. Plaintiff was bound to fulfill the offer that defendant accepted. Further, even if the March 30 letter were sent in error, we would be inclined to find that plaintiff was equitably estopped from denying defendant the benefit of the bargain, because she reasonably relied to her detriment on that letter in making continued payments. Knorr v. Smeal, 178 N.J. 169, 178 (2003).

Unlike the unpublished federal court decision plaintiff has cited to us, defendant's claim is not based merely on her having made payments under a trial period plan, but on plaintiff having unequivocally notified her that she qualified for the loan modification, and having induced her to make continued payments based on that promise. We emphasize that the obligation we find here, to provide defendant with a loan modification, lies with plaintiff. If plaintiff wishes to avoid alleged problems with the federal loan modification program, as represented to us at oral argument (albeit with no supporting legally competent evidence), our decision does not preclude plaintiff from offering to directly refinance defendant's mortgage through an "in house" loan.

Finally, we observe that inducing debtors to continue making mortgage payments over an extended period of time, on the promise of a loan modification, only to eventually pull the rug out from under them when they are unable to satisfy criteria beyond prompt continuing payment of the mortgage, borders on unconscionability.[1]

Affirmed.



[1] We confess some puzzlement at why a mortgage company would continue foreclosure proceedings against a debtor who, unlike many, is actually paying her mortgage. The "net present value" investment formula seems divorced from the current reality, which is that foreclosure is unlikely to yield a higher investment return than keeping in place a "paying" mortgage. We emphasize, however, that our decision of this appeal does not turn on any of those observations, but on the application of legal and equitable principles to the evidentiary record before us.