

[*1]

U.S. Bank N.A. v Thomas
2013 NY Slip Op 51520(U)
Decided on July 5, 2013
Supreme Court, Kings County
Schmidt, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 5, 2013

Supreme Court, Kings County

**U.S. Bank National Association, AS TRUSTEE FOR THE
STRUCTURED ASSET INVESTMENT LOAN TRUST,
2005-6, Plaintiff(s),**

against

Lydia R. Thomas, et al., Defendant(s).

7054/09

Plaintiff Attorney: Robin L. Muir, Esq., Hogan Lovells, US, LLP, 875 Third Avenue,
New York, NY 10022

Defendant Attorney: Pavita Krishnaswamy, Esq., Brooklyn Legal Services, 105 Court
Street, 4th Fl., Brooklyn, NY 11201

David I. Schmidt, J.

Upon the foregoing papers, defendant Lydia R. Thomas moves for an order, pursuant to 22 NYCRR § 202.44, confirming the report and recommendation of Referee Deborah Goldstein dated November 14, 2011.

Plaintiff U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust 2005-6 commenced this action to foreclose a mortgage executed by defendant on April 4, 2005. The mortgage secures an adjustable rate note in the amount of \$260,000.00. Following a significant upward adjustment of the interest rate, defendant encountered difficulties making payments under the mortgage and note, resulting in a default in December 2008. According to defendant, in May 2009, the servicer for plaintiff, ASC/Wells, which was obligated to follow the guidelines of the Home Affordable Modification Program (HAMP), offered defendant a modification with terms that were significantly less favorable than those which would be required under HAMP. In June 2009, [*2]defendant sent correspondence to ASC/Wells wherein she rejected the modification offer on the basis that it was not affordable and further requested that she be reviewed for a modification under HAMP.

Pursuant to CPLR 3408, this matter action was referred to the Foreclosure Settlement Conference Part (FSCP) for mandatory settlement conferences. Several conferences were thereafter held beginning on August 6, 2009, with ASC/Wells represented by the law firm of Steven J. Baum, P.C. (Baum). According to the report of Referee Goldstein, defendant reported at the initial conference that she had previously submitted modification workout packages to ASC/Wells seeking a HAMP review, but rather than conducting a HAMP review, ASC/Wells reviewed defendant for an in-house modification, erroneously claiming that a borrower must specifically request to be reviewed under HAMP. In subsequent conferences, ASC/Wells requested more documents from defendant and an extension of time to conduct a HAMP review. Instead of completing a HAMP review, ASC/Wells offered defendant a forbearance agreement. The referee states in her report that when she inquired about the details of the modification review that was being conducted, it was discovered that ASC/Wells was using incorrect income information. The referee directed defendant to clarify the income issue by submitting an updated workout package.

At a conference held on March 8, 2010, the appearing attorney from Baum reported that defendant was denied under HAMP as the result of a negative Net Present Value (NPV). According to the referee, ASC/Wells failed to provide defendant with a denial letter specifically stating the basis for denial, along with the inputs used for the NPV test as required by HAMP guideline 09-08. Additionally, the Baum attorney was unable to reach a representative of ASC/Wells with authority to settle and who had knowledge of the HAMP review conducted.

In her report, the referee states that ASC/Wells requested an entirely new workout application from defendant as the result of ASC/Wells' misplacement of documents and the fact that other documents previously submitted by defendant had become "stale." The referee instructed defendant to resubmit and update the modification package and instructed Baum and ASC/Wells to expedite a new HAMP review. However, due to apparent law office failure, the modification package was not forwarded by Baum to ASC/Wells when the parties met for the next settlement conference on August 11, 2010. The referee directed Baum to escalate and expedite the HAMP review and to appear at the next settlement conference with the results.

A conference was subsequently held on October 21, 2010. According to the referee, the Baum attorney reported that the modification review was in "the final stages" and that ASC/Wells required no further documentation. Nonetheless, the failure of ASC/Wells to present at the conference a finalized modification, as it was instructed, prompted the referee to issue a directive stating the following:

"Plaintiff/ASC has failed to comply w[ith] federal HAMP guidelines, and failed to complete its modification review despite the fact that defendant [*3] submitted an application for loss mitigation back in 6/09. Although ASC escalated' the review and conceded that all necessary documents were received from defendant, the review has not been completed. ASC is directed to complete its modification review and provide defense w[ith] a proposal for loss mitigation on or before 10/26/10."

The referee further directed ASC/Wells "to appear in person by a knowledgeable and authorized representative on 10/26/10 to address the inexplicable delays and blatant failure to adhere to federal guidelines, the good faith requirements under CPLR 3408 amongst other things."

Despite the directive, ASC/Wells appeared at the October 26, 2010 by Carol Orozco, who admitted that she lacked personal knowledge of the loan and the long history of the HAMP review. Moreover, the referee noted in her report that ASC/Wells failed to complete its HAMP review in accordance with its representations at the prior conference.

At the final settlement conference on November 19, 2010, the referee was advised that ASC/Wells hired the firm of Hogan Lovells to appear with Baum as co-counsel. The referee states in her report that the ASC/Wells attorneys did not address the prior delays in conferencing, but rather took the position that defendant was reviewed and denied under HAMP "a long time ago" for negative NPV. The referee stated that contrary to previous representations, ASC/Wells "had no intention of reviewing Defendant's recently submitted workout submissions under HAMP or substantiating the basis for the prior NPV denial (that was based on the wrong income)." The referee further stated:

"Throughout the conferencing process, absolutely no progress was made toward the evaluation of Defendant Thomas for a loan modification or the resolution of this foreclosure action. The lack of progress is wholly attributable to the Foreclosing Parties' dilatory conduct, which has wasted judicial time and resources, and has required Defendant to re-submit documents that were seemingly ignored. For several months, the Baum Law Firm and Servicer ASC/Wells stalled the modification review process by requesting additional and duplicative documents, while interest continued to accrue at the original annual percentage rate of 8.5%, which increased the payoff substantially.

Instead of conducting a timely review, the Foreclosing Parties and/or their counsel made several overlapping document demands; lost track of or failed to examine documents that Defendant submitted, resulting in duplicative requests; have allowed documents that were timely when submitted to become out-dated, thus providing a pretext for demanding multiple submissions of the same documents; denied Defendant's applications for loss mitigation without complying with federal HAMP guideline 09-08; and have apparently made no effort to evaluate the fundamental financial information that Defendant submitted more than two years ago in order to determine an affordable monthly payment upon which a modification could be structured. This conduct - which would continue *ad infinitum* if not [*4]checked - demonstrates the Foreclosing Parties' failure to participate in good faith in the foreclosure settlement conferencing process.

The Foreclosing Parties have prolonged and ultimately frustrated the workout process, inflated Defendant's original loan, caused the defense to attend successive conferences during which Servicer ASC/Wells and the Baum Law Firm conducted a protracted modification review, and wasted significant judicial resources. Because the Foreclosing Parties come to this Court of equity with unclean hands, having failed to negotiate an affordable loan modification in good faith, or to comply with HAMP guidelines and this Referee's directives, appropriate sanctions are recommended."

The matter was thereafter referred to this Part, where additional conferences were held with the parties. Oral argument on the instant motion to confirm the referee's report and recommendation was heard on April 4, 2013.

CPLR 3408, as amended in 2009, provides that "[b]oth 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 procedures and rules for CPLR 3408 settlement conferences promulgated by the Chief Administrator of the Courts are set forth in 22 NYCRR 202.12—a. With regard to the obligation of the parties to negotiate in good faith imposed by CPLR 3408 (f), these rules provide,

"The parties shall engage in settlement discussions in good faith to reach a mutually agreeable resolution, including a loan modification if possible. The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner" (22 NYCRR 202.12—a[c][4]).

Courts have found that lenders failed to negotiate in good faith under varied circumstances. In [*Wells Fargo Bank, N.A. v Hughes* \(27 Misc 3d 628 \[2010\]\)](#), the court dismissed the subject foreclosure action without prejudice where the lender, contrary to the directives of the court, presented a modification proposal which included an adjustable rate component. "Bad faith" was found where, despite defendants making all required payments under a trial modification, plaintiff denied defendants' request for a permanent modification based on their debt to income ratio without any evidence to support this determination ([*Wells Fargo Bank, N.A. v Meyers*, 30 Misc 3d 697 \[2010\]](#)). In the *Meyers* case, the court ordered that plaintiff execute a final modification based on the terms of the trial modification and dismissed the underlying foreclosure action. In *Household Finance*

Realty Corporation of New York v Philbrick (Sup Ct, Chautauqua County, March 31, 2011, Dillon, J., index No. K1-2010-1354), the court dismissed the action where the lender refused to consider any settlement proposal unless the borrower paid forty percent of the arrears, which was clearly beyond her financial ability. [*5]

In *BAC Home Loans Servicing v Westervelt* (29 Misc 3d 1224[A], 2010 NY Slip Op 51992[U] [2010]), the court barred plaintiff from collecting certain arrears, interest and fees due to plaintiff's default in appearing at a settlement conference, its failure to communicate with the referee, its refusal to re-examine defendant's income pursuant to HAMP directives and its refusal to work toward a modification with a borrower who is gainfully employed. In *One West Bank, FSB v Greenhut* (36 Misc 3d 1205[A], 2012 NY Slip Op 51197[U] [2012]), the court assessed a \$1,000.00 sanction against plaintiff, finding that plaintiff's failure to produce at a settlement conference a representative with authority to fully dispose of the case demonstrated a failure to proceed in good faith.

In [*Emigrant Mortgage Co. Inc. v Corcione* \(28 Misc 3d 161 \[2010\]\)](#), plaintiff's delay in responding to defendants' entreaties toward resolution, plaintiff's offer to defendant of a shockingly unconscionable loan modification agreement and plaintiff's misrepresentations as to the amount of taxes it advanced, led the court to find that plaintiff failed to act in good faith. As a result, the court barred and prohibited collection of interest accrued, legal fees and expenses for a certain period, fixed principal at a certain amount and awarded exemplary damages of \$100,000.00.

Recently, the Appellate Division, First Department advised that "[w]hile the aspirational goal of CPLR 3408 negotiations is that the parties reach a mutually agreeable resolution to help the defendant avoid losing his or her home' (CPLR 3408 [a]), the statute requires only that the parties enter into and conduct negotiations in good faith (see subd [f]). . .there are situations in which the statutory goal is simply not financially feasible for either party" ([*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 638 \[2012\]](#)). The court stated that "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by defendants, and plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*id.*). Nonetheless, the court pronounced that "merely by proving the absence of fraud or malice on the part of the lender" does not establish compliance with the good faith requirement of CPLR 3408 and

that "[a]ny determination of good faith must be based on the totality of the circumstances" (*id.* at 638-639).

On two occasions, the Appellate Division, Second Department determined that certain remedies, ordered by lower courts for violation of the good faith requirement of CPLR 3408, are not appropriate or authorized under the statute. In [*IndyMac Bank F.S.B. v Yano-Horoski*, 78 AD3d 895](#) [2010], the court stated that "the severe sanction imposed by the Supreme Court of cancelling the mortgage and note was not authorized by any statute or rule, nor was the plaintiff given fair warning that such a sanction was even under consideration" (*IndyMac Bank F.S.B.*, 78 AD3d at 896 [citation omitted]). Recently, in *Wells Fargo Bank, N.A. v Meyers* (___ AD3d ___, 2013 NY Slip Op 03085), the court held that the lower court's remedy of compelling the execution of a final modification based on the terms trial modification was unauthorized and inappropriate, as it had the effect of enforcing a contract [*6] to which the parties never freely agreed and deprived plaintiff of due process since it was not given notice that such remedy would be applied. While holding that the compulsion of a modification under the circumstances was beyond the scope of the court's power under CPLR 3408, the court stated in conclusion:

"[I]t is beyond dispute that CPLR 3408 is silent as to sanctions or the remedy to be employed where a party violates its obligation to negotiate in good faith. In amending CPLR 3408 to add subdivision (f), the Legislature declined to authorize or set forth any particular sanction or penalty to impose upon a party found to have failed to satisfy its obligation under CPLR 3408(f) to negotiate in good faith. Unless the Legislature chooses to specify appropriate sanctions or remedies to be employed in such circumstances, the courts will continue to endeavor to enforce the mandate of CPLR 3408(f) as best they can in the absence of a sanctioning provision"

* * *

"In the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case. What may prove appropriate recourse in one case may be inappropriate or unauthorized under the circumstances presented in another." Accordingly, in the absence of further guidance from the Legislature or the Chief Administrator of the Courts, the courts must prudently and carefully select among

available and authorized remedies, tailoring their application to the circumstances of the case. (*Wells Fargo Bank, N.A. v Meyers*, ___ AD3d ___, 2013 NY Slip Op 03085).

As a general rule, courts will not disturb the findings of a referee as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility ([*Last Time Beverage Corp. v F & V Distribution Co., LLC*, 98 AD3d 947](#), 950 [2012]). A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor (*id.*; [*see Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897](#), 898 [2011]). The record here supports the referee's findings that ASC/Wells and its counsel did not negotiate in good faith from the outset of the conferences by, among other acts and omissions, their failure to follow HAMP directives, their needless delaying of the workout process, their misrepresentations that a modification offer would be finalized by certain times and their violation of the referee's directive of October 21, 2010.

In its decision, the *Meyers* court noted that several courts, upon finding that foreclosing plaintiffs failed to negotiate in good faith, barred them from collecting interest, legal fees and expenses ([*see Bank of Am. N.A. v Lucido*, 35 Misc 3d 1211](#)[A], 2012 NY Slip Op 50655[U] [2012]; *BAC Home Loans Servicing v Westervelt*, 29 Misc 3d 1224[A], 2010 NY Slip Op 51992[U] [2010]; [*Emigrant Mtge. Co. Inc. v Corcione*, 28 Misc 3d 161](#) [2010]; [*Wells Fargo Bank, N.A. v Hughes*, 27 Misc 3d 628](#) [2010]). The *Meyers* court gave no clear indication as to whether such remedies were [*7]permissible or not, stating that "[w]hile we do not rule out the possibility of other permissible remedies, we conclude that the one employed here-imposition of the terms of the so-called original modification agreement proposed by the plaintiff and accepted by the defendants'. . . as the new, binding terms of the agreement between the defendants and Freddie Mac-was unauthorized and inappropriate" (Emphasis added). In addition to the aforesaid cases, there have been other instances where lower courts have cancelled interest as a remedy for a violation of CPLR 3408 (*Wells Fargo Bank, N.A. v Ruggiero*, 39 Misc 3d 1233[A], 2013 NY Slip Op 50871[U] [2013]; [*HSBC Bank USA, N.A. v McKenna*, 37 Misc 3d 885](#) [2012]; *U.S. Bank N.A. v Green*, Sup Ct, Kings County, March 25, 2013, Kurtz, J., index No. 9220/09).

The primary argument of plaintiff against the cancellation of interest is that the court does not have the authority to alter the contractual rights of the parties, particularly in light of the *Meyers*. However, the *Meyers* court, while holding that a court cannot compel a plaintiff to offer a modification with specific terms, did not explicitly hold that cancellation or tolling of interest cannot constitute an appropriate remedy under certain circumstances. The instant action for foreclosure is equitable in nature (*see Notey v Darien Constr. Corp.*, 41 NY2d 1055 [1977]; [Mtge. Elec. Registration Sys., Inc. v Horkan](#), 68 AD3d 948 [2009]). "Once equity is invoked, the court's power is as broad as equity and justice require" (*Mtge. Elec. Registration Sys., Inc.*, 68 AD3d at 948, quoting *Norstar Bank v Morabito*, 201 AD2d 545 [1994]). "In an action of an equitable nature, the recovery of interest is within the court's discretion" ([Dayan v York](#), 51 AD3d 964, 965 [2008]; *see* CPLR 5001 [a]; [Deutsche Bank Trust Co., Ams. v Stathakis](#), 90 AD3d 983, 984 [2011]). In an appropriate case, equity requires the cancellation of any interest awarded on the unpaid principal balance of the mortgage ([Norwest Bank Minn., NA v E.M.V. Realty Corp.](#), 94 AD3d 835 [2012]). Insofar as the lack of good faith of plaintiff's servicer resulted in the accumulation of interest during the protracted period of settlement negotiations, the court finds that the cancellation of interest and late fees on the principal balance of the mortgage from August 9, 2009, as recommended by the referee, is the appropriate sanction. In fact, it has been expressed by defendant's counsel during conferences with this court that such reduction of the indebtedness may result in a feasible modification under recent amendments to HAMP income requirements. Such a result would clearly serve the salutary purpose of CPLR 3408, which is to help defaulting mortgagors remain in their homes.

Of course, there may be a time when the Appellate Division directly addresses the issue of whether cancellation of interest is an authorized and appropriate under CPLR 3408, or when the Legislature or Chief Administrator of the Courts chooses to specify appropriate sanctions or remedies, which may or may not include the cancellation of interest. If plaintiff so elects, this court will issue an order staying this action until such time as the issue is settled. Otherwise, defendant's motion is granted to the extent that the report and recommendation of the referee is confirmed and that all interest and late fees on the underlying indebtedness are forfeited from August 6, 2009 until the date the parties agree to a modification.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C. [*8]

[Return to Decision List](#)