

VT SUPERIOR COURT
WASHINGTON UNIT

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

2013 OCT 15 A 11: 25

STATE OF VERMONT,)
Plaintiff)
)
v.)
)
BANK OF AMERICA, N.A.,)
Defendant)

FILED
CIVIL DIVISION
Docket No. 639-10-136wsc

CONSUMER PROTECTION COMPLAINT

I. Introduction

1. The Vermont Attorney General brings this suit under the Vermont Consumer Protection Act in response to unfair and deceptive acts and practices by Defendant Bank of America, N.A. ("Bank of America" or "Defendant") in the course of foreclosure mediations in this state, involving Defendant's (a) failure or refusal to comply with mediation settlements in Vermont state court foreclosure actions to which it previously agreed; (b) billing foreclosure defendants (homeowners) for more money than their mediation settlements provided; and (c) sending mailings to homeowners containing misrepresentations, including misrepresentations about the terms of mediation settlements, the amounts of money due Defendant, and the status of the foreclosure actions. The Attorney General seeks injunctive relief, restitution and other compensation to consumers, civil penalties, fees and costs, and other appropriate relief.

II. Parties, Jurisdiction and Related Matters

1. Defendant Bank of America, N.A., is a nationally-chartered bank with headquarters located at 100 North Tryon Street, Charlotte, North Carolina 28202.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

2. The Vermont Attorney General is authorized under the Vermont Consumer Protection Act, 9 V.S.A. § 2458(b), to sue to enforce the Act's prohibitions on unfair and deceptive acts and practices in commerce.

3. This Court has personal jurisdiction over Defendant and is the proper venue for this action, based on Defendant's lending and related financial activities throughout Vermont, including in Washington County.

4. This action is in the public interest.

III. Statutory Framework

A. Vermont's Foreclosure Mediation Law

6. Under the Vermont Foreclosure Mediation Law, 12 V.S.A. §§ 4631-4637, in an action for foreclosure of a mortgage on any owner-occupied dwelling house of four units or less, except in some limited cases, the court must refer the case to mediation with the mortgagee whenever the mortgagor enters an appearance or requests mediation prior to four months after judgment is entered.

7. During such a mediation, the mortgagee must, among other things, use and consider available foreclosure prevention tools, including loan modification, and produce for the mortgagor and mediator documentation of its consideration of those options.

8. The mediator in a foreclosure mediation is charged with writing a report describing the mediation and setting out the results of the mediation, including whether a full or partial settlement was reached.

B. The Consumer Protection Act

9. The Vermont Consumer Protection Act, 9 V.S.A. § 2453(a) ("the Act"), prohibits unfair and deceptive acts and practices in commerce.

10. A deceptive act or practice under the Act occurs when there is a material representation, omission, or practice, interpreted reasonably and likely to mislead consumers.

11. An unfair act or practice under the Act occurs when (a) there is substantial harm to consumers that they could not have reasonably avoided, and the harm is not outweighed by any countervailing benefit to consumers or to competition, or (b) another law or regulation designed to protect consumers is violated.

IV. Facts

A. *Bank of America v. Gaudette*

12. On February 10, 2102, Defendant sued Brian R. and Tina M. Gaudette in Vermont Superior Court, Grand Isle Unit, docket no. 15-2-12 Gicv, to foreclose on the mortgage on their home in Alburgh, Vermont. (The Gaudettes were divorced, and Ms. Gaudette did not participate in the case.)

13. The matter was referred to mediation, and retired Judge Benjamin Joseph was appointed as mediator.

14. The mediation took place on May 16, 2012, and resulted in an agreement by Bank of America to modify Mr. Gaudette's home loan on specified terms, including a total balance due of \$129,117.27, a new and fixed interest rate of 2.5 percent, a monthly payment of \$791.55 beginning in June 2012, and no contingencies or conditions except for Mr. Gaudette's obligation to make three consecutive "trial payments" at the agreed amount.

15. In early June, Mr. Gaudette made his first payment of \$800, more than the required \$791.55.

16. Bank of America then sent Mr. Gaudette a notice that his required payment amount would now be \$834 a month, in excess of the amount agreed to in mediation.

17. Although he disagreed with Bank of America's demand for an increased amount, but not wanting to jeopardize the mediation agreement, Mr. Gaudette sent the Bank a treasurer's check for \$868 on July 2, 2012, including an additional \$34 for the June payment and the requested \$834 for the July payment. He continued to pay \$834 a month through December 2012.

18. However, on July 10 and July 30, 2012, Bank of America sent Mr. Gaudette notices citing amounts due that were incorrect.

19. On September 27, 2012, the Grand Isle Superior Court held a status conference, at which the attorney for Bank of America advised that the Bank was at that time sending out a permanent loan modification package to Mr. Gaudette, which would mirror the trial payment plan agreed to at the May 2012 mediation.

20. Sometime after October 2, 2012, Mr. Gaudette received a statement from Bank of America containing terms that were inconsistent with the mediation agreement, including an interest rate of 3 percent for the first 5 years with a monthly payment of \$846.33 per month, and then 3.75 percent for the remainder of the loan term, with a monthly payment of \$888.35 per month.

21. By letter dated October 11, 2012, Mr. Gaudette advised the court that he would not sign the loan modification paperwork most recently sent to him, because it was materially different than what had been agreed to at his mediation.

22. Next, Bank of America sent Mr. Gaudette a notice dated December 17, 2012, stating that he had made a total of \$2,976.72 in “partial payments” on his loan, and that these “partial payments on your account are not sufficient to satisfy the full delinquency on your loan.” Without further explanation, the Bank enclosed a check in the amount of \$2,976.72, far short of the \$5,838.00 that Mr. Gaudette had actually paid to Bank of America from June through December 2012.

23. On January 24, 2013, the Grand Isle Superior Court, Hon. Dennis R. Pearson, presiding, issued a set of Findings, Decision, and Final Order that concluded that at the mediation session on May 16, 2012, Bank of America and Brian Gaudette had reached a complete and enforceable agreement on all material terms for modification of Mr. Gaudette’s underlying debt and mortgage; that there were no contingencies or conditions other than his initial three payments in the amount of \$791.55 per month; that Mr. Gaudette acted in accordance with the parties’ agreement; and that he was entitled to have that agreement specifically enforced against Bank of America.

24. Judge Pearson further noted that “there are over-riding policy issues in play here, including the Vermont Legislature’s determination that mediation of foreclosure disputes should be a priority in all cases to which it is applicable, and that loan modification and/or reinstatement where possible is a goal to be encouraged and facilitated by the courts.”

25. Judge Pearson ordered Bank of America to send Mr. Gaudette, within 30 days, a final loan and mortgage modification package with all necessary documents to sign, consistent with the terms of the mediation agreement, and to credit him for all payments previously made.

26. Judge Pearson set Mr. Gaudette's monthly payment at \$791.55, with the rest of his arrearage to be amortized over the life of the loan.

27. Mr. Gaudette made all monthly requirements as provided for in the mediation agreement and in Judge Pearson's Order.

28. Despite Bank of America's agreement to modify Mr. Gaudette's loan to require only monthly payments of \$791.55, with no back payment, as well as Judge Pearson's incorporation of the terms of that agreement in his Order and Mr. Gaudette's compliance with the agreement and the Order, during the first nine months of 2013 Bank of America sent Mr. Gaudette a series of inaccurate and threatening letters and statements, at odds with the agreement and the Order, including:

- a. February 22, 2013—a letter stating that Bank of America had received his payment of \$953.76 (he made no such payment) and that he now owed \$41,303.60. The letter threatened foreclosure and stated that the Bank would continue to report the past due status of his loan to credit reporting agencies until his loan was brought up to date.
- b. July 25, 2013—a letter stating that the Bank had received from Mr. Gaudette a payment of \$953.76 (again, he made no such payment) and that he now owed \$46,640.05. Once again, the Bank threatened foreclosure and said that it would continue reporting that Mr. Gaudette's loan was past due to credit reporting agencies until it was brought up to date.

- c. July 30, 2013—a letter stating that a loan modification under the HAMP program had been denied because Mr. Gaudette failed to provide requested documents and suggesting that he consider a short sale or deed in lieu of foreclosure.
- d. August 29, 2013—a statement setting out Mr. Gaudette’s required monthly payment as \$910.46 and his “[t]otal payments due to bring loan current” as \$41,308.09, plus \$7,155.83 in outstanding late charges and fees.
- e. September 10, 2013—a letter stating, “We previously notified you that you are ineligible for foreclosure prevention alternatives and that decision still stands.” The letter went on to say that Mr. Gaudette could reapply for a loan modification.
- f. September 20, 2013—a statement correctly (at last) stating Mr. Gaudette’s required monthly payment as \$791.55, but also setting out a figure of \$13,456.35 as “[t]otal payments due to bring loan current,” plus \$7,170.83 in outstanding late charges and fees.

29. On September 26, 2013, Mediator Joseph sent a letter to the Grand Isle Superior Court to complain that Bank of America was ignoring Judge Pearson’s Order incorporating the terms of the parties’ mediation agreement. Noting that Mr. Gaudette is a single father with two children who live with him part-time in a shared custody arrangement and who is worried he could lose his home, the Mediator requested a status conference, which has now been scheduled for October 24, 2013.

B. *Bank of America v. Rollins*

30. In September 2009, BAC Home Loans Servicing, LP (“BAC”) filed a foreclosure action in Vermont Superior Court, Chittenden Unit, docket no. S1230-09 CnC, against Richard Rollins of Bolton, Vermont. (Mr. Rollins’ ex-wife Kelly was named as a defendant in the case but is not a real party in interest.)

31. In July 2011, BAC merged with Defendant Bank of America.

32. Shortly after the Foreclosure Mediation Law became effective in July 2010, the court referred the matter to mediation.

33. After two mediation sessions, Bank of American denied Mr. Rollins a loan modification, in response to which he informed the court that he believed that his income was not properly taken into consideration.

34. The court set that issue for hearing, at which Bank of America was ordered to file an affidavit setting out the financial calculations that were used to deny Mr. Rollins a modification in mediation.

35. Bank of America did not file its affidavit until after the deadline set by the court, and the court ordered the Bank to reconsider Mr. Rollins for a modification based on information that seemed to indicate his eligibility for a modification; if no modification was agreed to, the parties were ordered back to mediation.

36. The parties had their first session with a new mediator, Aileen Lachs, in February 2012.

37. In a report dated October 9, 2012—following, among other things, a series of what were found to be unreasonable delays on the part of Bank of America—Mediator Lachs determined that the Bank had failed to participate in good faith in the mediation.

38. The court then ordered a final mediation.

39. At the third mediation, on January 7, 2013, Bank of America's representative stated that Mr. Rollins had been approved for a Home Affordable Modification Program (HAMP) loan modification, the terms of which the representative said she would have within 24 hours.

40. However, by letters dated January 17 and 18, 2013, Bank of America informed Mr. Rollins that he was denied for a HAMP loan modification.

41. The denial was found to have been based on Bank of America's use of incorrect financial information; but the Bank still did not offer a loan modification.

42. In a report dated February 22, 2013, Mediator Lachs found Bank of America to have once again acted in bad faith.

43. On or about April 23, 2013, Bank of America finally offered Mr. Rollins a three-month HAMP trial period plan, for the months of June, July, and August 2013.

44. On May 10, 2013, Bank of America's counsel sent an email to Mr. Rollins' attorney, setting out the terms of the modification, including "[n]o balloon payment."

45. The parties reconvened their mediation on May 17, 2013, to discuss the HAMP offer, and Mr. Rollins agreed to accept the trial period plan to the extent that the permanent modification that would follow was consistent with the representations of Bank of America's counsel.

46. Mr. Rollins made his three trial period plan payments as required.

47. On or about August 15, 2013, Mr. Rollins' counsel received a permanent HAMP loan modification offer from Bank of America that, contrary to the earlier agreement with the Bank, included a balloon payment of \$78,058.80.

C. Other Cases

48. Under *Cuomo v. The Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009), the Vermont Attorney General is federally preempted under the National Bank Act from issuing a civil investigative subpoena under the Consumer Protection Act to a national bank like Defendant for information on other instances of violation of the latter statute, as would normally be done in a consumer case prior to litigation. However, the Court in *Cuomo* also held that a state can sue a national bank to enforce its own laws.

49. The State of Vermont will seek to determine other instances of non-compliance with the Consumer Protection Act and the Foreclosure Mediation Law through discovery in this action.

V. First Count: Deception

50. Defendant's conduct as described in this Complaint involved deceptive representations to Vermont homeowners about the terms of agreed-upon loan modifications and payment amounts due, in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a), which prohibits deceptive acts and practices in commerce.

VI. Second Count: Unfairness

51. Defendant's conduct as described in this Complaint—including its failure or refusal to comply with mediation settlements in Vermont state court foreclosure actions to which it has previously agreed, and its billing homeowners for more money than their mediation settlements have provided—was unfair, in that it caused substantial injury to Vermont consumers that they could not have reasonably avoided, and that was not offset by benefits to consumers or competition.

52. Defendant's conduct as described in this Complaint was also unfair in that it ran counter to the standards and purposes of Vermont's Foreclosure Mediation Law, 12 V.S.A. §§ 4631-4637.

53. Defendant's conduct thus violated the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a), which prohibits unfair acts and practices in commerce.

WHEREFORE Plaintiff State of Vermont requests judgment in its favor and the following relief:

1. A permanent injunction requiring Defendant to comply with any settlement into which it enters in the course of a foreclosure mediation in the State of Vermont.
2. Appropriate monetary relief to all Vermont consumers with whom Defendant has agreed to, but for any period of time failed to comply with, a foreclosure mediation settlement.
3. Civil penalties of up to \$10,000 for each violation of the Consumer Protection Act.
4. The award of investigative and litigation costs and fees to the State of Vermont.
5. Such other relief as the Court deems appropriate.

Dated: 10/15/13

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by:

Elliot Burg
Elliot Burg
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
Tel. (802) 828-2153
eburg@atg.state.vt.us

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609