

**Wells Fargo Bank, N.A. v Lindo**

2013 NY Slip Op 30375(U)

January 23, 2013

Supreme Court, New York County

Docket Number: 850028/10

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MOULTON  
Justice

PART 40

WELLS FARGO BANK, N.A.

INDEX NO. 850028/10

DAVID LINDO, ETAL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

RECEIVED  
JAN 29 2013  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 1/23/13

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court: New York County  
Part 40B

RECEIVED  
JAN 29 2013  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

Index No. 850028/10

DAVID LINDO, CAROLINE OBOSKY-LINDO,  
ET AL.

Defendants.

-----X  
Peter H. Moulton, Justice

In this mortgage foreclosure action, defendant Caroline O'Bosky (named herein as Caroline Obosky-Lindo)<sup>1</sup> moves for sanctions and equitable relief against plaintiff. Plaintiff cross-moves for sanctions against O'Bosky.

**BACKGROUND**

O'Bosky and her ex-husband defendant David Lindo purchased the condominium apartment 5C located at 350 West 42<sup>nd</sup> street in April 2006. They entered into a mortgage with plaintiff for \$417,000. The mortgage is owned by Fannie Mae. Plaintiff is the servicer of the mortgage.

O'Bosky's and Lindo's marriage ended in divorce. According to

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<sup>1</sup>The parties use different spellings of Ms. O'Bosky's last name. The court herein adopts the spelling used by Ms. O'Bosky's counsel.

O'Bosky, as part of the divorce decree Lindo was supposed to transfer his interest in the apartment to her, and to pay her maintenance. O'Bosky asserts that Lindo did not comply with these obligations. The dissolution of the marriage apparently led to a default on the mortgage in June 2010.

Plaintiff brought this foreclosure action in December 2010. Plaintiff asserts that it allowed O'Bosky to serve a late answer in July 2011. Plaintiff's prior law firm did not file an RJI until September 19, 2011.

The court scheduled a mandatory settlement conference pursuant to CPLR 3408 for February 1, 2012. O'Bosky requested an adjournment of that conference and the matter was adjourned to March 28, 2012. Apparently, defendant requested, and received, an adjournment of that date as well, although plaintiff contends it was not informed and appeared for conference on that date.

The first conference was held with plaintiff and O'Bosky before Referee Solomkin on April 11, 2012. Lindo did not appear for the conference and he remains in default. The conference did not bear fruit and the matter was referred to me to see if I could help advance a settlement.

O'Bosky's motion for sanctions and other equitable relief is premised on plaintiff's alleged failure to negotiate in good faith. In order to evaluate that claim, it is necessary to recount to some degree the parties' positions taken in settlement discussions in

[\* 4]  
the court.

The parties are in agreement that O'Bosky does not currently have sufficient income to qualify for a HAMP modification. O'Bosky states in her papers that she is attending school to become an orthodontic assistant. In 2012 O'Bosky did not reside in the apartment and instead rented it out. She states that she intends to return to the apartment.

O'Bosky has sought to reach a settlement by a "short payoff," that is, by paying off the mortgage with a sum that would satisfy the entire amount of the remaining principal due on the mortgage, which she calculates at approximately \$386,805, along with some, but not all, of the additional interest that has accrued. The offer would also require plaintiff to waive some disbursements and legal fees. Plaintiff has consistently rejected this offer, and insisted on a settlement that involves eventual payment of the entire mortgage amount.

At the conference held before me on April 30, 2012, defendant's counsel again reiterated her offer, and discussed its potential advantages. Counsel for plaintiff replied that the mortgage was owned by Fannie Mae and that the regulations of that entity expressly prohibited any settlement that did not involve the payment of the entire mortgage amount. Defendant's counsel disputed this representation. The court asked counsel for plaintiff to provide the specific regulations upon which he relied.

He was unable to do so. The matter was adjourned to May 9, 2012, and I directed counsel for plaintiff to provide defendant's counsel with the pertinent regulations by May 7, 2012.

Plaintiff's counsel did not provide defendant's counsel with any Fannie Mae regulation that specifically prohibits the type of settlement proposed by defendant, because no such regulation exists. A new lawyer from petitioners' law firm appeared at the conference on May 9, 2012. He invoked Fannie Mae regulations that instead stand for the unremarkable proposition that Fannie Mae, like any institutional lender, seeks repayment of all its principal and interest when it re-negotiates mortgages with distressed borrowers. However, it is clear that this position is not a categorical requirement. The regulations, as is usual, also contemplate the possibility of two settlements that do not require a borrower to pay back all principal and interest: 1) short sales, and 2) a deed "in lieu." Additionally, plaintiff's counsel is silent concerning whether anyone at his firm actually conveyed defendant's offer to someone with authority at Fannie Mae, and, if so, the result of that inquiry. Counsel also does not state that he has personal knowledge that Fannie Mae has a policy of rejecting any such proposals.<sup>2</sup>

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<sup>2</sup>In his reply affirmation, plaintiff's attorney does attach a newspaper article that states that Fannie Mae will not allow principal reduction in mortgage foreclosure settlements. There is no mention of forgiveness of interest.

[\* 6]

Defendant thereupon brought this motion, arguing that plaintiff is not negotiating in good faith. The principal arguments made by defendant in support of this argument are 1) that plaintiff waited for nine months after filing the action to file an RJI, which delayed the commencement of the mandatory settlement conference and 2) that plaintiff's counsel made a material misrepresentation when he stated that Fannie Mae regulations expressly prohibit defendant's settlement proposal. Plaintiff then brought its own cross-motion, arguing that defendant is not entitled to a settlement conference in that she does not reside in the apartment and simply seeks to use the property as an investment.

#### DISCUSSION

##### A. Defendant's Motion

The statement made by plaintiff's counsel at the conference on April 30, 2012, was frivolous, as defined by 22 NYCRR § 130-1.1(c)(3). It was materially false to state that Fannie Mae regulations explicitly prohibit foreclosure settlements that involve payoffs for less than the total amount of principal and interest accumulated on a loan. The statement caused the adjournment of the settlement conference and so unnecessarily delayed any determination that a settlement could, or could not, be negotiated in this case.

However, the damage caused by this remark was minimal. On May 7, 2012, counsel for plaintiff, after actually consulting the relevant Fannie Mae regulations, corrected his colleague's remark. Moreover, at that conference, and in the instant motion papers, plaintiff has provided colorable arguments that provide an independent basis for rejecting defendant's offer. Therefore, plaintiff's counsel's misstatement did not substantially impair the parties' negotiations.

First, plaintiff points out that O'Bosky has not provided any documentation of Lindo's commitment to transfer his property interest in the apartment to her, and the status of the transfer. The divorce decree, or other order embodying this obligation, is not attached to defendant's papers. Real estate tax bills from 2012 attached to the motion papers list both Lindo and O'Bosky as owners. Absent Lindo's transfer of his interest to O'Bosky, plaintiff may have a difficult time negotiating with only one of the signatories of the mortgage. The court is sympathetic to Ms. O'Bosky's situation in the aftermath of her divorce, and has no reason to doubt her representation that her ex-husband is not complying with his obligations under the divorce decree. However, the fact remains that she has not established that she is the sole owner of the property.

Second, the market value of the apartment has not been established by either side. Plaintiff offers a Broker Price

Opinion made in 2011 that opines that the apartment was worth \$675,000. However, plaintiff does not offer any admissible evidence concerning the methodology that went into this valuation. For her part, Ms. O'Bosky states that she listed the apartment and that "[n]o one has offered me anything close to that figure [\$675,000] for my Apartment." She does not state the amount at which she listed the apartment and whether she got any offers. Plaintiff attaches to its motion papers a screen shot from a real estate website which indicates that O'Bosky's asking price was \$715,000. On the record before the court it is unclear whether the apartment could be sold at a price that would satisfy the mortgage in full. It is not unreasonable for plaintiff to be concerned about this issue. Plaintiff is concerned that if it agrees to a short payoff, as defendant proposes, defendant will then sell the property for a higher amount and realize a profit.

This concern is bolstered where, as here, defendant is not actually residing in the apartment. Ms. O'Bosky states that she continues to rent out the apartment while she lives with her parents in New Jersey. She states that this is a temporary arrangement, and that she will return to the apartment when she can afford it. O'Bosky gets tax bills and bills for condo charges at the apartment. However, plaintiff avers that she receives other bills in New Jersey and that her rental of the apartment shows that she has no intent of returning.

As discussed below, O'Bosky's current residence does not negate her right to a foreclosure conference in New York, however it is an added fact that could reasonably give plaintiff pause in determining whether to agree to defendant's proposal. Plaintiff is concerned that O'Bosky is not committed to living in the apartment and may be treating it as an investment property.

CPLR 3408(f) requires only that lenders bargain in good faith; it does not require either party to reach a settlement. (See Wells Fargo Bank NA v Van Dyke (101 AD3d 638 [1<sup>st</sup> Dep't 2012].) Plaintiff's invocation of a non-existent Fannie Mae regulation is not the only reason plaintiff initially rejected defendant's offer. The substantive concerns set forth above demonstrate that plaintiff's reluctance to accede to defendant's proposal is not per se evidence of bad faith.

Accordingly, the court finds that plaintiff's counsel's statement was frivolous, as defined by 22 NYCRR § 130-1.1(c)(3), but that this statement caused only a temporary derailment of settlement discussions. For this frivolous statement, the court directs plaintiff to pay defendant \$800 toward her reasonable attorney's fees incurred in preparing for, and appearing at, the conference on April 30, 2012.

Defendant also argues that plaintiff needlessly delayed this action by failing to file an RJI for nine months after serving and filing the complaint in this action. She argues that this delay is

evidence of bad faith that should trigger an array of equitable remedies.

Plaintiff offers no specific reason for the delay in filing, except to point out that the delay occurred on the watch of plaintiff's prior firm. Plaintiff argues that defendant could have filed an RJI herself, but the obligation to do so rests with the plaintiff under 22 NYCRR § 202.12-a[b][1]. O'Bosky was unrepresented by counsel during portions of the early stages of this litigation and so was particularly ill-equipped to take affirmative action.

Plaintiff also contends that O'Bosky is not entitled to a settlement conference under CPLR 3408, as she resides in New Jersey. Therefore, plaintiff argues, the delay in filing the RJI was of no moment, since defendant was not qualified for a settlement conference in any event. Plaintiff raises this argument for the first time in the instant motion practice. It made no attempt to forestall the initial settlement conference dates on this basis, even though plaintiff knew that O'Bosky was residing in New Jersey at the time the case commenced.

CPLR 3408(a) does not require that the property in question be the domicile or principal residence of the defendant for the dispute to qualify for a settlement conference. It refers to the defendant as "a resident" of the property. CPLR 3408(a) also states that settlement conferences must be held "in any residential

11] foreclosure action involving a home loan as such term is defined in [RPAPL § 1304]." The definition "home loan" of RPAPL § 1304 includes that the premises in question "is or will be occupied by the borrower as the borrower's principal residence." (Emphasis added.) Accordingly, based on O'Bosky's representation that she intends to move back into the apartment she is entitled to continue to avail herself of the foreclosure settlement part, at least at this juncture. (See Accredited Home Lenders Inc. v Hughes, 22 Misc3d 323.)

As noted above, the reason for plaintiff's delay in filing the RJI is unexplained in its papers.<sup>3</sup> Delay in filing the RJI, which in turn delays scheduling the foreclosure settlement conference, can cause unnecessary prejudice to a borrower. As time elapses during a foreclosure proceeding, interest on the note continues to run. Foreclosure proceedings sound in equity and courts have the equitable power to waive or reduce interest in cases where unjustified delay prejudices the borrower. (See Dayan v York, 51

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<sup>3</sup>The court notes that this action was filed soon after the Chief Judge's promulgation, in October 2010, of administrative order 548/10 requiring attorneys to submit affirmations concerning the integrity of foreclosure papers at the time of filing the RJI. (Administrative Order 548/10 was in place during the relevant period. It was later amended by Administrative Order 431/11.) In the aftermath of administrative rule 548/10's effective date, foreclosure cases were sometimes delayed as attorneys attempted to comply with the rule. This may have caused the delay by plaintiff's former counsel, although it is probably impossible to determine at this late date as that firm, Steven J. Baum, P.C., has disbanded.

AD3d 964, lv denied 12 NY3d 839; Danielowich v PBL Development, 292 AD2d 414.)

There is no bright line provided by applicable procedural rules that demarcates when delay in filing an RJJ in a foreclosure action becomes evidence of bad faith. 22 NYCRR. § 202.12-a[b][1] directs the plaintiff in a foreclosure action to file an RJJ "[a]t the time proof of service of the summons and complaint is filed with the county clerk." CPLR 306-b provides that service shall be effected within 120 days of filing of the summons and complaint, unless further time is allotted for good cause shown. O'Bosky was served personally pursuant to CPLR 308(1). Unlike other types of service set forth in CPLR 308, CPLR 308(1) does not specify a time within which proof of service must be filed with the clerk. (See JP Morgan Chase Bank NA v Ilardo, 36 Misc3d 359.) Additionally, O'Bosky did not answer the complaint until July 2011. While an answer is not a prerequisite to a foreclosure settlement conference, the defenses set forth in an answer can help focus the issues at a settlement conference, and provide additional leverage for settlement.

On the other hand, these expansive procedural time frames do not excuse an unexplained delay of nine months. Defendant appeared in this action by counsel in June 2011, and her counsel put plaintiff on notice by letter that defendant wished to negotiate. Certainly by that time, and particularly once defendant filed her

answer, plaintiff was on notice that the case was ready to move forward. Given that negotiation was mandatory, plaintiff should have filed the RJI at least by July 2011.

For above reasons, the court finds that plaintiff shall forfeit its claim to interest on the mortgage accruing from August 1, 2011 through September 19, 2011, the date plaintiff filed the RJI.

**B. Plaintiff's Cross-Motion**

Plaintiff's sanctions motion is based on defendant's allegedly frivolous claim that she is entitled to a settlement conference. As discussed above, plaintiff argues that defendant's current residence in New Jersey, her rental of the subject apartment, and the nature of her settlement offer, demonstrate that defendant is seeking simply to make a profit on an investment property at plaintiff's expense. It is sufficient, for now, that defendant has stated that she intends to return to the apartment. Defendant may wish to test that statement of intent during the course of negotiations. However, defendant's use of the mortgage foreclosure settlement part is not frivolous under 22 NYCRR § 130-1.1.

The second branch of the motion is for discovery concerning defendant's residence. This request is not included in the notice of motion. (CPLR 2214[a].) Moreover, defendant has not noticed any disclosure before seeking this relief. In any event,

disclosure will not be mandated while a foreclosure action is in the settlement part. The parties may voluntarily share information in order to facilitate negotiation while in the settlement part, but the court will not order such exchange.

#### CONCLUSION

Defendant's motion is granted to the extent that plaintiff shall pay defendant \$800 pursuant to 22 NYCRR 130-1.1. Additionally plaintiff shall forfeit its claim to interest on the mortgage accruing from August 1, 2011 through September 19, 2011, the date plaintiff filed the RJI. The parties shall appear at 111 Centre Street, Room 1127B, on February 14, 2013 at 2:15 pm for continued settlement negotiations. If this date and time are inconvenient for either side, the parties shall confer and propose alternate dates to the court.

This constitutes the decision and order of the court.

Date: January 23, 2013



AJSC

HON. PETER H. MOULTON  
SUPREME COURT JUSTICE