

Bariciano v Citimortgage, Inc.
2013 NY Slip Op 30779(U)
April 9, 2013
Supreme Court, Suffolk County
Docket Number: 11-30274
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 10-13-11 (#003)
MOTION DATE 3-7-12 (#004)
ADJ. DATE 1-8-13
Mot. Seq. # 003 - MD
004 - MG; CASEDISP

-----X

BARBARA BARICIANO,

Plaintiff,

- against -

CITIMORTGAGE, INC.,

Defendant.

-----X

DeLISA LAW GROUP, PLLC
Attorney for Plaintiff
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West Islip, New York 11795

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Upon the following papers numbered 1 to 63 read on these motions for a preliminary injunction and for dismissal ___; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 36 - 52 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 -35; 53 - 63 ; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff for a preliminary injunction and this motion by defendant for dismissal are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by plaintiff for a preliminary injunction restraining and enjoining defendant, its attorneys or agents from conducting the sale or disposition of the cooperative stock and proprietary lease evidencing ownership of the cooperative unit known as and located at 197 Pointe Circle North, Apt. 197, Coram, New York 11727 is denied; and it is further

ORDERED that this motion by defendant to dismiss the complaint pursuant to CPLR 3211 is granted.

Plaintiff borrowed \$129,150.00 from defendant and executed a secured loan agreement entitled

(PR)

“security agreement co-op” dated September 29, 2005 in favor of defendant indicating that the loan was to be repaid over a period of 30 years with interest at the rate of 5.25 percent per year. The loan was secured by plaintiff’s interest in shares of stock in a cooperative corporation and a proprietary lease of said cooperative corporation for premises known as and located at 197 Pointe Circle North, Apt. 197, Coram, New York. Plaintiff defaulted on her payments in 2009 and was offered and entered into a Home Affordable Modification Trial Period Plan agreement with defendant to make three monthly payments of \$237.86. Plaintiff’s request for a permanent loan modification at the same approximate monthly payment amount as the trial modification was denied by defendant and a foreclosure sale of her cooperative apartment was scheduled for October 3, 2011. Plaintiff was granted a temporary restraining order on September 29, 2011 restraining and enjoining defendant from conducting said sale.

By her complaint, plaintiff alleges that defendant informed her prior to December 2009 that if plaintiff could demonstrate, among other things, that she had a hardship that resulted in a reduction of her income and that her reduced income nevertheless enabled her to pay a reduced monthly loan installment amount, defendant would modify her loan agreement by reducing the interest rate and/or lengthening the loan term and/or reducing or deferring principal amounts due. In addition, plaintiff alleges that she satisfied said prerequisites and that she and defendant entered into an agreement by which plaintiff was required to timely pay three monthly trial modification payments in the amount of \$237.86, reduced from the original required payment amount, and if plaintiff did so, the original loan agreement would be permanently modified to said amount for the remaining life of the loan. Plaintiff also alleges that she timely paid all her payments under said trial modification agreement for five months from December 2009 through and including April 2010. She further alleges that in or about May 2010, defendant refused, without providing any reason or explanation, to convert the trial modification agreement into a permanent modification in violation of the agreement, and that defendant purported to serve plaintiff on or about September 2011 with a notice of foreclosure sale scheduled for October 3, 2011.

Plaintiff’s first cause of action seeks a declaratory judgment. Her second cause of action seeks a preliminary injunction and her fourth cause of action seeks a permanent injunction enjoining defendant from conducting such a foreclosure sale of defendant’s home claiming that defendant failed to comply with the requirements of Uniform Commercial Code § 9-611 (UCC § 9-611) and is without authority to conduct such sale and that plaintiff will be irreparably harmed by the loss of her home. Plaintiff’s third cause of action seeks specific performance of an agreement by defendant to make the modification permanent upon plaintiff’s compliance with the requirements of the trial modification based on defendant’s breach by refusing to accept further payment from plaintiff and by failing to make the trial modification permanent even though defendant informed plaintiff that the paperwork for the permanent modification was imminent. By her fifth cause of action plaintiff makes allegations sounding in fraudulent inducement.

Plaintiff now moves for a preliminary injunction restraining and enjoining defendant, its attorneys or agents from conducting the sale or disposition of the cooperative stock and proprietary lease evidencing ownership of the cooperative unit known as and located at 197 Pointe Circle North, Apt. 197, Coram, New York 11727. She asserts that she received inadequate notice of the scheduled sale of her cooperative apartment under UCC § 9-611(f) and that defendant breached the Home Affordable Modification Trial Period Plan agreement such that she is entitled to a preliminary injunction. In support of her motion, plaintiff submits her affidavit, her attorney’s affirmation and emergency affirmation, her complaint,

defendant's "Notice to Owner of Sale of Personal Property to Satisfy Lien," defendant's "Notice of Public Auction-Foreclosure Sale of Cooperative Apartment," an unsigned copy of a Home Affordable Modification Trial Period Plan, and a New York State Department of State Division of Corporations Entity Information on Citimortgage, Inc.

By her affidavit, plaintiff avers that the only documents she ever received from defendant or anyone else in the nature of a notice concerning the enforcement of her mortgage was a three-page document dated August 23, 2011 entitled "Notice to Owner of Sale of Personal Property to Satisfy Lien" and a one-page exhibit "Notice of Public Auction-Foreclosure Sale of Cooperative Apartment" providing only 41 days' notice rather than 90-days' notice of the scheduled sale and without the form and content required by UCC § 9-611(f). She states that she obtained a loan in the amount of \$135,000.00 to purchase the cooperative apartment in 2005, residing there as a single parent with her then 10 year old son, and that she fell behind on her monthly loan payments in June 2009 "due to employment hardships, including having been 'laid-off' from my work as an Office Manager for the company known as 'Global Securitization Services, LLC.'" In addition, plaintiff states that "[a]fter I was laid-off, I became eligible for unemployment benefits, but continued to find enough private jobs to support myself and my son." She also states that she was informed by defendant in November 2009 that she qualified for a loan modification plan and that the Home Affordable Modification Trial Period Plan agreement "made it clear to me that if I were to timely make three monthly trial payments of \$237.86 each, the modification would become permanent at or about that monthly payment figure." According to plaintiff, during the time that she made the three payments and an additional two, she was repeatedly assured by defendant's representatives that she needed to be patient and that when she attempted to make the next payment in May 2010 she was informed by defendant's representative that defendant would not accept payment because plaintiff had been denied a permanent modification. She asserts that defendant is improperly attempting to sell her home after accepting five trial modification payments, two more than required, then refusing to accept any more payments under the agreement.

Defendant opposes plaintiff's motion for a preliminary injunction on the ground that plaintiff did not qualify for a loan modification. Defendant's opposition includes the affidavit of Angie Fehl, defendant's business operations analyst and the notices to plaintiff by letters dated January 31, 2011 and June 27, 2011 of her ineligibility for the federal Home Affordable Modification Program (HAMP) and the demand letter dated April 27, 2011 sent certified mail return receipt with the United States Postal Service print out indicating that it was unclaimed.

Ms. Fehl explains in her affidavit that plaintiff's monthly payment under the note and security agreement was \$769.14, that plaintiff defaulted on the payments due in October or November 2009, and that effective December 1, 2009, plaintiff entered into a trial period plan under HAMP. Ms. Fehl concedes that plaintiff made the required three payments of \$237.86, the last being due on February 1, 2010, and that plaintiff made three additional payments of \$237.86 after the expiration of the trial plan, the last being made on May 6, 2010. However, Ms. Fehl avers that defendant did not receive a payment from plaintiff since that time, that plaintiff failed to provide a required current bank statement, and that plaintiff was advised by telephone on May 13, 2010, the deadline for review for a final HAMP modification, that her HAMP application had been denied. According to Ms. Fehl, since plaintiff insisted that she had provided all the necessary documents, defendant agreed to review her file again for a possible modification, and that on June 10, 2010 the file was reviewed again by the Loss Mitigation staff who determined that updated documents

were needed, which plaintiff faxed to defendant on July 17, 2010. Ms. Fehl states that plaintiff's application was reviewed on August 19, 2010 at which time it was determined that her loan was ineligible for HAMP because the investor in her loan, State of New York Mortgage Agency, HMB Series, did not participate in the HAMP program. Defendant provided written notice to plaintiff by letters dated January 31, 2011 and June 27, 2011 that "We are unable to offer you a Home Affordable Modification because: We service your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan under the Home Affordable Modification Program." According to Ms. Fehl, since plaintiff was ineligible for HAMP, defendant then reviewed the application for a traditional modification and concluded that she did not qualify because her sole income was unemployment compensation. In addition, she states that defendant received a phone call on October 12, 2010 from Donna Manvich, calling as an agent for plaintiff, and that defendant informed Ms. Manvich that it would reconsider plaintiff if she sent in new documentation and sent plaintiff a letter dated October 12, 2010 but that defendant did not receive the documents on October 21, 2010 and denied the review on that date. Also according to Ms. Fehl, defendant's records show that defendant's representatives spoke to plaintiff about possible loss mitigation in May, July, August and September 2010 and in January, March and June 2011 and that on May 11, 2010 defendant sent plaintiff a demand letter informing plaintiff of her default and the amount required to reinstate the loan as well as a 90-day notice required by UCC § 9-611 (f) by certified mail and regular mail. Ms. Fehl further states that on April 27, 2011 defendant sent plaintiff another demand letter with the 90-day notice required by UCC § 9-611 (f) by certified mail return receipt, which was returned unclaimed to the post office in the area of defendant's office on May 23, 2011.

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]; see *Shasho v Pruco Life Ins. Co. of N.J.*, 67 AD3d 663, 665, 888 NYS2d 557 [2d Dept 2009]; *Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Ruiz v Meloney*, 26 AD3d 485, 486, 810 NYS2d 216 [2d Dept 2006]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625, 920 NYS2d 362 [2d Dept 2011]).

Paragraph 3, entitled "The Modification," of the Home Affordable Modification Trial Period Plan agreement signed by plaintiff provides "I understand that once Lender is able to determine the final amounts of unpaid interest and any other delinquent amounts (except late charges) to be added to my loan balance and after deducting from my loan balance any remaining money held at the end of the Trial Period under Section 2.D. above, the Lender will determine the new payment amount. If (1) my representations in Section I were and continue to be true in all material respects; (2) I comply with the requirements in Section 2; (3) I provide the Lender with all required information and documentation; and (4) the Lender *determines that I qualify*, [emphasis provided] the Lender will send me a Modification Agreement for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date." Thus, plaintiff's payment of the trial period amounts and provision of all the requested documentation did not automatically entitle her to a permanent modification agreement pursuant to the terms of the Home Affordable Modification Trial Period Plan agreement. There was an additional

factor, the lender's determination of whether plaintiff qualified, and defendant determined that plaintiff did not qualify because the investor in her loan, State of New York Mortgage Agency, HMB Series, did not participate in the HAMP program. Thus, contrary to plaintiff's allegations, defendant did provide plaintiff with a reason or explanation for its denial of a permanent modification, was not required to accept payments made beyond the three month trial period, and did not breach the terms of the Home Affordable Modification Trial Period Plan agreement.

The decisions relied on by plaintiff in support of her motion are all distinguishable. In US. Bank Natl. Assn. v Mathon, 29 Misc3d 1228 (A), 920 NYS2d 245 (Sup Ct, Suffolk County 2010), the borrowers continued to send the lender nine extra payments in reliance and compliance with a letter from the lender's servicer subsequent to the trial modification agreement expressly promising that "If you make all [3] trial period payments on time and comply with all applicable program guidelines, you will have qualified for a final modification" and the lender's representatives verbally informed the borrowers that the underwriter had approved the final modification. Here, plaintiff never expressly received a verbal assurance from defendant's representatives that she had been approved for a permanent modification, she was only told to be patient, and none of the documents from defendant make the promise contained in the aforementioned letter. In Wells Fargo Bank, N.A. v Meyers, 30 Misc3d 697, 913 NYS2d 500 (Sup Ct, Suffolk County 2010), the lender's Home Affordable Modification Program Loan Trial Period agreement provided that if the borrowers were in compliance with the trial period and all representations were true, "then the Lender will provide [the defendants] with a Loan Modification Agreement" and immediately after the trial period began, the lender commenced the foreclosure action. Here, defendant's agreement has comparatively more requirements as evidenced by paragraph 3 and defendant scheduled a sale one year and 6 months after plaintiff's last trial modification payment.

Shares in a cooperative are personal property, not real property and the security interest in said shares is governed by UCC Article 9 (*see Matter of State Tax Commission v Shor*, 43 NY2d 151, 157, 400 NYS2d 805 [1977]; *Brief v 120 Owners Corp.*, 157 AD2d 515, 549 NYS2d 706 [1st Dept 1990]). In late 2009, a bill requiring similar notice to residential homeowners of cooperative apartments and offering similar protections to them as RPAPL § 1304 became law, and the bill is now codified at UCC 9-611(f) (*see Goldman v Emigrant Sav. Bank Long Island*, 32 Misc3d 1238 (A), 938 NYS2d 227 [Sup Ct, Queens County 2011]).

Here, defendant demonstrated that it provided plaintiff with timely notice pursuant to UCC § 9-611 and the Court's computerized records indicate that a settlement conference was held on September 12, 2012. Plaintiff's challenge of defendant's proof of mailing is unavailing.

In view of the foregoing, plaintiff failed to demonstrate a likelihood of success on the merits and the balance of the equities do not favor the issuance of a preliminary injunction in this action (*compare Perpignan v Persaud*, 91 AD3d 622, 936 NYS2d 261 [2d Dept 2012]; *Gates v Easy Living Homes, Inc.*, 29 AD3d 733, 815 NYS2d 683 [2d Dept 2006]). Therefore, her request for a preliminary injunction is denied.

Defendant's motion for dismissal pursuant to CPLR 3211 (a)(1) based on documentary evidence that it submitted in opposition to plaintiff's motion is granted inasmuch as the documents demonstrated that

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defendant did not breach the Home Affordable Modification Trial Period Plan agreement signed by plaintiff and defendant sent plaintiff a demand letter with the 90-day notice required by UCC § 9-611 (f) by certified mail return receipt on April 27, 2011, which was returned unclaimed to the post office in the area of defendant's office on May 23, 2011 (*see generally Bank of America, N.A. v Keso Sagg, LLC*, 103 AD3d 604, 960 NYS2d 135 [2d Dept 2013]; *Sands Point Partners Private Client Group v Fidelity Nat. Title Ins. Co.*, 99 AD3d 982, 953 NYS2d 147 [2d Dept 2012]). The Court notes that plaintiff in opposition to defendant's motion seeks to serve an amended verified complaint. Such an amendment can only be obtained by plaintiff by leave of court, that is, by motion, or by stipulation of all parties (*see CPLR 3025 [b]*). Inasmuch as plaintiff has not complied with CPLR 3025 (b), the Court declines to consider the purported amended complaint.

Accordingly, plaintiff's motion for a preliminary injunction is denied and defendant's motion for dismissal of the complaint is granted.

The foregoing constitutes the Order of this Court.

Dated: April 9, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

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