Wells Fargo Bank N.A. v Latronica
2014 NY Slip Op 32849(U)
October 28, 2014
Sup Ct, Sufflk County
Docket Number: 2009-19852
Judge: Jeffrey Arlen Spinner
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SUPREME COURT : STATE OF NEW YORK
I.A.S. PART XXI : SUFFOLK COUNTY

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

WELLS FARGO BANK N.A., Plaintiff - against - **DENISE T. LATRONICA AS ADMINISTRATRIX OF THE ESTATE OF ANTHONY LATRONICA, THE PEOPLE OF THE STATE OF NEW YORK, UNITED STATES OF AMERICA, et. ano.,** Defendants	**Index No.: 2009-19852** Mot. Seq. 001-MD CASEDISP Original Return Date: April 11, 2014 Final Submission Date: September 17, 2014 Mot. Seq. 002-XmotD CASEDISP Original Return Date: August 13, 2014 Final Submission Date: September 17, 2014

Presently pending before the Court are two written applications. The first (seq. 001), filed by Plaintiff, seeks summary judgment, striking the Answer of Defendant DENISE LATRONICA and appointing a Referee pursuant to RPAPL § 1321. The second (seq. 002), a cross-motion filed by Defendant DENISE LATRONICA, seeks consolidation, pursuant to CPLR § 602 with the action pending under Suffolk County Index No. 2009-24310, together with a finding of bad faith and a corresponding abatement of interest, costs and fees as well as recovery of counsel fees. As an alternative form of relief, Defendant seeks dismissal of both foreclosure actions.

Plaintiff commenced this action on May 26, 2009, under Suffolk County Index No. 2009-19852 (the "First Action"), pursuant to Real Property Actions and Proceedings Law Article 13, claiming the foreclosure of a second mortgage which encumbers residential real property located at 54 Hunter Drive, Smithtown, Suffolk County, New York. Said mortgage was given to secure a home equity line of credit. Plaintiff has demanded foreclosure of the Mortgage together with recovery of interest, costs, disbursements, attorney's fees and a deficiency judgment. The sole obligor and mortgagor therein was Anthony Latronica.

Thereafter and on June 24, 2009, the same Plaintiff, through the office of different counsel, commenced an action under Suffolk County Index No. 2009-24310 (the "Second Action"), claiming foreclosure of a first mortgage, which encumbers the same property as that in the First Action. Just as in the First Action, the sole obligor and mortgagor was Anthony Latronica..

Anthony Latronica, the husband of Defendant DENISE LATRONICA, died intestate on June 30, 2008. By way of a decree dated January 27, 2009, the Surrogate's Court of Suffolk County (Hon. John M. Czygier Jr., S.), under File No. 22-A-2009, appointed Defendant DENISE LATRONICA as Administratrix of the Estate of Anthony Latronica,.

Subsequent to the commencement of both actions, Defendant DENISE LATRONICA, through counsel, seasonably interposed responsive pleadings under both index numbers and thereafter both matters were scheduled for mandatory settlement conferences pursuant to CPLR § 3408. At the scheduled settlement conferences, there were eleven appearances made in the First Action and twenty four appearances made in the Second Action. In each action, Defendant assiduously attempted, albeit unsuccessfully, to reach a settlement, providing voluminous financial documents on numerous occasions which included bank statements, proof of income, releases, affidavits and more. Following each submission, each Plaintiff demanded further documents from Defendant. At one point, Defendant was led to understand that a loan assumption and modification had been approved, contingent only upon her conveying the premises from the estate to herself. Although she did go to the trouble and expense of effecting the requested conveyance, the assumption and modification were never forthcoming.

Defendant does not deny the existence of the default but instead concedes the same. Her papers describe, in exquisite detail, each and every step that she took in her unavailing attempts to obtain a loan modification, which would enable her to make payment to Plaintiff on each loan and to remain in her home. Indeed, as set forth above, she even went so far as to execute the documents necessary for her to assume personal liability for payment of these obligations. It is abundantly clear from Defendant's continuing course of conduct that she was, in both matters, acting in compliance with both the letter and the spirit of RPAPL § 1304, in attempting to settle the actions.

The papers submitted by Defendant in support of her cross-motion reveal what could best be described as an unbelievable degree of patience on her part and that of her attorney. The papers also clearly reveal that Plaintiff in both actions has failed to comply with the notice mandates of RPAPL § 1304, which are a strict pre-requisite to commencement of a foreclosure action, *Aurora Loan Services LLC v. Weisblum 85 AD 3d 95 (2nd Dept. 2011).* Where there exists a condition precedent to the commencement of an action (in this case, a statutory condition as set forth in RPAPL § 1304), the action will be subject to dismissal, *First National Bank of Chicago v. Silver 73 AD 2d 162 (2nd Dept. 2010).* The burden is upon the foreclosing mortgagee to prove its strict compliance with the statute. Here, Plaintiff in the First Action sent a notice dated January 5, 2009 addressed to "Estate of Anthony Latronica." In the Second Action, the same Plaintiff sent a notice dated March 15, 2009 addressed to "Anthony Latronica." While Plaintiff in the First Action argues that it was not required to send any notice under RPAPL § 1304, it advances no appellate authority in support of that proposition.. Instead, counsel refers this Court to the decision of a court of co-ordinate jurisdiction in such a manner as to strongly suggest that said opinion is controlling herein. That having been said, Plaintiff, in both actions, undertook to send a notice which purported to comply with the statute. A fair reading of the two notices fails to demonstrate compliance with the statute. Moreover, there has been no proof adduced that the mailing was made by both certified and ordinary mail, *Deutsche Bank National Trust Co. v. Spanos* 102 AD 3d 909 (2nd Dept. 2013). Where Plaintiff fails to prove compliance with statutory mandates, the action is subject to dismissal, *Hudson City Savings Bank v. DePasquale 113 AD 3d 595 (2nd Dept. 2014).*

Defendant asserts that Plaintiff has failed to negotiate in good faith, as mandated by CPLR § 3408. Not surprisingly, Plaintiff vociferously opposes Defendant's application, insisting (without articulating a factual basis) that it has acted in good faith throughout the process and that there exists absolutely no basis for Defendant's application. It cannot be reasonably claimed that Defendant did anything less than that which was requested of her by Plaintiff and the Court. Plaintiff's opposition to the cross-motion, distilled to its essence, consists of counsel's stentorian assertions that consolidation would be unduly prejudicial to Plaintiff in both actions, that there is no commonality of facts or law and that Plaintiff has not acted in bad faith. Plaintiff's counsel asserts that while Plaintiff did attend the settlement conferences, the matter could not be settled due to Defendant's repeated failure to produce requested documentation. The opposition to the cross-motion is most conspicuous for its lack of an affidavit of a party with actual knowledge. It is settled law that an Affirmation of counsel, absent proof of actual first-hand knowledge, is devoid of probative value, *Barnet v. Horwitz 278 AD 700 (2nd Dept. 1951).* The Affirmation of Plaintiff's counsel does not state the basis upon which her bald and unsupported statements are based, other than her position as an associate with Plaintiff's counsel. The opposition fails to substantively address any of Defendant's claims.

The Court does agree with the underlying principle that Plaintiff may not be forced or compelled to modify the loans at issue since they are, by their nature, contracts and that the Court may not act in a manner that is based upon sympathy for any of the parties, *Graf v. Hope Building Corp. 254 NY 1 (1930)*. However, it is true with equal force that an action to foreclose a mortgage is one sounding in equity and that all of the rules of equity jurisprudence are fully applicable thereto, *Jamaica Savings Bank v. M.S. Investing Co. 274 NY 215 (1937)*.

The decision in this matter must necessarily be controlled by the provisions of CPLR § 3408, which was promulgated by the New York Legislature in response to the mortgage foreclosure crisis that was (and still is) facing many of New York's homeowners. The statute, remedial in nature, was promulgated in 2008 and was substantially amended late in 2009. The relevant portions for purposes of this decision are CPLR § 3408(a) & (f), which read, in pertinent part, as follows:

> *"(a) In any residential foreclosure action involving a home loan...in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference...for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.*
>
> *"(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." CPLR 3408(a), (f)*

While the express language of CPLR § 3408 is clear on its face as to the rights and responsibilities of the parties, the term "good faith" is nowhere defined in the statute. Too, a review of the bill's legislative history fails to reveal any clue at all as to the definition of this term. Instead, working within a statutory vacuum, various trial courts have assiduously attempted to give true meaning to this concept in the absence of any definition or other guidance.

In attempting toreach a decision, this Court finds guidance within the language set forth in the matter of *US Bank N.A. v. Jose Sarmiento 991 NYS 2d 68, 2014 NY Slip Op 05533, 2014 NY App Div LEXIS 5457 (2nd Dept., July 30, 2014)*. In a scholarly opinion by Mr. Justice Leventhal, the Appellate Division carefully explored and clearly expounded upon the provisions and guidelines of CPLR § 3408 and, most important, the concept of good faith as applied to the mandatory settlement conference process. For purposes of the matter that is *sub judice*, this Court is only concerned with the issue of good faith. Indeed, the Appellate Division, in that opinion, has unequivocally stated that *"...the issue of whether a party failed to negotiate in 'good faith' within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution."* This express language constitutes the yardstick by which this Court must measure the conduct of both Plaintiff and Defendant in order to determine which party, if either, failed to act in good faith.

A close examination and careful consideration of the totality of the circumstances reveals that Defendant has fully complied with Plaintiff's document demands on multiple occasions, that Defendant and her counsel have appeared on at least 11 occasions in this matter (and 24 occasions on the Second Action) with respect to mandatory settlement conferences, that Plaintiff has failed to act in good faith by failing to provide Defendant with a decision on her multiple applications, by advising Defendant that she was approved for an assumption and modification but failing to provide the same, by compelling Defendant to repeatedly produce documents on multiple occasions, all of which has inured to the detriment of Defendant. Since April 1, 2010 (the date of the first mandatory settlement conference herein), interest has continued to accrue upon the loan obligation, together with the added accretion of costs, disbursements and, no doubt, a claim for reasonable counsel fees.

Based upon the totality of circumstances, this Court is constrained to find that Plaintiff has acted in bad faith throughout the mandatory settlement conference process, as "bad faith" has been defined in US Ban k N.A. v. Sarmiento, *supra*, thus inexorably warranting the granting of Defendant's application.

As for Defendant's claim for counsel fees, the Court finds guidance in RPL § 282, added by the Legislature in 2010 (Laws of 2010, Chapter 550, § 12, effective December 19, 2010. This statute permits recovery of reasonable counsel fees by a mortgagor in a situation where the mortgage documents permit recovery of the same by a mortgagee. In the matter that is before the Court and in view of Plaintiff's lack of good faith, an award of counsel fees to Defendant herein is clearly warranted.

It is, therefore,

ORDERED that Defendant's application (seq. 002) shall be and is hereby granted to the extent hereinafter set forth; and it is further

ORDERED that all interest, disbursements, costs and attorneys fees which have accrued upon the loan at issue since April 1, 2010 shall be and the same are hereby permanently abated, shall not be a charge on account of or to the detriment of Defendant, her heirs, successors or assigns and that Plaintiff and any assignee is forever barred, prohibited and foreclosed from recovering the same from Defendant; and it is further

ORDERED that such abatement shall continue *in futuro* and that no further interest, disbursements, costs or attorney's fees shall accrue or be chargeable to Defendant absent further Order of this Court; and it is further

ORDERED that Defendant is awarded reasonable counsel fees and disbursements, pursuant to RPL § 282, in the amount of $ 11,045.00, to be paid by Plaintiff within twenty one days of service of a copy of this Order with Notice of Entry; and it is further

ORDERED that this proceeding shall be and is hereby dismissed upon the failure of Plaintiff to comply with the conditions precedent within RPAPL § 1304; and it is further

ORDERED that Plaintiff's motion for summary judgment (seq. 001) shall be and the same is hereby denied as academic; and it is further

ORDERED that any relief not expressly granted herein shall be and is hereby denied.

This shall constitute the decision, judgment and order of the Court.

Dated: October 28, 2014
Riverhead, New York

ENTER:

JEFFREY ARLEN SPINNER, J.S.C.

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_X_ FINAL DISPOSITION __ NON-FINAL DISPOSITION

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