| **Washington Mut. Bank v Corena** |
| --- |
| 2014 NY Slip Op 33140(U) |
| March 31, 2014 |
| Supreme Court, Queens County |
| Docket Number: 17450/08 |
| Judge: Janice A. Taylor |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

---------------------------------------x

WASHINGTON MUTUAL BANK f/k/a WASHINGTON MUTUAL BANK, FA.,
Plaintiff(s),

Index No.:17450/08

Motion Date:7/18/13

Motion Cal. No.: 184

- against -

Motion Seq. No: 6

RUBEN CORENA, MARITZA CORENA, HOUSEHOLD FINANCE REALTY CORPORATION OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and JOHN DOE,

Defendant(s).

---------------------------------------x

The following papers numbered 1 to 10 read on this motion by defendants Ruben Corena and Maritza Corena for an order, pursuant to CPLR §3408(f) and 22 NYCRR 202.12-1, to toll accumulation of interest and fees on the subject mortgage, as of October 1, 2009.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits-Service......... | 1 - 4 |
| Affirmation in Opposition-Exhibits-Service.......... | 5 - 7 |
| Reply Affirmation-Exhibits-Service.................. | 8 - 10 |

Upon the foregoing papers it is **ORDERED** that the motion is determined as follows:

Plaintiff commenced this action on July 14, 2008, seeking foreclosure of a mortgage given by defendants Ruben and Maritza Corena ("Corena") on the real property known as 72-46 Cooper Ave., Ridgewood, New York to secure a promissory note evidencing a 30-year loan in the original principal amount of $410,400.00. The note set the contract and default rates of interest at 6.125% interest per year, and called for payment of a monthly mortgage

installment payment of $2493.63. Plaintiff alleged that defendants Corena defaulted in payment of the monthly mortgage installment due on May 1, 2008. Plaintiff obtained an order of reference dated July 10, 2008. Pursuant to the report of the Referee dated January 28, 2010, plaintiff was owed the amount of $390,275.58 in principal, and $43,617.31 in interest through January 26, 2010.

Defendants Ruben and Maritza Corena assert they have sufficient income to qualify for a modification of the mortgage loan, and that plaintiff was obligated to negotiate with them in good faith for an affordable modification of it. They assert that plaintiff instead has engaged in conduct which violates CPLR §3409 and 22 NYCRR 202.12-a and the guidelines of the Home Affordable Modification Program (HAMP). They claim plaintiff appeared at mandatory settlement conferences by counsel who was not properly prepared to negotiate or authorized to do so. They also claim plaintiff refused to enter into a permanent modification of the mortgage loan following their successful compliance with the HAMP trial period plan made effective July 1, 2009, failed to account for large payments they made, and failed to offer a modification agreement which complies with "enforceable program guidelines." Defendants Corena assert that plaintiff, by such conduct, has caused the accrual of more than $100,000.00 in unwarranted mortgage interest and fees. Defendants Corena also assert that the interest and fees should be equitably tolled from October 1, 2009, until such time as plaintiff "satisfies its legal obligations."

Plaintiff opposes the motion, asserting that defendants Corena have failed to demonstrate it has not negotiated in good faith to reach a mutually agreeable resolution. It contends that it negotiated in good faith by attending four settlement conferences and making two offers to permanently modify the mortgage, including one made during the pendency of the appeals by defendants Corena from orders of this court entered on January 4, 2012 and July 17, 2012. It also contends its counsel was sufficiently prepared and authorized to act at the settlement conferences and that defendants Corena chose not to accept its offers, notwithstanding that they could have afforded the proposed modified payment terms. Plaintiff further contends that defendants Corena have prolonged the prosecution of the action by making previous motions to toll the accrual of interest, and appealing the January 4, 2012 and July 17, 2012 orders of this court, which appeals were dismissed by decision and order dated May 8, 2013 of the Appellate Division, Second Department.

CPLR §3408 reflects a clear legislative intent to aid homeowners threatened with foreclosure (*see Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). It mandates settlement

conference proceedings "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" (*see* CPLR §3408[a]). CPLR §3408(f) provides that both the plaintiff and defendant "shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." In addition, CPLR §3408(c) requires that "[a]t any conference ..., the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case" (CPLR §3408[c]). The Uniform Civil Rules for the Supreme Court with respect to mandatory settlement conference proceedings (*see* 22 NYCRR 202.12-a) in large part repeat the statutory requirements.

In the event the court determines that the plaintiff had failed to negotiate in good faith to reach a mutually agreeable resolution in the mandatory foreclosure settlement conferences, it has the authority to impose a sanction or remedy (*see* CPLR §3408; *Bank of America, Nat. Assn. v Lucido*, 114 AD3d 714 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 11 [2d Dept 2013]). CPLR §3408 is silent as to sanctions or the remedy to be employed where a party violates its obligation to negotiate in good faith. The Appellate Division, Second Department recognizes that various courts have deemed the tolling or cancellation of interest, when tailored to the circumstances, to be an appropriate and authorized remedy (*see Wells Fargo Bank, N.A. v Meyers*, 108 AD3d at 20)(*see e.g. U.S. Bank Nat. Assn. v Thomas*, 40 Misc 3d 1241(A) [Sup Ct, Kings County 2013]; *Wells Fargo Bank, N.A. v Ruggiero*, 39 Misc 3d 1233[A] [Sup Ct, Kings County 2013]).

Defendants Corena have failed to demonstrate that plaintiff failed to negotiate in good faith to reach a mutually agreeable resolution during the settlement conference process as required under CPLR §3408(f). The amendment to CPLR §3408 imposing an obligation to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible, was not made effective until February 13, 2010 (*see* CPLR §3408[f]; L 2009, ch 507). Plaintiff had already concluded in late 2009 that upon review of financial documents submitted by defendants Corena, defendants Corena, who had been offered a trial modification plan and made the required payments thereunder, were not qualified for a permanent HAMP modification. Plaintiff hence refused to make permanent the trial modification plan which was effective July 1,

2009 through September 1, 2009. Defendants Corena have failed to demonstrate such determination was erroneous under the HAMP guidelines, reached by plaintiff without proper consideration of their finances or the guidelines, or made by it in consideration of improper factors.

Plaintiff, which had previously obtained an order of reference dated July 10, 2008, thereafter filed a motion for leave to enter a default judgment of foreclosure and sale on February 18, 2010. It, however, withdrew the motion on March 16, 2010. On October 7, 2010, the court notified the parties of a foreclosure settlement conference scheduled for November 23, 2010. At that conference, plaintiff's counsel informed the Court Attorney-Referee that defendants Corena had been made a loan modification offer which would soon arrive in the mail. The conference was adjourned until December 14, 2010.

Defendants Corena received the offer on or about November 26, 2010.[1] It was to take effect on December 1, 2010, upon the return of an executed copy of the agreement.

Defendants Corena, however, did not execute and return the proposed agreement to plaintiff. They make no claim that plaintiff's offer was not based upon proper evaluation of their finances or that they could not afford to pay the proposed monthly mortgage installments. Rather, they claim they feared they would be unable to make the scheduled future payments beginning in year 8 since defendant Maritza Corena was nearing retirement age. They also claim they believed certain substantial payments had not been properly credited to them by plaintiff. To the extent their attorney delivered a letter dated December 3, 2010 to plaintiff's counsel requesting a copy of the payment history and an escrow breakdown, the letter was not annexed to the copy of motion papers provided to the court. In any event, under CPLR §3408(f), the production of a payment history and itemization of the amounts needed to cure the arrears is suggested, not mandatory. The Court

---

[1] The proposed modification agreement called for the addition of $81,681.11 ($56,520.06 [interest] + $22,121.30 [escrow advance] + $4698.87 [recoverable balance, foreclosure/bankruptcy costs (if applicable)] - $1659.12 [less credits] = $81681.11) to the then current principal balance of $389,269.82, representing capitalized interest, fees and expenses and other amounts due under the original mortgage, resulting in a new principal balance of $470,950.93 ($81,681.11 + $389,269.82 = $470,950.93), and set the interest rate at 2% for the first five years, and then increased it in years 6 and 7, and then again in years 8-27. The proposed agreement set forth a schedule of the monthly payments of principal and interest, with an initial new principal and interest payment in the amount of $1900.10, plus $757.51 in escrow funds, for an initial new total monthly mortgage payment of $2657.61.

Attorney-Referee adjourned the conference held on December 14, 2010 until February 15, 2011 so that plaintiff could provide defendants Corena with the requested information. To the extent defendants Corena assert their attorney sent and e-mailed plaintiff's counsel another letter on January 25, 2011 seeking a payment history and escrow analysis, that letter was also not annexed to the copy of the motion papers provided to the court.

In the meantime, on December 28, 2010 and January 26, 2010, defendants Corena tendered payments in the amount of $2657.61 to plaintiff, but still did not execute the proposed agreement. Thus, defendants Corena have failed to show that plaintiff's rejection of the tender made on January 26, 2011 was improper.

At the next scheduled settlement conference held on February 15, 2011, plaintiff's counsel produced a payment history. The document set forth, among other things, payments received from defendants Corena, principal paid, interest paid, escrow paid, and principal, escrow and advance balances. Defendants Corena claim the payment history did not credit them for payments they made since 2007 in the approximate total amount of $25,000.00, and that plaintiff's attorney was unable to explain the document. Defendants Corena have failed to point to any specific item included in the payment history which needed explanation by plaintiff. They, more importantly, have failed to demonstrate that the amounts of unpaid principal balance, interest or escrow advances set forth in the November 17, 2010 proposed modification agreement were erroneous. Under the circumstances, the delay in providing the payment history cannot be considered proof of lack of good faith on plaintiff's part. Nor have defendants Corena demonstrated that they made any counterproposal for modification to plaintiff. Defendants Corena consequently cannot show the claimed lack of authority of plaintiff's counsel to settle the case had an adverse impact on the progress of the negotiations.

The conference was adjourned to March 8, 2011, and by order dated that date, the Court Attorney-Referee, in effect, released the case from the residential foreclosure conference part, noting the case had not settled and that the parties had failed to arrive at mutually agreeable modification terms. The Court Attorney-Referee, in his order, did not indicate that plaintiff had failed to negotiate in good faith, or that counsel for plaintiff had been unprepared during the conferences or lacked full authorization to dispose of the case.

To the extent defendants Corena assert plaintiff failed to negotiate in good faith after the settlement conference process contemplated pursuant to CPLR §3408 was complete, the subject

mortgage does not require that plaintiff negotiate with them at a post-acceleration juncture. Nevertheless, in an action of an equitable nature, the recovery of interest is within the court's discretion (*see* CPLR 5001 [a]; *Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]). The exercise of that discretion is governed by the particular facts in each case, including any wrongful conduct by either party (*see Danielowich v PBL Dev.*, 292 AD2d at 415; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]).

In this case, defendants Corena have failed to demonstrate plaintiff engaged in wrongful conduct following the release of the case from the residential foreclosure conference part. Rather than immediately move to confirm the referee's report of computation and for a judgment of foreclosure and sale, plaintiff reviewed a new loan modification application submitted by defendants Corena on March 8, 2011, and denied it on August 3, 2011. The court declines to exercise its discretion to hold plaintiff responsible for that delay in prosecuting this action where plaintiff was engaged in review of the March 8, 2011 application, particularly where defendants Corena have failed to show they timely provided certain requested documentation. In addition, defendants Corena thereafter engaged in motion practice in an effort to toll the accumulation of interest and fees on the subject mortgage, and subsequently, to extend the time in which to answer the complaint. That plaintiff also reviewed another loan modification application made by defendants Corena on October 9, 2012, and made an offer in January 2013, during the pendency of the appeal, likewise may not be viewed as wrongful conduct on the part of plaintiff warranting forfeiture of interest. Lastly, the continued communications and negotiations between counsel for plaintiff and defendants Corena through March 12, 2013 regarding the offer does not constitute an unreasonable delay attributable solely to plaintiff in the resolution of the foreclosure action.

The motion by defendants Corena is denied.

Dated: March 31, 2014

***JANICE A. TAYLOR, J. S. C.***

C:\Program Files (x86)\neevia.com\docConverterPro\temp\NVDC\02E59AB2-9600-4D1A-BB97-33C078EC5524\QUEENS174506SCIV_1396980597545.WPD