

<b>HSBC Bank USA, N.A. v Begum</b>
2015 NY Slip Op 30697(U)
March 26, 2015
Supreme Court, Queens County
Docket Number: 701949/2014
Judge: Thomas D. Raffaele
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13  
Justice

\_\_\_\_\_  
HSBC BANK USA, NATIONAL ASSOCIATION x  
AS TRUSTEE FOR WELLS FARGO ASSET  
SECURITIES CORPORATION, MORTGAGE  
ASSET-BACKED PASS-THROUGH CERTIFICATES  
SERIES 2007-PA5

Index  
Number 701949/2014  
  
Motion  
Date October 9, 2014

Plaintiffs,

Motion Seq. No. 1

-against-

RAHIMA BEGUM, NATIONAL CITY BANK, AND  
JOHN DOE,

Defendants.

\_\_\_\_\_x

The following numbered papers 1 to 46 read on this motion by defendant Rahima Begum to (1) impose as a sanction upon plaintiff for its failure to negotiate in good faith pursuant to CPLR 3408(f), the tolling of the accrual of interest with respect to the mortgage loan *nunc pro tunc* to the date of the commencement of the action, (2) direct plaintiff to return to the residential foreclosure settlement conference part and enter into a loan modification agreement, (3) produce any documentation showing: (a) investor restrictions which prohibit modification of the subject mortgage loan; (b) plaintiff's efforts to obtain a waiver of such restrictions; (c) any basis for denial of the waiver and (4) for an award of attorneys' fees with respect to the motion.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits ..... EF Nos. 27-30  
Answering Affidavits - Exhibits ..... EF Nos. 32-34  
Reply Affidavits ..... EF Nos. 36-46

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

Plaintiff commenced this action on March 24, 2014, seeking to foreclose a mortgage given by defendant Rahima Begum on the real property known as 47-33 39th Street, Sunnyside, New York, to secure a note evidencing a loan in the principal amount of \$581,600.00, plus interest. Plaintiff alleged that it is the holder of the mortgage and note and defendant Begum defaulted under the note and mortgage by failing to pay the monthly mortgage installment due on December 1, 2008 and thereafter.

Between June 17, 2014 and August 19, 2014, plaintiff's counsel, and defendant Rahima Begum and her attorney, participated in three residential foreclosure settlement conferences pursuant to CPLR 3408. Prior to that period, co-counsel for plaintiff advised defendant Rahima Begum's attorney, by letter dated June 13, 2014, that the mortgage arrears totaled approximately \$267,000.00, i.e. more than the cumulative total of 12 months of the monthly mortgage payment, and consequently, the investor on the loan would not allow a loan modification unless defendant Rahima Begum made an up-front payment of approximately \$223,000.00. Wells Fargo Home Mortgage, plaintiff's servicer, thereafter advised defendant Rahima Begum by letter dated July 29, 2014, that she did not qualify for a loan modification under the Federal Home Affordable Modification Program (HAMP) because the investor who owned the mortgage declined the servicer's request to modify the loan, and that it (the servicer) lacked the contractual authority to modify the loan under the HAMP due to limitations in its servicing agreement (with plaintiff). By letter dated August 5, 2014, Wells Fargo Home Mortgage also advised defendant Rahima Begum that she did not qualify for a traditional (non-HAMP) loan modification under the "piggy-back" or "piggy-back with temporary rate reduction" program because, based upon her financial documentation, the resulting mortgage payment would be unaffordable under the requirements of the program.

By letter also dated August 5, 2014 to counsel for defendant Rahima Begum, counsel for plaintiff reiterated that the loan modification application pursuant to the HAMP had been denied because "the investor of th[e] loan ... elected not to participate in [the] HAMP." Counsel for plaintiff explained that defendant Rahima Begum's loan modification application for a traditional "piggy-back" modification had been denied insofar as she was more than twelve months in arrears. Plaintiff's counsel advised that defendant Rahima Begum would be eligible for a "piggy-back" modification if she made an up-front payment of approximately \$223,000.00.

Defendant Rahima Begum's counsel requested a copy of the servicing agreement from plaintiff's attorney and was provided on-line access to it. Counsel for defendant Rahima Begum presented copies of these letters and excerpts of the servicing agreement to the Court Attorney Referee at the residential foreclosure settlement conference.

By order dated August 19, 2014, the Court Attorney Referee directed plaintiff to move for an order of reference by April 14, 2015, when a status conference was scheduled. The Court Attorney Referee noted that defendant Rahima Begum had been denied a modification, because the investor maintained it was not obligated to participate in the HAMP. The Court Attorney Referee also noted that counsel for defendant Rahima Begum intended to seek to litigate that issue “outside” of the residential foreclosure settlement part. The Court Attorney Referee also noted the restrictions of plaintiff precluded “in-house” loan modification options since the mortgage loan was more than 12 months in arrears.

Defendant Rahima Begum contends that plaintiff has failed to act in good faith in its negotiations as required by CPLR 3408.

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 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 (*see Wells Fargo Bank, N.A. v Meyers*, 108 AD3d at 19). In such absence, “courts have resorted to a variety of alternatives in an effort to enforce the statutory mandate to negotiate in good faith” (*id.*). The Appellate Division, Second Department has recognized that a sanction of barring a foreclosure plaintiff from collecting interest for a period of time can be a provident exercise of discretion under the appropriate circumstances (*see U.S. Bank Nat. Assn. v Smith*, 123 AD3d 914 [2d Dept 2014]; *U.S. Bank N.A. v Williams*, 121 AD3d 1098 [2d Dept 2014]; *see generally Norwest Bank Minn., NA v E.M.V. Realty Corp.*, 94 AD3d 835, 837 [2d Dept 2012]; *Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 984 [2d Dept 2011]; *Preferred Group of*

*Manhattan, Inc. v Fabius Maximus, Inc.*, 51 AD3d 889, 890 [2d Dept 2008]), and 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]).

Defendant Rahima Begum has not demonstrated 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). Her arguments regarding the applicability of the HAMP, whether plaintiff followed guidelines pursuant to the HAMP, and whether the investor does not allow loan modifications under the HAMP were improperly raised for the first time in her reply papers. In addition, the excerpted copy of the servicing agreement she presented in support of her motion indicates that it was dated as of October 29, 2007, before the United States Department of the Treasury was authorized to promulgate the HAMP (see Emergency Economic Stabilization Act of 2008 [12 USC §§ 5201–5261]), and does not allow the modification of the material elements of a mortgage loan covered by the agreement without express permission of the master servicer. Defendant Rahima Begum makes no claim that the servicing agreement is inapplicable to the subject mortgage, or was amended following promulgation of the HAMP to include language concerning the participation by plaintiff or plaintiff’s servicer in the HAMP (cf. *Davis v Citibank, N.A.*, 116 AD3d 819 [2d Dept 2014]). Thus, defendant Rahima Begum has failed to show the HAMP guidelines are applicable herein.

Furthermore, the inquiry by plaintiff’s servicer into whether the investor would voluntarily participate in the HAMP for the purpose of permitting modification of the subject mortgage loan was declined. Defendant Rahima Begum has failed to cite to any provision in the loan documents, or any statute or regulation, requiring a lender to provide documentation of such an inquiry or the response of the investor.

Defendant Rahima Begum asserts improperly for the first time in her reply papers that plaintiff should have offered her a “piggy-back” loan modification in 2009, when she would have been in arrears for less than 12 months, thus obviating the need for her to make a large up-front payment. She, however, has failed to establish she sought a “piggy back” loan modification (or other in-house loan modification product) within the first 12 months of her default in payment of the mortgage. Moreover, the amendment to CPLR 3408, imposing the obligation on the plaintiff to negotiate with the defendant borrower 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), more than 12 months after defendant Rahima Begum’s

alleged default. Defendant Rahima Begum, furthermore, defaulted in appearing and answering the complaint in the prior foreclosure action (Index No. 13744/2009), and defaulted appearing at the residential foreclosure conference held therein (*see* order dated October 8, 2009 of Court Attorney Referee Leonard N. Florio).

Defendant Rahima Begum also successfully caused the default judgment in the prior foreclosure action to be vacated, and the complaint insofar as asserted against her to be dismissed, on the ground of lack of personal jurisdiction due to improper service of process (*see* orders dated October 15, 2012 and November 14, 2013). Defendant Rahima Begum therefore cannot claim that plaintiff acted in bad faith in having failed to negotiate to reach a mutually agreeable resolution with her within the confines of the prior action.

Nor has defendant Rahima Begum established that plaintiff cannot require payment of the arrears as a condition to entering into a piggy-back modification agreement. She has failed to cite to any provision in the loan documents imposing on plaintiff a duty to modify the loan documents or negotiate a workout, with or without such an up-front payment (*see Brown v Deutsche Bank Nat. Trust Co.*, 120 AD3d 440 [1st Dept 2014]). CPLR 3408 does not purport to require parties to reach an agreement and this court may not endeavor to force an agreement upon the parties (*Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 20 [2d Dept 2013]).

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, and in the interest of justice and judicial economy, the court shall exercise its discretion to toll the interest, *nunc pro tunc*, to the commencement date of this action (*see Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]; *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 accordance with the foregoing, the motion is denied, except for the tolling of the interest described in the preceding paragraph.

Dated: March 26, 2015

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Thomas D. Raffaele, J.S.C.