

U.S. Bank Natl. Assoc. v Johnston
2016 NY Slip Op 30849(U)
May 2, 2016
Supreme Court, Queens County
Docket Number: 23243/2013
Judge: David Elliot
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

U.S. BANK NATIONAL ASSOCIATION, etc.,
Plaintiff,

-against-

NADEZDA JOHNSTON, et al.,
Defendants.

Index No. 23243/2013

By: **ELLIOT, J.**

Date: May 2, 2016

Motion Cal. Nos. 131 & 154

Motion Seq. Nos. 3 & 4

Motion Date: Apr. 1 & Apr. 6, 2016

In this action to foreclose a mortgage, defendant Nadezda Johnston (defendant) moves for an order, pursuant to CPLR 3408, finding that plaintiff failed to negotiate in good faith and imposing a sanction therefor. Plaintiff separately moves for an order, *inter alia*, granting it a final judgment of foreclosure and sale.

Plaintiff commenced this action to foreclose a mortgage on December 24, 2013. Defendant filed an answer to the complaint on January 16, 2014. The parties initially appeared for a Residential Foreclosure Conference on May 12, 2014. Several conferences were held thereafter. The matter was then released therefrom because “the defendant’s application for a modification was denied due to an inability to reach an affordable payment” (CA-R Cimino).

Plaintiff then moved for an order, *inter alia*, granting it summary judgment against defendant and appointing a referee to compute. Same was granted without opposition on September 16, 2015. Shortly thereafter, defendant filed a prior motion seeking similar relief to that which she now seeks; same was denied by order dated December 14, 2015, inasmuch as her affidavit in support thereof was unsigned, undated, and did not contain a jurat (CPLR 2101 [a], 2309). Defendant now renews said motion and corrects the defect noted. Plaintiff opposes the motion and separately moves for judgment of foreclosure and sale. Defendant has not opposed that motion.

In support of her motion, defendant avers that plaintiff has not negotiated in good faith as required by CPLR 3408 (f), by using “unfair tactics of delaying, misinforming, and or denying information about the manner in which they process the numbers and other aspects related to my modification applications.” Defendant alleges the following took place prior to commencement of this action: she applied for a loan modification in 2009 after continuously being behind one or two payments, and was denied with no clear explanation or room for negotiation; she fell behind in 2010 and applied for a loan modification a second time, and was again denied in similar fashion; in 2011, the mortgage servicer (Wells Fargo Bank, N.A.) stopped accepting payment (which payment would have brought her to four months behind on her monthly mortgage obligation); she applied for a third loan modification on or about September 2013, which application was acknowledged by the servicer on October 30, 2013; she was served with a notice of default dated October 21,

2013, by which time the total delinquency was over \$85,000.00; and, on December 24, 2013, plaintiff commenced the within action.

Defendant then details the circumstances surrounding the foreclosure settlement conferences. On May 12, 2014 at the first conference, plaintiff's counsel "offered no information" regarding her third loan modification application; rather, a new application was requested on the ground that the prior one was "stale." The above-mentioned court-attorney referee directed her to do so and the conference was adjourned to July 16, 2014. On that date, and at the following conference of September 2, 2014, defendant was required to submit documentation as to whether a certain family member, Fabio Guinard, residing in her home and paying her \$500.00 per month, was a tenant or contributor. Defendant states that documentation regarding same was never before an issue. Though she provided a letter, together with Mr. Guinard's May 2014 bank statement – reflecting a Social Security payment award in the amount of \$580.00 – and an affidavit from him stating that he is making rent payments to defendant in the amount of \$500.00 per month, on June 25, 2014, plaintiff's counsel requested, *inter alia*, a social security income award letter for Mr. Guinard for 2014. On October 6, 2014, at the next conference, the award letter –which she had recently provided to the servicer – was the subject; however, the modification had not yet been answered and the fifth conference date was scheduled for November 12, 2014. By that date, the modification application had been denied by letter dated November 3, 2014 since, "[b]ased on the documentation you provided, we are unable to reduce your principal

and interest payment by 10% or more.” The matter was then released from the conference part as noted, *supra*. Defendant appealed the decision on December 2, 2014 but was denied 12 days later with no clear explanation.

In opposition, without specifically addressing defendant’s various allegations of lack of good faith, plaintiff posits that the matter was released from the Residential Foreclosure Part without any finding of bad faith or lack of good faith on plaintiff’s part and, as such, defendant is not entitled to the relief requested. In any event, plaintiff urges that the court may not impose contractual terms on the parties; *i.e.*, there is no entitlement to a modification (*see e.g. U.S. Bank Natl. Assn. v Sarmiento*, 121 AD3d 187 [2014]; *PHH Mtge. Corp. v Hepburn*, 128 AD3d 659 [2015]; *U.S. Bank Natl. Assn. v Williams*, 121 AD3d 1098 [2014]). Defendant contends in reply that there was no fact-finding effort of any kind in the Residential Foreclosure Part with respect to lack of good faith.

CPLR 3408 (f) provides that “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible” (*see also Wells Fargo Bank, N.A. v Miller*, 136 AD3d 1024 [2016]; *LaSalle Bank, N.A. v Dono*, 135 AD3d 827 [2016]; *Onewest Bank, FSB v Colace*, 130 AD3d 994 [2015]). The statute was enacted in response to the 2008 mortgage crisis which “requires only that the parties enter into and conduct negotiations in good faith” (*U.S. Bank Natl. Assn.*, 121 AD3d at 200; *see Deutsche Bank Nat. Trust Co. v Twersky*, 135 AD3d 895 [2016]), its purpose to ensure that both plaintiff and defendant be “prepared to participate in a meaningful effort at

the settlement conference to reach resolution” (*U.S. Bank Natl. Assn.*, 121 AD3d at 200, quoting 2009 Governor’s Program Bill Mem., Bill Jacket, L. 2009, ch. 507 at 11; *see Wells Fargo Bank, N.A.*, 136 AD3d at 1025; *LaSalle Bank, N.A.*, 135 AD3d at 828; *U.S. Bank Natl. Assn. v Smith*, 123 AD3d 914 [2014]). The court must look at the totality of the circumstances to determine whether plaintiff’s conduct did not constitute such a meaningful effort, which includes circumstances where “a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds” (*U.S. Bank Natl. Assn.*, 121 AD3d at 204; *see Wells Fargo Bank, N.A.*, 136 AD3d at 1025). Though the statute does not provide a remedy for a CPLR 3408 (f) violation, courts have held that an abatement of interest, counsel fees, costs, and disbursements constitutes an appropriate sanction (*see LaSalle Bank, N.A.*, 135 AD3d at 829; *U.S. Bank Natl. Assn.*, 123 AD3d at 917).

Here, the record does not support the conclusion that plaintiff’s conduct at the settlement conference did not constitute a meaningful effort at reaching a resolution or that a hearing is warranted on that issue (*see Wells Fargo Bank, N.A.*, 136 AD3d at 1025; *Aurora Loan Servs., LLC v Chirinkin*, 135 AD3d 676 [2016]; *Bank of N.Y. v Castillo*, 120 AD3d 598 [2014]). As a preliminary matter, defendant’s recitation of her allegations as to plaintiff’s conduct pre-settlement conference is not relevant for purposes of her motion pursuant to CPLR 3408 (f) since, as noted above, the purpose of the good faith requirement is to ensure that plaintiff is prepared to participate to reach resolution *at the settlement conference* (*Wells*

Fargo Bank, N.A., 136 AD3d at 1025; *U.S. Bank N.A.*, 121 AD3d at 200; *U.S. Bank Natl. Assn.*, 123 AD3d at 916).

Even though the court is to focus on the conduct of the parties at the settlement conferences, it is noted that it cannot be said that plaintiff failed to negotiate in good faith when it neglected to accept defendant's offer of partial payment prior to commencing the action (*see Deutsche Bank Natl. Trust Co.*, 135 AD3d at 896 [defendant did not establish lack of good faith on plaintiff's part by showing that plaintiff refused to accept a lump sum payment proposal in full satisfaction of loan balance]). Nor does it appear from the one pre-commencement denial letter, dated November 12, 2009, that defendant provided, that plaintiff's denial was unclear; rather, same was due to defendant not having provided all the information requested.

As far as the plaintiff's alleged conduct at the settlement conferences, it appears from the facts alleged and the documentation proffered that the settlement conferences spanned an approximate six-month period; that defendant was asked to submit a "fresh" loan modification at the outset; that plaintiff requested additional documentation in connection therewith approximately one month thereafter and that, ultimately, due to plaintiff's inability, under HAMP, to come up with a modification that was financially viable for defendant, the application was denied. This does not rise to the level of "dilatory conduct" sufficient to make a finding as to the absence of good faith or to warrant a hearing on said issue (*cf. LaSalle Bank, N.A.*, 135 AD3d at 829 [lower court properly found that

plaintiff failed to negotiate in good faith when facts revealed that document requests, many of which documents were already provided by defendant, were made over a 40-month period; plaintiff required that defendant complete numerous applications to two different servicers; that there were at least 24 court appearances; that plaintiff repeatedly failed to comply with court orders directing it to furnish documents to defendant; that plaintiff refused to negotiate loan modification terms]; *Onewest Bank, FSB*, 130 AD3d at 996 [similar findings]).

As to defendant's contention that plaintiff did not act in good faith by requesting evidence of Mr. Guinard's social security award when, in effect, its servicer must have known the existence of same – having electronically received these installments by virtue of Mr. Guinard being a Wells Fargo Bank customer – the court finds that plaintiff's request for further documentation is not unreasonable. As to defendant's challenge to the final denial of her application on November 3, 2014 (defendant indicates that she only challenged this denial), defendant does not provide documentary evidence of her appeal of same, or documentary evidence that she challenged the accuracy of the Net Present Value inputs utilized to determine whether a modification was financially viable (*cf. U.S. Bank Natl. Assn.*, 121 AD3d at 194).

Accordingly, defendant's motion is denied. Plaintiff's motion is granted. The referee's report, dated October 29, 2015, is ratified and confirmed.

Submit Judgment of Foreclosure and Sale. Provide therein for counsel fees in the amount of \$3,500.00. Further provide for referee's fees of \$250.00 for the sale, inasmuch

as said referee received \$500.00 for the computation per order dated September 16, 2015.

J.S.C.