

One W. Bank v Coffey
2018 NY Slip Op 32012(U)
August 14, 2018
Supreme Court, Suffolk County
Docket Number: 034373/2009
Judge: James Hudson
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COPY Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X

ONE WEST BANK,

Plaintiff,

-against-

JOHN F. COFFEY, JR.; ROSEMARIE S. COFFEY;
PAUL MASARACCHIA; GARY GAGLIARDI;
PATRICIA GAGLIARDI; TRIANA GAGLIARDI;
MARIE GAGLIARDI; EVA COLON; KAITLIN
COFFEE; DARRA McDONOUGH,

Defendants.

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INDEX NO.: 034373/2009

MOT. SEQ. NO.: 003-Mot D; CASEDISP

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Upon the following papers numbered 1-13 read on this motion/order to show cause for a Judgment of Foreclosure Sale; Notice of Motion/ Order to Show Cause and supporting papers 1-7; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 8-9; Reply Affidavits and supporting papers 10-13 ;(and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq. no: 003) by the Plaintiff for an order pursuant to RPAPL §1351 is granted as to a judgment of foreclosure and sale, modified pursuant to CPLR Rule 3408 (j), denying Plaintiff judgment for mortgage interest, costs and fees for the period commencing July 1st, 2014 through and including March 18th, 2017; and it is further

ORDERED that the relief requested in the answer of Defendants John F. Coffey and Rosemarie S. Coffey tolling mortgage interest, costs and fees for the period commencing July 1st, 2014 through and including March 18th, 2017 is granted.

This is an action seeking foreclosure and sale on residential real property situate in Amityville, Suffolk County, New York. In short, Plaintiff mortgagee's delay in case processing caused financial detriment to Defendant Mortgagors in accumulated interest, costs and fees.

A brief case history is illustrative: During December 2013, Justice Peter H. Mayer granted Plaintiff summary judgment and appointed Samuel DiMeglio, Jr., Esq. as Referee. Thereafter, a series of events occurred, all leading to a four year delay in finalizing the instant foreclosure and sale: 1) 2014-Plaintiff filed for change of counsel; 2) 2015-Plaintiff changed loan service agent; (3) 2016-Plaintiff demanded further client documentation; (4) An oath and report was completed by the Referee, Mr. DiMeglio in June 2017; (5) On June 30th, 2017, Plaintiff filed a notice of motion for judgment of foreclosure sale and accompanying documents; (6) Defendants answered August 16th, 2017; (7) Plaintiff filed its reply in August 2017.

In their answer, Defendants John F. Coffey, Jr. and Rosemarie S. Coffey (“Coffeys”) oppose granting Plaintiff interest, costs and fees for a stated term of months during the four years which have elapsed in the foreclosure and sale of their Amityville residence. Defendants contend that Plaintiff failed to act in good faith in its attempts to settle the case. Defendants also contend that Plaintiff failed to expeditiously pursue its remedy of foreclosure and sale. Defendants further contend that same failure to proceed in good faith resulted in Defendants being financially damaged. The Coffeys estimate interests and costs incurred over thirty four (34) months commencing June 2014 through and including March 2017 to be \$106,903.00. Defendants request relief from their obligation to pay that interests and costs. The Court notes that the Coffeys do not oppose the foreclosure sale.

Plaintiff’s Counsel correctly notes in her affirmation that a mortgage “foreclosure action sounds in equity and triggers the equitable powers of the court,” (*U.S. Bank National Association v. Williams*, 121 AD 3d 1098, 1101, 995 NYS2d 172, 176 [2d Dept 2014 NY Slip Op. 07349], quoting *Norwest Bank Minn., N.A. v. E.M.V. Realty Corp.*, 94 AD3d 835, 943 NYS2d 113[2d Dept 2012]). “Once equity is invoked, the court’s power is as broad as equity and justice require,” (*Mortgage Elec. Registration Sys., Inc. v. Horkan*, 68 AD3d 948, 948, 890 NYS2d 326 [2d Dept 1009]).

CPLR Rule 3408 controls mandatory settlement conference(s) in residential foreclosure actions and sets the statutory requirements of foreclosure scheduling (McKinney’s CPLR 3408). CPLR 3408(f) requires that the parties “...must negotiate in good faith to reach a mutually agreeable resolution...”

The concept of “good faith” sounds in equity and is a requirement of negotiation is a residential foreclosure case. Good faith is examined and determined through a *totality of the circumstances* standard, (*U.S. Bank National Association v. Sarmiento*, 121 AD3d 187, 991 NYS2d 68[2d Dept 2014 NY Slip Op. 05533]; see *PNC Bank National Association v. Campbell*, 142 AD3d 1147, 38 NYS3d 234 [2d Dept 2016 NY Slip Op. 06201]). In

Sarmiento, the Court Attorney Referee reported that over a three (3) year period of time the Plaintiff/Mortgagee had engaged in three (3) unsuccessful settlement conferences. The Referee contended that plaintiff had failed to negotiate in good faith. (*Id.* at 195, 73). The Court determined that plaintiff's communication with defendant "had sown confusion, distress, and doubt, by including, among other things, confusing and vague rejection notices and requests for duplicative documents." (*Id.* at 197, 75).

Similarly, in the case at bar, Plaintiff in its reply confirms that, post the 2013 decision of Justice Peter H. Mayer, Plaintiff changed counsel (filed consent to change attorney during 2014), and the Referee Mr. DiMeglio was appointed in early 2014. Plaintiff changed the bank service agent during 2015, held a settlement conference during 2016, demanded "further client documentation" from Defendants/Coffeys. Referee DiMeglio executed his oath and report June 1st, 2017, asserting \$719,502.62 due to Plaintiff from date of default through March 18th, 2017. On June 30th, 2017, Plaintiff filed its Notice of motion for judgment of foreclosure and sale; four (4) years after summary judgment was granted. As in **Sarmiento**, Defendant Coffeys answered, asserting lack of good faith and requesting relief.

Plaintiff's Counsel demonstrates a thorough grasp of the legal concepts in contest in this matter and cites to proper statutes and authority.

It should be noted that Plaintiff does not contend that the Coffeys in any way were dilatory or uncooperative or evasive nor that the Coffeys acted in any way other than in good faith throughout the foreclosure process. Plaintiff asserts that "The Defendant's opposition does not offer any credible evidence that Plaintiff has intentionally delayed in proceeding in this foreclosure action, especially in bad faith." Plaintiff concludes with an unsupported allegation that the Coffeys have been "unjustly enriched at Plaintiff's expense" by the four (4) year delay of the instant foreclosure case. Plaintiff, in reliance of that allegation requests that the Coffeys be denied requested relief. Nowhere does Plaintiff defend nor explain the reasons for the lengthy delay is the case. Plaintiff also fails to address Defendant's claim of damages.

Defendants note that "conduct such as...unexcused delay, unexplained charges, and misrepresentations have been held to constitute bad faith,"(or, parenthetically, lack of good faith); (*citing Flagstar Bank, FSB v. Walker*, 37 Misc3d 312, 318 [Sup Ct, Kings County 2012]; *Wells Fargo Bank, N.A. v. Ruggiero*, 39 Misc3d 1233 [A] at *6 [Sup Ct. Kings County 2013]).

The Court notes that evidence of a Plaintiff engaging in dilatory conduct, (include) making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided (*Onewest Bank, FSB v. Colace*, 130 AD3d 994, 995-96, 15 NYS3d 109, 110-11 [2d Dept 2015]).

In a foreclosure case where the court found wrongful conduct through mortgagee delay, the remedy of canceling interest during the period of delay was a provident exercise of court discretion, (*U.S. Bank National Association v. Williams*, 121 AD3d 1098, 995 NYS2d 172 [2d Dept 2014 NY Slip Op 07349]).

Additionally, it should be noted that the essence of the equitable defense of laches is prejudicial delay in the assertion of rights, (*Deutsche Bank National Trust Company v. Joseph*, 117 AD3d 982, 986 NYS2d 545 [2d Dept 2014 NY Slip Op. 03794], quoting *Stein v. Doukas*, 98AD3d 1026, 1028, 950 NYS2d 773 [2d Dept 2012]). The *Deutsche Bank* Court explained:

“To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that the relief is accorded the complainant.” (*Id.* at 982, 546); quoting *Stein v. Doukas*, 98 AD3d at 1028, 950 NYS2d 773 [2d Dept 2012], quoting *Cohen v. Krantz*, 227 AD2d 581 [2d Dept 1996; 582, 643 NYS2d 612, see *Meding v. Receptopharm, Inc.*, 84 AD3d 896, 897, 923 NYS2d 165 [2 Dept 2011]; *Dwyer v. Mazzola*, 171 AD2d 726, 727, 567 NYS2d 281[2d Dept 2008]).

“Moreover, the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense (laches).” (*Id.* at 984, 547; quoting *Stein v. Doukas*).

“In an action of an equitable nature, the recovery of interest is within the court’s discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party” (*U.S. Bank National Association v. Zembova*, 137 AD3d 1010, 27 NYS3d 611 [2d Dept 2016 NY Slip Op. 01830]; quoting *Dayan v. York*, 51 AD3d 964, 965, 859 NYS2d 673 [2d Dept 2008]; see CPLR 5001[a]).

It has been held by this Court that CPLR Rule 3408 is constitutional, (*MLF3 Jagger LLC v. Kempton*, 56 Misc3d 227, 50 NYS3d 247 [Sup Ct. Suffolk County 2017]).

Building upon the protections and process already in place in dealing with residential mortgage foreclosure, and controlling herein, CPLR Rule 3408 was amended during 2016 to include 3408(j):

“Upon a finding by the court that the Plaintiff failed to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to this subdivision and subdivision (k) of this section *the court shall, at a minimum*, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the Plaintiff, and where appropriate, the court may also impose one or more of the following... (4) Award any other relief that this court deems just and proper.”

In the case at bar, the Plaintiff notably offers only excuses, not reasons for its inordinate delay in processing the aspects of the case which were within its power. The Court finds that the delay caused the Defendants, John F. Coffey, Jr. and Rosemarie S. Coffey to have been avoidable through conscientious prosecution of the case by Plaintiff. The Court finds that Defendants were financially damaged due to that avoidable delay which was beyond their control.

The Court further notes that the Defendants, John F. Coffey, Jr. and Rosemarie S. Coffey do not object to the foreclosure action, only to the interests and costs accumulated during Plaintiff's lengthy delay.

The Court finds that the delays attributable to Plaintiff constitute a lack of good faith, and that the equitable relief provided by CPLR Rule 3408(j) is warranted. The relief requested by Defendants John F. Coffey, Jr. and Rosemarie S. Coffey comport with the statutory minimum relief to be afforded under these circumstances.

Finally, the Court does not make any determination as to the balance of Defendants allegations and claims, which the Court notes are unsubstantiated.

Accordingly, the Defendant's request for relief from interests and costs associated with this foreclosure action in the amount of \$106,903.00 commencing June 1st, 2014 through and including March 18th, 2017, representing mortgage interest and real property taxes for that period, is granted against the Plaintiff. The Plaintiff's motion for Judgment of Foreclosure


OneWest Bank, FSB v John Coffey, et al.

Index No.:034373/2009

and Sale is granted subject to that modification for stated relief. Plaintiff is directed to submit a proposed modified Judgment of Foreclosure and Sale incorporating the relief granted herein.

This foregoing decision constitutes the Order of the Court.

DATED: AUGUST 14TH, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court