

Wells Fargo Bank, N.A. v Marchisello

2020 NY Slip Op 34395(U)

November 23, 2020

Supreme Court, Suffolk County

Docket Number: 604280-15

Judge: Denise F. Molia

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PUBLISH

Index No.: 604280-15

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA.**
Justice

Wells Fargo Bank, N.A., as Trustee for the
Certificateholders of the BSSP Trust 2007-EMX1,
Mortgage-Backed Notes, Series 2007-EMX1,

Plaintiff,

- against -

Joseph Marchisello, Tabitha Lam, Slomins Inc.,
Portfolio Recovery Associates LLC, Capital One Bank
USA NA, New York State Department of Taxation
and Finance, Clerk of the Suffolk County District
Court, Cypress Financial Recoveries LLC, Cach LLC,
Clerk of the Suffolk County Traffic & Parking
Violations Agency, and "JOHN DOE #1" through
"JOHN DOE #10, the last ten names being fictitious
and unknown to the plaintiff, the person or parties
intended being the persons or parties, if any, having or
claiming an interest or lien upon the mortgaged
premises described in the Complaint,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 2/2/18
SUBMISSION DATE: 5/17/19
MOTION SEQ. NO.: 003 MOT ADJ
004 MG

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Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated February 7, 2017 (003); Affidavit in Support dated February 6, 2017; Exhibits annexed thereto; Affirmation in Opposition dated February 13, 2017; Exhibits A through G annexed thereto; Order to Show Cause dated January 18, 2018 (004); Affirmation dated January 13, 2018; Affidavit dated January 17, 2018; Exhibits A through I annexed thereto; Affirmation in Opposition dated February 26, 2018; Exhibits A through Q annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by defendant Tabitha Lam (003), for an Order vacating the Judgment of Foreclosure and Sale, is adjourned to February 26, 2021, pending the holding of a Bad Faith Hearing.

ORDERED, that the motion by defendant Tabitha Lam (004), pursuant to CPLR 3408, for an Order setting the matter down for a hearing to determine if plaintiff has demonstrated bad faith for its failure to negotiate in good faith during the settlement process pursuant to Banking Law §6(g), 12 U.S.C. §1701(j)(3), CPLR 3408(f)(2), CPLR 3408(l), (j), (k), and (l), NYCRR §202.12-a, 3 NYCRR 419.2, 3 NYCRR 419.3, and 12 C.F.R. 1024.41(d), is granted; and it is further

ORDERED, that the parties are directed to appear for a Bad Faith Hearing to be held at the Courthouse, One Court Street, Courtroom 431, Riverhead, New York, on February 25, 2021 at 9:30 a.m.

The record reflects that the defendant Tabitha Lam remains in title to the subject premises, previously as a tenant by the entirety and now as the sole fee tenant as the surviving spouse of Joseph Marchisello, who died on March 5, 2011. As a borrower and fee owner, Lam is entitled to be considered for a loan modification irrespective of the fact that she is not an obligor on the Note (see, Charles Schwab Bank v. Winitch, 179 A.D.3d 1003; Bank of New York v. Forman, 176 A.D.3d 663).

The parties participated in nine Foreclosure Settlement Conferences between May 2017 and January 2019. During that time the plaintiff contended that Lam must formerly assume the mortgage prior to being considered for a loan modification. Such demand by plaintiff is not supported by either CPLR 3408(a) or Banking Law §6-g.

CPLR 3408(f)(2) incorporates by reference all state and federal laws concerning loan servicing and the modification process. Federal and New York State law specifically prohibits the practice of dual tracking, *i.e.*, the prosecution of a foreclosure action to sale while a loan modification is still “open”.

CPLR 3408(a)(2)(i) entitles Lam to the protection of the rule, even where she is not identified as a borrower on the mortgage instrument. CPLR 3408(1)(20(ii) and CPLR 3408(f)(2) incorporate by reference the rules and regulations of the Superintendent of the Department of Financial Services (“Superintendent”), as well as state and federal laws and rules governing mortgage loan servicing.

Based upon the Superintendent’s rules, this Court has the ability to review and evaluate the defendant’s assertions that the plaintiff acted in bad faith during the loan modification process.

3 NYCRR §419.3 requires loan servicers to comply with all applicable provisions of federal and state laws, as follows:

“In addition to applicable provisions of Banking Law article 12-D and the requirements of Part 418 of this Title and this Part, a servicer shall comply with all applicable Federal and New York State laws and regulations relating to mortgage loan servicing, including but not limited to RESPA, the Truth-in-Lending Act, 15 U.S.C. section 1600 *et seq.* and regulation Z adopted thereunder, 12 C.F.R., section 226 *et seq.*, section 6-k of the Banking Law and article 9, title 3-A, of the Real Property Tax Law.”

3 NYCRR §419.11 requires a foreclosing plaintiff to offer a loan modification rather than other loss mitigations when modification will net the lender more than a liquidation of the property at foreclosure sale. 3 NYCRR §419.11(b) provides:

“Servicers should consider a loan modification as an alternative to foreclosure when:

- (1) the borrower demonstrates that he or she is in imminent risk of defaulting on the mortgage loan as a result of a financial hardship or has experienced a financial hardship and is unable to maintain the payment at the current amount required under the mortgage loan or is unable to make up the delinquent payments; and
- (2) the net present value of the income stream expected of the modified loan is greater than the net present value of the income stream that is expected to be recovered through the disposition of the property through a foreclosure sale.”

As a threshold matter, the Court finds that the plain language of the applicable statutes prohibits the “dual tracking” of a loan and intends that the duty to negotiate in good faith by both parties continue throughout the course of the litigation. In fact, a loan servicer is prohibited from moving for a judgment of foreclosure and sale or scheduling an auction date if the borrower has submitted a full application for loss mitigation (see, 12 C.F.R. §1024.41(g)).

The defendant has established *prima facie* that the plaintiff has breached the Superintendent’s regulations by the pre-rejection of her loan modification application. Lam contends that the plaintiff has failed to comply with the Garn-St. Germain Act, which creates an exemption for non-borrowing spouses to step into the shoes of a deceased borrowing spouse (see, 12 U.S.C. §1701(j)(3)). The defendant’s submissions raise a triable issue of fact as to whether the plaintiff negotiated in good faith and whether Lam was deprived of a meaningful opportunity to resolve this action through the loan modification process or other potential working options (see, CPLR 3408(f)). Under the circumstances presented, the Court is required to conduct a hearing pursuant to CPLR 3408(i) and CPLR 3408(j) (see, M&T Bank v. Biordi, 176 A.D.3d 1194; U.S. Bank v. Fisher, 169 A.D.3d 1089; Wells Fargo v. Nimkoff, 159 A.D.3d 869; U.S. Bank N.A. v. Sarmiento, 121 A.D.3d 187, 200).

The foregoing constitutes the Order of this Court.

Dated: November 23, 2020


HON. DENISE F. MOLIA A.J.S.C.