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Flagstar Bank, FSB v Walker
2012 NY Slip Op 22148
Decided on May 31, 2012
Supreme Court, Kings County
Kramer, J.
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<p>Flagstar Bank, FSB, Plaintiffs,</p> <p>against</p> <p>Bevan Walker and Pamella M. Walker a/k/a Pamella Walker, et al, Defendants.</p>
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8230/11

Plaintiff was represented by

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Herbert Kramer, J.

There is only one standard for good faith under CPLR 3408. That standard exists regardless of insurance regulations by FHA, or others and independent of investor restrictions.

This Court holds that the best uniform standard for "good faith" is compliance with the Federal HAMP regulations.

In March of 2009, in response to the nation-wide foreclosure crisis, the Treasury Department introduced the HAMP program. HAMP is a government-subsidized mortgage modification program, which was designed to make qualified mortgage loans affordable to borrowers who are in default or who are in imminent danger of default. All banks that received financial assistance from [*2]the Federal Government under the Troubled Asset Relief Program ("TARP") were required to sign a Participation Agreement with the United States Treasury Department, agreeing to participate in the HAMP program and comply with HAMP guidelines. In order to be eligible for a "HAMP" modification the loan must have been originated prior to January 1, 2009, the property is a one to four family unit, owner occupied with certain unpaid principal caps, among other criteria. *See, J.P. Morgan Chase Bank, N.A. v Ilardo*, 940 N.Y.S.2d 829 [2012]. [\[FN1\]](#)

In order to apply for a HAMP modification the borrower must submit various documents for the servicer or lender to review. Included in those documents are financial information, hardship letters, tax forms and a Dodd-Frank certification. Once the package is complete the servicer or lender then reviews the borrower for a modification according to the guidelines set by HAMP to determine whether the mortgage payments can be lowered to 31% of the borrowers income. The mechanisms set forth in the HAMP guideline include a "waterfall" which manipulates the terms of the mortgage to obtain a modification. [\[FN2\]](#)

The New York Legislature enacted CPLR §3408 in 2008, which applies to certain residential foreclosure actions in the State of New York with the express legislative intent to

"help the defendant avoid losing his or her home." CPLR 3408 (a).

CPLR §3408 requires, among other things, that mandatory settlement conferences be held for the purposes of:

discussions 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 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 purposes the court deems appropriate." CPLR 3408 further requires that "both the plaintiff and defendant shall negotiate in *good faith* to reach a mutually agreeable resolution, including a loan modification, if possible.

It is this term, "good faith," which has become a matter of great contention.

[*3]The instant action was commenced by summons and verified complaint in April of 2011. The verified complaint alleges that on January 22, 2009, the defendants Bevan Walker and Pamella M. Walker executed and delivered to Mortgage Electronic Registrations Systems, Inc. (MERS) acting solely as nominee for ICC mortgage Services, its successors and assigns a Mortgage in the principal amount of \$548,576.00. Thereafter the mortgage was assigned from MERS, acting solely as nominee for ICC Mortgage Services to Flagstar Bank, FSB, by an assignment of mortgage dated January 24, 2011 "and is currently in the process of being recorded in the Kings County City Register's Office."

The complaint further alleges that the defendants defaulted on their obligations under the terms of the Note and Mortgage on June 1, 2010. The plaintiff "is now and was at the commencement of the within action the sole, true and lawful owner of the said Note and Mortgage securing the same or has been delegated the authority to institute a mortgage foreclosure action against the same or has been delegated the authority to institute a mortgage foreclosure action against the homeowner by the owner and holder of the subject Mortgage and Note."

Allegedly, the note was assigned by endorsement to Flagstar Bank by Dean Sourial, as President of ICC Mortgage. The purported assignment is endorsed on the face of the note and undated. Furthermore, Flagstar asserts that the original note was endorsed and delivered to it prior to the commencement of this action and that the original note remains in its "vault."^[FN3]

Pursuant to CPLR 3408 a settlement conference was initially held on October 25, 2011. Thereafter the parties appeared in the settlement part on January 3, 2012 and February 29, 2012. At the last conference the matter was referred to the Judicial Foreclosure Referral Part for a hearing on whether the parties acted in "bad faith" during the settlement negotiations. On May 15, 2012 a hearing was held on the record.

The defendants' witnesses included the attorney for the defendant and the defendant Mrs. Pamela Walker. This Court finds the testimony of Ms. Pullini, the defendants' attorney, to be credible. Ms. Pullini testified that a modification would be possible for the defendants if the HAMP mechanisms were utilized.^[FN4]

FHA is neither the owner nor investor of the loan but rather an insurer of the note. As insurer, FHA requires the loans and borrowers meet certain criteria for origination. "Congress created the Federal Housing Administration's FHA Single Family Insured Loan program to "meet the housing needs" of low-to-moderate income borrowers. 12 U.S.C. § 1708(a)(7). In the event of a default the lender may file a claim with the Secretary of Housing and Urban Development. *id.* at 1709(a). If a default has occurred a mortgagee "shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure...*Id.* 1715u(a). A mortgagee must consider the comparative effects of their elective servicing actions and must take those appropriate actions which can reasonably be expected to generate the smallest financial loss to the Department (of housing and [*4]Urban Development) 24. C.F.R. 203.501"*Sinclair v Donovan*, 2011 WL 5326093 [S.D. Ohio].^[FN5] The loss mitigation options have been interpreted to benefit the Government as provider of the insurance. *See, Id.* See also 24 C.F.R. 203.501 (Mortgagees must consider the comparative effects of their elective servicing actions, and must take those actions which can reasonably be expected to generate the smallest financial loss to the Department.)

Furthermore, plaintiff during the hearing testified that FHA restricts its ability to modify loans. FHA, in opposition to HAMP prohibits extending the term of the loan,

lowering the interest rate lower than the average rate, loan forgiveness and balloon payments. Therefore, plaintiff alleges that its hands are tied.

In this action the note is not technically eligible for HAMP, as it originated after January 1, 2009. Regardless, whether or not the loan qualifies for HAMP or not, the most appropriate benchmark for good faith are the HAMP guidelines.

Good Faith

This action gives rise to a pertinent inquiry, what is the standard of good faith required by CPLR 3408? It is apparent to this Court that good faith is not just the absence of "bad faith," but requires actively working towards a standard of good faith, which is applicable to all foreclosure actions. *See e.g. Southern Industries, Inc. v. Jeremias*, 66 AD2d 178 (1978) (discussing a lack of good faith but not "bad faith"). It is antithetical to a court of equity to have various standards of good faith for defendants in the same circumstances. Equity is equality and equity provides the same measure of justice to each party. NY Jur.2d (Equity) § 87 *citing In re Miglietta*, 287 N.Y.246 [1942], *Loma Holding Corp. v. Cripple Bush Realty Corp.*, 147 Misc. 655 [1933].^[FN6] Further, this Court has previously held that the good faith requirement has been present even prior to the enactment of CPLR 3408. *See, HSBC v. Sene*, 34 Misc.1232(A) (Sup. Ct. 2012).

Plaintiff asserts that FHA, as a federal agency, restricts and binds its ability to contemplate a HAMP modification. Essentially, this is an issue of preemption.

Obviously state law imposes duties and obligations on mortgage servicers irrespective of FHA and HAMP. *See Olivares v. PNC Bank, N.A.*, 2011 WL 4860167 (D. Minn.). Furthermore, displacement of state law will occur only where significant conflict exists between state and federal laws. *Id. citing Boyle v. United Tech Corp.*, 487 U.S. 500 [1988]. Conflict preemption occurs when [*5] it is physically impossible to comply with both federal and state regulations or state law stands as an obstacle to accomplishing goals of federal law *Id. citing Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 [1991]. The "law of property is one of those areas of law traditionally reserved to the states where a strong presumption against preemption applies, but even that presumption cannot overcome a direct conflict with federal law. *School Bd of Avoyelles Parish v. US Dept of Interior*, 647 F.3d 570 [5th Cir. 2011].

It is this Court's opinion that utilizing the HAMP mechanisms as the marker for good faith in negotiations will enable the plaintiffs to abide by both state and federal regulations. The HAMP guideline are the most clearly designed to abide by both New York State's public policy to avoid defendants losing their homes. In the instant action, FHA will likewise be protected by utilizing HAMP guidelines because the property is significantly underwater. [FN7](#)

In the interests of equity, this matter is stayed pending the plaintiff re-evaluating the defendants under the rubric of HAMP. Once an evaluation has been made the parties are directed to contact the Judicial Referral Foreclosure Part to schedule a conference.

This constitutes the decision and order of the Court.

J.S.C.

Footnotes

[Footnote 1:](#) There is a HAMP-FHA program which pertains to specifically FHA insured loans.

[Footnote 2:](#) The first step of the "waterfall" is to capitalize accrued interest and arrears (all late fees may not be capitalized and must be waived if the borrower satisfies all conditions of a trial plan). Second, the interest rate is lowered to the current interest rate, if the loan is an adjustable rate loan then the starting interest rate is the "re-set rate." The interest rate is then lowered in increments of .125% until the 2% floor. If necessary, the term of the loan is extended by up to 480 months from the modification effective date, "if a term extension is not permitted under the applicable PSA or other investor servicing agreement, reamortize the mortgage loan based upon an amortized schedule of up to 480 months with a balloon payment due at maturity. If necessary the servicer must provide for principal forbearance to achieve the target monthly mortgage payment ratio. If the monthly mortgage payment is lowered to 31% of the monthly income then the "net present value" ("NPV") test is run to determine whether it is advantageous for the lender to offer the modification or to proceed in the alternative.

[Footnote 3:](#) However, in spite of being ordered to produce the original note, Flagstar has yet to comply with that order and rather provides the court with a photocopy of the purported note.

[Footnote 4:](#) During the hearing the plaintiff testified that FHA's was an investor in the loan, that the note was endorsed in blank, and later that FHA actually owned the note.

[Footnote 5:](#) "Specific options [regarding appropriate actions are itemized, among them,

deeds in lieu of foreclosure under 203.357, pre-foreclosure sales, under 203.370, partial claims under 203.414, assumptions under 203.512, special forbearance under 203.417 and 203.614 and recasting of mortgages under 203.616." *Sinclair v Donovan*, 2011 WL 5326093 [S.D. Ohio]

Footnote 6: Conduct such as providing conflicting information, refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations have been held to constitute "bad faith." *see Wells Fargo Bank, N.A. v. Meyers*, 30 Misc 3d 697 [2010], *Emigrant Mortg. Co. Inc. v. Cocione*, 28 Misc 3d 161 [2010], *Wells Fargo Bank, N.A. v. Hughes*, 27 Misc 3d 628 [2010], Refusal to accept deed-in-lieu of foreclosure would be considered bad faith. *HSBC v. Cayo*, 34 Misc 3d 856 [2011]. Dilatory practices as evidence of bad faith and the parties' obligation to not only come to the court in good faith but to continue negotiations in good faith. *Deutsche Bank Trust Company of America v. Davis*, 32 Misc 3d 1210 (A).

Footnote 7: The amount due on the loan is approximately \$600,000.00 on a property that is valued around \$400,000.00.

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