2016 NY Slip Op 26047

EMIGRANT SAVINGS BANK-LONG ISLAND, Plaintiff,
v.
MICHELE BERKOWITZ, "JOHN DOE NO.1" THROUGH "JOHN DOE #20," THE LAST TWENTY NAMES BEING FICTITIOUS and UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES, DESCRIBED IN THE COMPLAINT, Defendants.

27142/2012.

Supreme Court, Suffolk County.

Decided February 19, 2016.

STAGG, TERENZI, CONFUSIONE and WABNIK, LLP, By: Jacqueline M. Della Chiesa, Esq., 401 Franklin Ave, Suite 300, Garden City, NY 11530,

SCHWARTZ LAW GROUP, By: Kenneth B. Schwarz, Esq., 326 Broadway, Suite 203, Bethpage, NY 11714, Attorneys for Plaintiff.

JAMES HUDSON, J.

It is

The case at bar is an action to foreclose upon a note and mortgage. Plaintiff ultimately obtained a Judgment of Foreclosure and Sale which was entered on October 6, 2015. The *locus in quo* was scheduled for sale on January 14, 2016. Defendant has made a motion for an order staying the sale and enforcement of the judgment on the basis of the Notice of Sale being served in violation of the dual tracking provisions of 12 CFR 1024.41(g) (*i.e.* Federal Regulation X). Specifically, Defendant contends that the Plaintiff (loan servicer) has failed to render a determination on Defendant's appeal on her application for loss mitigation and has not responded to her notice of appeal.

The resolution of the instant motion turns on the applicability of the aforementioned federal regulation. Effective January 10, 2014, the Federal Consumer Financial Protection Bureau's ("CFPB") Regulation "Title X" was

promulgated pursuant to the Dodd-Frank Act and the 2013 Real Estate Settlement Procedures Act ("RESPA"). **It delineated several procedures as conditions precedent to applying for a Judgment of Foreclosure. 12 CFR §1024.41[c] states, *inter alia,* that "... [i]f a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall [e]valuate the borrower for all loss mitigation options available to the borrower; and [p]rovide the borrower with a notice in writing stating the servicer's determination..." 12 CFR § 1024.41(g) of RESPA further provides that "... [i]f a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any ... foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not ... conduct a foreclosure sale ..."**

In the event that the loss mitigation application is denied by the holder of the loan, 12 CFR § 1024.41(h)(4) constrains a loan servicer from conducting a foreclosure sale where an appeal to an application for loss mitigation has been brought, unless the servicer has rendered a determination on the appeal and advised the borrower how long the borrower has to accept or reject any prior offer.

The uncontroverted documentary proof submitted by the Movant and Respondent demonstrate that the parties were proceeding pursuant to the requirements of Title X. Defendant had submitted a loss mitigation proposal which was considered and rejected by Plaintiff loan servicer on August 12, 2015 (Defendant's Exhibit "C").

Defendant's "C" contains the following language:

RIGHT TO SEEK RECONSIDERATION OF THIS DECISION
"You have the right to ask Emigrant to reconsider its decision to deny your loss mitigation request. Such requests are reviewed by Zhanna Kandel, First Vice President. If you disagree with this decision and wish to seek reconsideration, you *MUST* notify Emigrant of your request for reconsideration *IN WRITING* within 14 days after this notice.

Requests for reconsideration *WILL NOT* be taken by telephone. You may submit your request for reconsideration via e-mail to Ms. Kandel at LossMitigation@emigrant.com or in the form of a letter mailed to Ms. Kandel at 6 E. 43rd Street, 10th Floor, New York, NY 10017. Your letter or email should set

forth the reasons why you believe that the action taken by Emigrant was in error or mistaken." (Emphasis in the original).

Defendant, dissatisfied by the rejection of her loss mitigation plan, prepared an appeal (Defendant's Exhibit "D"). Defense counsel contends that this was forwarded by email and ordinary mail. A review of exhibit "D", however, indicates two facts which the Court finds to be of great significance. Initially the email address used by Defendant is incorrect. LossMitigtion@emigrant.com is the address typed in the appeal. The *actual* email address of Plaintiff is LossMitigation@emigrant.com. A detailed inspection of the exhibit also reveals that the regular mail address of Plaintiff's agent is nowhere to be found on this document. This corroborates Plaintiff's contention that it had not been notified of Defendant's appeal.

Although the case at bar appears to be a case of first impression in New York, there are several federal decisions interpreting this recent creation of procedural rights for debtors facing threat of foreclosure. **The Court in *Campbell v. Nationstar Mortg*. No. 14-1751, ___ Fed. Appx. ___, ___, 2015 WL 2084023, at *7 and *8 (6th Cir. May 6, 2015) held that 12 C.F.R § 1024.41 could not be retroactively applied to a foreclosure sale that took place several months prior to January 10, 2014 (Title X's effective date).**

The question of retroactive application is not at issue in the case before us. Instead, the instant case appears to be more analogous to the fact patterns presented to the Courts in the cases of *White v. Wells Fargo Bank*, No. 2:14-cv-12506, 2015 WL 1842811 (E.D.Mich. April 22, 2015); *Cooper v. Fay Servicing, LLC*, 115 F. Supp. 3d 900 (S.D. Ohio 2015) and *Dionne v. Fed. Nat. Mortgage Ass'n*, 110 F. Supp. 3d 338 (D.N.H. 2015).

In the *White and Cooper* decisions the Courts drew attention to a "... non-binding consumer guide published by the Consumer Financial Protection Bureau, which states:

These new rules [Regulation X] became effective on January 10, 2014. Any borrower who files a complete loss mitigation application on or after January 10, 2014 and more than 37 days before a foreclosure sale is entitled to an evaluation of the complete loss mitigation application for all available loss mitigation options (so long as the conditions of 12 C.F.R. 1024.41 are met). The servicer must conduct this evaluation even if the borrower previously filed for, was granted, or was

denied a loss mitigation plan before January 10, 2014." (*White* at *3 ___, *Cooper* at 900 ___ *citing* CFPB, Help for Struggling Borrowers: A guide to the mortgage servicing rules effective on January 10, 2014, at 8 (January 28, 2014).

The Court in *Dionne* focused on the actual notice that the lender had received and that the debtors "... have alleged that they were assured on at least two occasions that their loan modification application was complete and under review" (Id. at 343).

Although not specifically articulated, the *Dionne* Court was clearly invoking the doctrine of Promissory Estoppel when it noted that the debtors had "... opted not to take legal action because they reasonably relied on Chase's promises that the foreclosure sale would not go forward" (Id. At 343).

In the case at bar **we find that Title X, conferring rights in derogation of the common law of Contract and Real Property, requires strict compliance with its notification mandate in order for a party to claim protection under its rule** (*see* *Old Republic Nat. Title Ins. Co. v. Conlin*, 129 AD3d 804, 805, 13 N.Y.S.3d 99, 101[2nd Dept. 2015]; *Hometown Bank of Hudson Val. v. Belardinelli*, 127 AD3d 700, 7 N.Y.S.3d 289 [2nd Dept.2015]; *Valley Sav. Bank v. Rose*, 228 AD2d 666, 646 N.Y.S.2d 349 [2nd Dept.1996]); *Dollar Dry Dock Bank v. Piping Rock Bldrs.*, 181 AD2d 709, 581 N.Y.S.2d 361 [2nd Dept.1992]; McKinney's Cons.Laws of NY, Book 1, Statutes § 301). **The undisputed documentary proof establishes that Defendant has failed to properly serve her notice of appeal.**

The sole grounds to overlook this requirement would be for the Court to apply Estoppel for the same reasons as the *Dionne* Court. Unfortunately for Defendant herein, the actions of Plaintiff in continuing negotiations for a possible mitigation do not satisfy the requirements of this equitable doctrine. Although it appears that negotiations continued despite the failure of Ms. Berkowitz to properly notify Plaintiff of her appeal, there is no indication that Plaintiff made a unambiguous promise that it intended to refrain from enforcing its rights to proceed to foreclosure (*Schwartz v. Miltz*, 77 AD3d 723, 724, 909 N.Y.S.2d 729, 731 (2nd Dept. 2010).

Under the circumstances presented, Defendant has failed to show either compliance with the notification requirement of Title X or any equitable basis to excuse such non-compliance. Accordingly, the motion must be denied.

The foregoing constitutes the decision and Order of the Court.