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Bank of Am. N.A. v Lucido
2012 NY Slip Op 50655(U)
Decided on April 16, 2012
Supreme Court, Suffolk County
Spinner, J.
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Decided on April 16, 2012

Supreme Court, Suffolk County

Bank of America N.A., Plaintiff

against

G. Lucido also known as GALINA LUCIDO, JOHN A. LUCIDO et. al., Defendants

2009-03769

Davidson Fink L.L.P.

Attorneys for Plaintiff

28 East Main Street

Rochester, New York 14614

John Lucido

Defendant Pro Se

46 Merrits Path

Rocky Point, New York 11778

Jeffrey Arlen Spinner, J.

Plaintiff commenced this action claiming foreclosure of a mortgage by filing its Notice of Pendency and Summons and Complaint with the Clerk of Suffolk County. The mortgage at issue was given by Defendants to MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC. As Nominee For FIRST FRANKLIN FINANCIAL CORP. on March 23, 2007 in the original principal amount of $ 494,000.00 and was recorded with the Clerk of Suffolk County in Liber 21524 of Mortgages at Page 751. It was given as collateral security for a simultaneously executed Note in the same amount, the same constituting a first lien encumbering premises known as 46 Merrits Path, Rocky Point, New York.

Sometime thereafter and through no fault of their own, Defendants defaulted upon their monthly installment payments due under the Note. It is undisputed that the principal balance owed to Plaintiff, as of the date of default, was and remains at $ 493,219.75. Following the [*2]commencement of this action, an initial settlement conference, as mandated by CPLR § 3408 was convened on June 2, 2009. Thereafter, seventeen additional or adjourned settlement conferences were held, each one a component part of a continuing albeit fruitless effort to resolve this matter. It was only upon the express directive of the Court that one of Plaintiff's representatives travelled from Fort Worth, Texas to appear with a view toward some amicable resolution of this action. However, in derogation of the mandatory provisions of CPLR § 3408(c), no person ever appeared on Plaintiff's behalf who was vested with any authority to settle or otherwise compromise the matter. Further delays were occasioned by serious illness having afflicted both of the Defendants as well as the unfortunate passing of Mrs. Lucido (Mr. Lucido requested that the matter be temporarily removed from the conference calendar because he was unable to move forward while attending to the care of his wife). In addition, Plaintiff's former counsel, Steven J. Baum P.C., was discharged and the firm was thereafter disbanded.

Defendant JOHN LUCIDO has, in the past, been employed as a commercial mortgage

broker. Though he was not involved professionally in the procurement of the loan at issue herein, he apparently enjoys a considerable degree expertise in the area of mortgage financing, which knowledge has been displayed to this Court on multiple occasions. Throughout the settlement conference process, Defendants had, on not less than three occasions in the presence of the Court, submitted the rather voluminous financial documentation demanded by Plaintiff, to be used in considering the initial request for a customary modification. At one point in time, Defendants were offered a so-called "trial modification" with no terms disclosed other than a monthly payment amount to be remitted. However, that offer was never accepted by Defendants because of Plaintiff's steadfast and continued refusal to disclose any of its terms to them, including the interest rate as well as the manner in which their payments would be applied to the debt, a tactic that was strenuously defended by Plaintiff's successor counsel as "general industry practice."

At one of the early settlement conferences, Mr. Lucido informed the Court that the servicing of his loan had been transferred to one of Plaintiff's wholly-owned subsidiaries and that they had embarked upon a print and internet advertising campaign wherein they were offering principal reductions in an apparent effort to help homeowners bring their delinquent loans current. They advertised basic requirements of a delinquency of over 60 days duration coupled with a principal balance in excess of 120% of the value of the property (as just one example of these blandishments by Plaintiff, see *homeloanhelp.bankofamerica.com*). Based in large part upon this inducement, Mr. Lucido repeatedly raised the possibility of a principal reduction and when he was advised, in open court, that it would be "considered" by the bank, he obtained a third party evaluation of the Property, reflecting the fair market value to be $ 250,000.00. He thereupon prepared and submitted a written proposal requesting a principal reduction to $ 250,000.00, coupled with the immediate deposit with Plaintiff of $ 23,588.52, a sum equal to twelve months of principal, interest, taxes and insurance for it to hold in escrow to ensure his performance, a reduction in the interest rate to 4.50% (at that time, HAMP modifications were being offered with interest at 2%) and the immediate commencement of payments upon the new principal amount at the new interest rate. This written proposal was sent to Plaintiff prior to January 26, 2011 and by February 9, 2011 it had advised Defendant, by letter, that it had received his proposal and that the same was under consideration. [*3]

The conference was adjourned several more times until June 9, 2011. At that

conference, prior counsel advised Defendant and the Court that Plaintiff was "unwilling" to reduce the principal and actually misrepresented to the Court that there had been *"...thirteen conferences and Defendant has never submitted financials."* Prior counsel further misrepresented to the Court that Plaintiff did not offer any loan modification programs that included a principal reduction as a component. At that juncture, the Court warned counsel that if there was found to be a lack of good faith in the settlement conference proceedings, the Court would consider the imposition of financial sanctions upon Plaintiff. The Court adjourned the conference to July 13, 2011 with the directive that a representative appear on Plaintiff's behalf to provide an explanation to the Court.

On July 13, 2011, the matter again appeared for conference with prior counsel present. Plaintiff's representative informed the Court that the total debt owed by Defendants and secured by the Property (principal, interest, advances, etc.) now stood at $ 673,959.23 and further, affirmatively stated under oath that *"This loan is part of a pooling of loans that entrust mortgage—in fact, securities and their pooling and servicing agreement does not allow us to reduce the principal balance."* When the Court called for production of the pooling and servicing agreement (the "PSA"), counsel stated that their office was just informed "today" of this claimed restriction and, in furtherance of Plaintiff's position, stated that *"We can't consider a principal reduction. It's prohibited by the PSA."* The bank representative did concede, however, that Defendants had been assiduously trying to work the matter out and that they had, in fact, been submitting financial documentation as requested by Plaintiff. The bank representative also asserted that she had an appraisal showing the property value to be $ 356,000.00 but when pressed for a copy, she stated that it was "tentative." No such appraisal was ever provided to the Court (indeed Plaintiff never produced any written indicia of the value of the Property), thusleaving the Court to accept the market value of $ 250,000.00 as advanced by Defendants.

The matter was again adjourned while the Court waited patiently for production of a copy of the PSA. Despite the Court's order, it was not produced on September 14, 2011 nor was it provided on October 19, 2011. However, upon some intense prodding by the Court, prior counsel generously offered to provide the Court only with what Plaintiff considered to be the "salient portions" of the PSA, despite the Court's clear and unambiguous order that the entire agreement be provided. Once again, the PSA was not provided for the December 7, 2011 conference, necessitating yet another adjournment, this time to December 21, 2011.

A document purporting to be a complete copy of the PSA, consisting of 258 pages in PDF form, was finally e-mailed by prior counsel to the Court late in the day on December 15, 2011 (some 155 days after the Court ordered its production), forcing the Court to continue the matter yet again, from December 21, 2011 to January 4, 2012, and advising the parties that there would be a hearing on that date to consider the entire matter, including the possible imposition of sanctions for a lack of good faith.

At the January 12, 2012 hearing, the office of Steven J. Baum P.C. (Plaintiff's counsel of record) failed to appear. Instead, a gentleman appeared, stating that he was per diem counsel to Pulvers Pulvers & Thompson who, in turn, was of counsel to Davidson Cook who were now attorneys for Plaintiff, though no substitution of attorney had been filed. Counsel indicated his [*4]readiness to proceed with the matter. The same bank representative who had appeared the prior year was present for the hearing as was Defendant Mr. Lucido. At the hearing, it was quickly established that the "complete" PSA as provided to the Court excluded the schedules to which it referred as an integral part, which included a description of the mortgage loans which were to be part of the pool. Although Plaintiff's representative claimed that she was in possession of the schedules, like the phantom appraisal, they were never provided to the Court. During questioning by the Court, Plaintiff's representative conceded that Bank of America *"...always had..."* the PSA in their possession. This failure to disclose, coming upon the heels of Plaintiff's 155 day delay in providing the PSA coupled with what appears to be the intent, by Plaintiff and its prior counsel, to deceive this Court by deciding to only provide what it deemed to be the "salient" portions of the PSA, leads this Court toward the conclusion that Plaintiff was not acting in good faith throughout the pendency of this matter.

Further examination of documents revealed that Plaintiff claimed standing by virtue of an Assignment from LaSalle Bank National Association acting as Trustee under the PSA that is at issue herein. That Assignment, clearly prepared by the law firm of Steven J. Baum P.C., was acknowledged on December 22, 2008 but expressly stated that it was *"...effective as of March 30, 2007."* The PSA deals with an entity denominated as "Merrill Lynch First Franklin Mortgage Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-3." Examination of the PSA reveals that it was consummated on May 1, 2007 (a fact that is reflected in the Assignment), which was the date on which it came into legal existence. The Assignment however expressly states that it became effective some 32 days *prior* to the

existence of the PSA. Though questions were raised by the Court, this issue was not resolved, either by counsel or by Plaintiff.

The hearing went forward with Plaintiff vigorously asserting that the PSA absolutely prohibited any reduction of the principal. Upon pointed inquiry by the Court, the following colloquy transpired:

THE COURT: Where is it in that agreement that it states that principal reductions are absolutely prohibited?

BANK: Okay. I read through that here, and I don't know something stating completely prohibited. It doesn't come right out and say that portion.

THE COURT: That's what was represented to the Court. Where does it say that? Give me a page.

BANK: I highlighted it.

BANK COUNSEL: I will read it for you.

BANK: Page 86 is what I had highlighted, and then on Page 90.

BANK COUNSEL: There are provisions in the PSA permitting—

THE COURT: You said Page 86?

BANK COUNSEL: 86, it is section 301, servicer to service mortgage loans. The sentence starting with "notwithstanding" approximately fifteen lines down.

THE COURT: All right. This refers to servicer not engaging in any conduct which would essentially cause the REMIC, the Real Estate Mortgage Investment Conduit, to fail to qualify as a REMIC or to result in the imposition of certain taxes under the Internal Revenue Code.

BANK COUNSEL: Correct.

THE COURT: Where does it say that a principal reduction is prohibited?

BANK COUNSEL: What this PSA document does state is that there are provisions that can [*5]prohibit the forgiveness of principal or the reduction of principal, but there are other provisions, specifically Page 90, that put it within the discretion of the servicer to recommend a principal reduction which must be signed off on by the investor.

MR. LUCIDO: Where?

BANK COUNSEL: It begins with "notwithstanding Clause 2 above, in the event that mortgage loan is in default."

MR. LUCIDO: Where is this? Can you highlight that? Page 90? Okay, I see it. This actually allows for it.

THE COURT: This seems to permit—

BANK COUNSEL: Correct, and that's what we are trying to tell the Court here. There are provisions that prohibit but there are provisions that do allow the servicer to recommend the reduction of principal. But it must be accepted by the investor. It must be in the best interest of the—

THE COURT: But that's not what has been represented to this Court by the bank and their prior counsel. In fact, prior counsel explicitly represented to this Court on more than one occasion that it is absolutely prohibited under these documents, under this PSA. That is what has been represented to this Court.

BANK COUNSEL: We do submit that it might have been due to some of the provisions prohibiting principal reduction. They would have thought that those provisions may have been triggered. It might have been the opinion of the Court that they have not been.

THE COURT: Where are the express prohibitions, the ones that the bank relies on that they used here in telling this Court that they will not consider a principal reduction because it is absolutely prohibited under the terms of the PSA?

BANK COUNSEL: Under the initial clause, which is 13 lines down from Section 3.01, servicer of service mortgage loan.

THE COURT: Show me where else that it absolutely prohibits a principal reduction? Is there anywhere else in there that you can find?

BANK COUNSEL: We have not found an absolute bar, a prohibition of forgiving or reducing. It is our position, and we submit to this Court, that there are circumstances that if occurring, which is also the signing off of the client, that a principal reduction could occur under certain circumstances.

Subsequent to the foregoing colloquy and without any further concession to the Court's line of inquiry, counsel advised the Court that an offer was now being made to Defendant, stating that *"We are going above and beyond what—we are bending the rules of our underwriting. We are attempting to put together a product here that is not generally offered to the rest of the populace, the rest of the clientele, a 43.5 year product at 2% without the financials."* When the Court inquired as to the reason for Plaintiff's abrupt about-face, counsel attempted to deflect attention from Plaintiff, instead intimating that the Court was, in effect, coercing a resolution by having *"...held the bank's feet to the fire..."* and further mis-stating the facts by incorrectly asserting that *"...This Court was not willing to hear it after learning that there was not a principal reduction."* It must be pointed out that in this matter as in all other foreclosure matters assigned to this Part, the Court has only attempted to fulfill its statutory responsibilities and has not, in any manner forced, coerced nor compelled any particular resolution. It is also important to note here that counsel advised the Court that Plaintiff had a new BPO showing a value of $ 346,000.00 and although requested by the Court, this BPO, like the phantom appraisal referred to on July 13, 2011, was never produced.

Based upon the foregoing factual scenario, the Court has serious and substantial questions as to whether or not Plaintiff and its prior counsel of record have acted in good faith in this [*6]matter. By reason of the lengthy delays herein, interest has been accumulating on the debt along with sums that may be due for advances for property taxes and insurance, to say nothing of Plaintiff's claimed counsel fees (which are, of course, subject to review by the Court). While it is important to note that the Court has grave reservations related to the actions in this matter of Steven J. Baum P.C., Plaintiff's former counsel of record, the Court hastens to add that it has absolutely no such issues with either Henry P. DiStefano Esq. or Alicia Menechino Esq. (in fact, the appearances covered by these two most excellent attorneys were the only ones upon which the Court was able to

obtain a straight answer about anything on the Plaintiff's case herein).

In 2008, New York's Assembly and Senate enacted Chapter 472 of the Laws of 2008 which constituted a sweeping reform of the laws governing sub-prime, high cost and non-traditional home loans. Included as part and parcel of that legislation was the newly enacted CPLR § 3408 which required a mandatory settlement conference in an action to foreclose such a mortgage. Since that enactment, this Court, sitting first as Suffolk County's Residential Mortgage Foreclosure Conference Part and thereafter as an I.A.S. Part, has mandated that the parties to such an action act and negotiate in good faith. Indeed, in December of 2009, both the Assembly and the Senate amended CPLR § 3408 by way of Chapter 507 of the Laws of 2009, which, among other things, added a *requirement* that the parties act and negotiate in good faith (see CPLR § 3408(f) which states that *"Both the plaintiff and the defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."*). This statutory scheme is further buttressed and implemented by the provisions of The Uniform Rules For The Trial Courts, 22 NYCRR § 202.12-a. Indeed, that Rule vests the Court with broad powers to assist the parties in reaching a settlement of their differences, stating, in pertinent part, that *"...The court may also use the conference for whatever other purposes the court deems appropriate,"* 22 NYCRR § 202.12-a(c)(2). That Rule further imposes upon the Court the duty to be certain that all parties act in compliance therewith, stating that *"...The court shall ensure that each party fulfills its obligation to negotiate in good faith..."* 22 NYCRR § 202.12-a(c)(4). For this Court to do anything less would be a serious derogation of its statutory responsibilities and would do a great dis-service to the public that it is obligated to serve..

Since an action to foreclose a mortgage is clearly a suit in equity, *Jamaica Savings Bank v. M.S. Investing Co. 274 NY 215 (1937)*, all of the rules and tenets of equity are fully applicable to the proceeding, including the rules governing punitive or exemplary damages, *I.H.P. Corp. v. 210 Central Park South Corp. 12 NY2d 329 (1963)*. In the timeless words of Judge Benjamin Cardozo *"The whole body of principles, whether of law or of equity, bearing on the case, becomes the reservoir drawn upon by the court in enlightening its judgment" Susquehannah Steamship Co. Inc. v. A.O. Andersen & Co. Inc. 239 NY 289 at 294 (1925)*. In a suit in equity, the Court is vested with jurisdiction to do that which ought to be done. While the formal distinctions between an action at law and a suit in equity have

long since been abolished in New York (see *CPLR 103, David Dudley Field Code of 1848 §§ 2, 3, 4, 69*), the Supreme Court, as New York's trial court of general jurisdiction, is nevertheless vested with equity jurisdiction and the distinct rules governing the application of the principles of equity are still very much applicable, *Carroll v. Bullock 207 NY 567 (1913)*.

While the Court understands that the instruments upon which a mortgage foreclosure [*7]action is based are contractual in nature and, understanding that *"[s]tability of contract obligations must not be undermined by judicial sympathy" Graf v. Hope Building Corp. 254 NY 1 at 4 (1930)*, it is equally true, as decreed in *Noyes v. Anderson 124 NY 175 at 179 (1891)* that *"a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression."* Thus, equity will not intervene on behalf of one who acts in an unjust, unconscionable or egregious manner, *York v. Searles 97 AD 331 (2nd Dept. 1904), aff'd 189 NY 573 (1907)*. This Court cannot, and will not, countenance a lack of good faith in the proceedings that are brought before it, especially where blatant and repeated misrepresentations of fact are advanced, neither will it permit equitable relief to lie in favor of one who so flagrantly demonstrates such obvious bad faith.

In those very rare instances where the conduct of a party is unconscionable, shocking or egregious, a Court of equity is vested with the power to award exemplary damages. Exemplary damages may lie in a situation where it is necessary to both effectuate some punishment and to deter the offending party from engaging in such reprehensible conduct in the future. Such an award may also be made to address, as so clearly and succinctly enunciated by our Court of Appeals in *Home Insurance Co. v. American Home Products Corp. 75 NY2d 196, 550 NE 2d 930, 551 NYS 2d 481 (1989) "...gross misbehavior for the good of the public...on the ground of public policy"*. Indeed, exemplary damages are intended to have a deterrent effect upon conduct which is unconscionable, egregious, deliberate and inequitable, *I.H.P. Corp. v. 210 Central Park South Corp. 12 NY2d 329, 189 NE 2d 812, 239 NYS 2d 547 (1963)*.

In the matter that is *sub judice*, the record unequivocally demonstrates that Plaintiff, through its deliberate and contumacious conduct, has failed to act in good faith, although required by statute to do so. This Court is driven to the inescapable conclusion that Plaintiff has deliberately acted in bad faith over the preceding thirty four months. Through its repeated and persistent failure and refusal to comply with the lawful orders of the Court

including those which directed production of documentation that was essential to address critical issues in the present matter, it has repeatedly caused to be put forth material mis-statements of fact which appear to have been calculated to deceive the Court and has delayed these proceedings without good cause, thereby needlessly increasing the amount owed upon the mortgage debt, to say nothing of the needless waste of the Court's time and resources, as well as those of Defendant. In short, the conduct of Plaintiff in this matter has been over-reaching, willful and unconscionable, is wholly devoid of even so much as a scintilla of good faith and cannot be countenanced by this Court.

Under the unique circumstances of this matter, the Court determines that it is fair and equitable that Plaintiff be forever barred, precluded, prohibited and foreclosed of and from collecting any of the claimed interest accrued on the loan between the date of default and the date of this Order; that Plaintiff be barred and prohibited from recovering any claimed legal fees and expenses; and further, that the amount due Plaintiff under the Note and Mortgage herein be determined at this time to be no more than the principal balance of $ 493,219.75, exclusive of advances for property taxes and property insurance. The Court also determines that under the circumstances herein, the imposition of exemplary damages upon Plaintiff is equitable, necessary and appropriate, both in light of Plaintiff's shocking and deliberate bad faith conduct as well as to serve as an appropriate deterrent to any future outrageous, improper and wrongful conduct. The Court hereby fixes and determines [*8]the amount of exemplary damages in the sum of $ 200,000.00, recoverable by Defendants from Plaintiff in the nature of a principal reduction upon the mortgage sought to be foreclosed by Plaintiff.

For all of the foregoing reasons, it is, therefore

ORDERED , ADJUDGED and DECREED that Plaintiff, its successors, assigns and others are forever barred, foreclosed and prohibited from demanding, collecting or attempting to collect, directly or indirectly, any and all of the sums secured by the mortgage under foreclosure herein designated or denominated as interest, attorney's fees, legal fees, costs, disbursements or any sums other than the principal balance as well as advances for property taxes and property insurance if any, that may have accrued from the date of default up to the date of this Order; and it is further

ORDERED, ADJUDGED and DECREED that the debt due Plaintiff under the Note and Mortgage under foreclosure in this action be fixed at $ 493,219.75, exclusive of any

sums advanced for property taxes or property insurance; and it is further

ORDERED, ADJUDGED and DECREED that Defendant JOHN LUCIDO be and is hereby awarded exemplary damages as against Plaintiff in the amount of $ 200,000.00 to abide the event; and it is further

ORDERED, ADJUDGED and DECREED that the foregoing award of $ 200,000.00 in exemplary damages shall be and is hereby applied as a credit against the principal balance of the mortgage under foreclosure herein, amending and reducing the same to $ 293,219.75.

This shall constitute the Decision, Judgment and Order of the Court.

Dated: April 16, 2012

Riverhead, New York

E N T E R:

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Jeffrey Arlen Spinner, J.S.C.

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