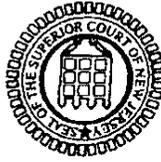


SUPERIOR COURT OF NEW JERSEY

MARGARET MARY MC VEIGH, P.J. CH



COURTHOUSE
PATERSON, NEW JERSEY 07505

January 7, 2013

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RE: In Re Application of Wells Fargo Bank NA
To Issue Corrected Notices of Intent to Foreclose
On Behalf of Identified Foreclosure Plaintiffs in
Uncontested Cases
Docket No.: F9564-12

Counsel:

In this motion, Legal Services of New Jersey ("Legal Services") seeks an order that the prejudgment interest in the OTSC cases be awarded at the legal rate rather than the contract rate. Legal Services argues that the delay in processing foreclosures has been extremely prejudicial to homeowners and corrosive to equity because Plaintiff routinely seeks to impose contract rates of interest and other fees allegedly incurred during the pendency of the case. Legal Services states that some Defendants have interest rates that exceed 13% while the prejudgment rate of interest set by the Court was 1.5% in 2010, 0.5% in 2011 and 2012, and will be 0% in 2013. Legal Services argues that because excessive interest erodes home equity and due to the delay in processing foreclosures, the OTSC should impose the lawful interest rate rather than the contract interest rate. Legal Services also argues that late fees and property preservation fees should be excluded from the judgment amount because it is inequitable to assess a monthly fee against homeowners who had absolutely no control over the delay. Plaintiff argues that because borrowers and lenders agreed to prejudgment interest rates within mortgages and notes at the time the loans were originated, New Jersey law dictates that those interest rates must control.

Plaintiff argues that any equity arguments favor Plaintiff because any delays were not caused by Plaintiff and ultimately benefited foreclosure defendants. Plaintiff argues that the Court should not exclude late fees and property preservation fees because doing so would go beyond Guillaume, which only addressed attorneys' fees and court costs. Furthermore, Plaintiff has already agreed to eliminate its attorneys' fees and court costs in the corrected NOIs and further exclusion of costs would be inequitable.

I. Pre-Judgment Interest

Legal Services points to Comment 2.1 of R. 4:64-2 in support of its argument that the legal interest rate rather than the contract interest rate should be imposed. Comment 2.1 states that "in calculating the amount due, note that there may be three discrete interest rate periods: until default, assessed at the contract; between default and judgment, assessed either at the contract rate or by the court . . . ; and post-judgment, assessed in accordance with R. 4:42-11(a)." However, R. 4:64-2 clearly states that "[p]re-judgment interest, if demanded in the complaint, shall be calculated on a rate of interest provided by the instrument of indebtedness." Therefore, the loan document being the instrument of indebtedness permits the contract rate to be applied should Plaintiffs demand it in the complaint. Also, the court has held that where there is an untoward delay in permitting the mortgagee's recovery, the court may allow the contract rate to be extended beyond the date of the original final judgment based on equity. See Shadow Lawn Sav. & Loan Ass'n v. Palmarozza, 190 N.J. Super. 314, 318 (App. Div. 1983). The court stated that, "[w]hen the legal rate is less than the contract rate it may be equitable to allow interest to run on the judgment at the contract rate to avoid prejudice to a mortgagee caused by delays in satisfying the judgment." Id. In Shadow, the trial court ordered the entry of final judgment on March 26, 1980, and ordered an amendment to the final judgment on July 30, 1981 with interest running at the contract rate until the date of the amended final judgment. Id. Here, Legal Services argues that the delay in satisfying the judgment was caused by the mortgagee.

Plaintiff argues that it has prosecuted its foreclosures expeditiously and that any delays were due to new court rules requiring CODIs in uncontested cases and the conflicting appellate decisions in Laks and Guillaume. Plaintiff states that it has worked diligently with the Special Master and was the first major bank to follow the Supreme Court's April 4, 2012 Order. Plaintiff argues that should legal interest be awarded, Plaintiff would be in a worse position by following the Court's Order rather than if it had filed individual motions or had dismissed all of its cases. Here, Plaintiff fails to address that it always had the option to dismiss the complaint against borrowers for whom it had issued deficient NOIs and could not submit CODIs. In addition, Plaintiff fails to address that its service of deficient NOIs in the first place on borrowers is what caused the necessary action taken by the Court. Therefore, Plaintiff fails to convince the Court that it is not responsible for the delays in its foreclosure proceedings. In fact, even if certain delays were caused by the courts, the one party who is clearly not responsible for any delays is the borrower who never contested the action.

Plaintiff argues that any balance of equities in this matter favors Plaintiff. Plaintiff argues that any delay has harmed itself and benefitted borrowers. Plaintiff states that as the servicer, it has taken on the burdens of paying the property taxes, homeowner's insurance, and flood insurance on behalf of borrowers who have defaulted on their mortgages. Plaintiff states that, alternatively, borrowers have not suffered any harm due to the delay since they have avoided the substantial burdens of making mortgage payments, paying property taxes, homeowner's insurance, and flood insurance. Plaintiff also argues that borrowers will likely never realize the burden of paying the accrued interest because in most cases, after the sheriff's sale takes place, Plaintiff does not exercise its right to pursue deficiency judgments. Plaintiff further argues that it has no incentive or interest in delaying the foreclosure process since it cannot recoup any of its losses until it receives the proceeds from the sheriff's sale, while borrowers clearly benefit from

an elongated foreclosure process as they can remain in their homes for additional time without paying their monthly obligations under the note and mortgage.

Here, Plaintiff fails to address the loss of equity concerns posed by Legal Services. In its brief, Legal Services points out that for a typical \$350,000 mortgage, the difference between the contract rate of interest and the legal rate of interest may be more than \$20,000 and could be the difference between surplus funds to the homeowner and a deficiency. In addition, Plaintiff has already admitted that it rarely pursues borrowers in its deficiency judgment and that borrowers will likely never pay the accrued interest, making it unclear why Plaintiff wishes to pursue the more extensive contract rate. As mentioned previously, it is clear the delay was not caused by the borrower, who never contested the action; therefore, any potential benefit of a surplus should be afforded to them. This, however, may not apply in cases that were contested but became subject to this action upon summary judgment or other actions striking an answer.

Plaintiff argues that where the parties have agreed to a contract prejudgment interest rate, the court does not have discretion to award a different amount. Where a private enterprise has obligated itself contractually to pay prejudgment interest it must be required to comply with its contractual obligations. Van Note-Harvey Assocs., P.C. v. Twp. Of Hanover, 175 N.J. 535, 542 (N.J. 2003).

Prejudgment interest usually stands on a different footing than post-judgment interest or contract interest. An award of prejudgment interest is not determined by court rule except in tort actions. R. 4:42-11(b). Further, the allowance of prejudgment interest in contract and contract-like actions, even on liquidated claims, is not a litigant's right but rests rather in the court's discretion, required to be exercised with equitable principles and consideration in mind.

Estate of Kolker, 212 N.J. Super 427, 439-440 (Law Div. 1986). Plaintiff argues that Kolker holds that where there is a contractual prejudgment interest rate, that it must be honored and upheld. Plaintiff argues, "[i]t would appear that for the rate of prejudgment interest to be equitable it should reflect the rate fixed by the parties in an arm's length transaction." Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors, 518 F.2d 640, 645 (3d Cir. N.J. 1975). While Legal Services notes, "[e]quity is not served by permitting a debtor to refuse repayment of a note when it becomes due and then to profit by the delay resulting from ensuing litigation." Id. Here, Legal Services argues that since Plaintiff caused the delay, they should not profit from it. Kolker clearly states that the rate rests within the court's discretion based on equitable principles and considerations. Also, Mid-Jersey recognizes equitable considerations. Therefore, the court may consider the equities when determining prejudgment interest even where the parties have negotiated a contract rate.

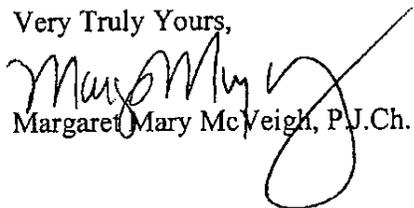
II. Late Fees and Other Costs

Late fees may only be imposed if provided in the note and up to the date the original complaint was filed. See R. 4:64-2. Therefore, any delay caused by the OTSC process will not affect the late fees charged in the judgment amount.

Plaintiff argues that it voluntarily agreed to exclude all attorneys' fees and court costs from the corrected NOIs but that it is entitled to other types of costs relating to late fees, appraisal costs, inspection costs, and property preservation. Plaintiff cites an unpublished appellate decision in support of its argument. However, the case cited deals solely with late fees which have already been addressed by the Court.¹ Neither Plaintiff nor Defendant provides any case law with regard to property preservation fees. Therefore, should the Court use the same equitable analysis as noted above, it may find that eliminating the property preservation fees from the time that Plaintiff's delay in processing foreclosures occurred may be appropriate.

Therefore, the Court finds itself bound by law to adhere to the terms of the contract negotiated by the parties. The prejudgment interest should remain at the contract rate. Further, the Court finds no basis in any law to eliminate the property preservation fees.

Very Truly Yours,


Margaret Mary McVeigh, P.J.Ch.

MMM:rlg

¹ The court does note that "[a]lthough the allowance of interest in contractual actions is generally governed by equitable principles, such principles are inapplicable when the rate of interest is, as here, determined by contract." Alsentzer v. Bulboff, 2005 WL 3701461 at *7 (citing Van-Note, *supra*, 541-42). Thus, Alsentzer held that the trial court acted in error by reducing the amount of prejudgment and late fees based upon a reasonableness analysis. See Id.