SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY

Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINONS

LETTER OPINION

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Re: Ditech Financial, LLC v. Tiffiny Cruz
Docket No. HUD-F-3869-15
Date of Trial: May 23, 2017
Date of Decision: June 14, 2017

Dear Counsel:

Introduction

This matter came before the Court for a trial on May 23, 2017 on the sole issue of whether there was a default on the underlying loan agreement, more specifically, whether Defendant's admitted prior default, based upon her failure to make loan payments under her mortgage documents in 2010, is trumped by the circumstances in late 2013 and early 2014 surrounding the processing of her preliminary (trial) and proposed final loan modification agreement with the Plaintiff.

Both Plaintiff and Defendant stipulated that Defendant had signed the note and mortgage, received the proceeds from the loan, defaulted on the loan in 2010, and was subsequently offered a trial modification where she made three (3) payments between October 1, 2013 and November 29, 2013. The only issue that is currently before the Court involves the fact question of whether Plaintiff took reasonable steps to serve the Defendant with a permanent loan modification package. It is here where the parties' contentions diverge.

Plaintiff contends that it took reasonable steps to serve the Defendant with this package at the address of record it had for the Defendant, and that Defendant's failure to return an executed permanent loan modification agreement caused the original default to remain in effect, ultimately leading to the filing of a foreclosure complaint, which did in fact take place on February 2, 2015. Defendant contends Plaintiff did not send the package to the Defendant's residence and, as a result, the Defendant did not have the opportunity to have the benefit of the loan modification. Accordingly, Defendant seeks a "proper remedy,"[1] more specifically " a credit of all of the missed payments as having been made" and to continue the loan modification plan under the terms that were offered, but not received, approximately three-and-a-half (3.5) years ago.

Findings of Facts

While not operative to the issue presented, the Court recites the undisputed background.

On July 21, 2003, Defendants Tiffiny Cruz and Ramon Milian executed and delivered a promissory note securing the sum of $176,000 to Countrywide Home Loans, Inc. Defendants agreed to pay the lending bank $1,055.21 in monthly installments, with the unpaid balance and interest due on August 1, 2033. To secure the note, Countrywide and Defendants Cruz and Milian executed a mortgage to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc. ("MERS") encumbering the Defendants' property at 48 Astor Place, Jersey City, New Jersey. The mortgage was recorded on February 4, 2004.

On August 10, 2011, MERS assigned the mortgage to Bank of America, N.A., which was recorded on September 2, 2011. On June 20, 2013, Bank of America, N.A. assigned the mortgage to Green Tree Servicing LLC, which is now known as Ditech Financial LLC, the Plaintiff. This assignment was recorded on July 9, 2013.

Defendants defaulted under the loan documents on December 1, 2010, by failing to make the payment due.

As to the operative facts, the Court received the testimony of the Plaintiff's representative, Stephanie Cejas, a foreclosure mediation specialist for the Plaintiff, who presented evidence in the form of the call log records of the Plaintiff, reflecting the chronology of conversations between the Plaintiff's representatives and the Defendant and actions taken during the operative period. Those records along with letter/document communications between the Plaintiff, or its predecessor, Green Tree Servicing, LLC, and the Defendant were marked into evidence by consent. The Court also heard from the Defendant, Ms. Cruz, to complete the evidence presented in this trial.

Ms. Cejas' testimony on the log records reflected the following operative chronology.

On July 11, 2013, the Plaintiff received a call from the Defendant Tiffiny Cruz indicating her intent to complete her application for a loan modification, but had not yet received a loan

1 See Defendant's post-trial submission, at page 4.

modification package. Ms. Cruz was advised to check her mailing address. Ms. Cejas testified that the address of record they had for the Defendant was her mother's address, 585 E. 16th Street, Apartment 6E Brooklyn, New York. At that time, Defendant Cruz requested that the mailing address be changed to the mortgaged property address of 48 Aster Place, Jersey City, New Jersey, which information was updated into the Defendant's file.

On July 31, 2013, a log entry reflects that Plaintiff's representative spoke to the Defendant regarding missing documents that were required to complete her application for a loan modification.

The next operative entry was between August 13 and August 19, 2013, at which point the file was marked that the package sent to the Aster Place address at Defendant's request had been returned by the Post Office as undelivered. Thereafter, Defendant's address in Plaintiff's filing system was changed back to the address in Brooklyn, New York on E. 16th Street, as the Post Office return was still showing the Brooklyn address as the forwarding address.

A letter from Plaintiff's predecessor, Green Tree Servicing, LLC, dated September 9, 2013, addressed to the Defendant Cruz at the East 16th St Brooklyn address, enclosed a package containing an offer for the Defendant to participate in a trial modification plan, in which the Defendant was to make a monthly payment of $1,320.59 for three consecutive months, from October 1, 2013 to December 1, 2013. Specifically, the trial offer states that the loan modification was a "Fannie Mae Loan Modification," as the Defendant "did not meet all of the eligibility criteria for a permanent modification under the government's Home Affordable Modification Program (HAMP)." The trial offer further provides that "[a]fter all trial period payments are timely made, your mortgage will be permanently modified." The trial offer also states that "[y]our loan will not be permanently modified until you successfully complete the Trial Period Plan and you enter into a Loan Modification Agreement." Finally, the trial offer also describes the process for permanent loan modification:

> Once you make all of your trial period payments on time, we **will** send you a Loan Modification Agreement detailing the terms of the modified loan. **The Loan Modification Agreement will become effective once you and we have signed it**. (emphasis added).

While Defendant testified that she never lived at the East 16th Brooklyn address, the Defendant made the three (3) required payments under the trial modification plan that had been sent to that address, by making payments on October 1, 2013, October 31, 2013, and November 29, 2013.

The next operative log entry indicates that on December 3, 2013 a permanent loan modification package had been generated which was confirmed by a letter of that date generated by Green Tree to the Defendant at the E.16thSt. Brooklyn address, congratulating her on being approved for a permanent loan modification and advising her of the requirement that the enclosed agreement be signed and returned by January 2, 2014. It further provided that if the signed agreement was not received by that date, the offer would end and her loan would not be modified. Green Tree's letter indicates that their offices are located in Tempe, Arizona.

A day after the letter went out from Green Tree's offices, the log entries indicate a conversation took place between Plaintiff's representative and the Defendant on December 4, at which time Defendant was advised to continue the trial payments until the "permanent loan modification documents are sent."

On December 31, 2013, Defendant made a fourth payment under the trial plan.

On January 6, 2014, the log entry indicates approval to send a duplicate copy of the permanent modification agreement offer to the Brooklyn address by FedEx. No proof of any covering letter with this date or proofs of the FedEx service were produced at trial.

Log entries further indicate that on January 9, 2014, Plaintiff's representative had a follow-up telephone call with the Defendant, during which the Defendant advised that she had a few questions about the permanent modification offer and would return the documents the next day. On January 15, 2014, Plaintiff followed-up with the Defendant again by telephone call, at which point the Defendant advised that she had returned the modification agreement on the previous Friday or Monday. When Plaintiff's representative called the Defendant on January 20, Defendant called back and again advised that the loan documents had already been sent.

Defendant denies these conversations ever took place and argues that any conversation that may have taken place was regarding missing documents in her application. Ms. Cejas, in rebuttal, testified that once a permanent loan modification is offered, as it was in this case, all necessary documents have already been provided and there would be no need at that juncture to discuss missing documents.

Ms. Cejas testified to a log entry on February 11, 2014 in which another FedEx delivery of the permanent loan documents was authorized and she opined that the document were sent again to the Brooklyn address because, despite the Defendant's representations that she had returned the documents for the permanent loan modification, they were never returned by the Defendant.

Finally, on February 26, 2014, Plaintiff sent a letter denying the Defendant from receiving a permanent loan modification due to Defendant's failure to execute any of the sent permanent modification agreements.[2]

Defendant, Tiffiny Cruz testified that she never received the permanent loan modification offer and denied having the January 2014 conversations reflected in Plaintiff's log notes. Ms. Cruz stated that she did request that they change her mailing address to the mortgaged property on Aster Place in Jersey City because she was not receiving mail at her address where she was

[2] While the scope of the operative chronology through the testimony of the Plaintiff's representative, her direct and cross-examination and the testimony of the defendant, end with the termination of the loan modification offer in February 2014, there was evidently other offers of loan modification following the filing of the foreclosure complaint in February 2015. Since not raised by either party during the trial or in post-trial submissions, the Court does see any need to address said offers.

residing in Brooklyn---her grandmother's home at 541 First Street. She testified during the operative period that she also orally advised the Plaintiff's representative that her mailing address was at her grandmother's address in Brooklyn, where her monthly bank statements were sent and never provided them with her mother's address on East 16th St in Brooklyn, although she did receive from her mother some documents from the Plaintiff addressed to her at her mother's address.

Discussion

Defendant alleges she did not default on the loan based on her approval for a modification and completion of the trial payment plan. At trial, Plaintiff produced evidence, though its witness Stephanie Cejas, that permanent loan modification documents were mailed to Defendant, Tiffiny Cruz, addressed to the mailing address of 585 E 16th St, Apt 6E, Brooklyn, NY 11226. While Defendant testified and argues that the mailing address, to which the permanent loan modifications were sent, was her mother's address, where she apparently did not receive mail, she had previously received the trial modification offer at that address and thereafter made payments on the trial plan.

While Defendant testified that she requested to have the mailing address changed to a different address on several occasions, Defendant failed to produce any documentation to support that request. To the contrary, Plaintiff's log notes only reflect only one such request on August 13, 2013. The log notes further provide that Ditech did apparently make the requested change to the mortgaged premises in Jersey City, but the mailing address was subsequently reverted back to the last address on file after the mail sent to the requested address was returned as being undeliverable.

Furthermore, Plaintiff's witness testified as to various communications between Plaintiff and Defendant, which suggest that Defendant was in receipt of the permanent loan modification documents. On January 9, 2014, Defendant called Ditech in regards to questions she had regarding the permanent modification documents, suggesting that she was in possession of the documents. Defendant also stated that she would be returning the documents the next day. On January 15, 2014, during a follow up call, Defendant advised Ditech that she had returned the modification agreement the previous Friday or Monday. Finally, on January 20, 2014, Defendant claimed the documents were in the mail.

Defendant refuted these conversations and testified that the documents she was referring to were hard copies of financials that were required by the Plaintiff. Plaintiff's witness, who was sequestered during Defendant's testimony, further confirmed in rebuttal that once a trial loan modification is offered, no financial documents are required by the servicer.

Under New Jersey Law, where there is proof of execution, recording, and non-payment of the note and mortgage, a mortgagee has established a *prima facie* right to foreclose. Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). In the event of a default, a mortgagee may also elect to demand the entire mortgage debt, if an acceleration clause exists. Cox v. Kille, 50 N.J. Eq. 176, 177 (Ch. Div. 1892). An answer that denies the allegations in the complaint or

raises separate defenses, contesting the validity or priority of the mortgage or the lien being foreclosed, or creating an issue with respect to the plaintiff's right to foreclose it, would rebut a plaintiff's *prima facie* right to foreclose. R. 4:64-1(c)(2). Any other defense would have no connection to the limited subject matter of the foreclosure action and, as such, would not arise out of the same transaction as the foreclosure action. See Falcone v. Middlesex Cty. Med. Soc., 47 N.J. 92, 219 (1996).

The sole issue before this Court is whether there was a default under the underlying loan documents based upon Defendant's failure to return an executed permanent loan modification agreement to the Plaintiff. Plaintiff argues that Defendant is not entitled to a loan modification due to her failure to return an executed permanent modification agreement. Defendant argues that the loan modification agreement was not received by the Defendant, and therefore the Defendant did not execute the agreement. Accordingly, Defendant asserts that Plaintiff should be estopped from declaring the mortgage loan in default.

Both Defendant and Plaintiff acknowledge that the Defendant's right, if any, to a loan modification, is a contractual right, stemming from the September 9, 2013 trial modification offer letter sent to the Defendant, as a result of which Defendant made the trial period payments.[3] The September 9, 2013 trial modification offer does require that the Plaintiff submit a permanent loan modification if the Defendant met her obligations, as it provides: "Once you make all of your trial period payments on time, we will send you a Loan Modification Agreement detailing the terms of the modified loan." Here, the Plaintiff was plainly obligated to send the Defendant Cruz a permanent loan modification based on the Defendant's payment of the trial period payments.

The trial loan modification entered into by the Defendant was a Fannie Mae Loan Modification, as opposed to a HAMP modification. Under the Fannie Mae Standard Modification Servicing Guide, the servicer must inform the borrower that the trial modification will not be binding until the Defendant executed a permanent loan modification agreement. The Servicing Guide provides:

> The servicer must communicate with the borrower that the mortgage loan modification will not be binding, enforceable, or effective unless and until all conditions of the mortgage loan modification have been satisfied, which is when all of the following have occurred:
>
> - the borrower has satisfied all of the requirements of the Trial Period Plan,
> - the borrower has executed and returned a copy of the Loan Modification Agreement (Form 3179), and
> - the servicer or Fannie Mae (depending upon the entity that is the mortgagee of record) executes and dates Form 3179.

[3] Trial modification offers arising under HAMP are recognized to be contract offers. See Arias v. Elite Mortg. Group, Inc., 439 N.J. Super. 273, 276-77 (App. Div. 2015) ("[A] mortgagor may nonetheless assert a common-law contract claim based on a bank's failure to honor promises made in a HAMP Trial Period Plan Agreement [as] the terms of the TPP Agreement must be construed as a promise by the bank that if the debtor complies with its terms, she will be offered a loan modification."). Likewise, here, the Fannie Mae Loan Modification for which the Defendant qualified may also be considered a contract offer, in which the Defendant agreed to meet certain requirements in exchange for the ability to execute a permanent loan modification at the end of the trial period.

Servicing Guide D2-3.2-05: Fannie Mae Standard Modification, FANNIE MAE (Feb. 15, 2017), https://www.fanniemae.com/content/guide/servicing/d2/3.2/05.html#Offering.20a.20Trial.20Period.20Plan.20and.20Completing.20a.20Fannie.20Mae.20Standard.20Modification. The trial modification offer letter sent by the Plaintiff to the Defendant did specifically indicate that the modification would not become permanent unless the Defendant made the required payments and thereafter executed a permanent modification agreement, which would be sent to the Defendant by the Plaintiff after the payments had been received.

New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed. Bruce v. James P. MacLean Firm, 238 N.J. Super. 501, 505 (Law Div.), aff'd o.b., 238 N.J. Super. 408 (App.Div.1989); Tower Management Corp. v. Podesta, 226 N.J. Super. 300, 304 n. 3, 544 A.2d 389 (App.Div.1988); Cwiklinski v. Burton, 217 N.J. Super. 506, 509-10 (App.Div.1987). The conditions that must be shown to invoke the presumption are (1) that the mailing was correctly addressed; (2) that proper postage was affixed; (3) that the return address was correct; and (4) that the mailing was deposited in a proper mail receptacle or at the post office. Lamantia v. Howell Tp., 12 N.J. Tax 347, 352 (1992). At trial, Plaintiff presented log notes demonstrating when the documents were prepared to be mailed out, the mailing address used, and that they were sent via FedEx to the Defendant. Furthermore, Fannie Mae investor guidelines state that all documents sent to borrowers must be sent by first class mail and permanent modification documents can be mailed FedEx at the discretion of the servicer.

Plaintiff, which the Court finds to have acted in good faith in reviewing Defendant for a loan modification and using its best efforts to send Defendant the permanent modification documents, has satisfied the conditions to invoke the presumption that the permanent loan modification documents were properly mailed and received by the Defendant. The Court finds that the Plaintiff did send three permanent loan modification agreements to the Defendant at the 585 E 16th St, Apt 6E, Brooklyn, New York address, at which the Defendant also received the trial modification offer and which was the address of record for the Defendant. Defendant's apparent receipt of the documents was confirmed by the Defendant during the two phone calls that occurred on January 9, 2014 and January 15, 2014, as reflected in Plaintiff's records and elicited in Plaintiff's trial testimony. Therefore, the Court finds that the Plaintiff has complied with its requirements established under the Fannie Mae Loan Modification Program and also the September 9, 2013 trial modification period offer.

Because the Plaintiff met its requirements in submitting the permanent modification to the Defendant, the onus to actually execute and return the documents shifted to the Defendant, pursuant to the plain terms of the contract. The Defendant failed to execute the agreement, and thus the permanent modification offer was revoked. Accordingly, the Court rejects Defendant's argument that Plaintiff should be estopped from declaring the debt in default.

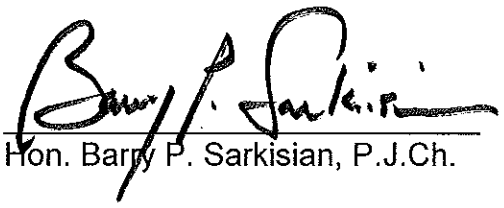
Conclusion

For the aforementioned reasons, the Court finds that the Defendant failed to execute a permanent loan modification agreement as required by the loan modification offer, and therefore was not entitled to a permanent loan modification. Therefore, the Court rejects Defendant's arguments that the Plaintiff be estopped from declaring her to be in default of the loan documents. Accordingly, because the Plaintiff has proven execution, recording, and non-payment of the note and mortgage, the Court finds that Plaintiff has established a *prima facie* right to foreclose. Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). The Court hereby strikes Defendant's answer and refers this case back to the Office of Foreclosure to proceed as an uncontested matter.

The Court also notes that nothing prevents the Defendant from filing a new application for a loan modification following the issuance of the Court's order under this opinion.

Plaintiff's attorney to submit an order in conformity with this opinion within the next five (5) days.

SO ORDERED,



Hon. Barry P. Sarkisian, P.J.Ch.