

At Commercial Division, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of September, 2013.

NEW YORK SUPREME COURT- KINGS COUNTY

Present: Hon. Carolyn E. Demarest, IAS Part 19

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE REGISTERED HOLDERS OF
MORGAN STANLEY ABS CAPITAL I INC. TRUST
2007-HE5 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-HE5,

Plaintiff,

-against-

MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS A
NOMINEE FOR WMC MORTGAGE CORP., and "JOHN
DOE" #1-10, "MARY DOE" #1-10, and "JANE DOE" #1-10,
the names being fictitious, their true names being unknown to
plaintiff, persons intended being persons in possession of
portions of the premises described in the complaint in this action,

Defendant(s).

Index No.

Motion Date ... 6/26/2013

Pre- Calendar

Conference Calendar No. ... 1

Sequence No.

*Decision
and
Order*

The following papers numbered 1 to 2 read on this motion

- Notice of Motion and Affirmation 1
- Affirmation of Service..... 2

This is an action to foreclose on a mortgage on real property located at 1348 East 37th Street, in the County of Kings, City and State of New York.

Defendants, move for an order finding plaintiff violated C.P.L.R. § 3408(f) in failing to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, to the above captioned foreclosure action; and for a further order dismissing the foreclosure action with prejudice pursuant to C.P.L.R. § 3211(a)(3) for plaintiff's lack of standing to commence and prosecute the within foreclosure action. Defendants' motion was submitted to the Court without opposition.

This matter first came before the Court on May 16, 2013, for a Good Faith Hearing as set

down in the Directive issued by Special Referee, Deborah Goldstein, dated April 2, 2013, and the defendants moved the Court for a finding of plaintiff's bad faith and for dismissal of the foreclosure action, with prejudice, based upon the plaintiff's lack of standing. The Court set down the motion for oral argument on June 26, 2013, on consent of all parties, and all parties appeared on the return date before the Court. Upon plaintiff's failure to submit opposition to the motion, the Court granted the defendants' motion in its entirety.

Before granting the Defendants' motion, the Court noted that plaintiff was given ample opportunity to obtain the original loan documents needed to prove its standing and satisfy defense counsel's inquiry into plaintiff's standing with the intention of promoting a modification of the mortgage, but plaintiff failed to obtain the original loan file within the time period set down by the Court and accordingly was not ready to offer oral argument in opposition to the defendants' motion.

Counsel for plaintiff attempted to request an adjournment of the motion on the return date after having had more than one month to procure the documents needed to oppose the defendants' motion. Defense counsel opposed the request for an adjournment citing plaintiff's prior dilatory conduct during the foreclosure settlement conferences, as reported by Special Referee, Deborah Goldstein.

Special Referee, Deborah Goldstein, issued a report finding that plaintiff had failed to comply with C.P.L.R. § 3408(f) by not acting in good faith during the Foreclosure Settlement Conferences held before her. Special Referee Goldstein also reported that plaintiff had failed to produce title documents pursuant to C.P.L.R. § 3408(e).

C.P.L.R. § 3408(e) provides in pertinent part that, "[F]or plaintiff, such documents should include, but are not limited to, payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note. If the plaintiff is not the owner of the mortgage and note, plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note."

C.P.L.R. § 3408 (f) provides that, "[B]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."

The Special Referee's findings are entitled to deference where credibility is at issue, since the Referee has the opportunity to see and hear the witnesses. See *HSBC Bank USA, N.A. v. McKenna*, 37 Misc.3d 885 (N.Y. Sup. Ct., 2012). Where a mortgagee has been found to breach the duty of negotiating in good faith, Courts have ordered that no interest be collected on the underlying loan, either from a date during the proceeding that would appear to correspond to the mortgagee's breach or from the date of the mortgagor's default on the loan. This remedy includes a bar on attorney fees and costs. See *US Bank Natl. Assn. v. Padilla*, 2011 N.Y. Slip Op. 50535[U], at *4; see also *BAC Home Loans Servicing v. Westervelt*, 2010 N.Y. Slip Op. 51992[U]. Generally, a foreclosure action is equitable in nature and triggers the equitable powers of the Court. In an action of an equitable nature, the recovery of interest is within the Court's discretion. With the exercise of that discretion, governed by the particular facts in each case, including any wrongful conduct by either party, the recovery of interest may be limited by the Court. In an appropriate case, equity requires the cancellation of any interest awarded to the mortgagee on the unpaid principal balance of the mortgage. *Norwest Bank Minn., N.A. v. E.M.V. Realty Corp.*, 94 A.D.3d 835, 837 (2nd Dept. 2012). The Court finds that this is an appropriate case for such a remedy.

C.P.L.R. § 3211(a)(3) provides that, "[A] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that: . . . (3) the party asserting the cause of action has not legal capacity to sue..." Plaintiff having failed to submit evidence of its standing despite having had an opportunity to seek and obtain the original loan documents, the defendant's motion is received by the Court without opposition.

Given plaintiff's prior dilatory conduct during the Foreclosure Settlement Conferences as described in the Special Referee's Directive, and its failure to obtain original loan documents needed to oppose the defendants' motion, ^{for reasons stated on the record at argument} the Court finds that plaintiff has acted in bad faith and defendants's motion to dismiss is granted without opposition.

Accordingly, it is Ordered that all interest, late fees and attorney's fees be cancelled from the date of default to date of this order, and that the foreclosure action be dismissed with prejudice; and

It is further Ordered that ^{the County Clerk is directed} ~~plaintiff take all necessary steps~~ to cancel the Lis Pendens

^{recorder against the premises}

HON. CAROLYN E. DEMAREST
J.S.C.

CEO
JSC



1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS: CIVIL TERM : PART 19

3 -----X
4 DEUTSCHE BANK NATIONAL TRUST

5 Plaintiff,

6 - against -

7 Defendant.

8 -----X
9 Index No.

360 Adams Street
Brooklyn, New York
June 26, 2013

10 B E F O R E : HONORABLE CAROLYN E. DEMAREST,
11 Justice

12 A P P E A R A N C E S:

13 HOUSER & ALLISON
14 Attorneys for the Plaintiff
60 East 42nd Street, Suite 1148
New York, New York 10165
By: MITRA P. SINGH, ESQ.

15
16 R. DAVID MARQUEZ, P.C.
17 Attorney for the Defendant
50 Clinton Street, Suite 214
18 Hempstead, New York 11550
By: R. DAVID MARQUEZ, ESQ.

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24 ESTHER G. SPIELMAN, CSR, RPR, CRR
25 SENIOR COURT REPORTER

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1 THE CLERK: Number one on the pre-calendar
2 conference calendar, Deutsche Bank National versus
3 _____, Index Number
4 Counsel, your appearances for the record.

5 MR. SINGH: For the plaintiff, Deutsch,
6 Houser & Allison, by Mitra P. Singh, 60 East 42nd
7 Street, Suite 1148, New York, New York one 10165,
8 representing Deutsche Bank.

9 MR. MARQUEZ: R. David Marquez, 50 Clinton
10 Street, Suite 214, Hempstead, New York 11550 for

11
12 THE COURT: When you were here about a month
13 ago, I was hopeful that there would be a resolution.

14 Has anything been resolved?

15 MR. MARQUEZ: If I may, if it please the
16 Court, as we left off, we had the issues of standing
17 that were looming and that had to be determined first
18 before there would be any other discussion.

19 THE COURT: Was that resolved? Were you
20 provided with the documents?

21 MR. MARQUEZ: I wasn't provided with any
22 documents.

23 There was no opposition of my motion
24 whatsoever.

25 MR. SINGH: Your Honor, if I may, I was going

1 to reach out to Mr. Marquez for an adjournment to get
2 the additional documents.

3 I'm waiting for the loan file with the
4 original loan documents.

5 Sometime last week, I received in E Court
6 that the matter was adjourned.

7 THE COURT: What is your name, sir?

8 MR. SINGH: Mr. Singh, S-I-N-G-H.

9 THE COURT: You were standing here where you
10 were standing on May 16th.

11 It's not like you didn't know. It was
12 adjourned then to today.

13 MR. SINGH: No, the motion was put on today,
14 because on May 15th, the motion hadn't been filed
15 yet.

16 THE COURT: I make notes of appearances.

17 My notes says 6/15, PM and you were to
18 adjourn.

19 MR. SINGH: I am seeking an adjournment to
20 get additional documents to prepare it and to provide
21 Mr. Marquez with the original loan documents.

22 THE COURT: Well, Mr. Marquez, I will let you
23 speak.

24 It's your motion, I believe.

25 MR. MARQUEZ: Yes, your Honor.

1 And if you recall, we were here back on
2 May 16th, and your Honor gave us three dates, a date
3 by which I had to file motions which I did.

4 I did serve it physically upon counsel for
5 the plaintiff who was at that time accompanied by
6 Mr. Sirrico who was the prior counsel on this matter.

7 And then I electronically filed it and
8 received a message from the E clerk court why it was
9 being put down for today at 2:15.

10 I resubmitted electronically an affirmation
11 indicating that we had been here before, and it was
12 at the Court's pleasure that we had noticed for today
13 at this hour as well as E filing my affidavit of
14 service.

15 The time has come and gone. I really don't
16 know what to say.

17 Assuming that the plaintiff has a collateral
18 file in its possession, they've had a month to
19 produce it.

20 THE COURT: Yes.

21 Mr. Singh, I don't understand how you could
22 be appearing in a case that you initiated, that is,
23 your client initiated and come to court on apparently
24 several occasions without a file.

25 How could that be?

1 MR. SINGH: Well, your Honor, these original
2 loan documents are stored in a secured vault.

3 THE COURT: You have an obligation, sir, when
4 you come into a courtroom like this to come in
5 prepared with proof that you have a reason to be
6 standing.

7 This is a motion to dismiss. I'm inclined to
8 do it now, and part of it is based on your dilatory
9 tactics. I don't know if it's you personally, but it
10 is your client.

11 Now the issue of cause is standing and you
12 haven't responded to the motion and given the
13 documentation to Mr. Marquez that's necessary.

14 I'm not granting you anymore adjournments.
15 You were to be prepared today. You don't have any
16 explanation.

17 The only problem, Mr. Marquez, is that you're
18 going to have more problems with this case probably
19 or your client will be left here as a result of the
20 dismissal.

21 MR. MARQUEZ: If you recall, we were here on
22 a bad faith hearing.

23 THE COURT: That's what the motion seeks, a
24 finding of bad faith.

25 It has been demonstrated here even before the

1 Court from what was going on, and your record is
2 voluminous with Miss Goldstein's documents that there
3 was a failure to comply, and there is substantial
4 evidence of not performing in good faith, and I'm
5 making that finding on the record.

6 You could submit a short order to that effect
7 upon the documentation, upon the failure to comply'
8 with Court order.

9 And you're in default, sir. You were
10 directed to supply opposition to this motion by 6/14
11 in my notes here. And I make notes.

12 So, bear in mind if you come again, you will
13 not be dealing with somebody who doesn't know what
14 was going on last time around.

15 The motion is granted. The case is
16 dismissed.

17 MR. MARQUEZ: Thank you, your Honor.

18 THE COURT: You want to do a short order.

19 MR. MARQUEZ: I would be happy.

20 THE COURT: You can do that, noting that
21 there is a failure to comply with the history, with
22 the directions of the Court on the prior date of the
23 16th of May when I directed certain activity to be
24 taken on the part of plaintiff, and you did raise on
25 the record at that time the standing question that

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1 has been the question.

2 There is default. There is not even an
3 answer to this motion.

4 And, of course, you'll note also in your
5 order, that is, for the reason cited on the record in
6 open court for the purposes of appeal as the
7 plaintiff may be appealing. Okay. That's it.

8 MR. MARQUEZ: With regards to preparation of
9 the order, will I be doing the preparation of the
10 short order?

11 THE COURT: What you might want to do is you
12 might want to draft it up.

13 In order to create a complete record, you'll
14 need the minutes. You will need the minutes.

15 Would you prefer to submit an order rather
16 than just doing a short form, not order.

17 MR. MARQUEZ: Maybe I would.

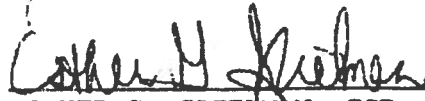
18 So I could have the benefit of the minutes?

19 THE COURT: Yes. Submit an order.

20 MR. MARQUEZ: Okay.

21 * * *

22 It is hereby certified that the foregoing is a true
23 and accurate transcript of the proceedings.

24 
25 ESTHER G. SPIELMAN, CSR, RPR, CRR
SENIOR COURT REPORTER
SUPREME COURT-KINGS COUNTY