COPY

MEMO DECISION& ORDER

INDEX NO. 29860/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 001: 1-15-2016; 003: 2/22/2017
Adjourned Date: 001: 6-9-2016
Motion Sequence: 001: MG; 003: MD

----------X

MorEquity, Inc.,

Plaintiff,

-against-

James M. Burke Sr. a/k/a James M. Burke a/k/a James Burke, Donna Burke, JPMorgan Chase Bank, NA, Cavalry Portfolio Services LLC AAO Cavalry SPV I LLC AAO Ecast Settlement Corp AAO MBNA, "John Doe", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

Knuckles, Komosinski & Elliott, LLP
Attorneys for Plaintiff
565 Taxter Road
Suite 590
Elmsford, NY 10523

James Burke & Donna Burke
19 Marianna Place
East Islip, NY 11730

Gold Benes, LLP
Prior Attorneys for Defendants Burke
1854 Bellmore Avenue
Bellmore, NY 11710

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (001) by defendants James Burke and Donna Burke for a finding that the plaintiff failed to negotiate in good faith, dated December 7, 2015, and supporting papers; (2) Affirmation in Opposition by the plaintiff dated May 28, 2016, and supporting papers; and (3)Notice of Motion in Support of Summary Judgment by the plaintiff, dated January 19, 2017, and supporting papers; it is

ORDERED that the defendants' motion seeking a finding that the plaintiff failed to negotiate in good faith (001) and plaintiff's motion for summary judgment and an order of reference (003), are hereby consolidated for the purposes of this determination; and it is

ORDERED that plaintiff's motion for summary judgment and an order of reference (003) is denied, without prejudice to renewal, within 120 days, not to be extended without leave of Court; and it is further

ORDERED that defendants' motion seeking a finding that the plaintiff and its agents and assigns have acted in bad faith (001) is granted to the extent that the Court finds that the plaintiff failed to negotiate in good faith from March 5, 2013 through April 15, 2015 and as a result, if and when the

plaintiff ultimately prevails in the instant foreclosure action, the Court tolls the accumulation and collection of interest, costs and attorneys' fees that accrued during this time period; and it is further

ORDERED that the plaintiff shall include a copy of this decision with any subsequent application for summary judgment and an order of reference.

This is an action to foreclose a mortgage on real property known as 19 Marianna Place, East Islip, NY 11730. On March 19, 2005, defendant James M. Burke Sr. a/k/a James M. Burke a/k/a James Burke executed a note in the amount of $250,000.00 in favor of Wilmington Finance, a division of AIG Federal Savings Bank. On the same date, defendant James Burke and defendant Donna Burke ("defendants") gave the lender a mortgage on the subject property. The defendant mortgagors allegedly defaulted by failing to make monthly payments which came due on March 1, 2011 and thereafter. After failing to cure the default in payment, plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on September 26, 2012. Issue was joined by interposition of the defendants' answer dated November 1, 2012. By their answer, the defendants generally deny the material allegations set forth in the complaint and assert four affirmative defenses, including the plaintiff's lack of standing and failure to comply with RPAPL 1304.

Following a series of conferences with this court, the defendants, through their attorney at the time, moved for a finding that the plaintiff failed to negotiate in good faith.[1] Subsequently, the plaintiff made a motion for summary judgment and an order of reference which was unopposed. It appears that the defendants are no longer represented by counsel.

A plaintiff moving for summary judgment in an action to foreclose a mortgage demonstrates a prima facie case through the production of the mortgage, the unpaid note, and evidence of default (*see, **Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]). "Where, as in this case, the plaintiff's standing has been placed in issue by reason of the defendant's answer, the plaintiff additionally must prove its standing as part of its prima facie showing" (***Wells Fargo Bank, N.A. v Archibald***, — NYS3d — [2d Dept 2017], 2017 NY Slip Op. 03800, 2017 WL 1902211 ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 773, 10 NYS3d 255 [2d Dept 2015]; *see, **Wells Fargo Bank, N.A. v Rooney***, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]). Standing in a mortgage foreclosure action is established where plaintiff produces evidence that it was the holder or assignee of the underlying note when the action was commenced (*see, **Aurora Loan Servs., LLC v. Taylor***, 25 NY3d 355, 34 NE3d 363, 12 NYS3d 612 [2015]).

Here, the plaintiff has failed to meet its prima facie burden in several respects. First, the plaintiff has failed to establish, prima facie, that it had standing to commence the action. The note contains an undated allonge with an endorsement from Wilmington Finance, a division of AIG Federal Savings Bank to MorEquity, Inc. as well as an undated allonge containing an endorsement in blank from MorEquity, Inc.. The assignments reflect that the mortgage "together with the note(s) and obligations therein described" were assigned from Wilmington Finance to MorEquity, Inc. by assignment dated March 29, 2005. The note and mortgage were thereafter assigned from MorEquity,

---

[1]The Court notes that in its motion for a finding of bad faith, the defendants also re-assert their standing defense, arguing that the plaintiff was not authorized to commence this action or participate in the settlement negotiations since it transferred its rights in the note and mortgage to DLJ Mortgage Capital, Inc. by an assignment dated February 7, 2011.

Inc. to DLJ Mortgage Capital, Inc. by assignment dated February 7, 2011. Following the commencement of this action, the mortgage was assigned from DLJ Mortgage Capital, Inc. to Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee for Carlsbad Funding Mortgage Trust, by assignment dated April 30, 2015. In support of its motion, the plaintiff submits two affidavits. The first is by Michael Bennett, an Assistant Secretary of Rushmore Loan Management Services LLC, the servicer for Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Carlsbad Funding Mortgage Trust, the assignee of the plaintiff. Mr. Bennett states "That Plaintiff or its agent(s) has been in possession of the original Note with allonge indorsed in blank prior to and during the commencement of this action." In submitting this affidavit of merit, however, the plaintiff failed to demonstrate the admissibility of the records relied upon under the business records exception to the hearsay rule (CPLR 4518[a]), since the affiant, an employee of the servicer for plaintiff's assignee, did not attest that he was personally familiar with the record-keeping practices and procedures of the maker of the business record relied on (*see generally* ***Aurora Loan Servs., LLC v. Baritz***, 144 A.D.3d 618, 41 N.Y.S.3d 55, 58 [affidavit insufficient to demonstrate standing where loan servicer's officer/affiant had no personal knowledge of plaintiff's record-keeping practices and procedures]; ***Arch Bay Holdings, LLC v. Albanese***, 2017 WL 189206, at *3 [1/18/2017] [same]; ***HSBC Mortg. Servs., Inc. v. Royal***, 142 A.D.3d 952, 954, 37 N.Y.S.3d 321, 323 [affidavit insufficient to demonstrate borrower's default in payment where loan servicer/employee of plaintiff's predecessor-in-interest not personally familiar with plaintiff's record-keeping practices and procedures]. A second affidavit entitled "Affidavit of Mailing and Note Possession" by Damontrea Coleman, an Assistant Secretary for Nationstar Mortgage, LLC, a previous servicer for plaintiff MorEquity, also fails to lay a proper foundation for its assertion as to the plaintiff's standing. While Ms. Coleman affirms that "Morequity, or its custodian, had physical possession of the original Note with an allonge firmly affixed thereto indorsed to its order from August 4, 2011 until November 1, 2014," she does not allege familiarity with the plaintiff's records and record-keeping practices and procedures. Moreover, neither affidavit nor the attorney's affirmation attempt to explain how MorEquity held the note at the time this action was commenced in 2012, when an assignment of the note and mortgage from MorEquity to DJL Mortgage Capital, Inc. was executed on February 7, 2011. Rather, the attorney's affirmation further muddles the issue, asserting at one point "[t]hat Wilmington was the holder of the Note as well as the assignee of the Mortgage which are the subject of this action at commencement." Accordingly, the plaintiff has failed to meet its prima facie burden as to standing.

Moreover, Mr. Bennett, an employee of the servicer of plaintiff's assignee which received the note and mortgage after the commencement of this action, has not laid the proper foundation that he is familiar with the record-keeping practices of the maker of the records establishing the defendants' default, which allegedly occurred on March 1, 2011. The affidavit is thus insufficient to satisfy the plaintiff's prima facie burden to establish the defendant's default in payment under the note (*see* ***HSBC Mortg. Servs., Inc. v. Royal***, 142 AD3d 952, 37 NYS3d 321, 323 [2d Dept 2016]; *see also* ***Citibank, N.A. v. Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***U.S. Bank, N.A. v. Madero***, 125 AD3d 757, 758, 5 NYS3d 105 [2d Dept 2015]).

The plaintiff also failed to establish, prima facie, that it strictly complied with the 90-day notice required by RPAPL 1304 (*see* ***JPMorgan Chase Bank, Nat. Ass'n v. Kutch***, 142 AD3d 536, 537, 36 NYS3d 235, 236 [2d Dept 2016]). Where, as here, a plaintiff alleges compliance with RPAPL 1304 in its complaint, the plaintiff must "prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers" (***Aurora Loan Services,***

LLC v Weisblum, 85 AD3d 95, 106, 923 NYS2d 609, 616 [2d Dept 2011]; *see also*, ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 26 NYS3d 235 [2d Dept 2016]). The conclusory statements in the affidavit of Ms. Coleman, even when combined with copies of the notices with tracking numbers, are insufficient to establish that the notices were sent in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing (*see* ***Citibank, N.A. v Wood***, —NYS3d— [2017], 2017 NY Slip Op 03727, 2017 WL 1903218 [2d Dept 2017]; ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]).

Accordingly, the plaintiff's motion is is denied, without prejudice to renewal, within 120 days, not to be extended without leave of Court, and the proposed order submitted by the plaintiff has been marked "not signed."

The Court next turns to the defendants' motion seeking a finding that the plaintiff and its agents and assigns have acted in bad faith and an award of appropriate sanctions. Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution (*see* CPLR 3408[f]; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 11, 996 NYS2d 108 [2d Dept 2013]). In assessing whether a party failed to negotiate in good faith, the court must find that the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution (*see* ***US Bank, N.A. v Sarmiento***, 121 AD3d 187, 203, 991 NYS2d 68 [2d Dept 2014]; ***US Bank, N.A. v Smith***, 123 AD3d 914, 123 AD3d 914 [2d Dept 2014]; ***US Bank Nat. Ass'n v Williams***, 121 AD3d 1098, 995 NYS2d 1172 [2d Dept 2014]). Courts have found that dilatory conduct such as failing to expeditiously review submitted financial information, sending inconsistent and contradictory communications, or making piecemeal or excessive and repetitive document requests, as well as denying a request for loan modification without adequate grounds or failing to follow applicable HAMP regulations and guidelines, can constitute a plaintiff's failure to negotiate in good faith (*see* ***Aurora Loan Servs., LLC v Diakite***, 148 AD3d 662, 48 NYS3d 490 [2d Dept 2017]; ***LaSalle Bank, N.A. v Dono***, 135 AD3d 827, 24 NYS3d 144 [2d Dept 2016]; ***Onewest Bank, FSB v Colace***, 130 AD3d 994, 15 NYS3d 109 [2d Dept 2015]; ***US Bank, N.A. v Sarmiento***, 121 AD3d at 204, *supra*; ***US Bank, N.A. v Smith***, 123 AD3d at 916-917, *supra*).

Courts have discretion to impose sanctions for violations of CPLR 3408(f) and, in particular, sanctions tolling interest, costs and attorneys' fees that accrued during the period the plaintiff failed to negotiate in good faith have been found appropriate (*see* ***Aurora Loan Servs., LLC v Diakite***, 148 AD3d at 664, *supra* [noting that, although not applicable to the instant case, recently amended CPLR 3408 now expressly provides that upon a finding by the court that the plaintiff failed to negotiate in good faith, "the court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff"]).

The court notes that in their instant application, the defendants provide a detailed account of the negotiating process together with extensive supporting documents, including all denial letters from the plaintiff, email correspondence and loan modification applications. To a great extent, the lengthy and tortured history of negotiations in the instant foreclosure matter reads like a classic bad faith scenario. As reflected in the "Referral Memo" by Court Attorney-Referee Ralph J. Bavaro, a copy of which was provided to both counsel for purposes of this motion and is attached to this decision as Exhibit "A", this case was scheduled for conferences in the foreclosure part twelve (12) times between March 5, 2013 and February 26, 2015, and nine (9) conferences were held during that time period.

Between March 5, 2013 and December 2013, there was a continuous process of loan modification application submissions by the defendants, delayed missing document letters from the plaintiff, and repeated submissions. The plaintiff did not comply with court imposed timelines on at least two occasions, and their untimely reviews and late missing document letters caused earlier submitted documents to go stale, requiring re-submission. At a conference on February 20, 2014, it was reported that the defendants' application for a HAMP modification had been denied due to insufficient income, but the defendants believed there was a discrepancy regarding their actual income amount and indicated that they would appeal the denial with the servicer. At the next conference on April 17, 2014, the appeal was still pending and the plaintiff requested a new loan modification application to consider the defendants for an in-house modification as well. According to the defendants, they received conflicting information and directives regarding the extent of additional documentation that would be needed to be considered for this modification. By letter dated April 29, 2014, Nationstar once again indicated that the defendants were not eligible for a HAMP modification and denied the defendants' application for a "standard modification" on the grounds of "Negative Disposable Income." When the defendants' attorney followed-up on their pending appeal of the previous denial of their HAMP application, she was told that she should have submitted the appeal to Nationstar directly, rather than through Nationstar's attorneys, as she had apparently previously been directed. The appeal was resubmitted in May 2014. On June 12, 2014, Nationstar denied the defendants' appeal due to "Negative Disposable Income." The defendants assert that once again Nationstar failed to include all of Mr. Burke's income in its analysis and they appealed the denial of the appeal on this basis. By letter dated July 16, 2014, Nationstar denied this appeal finding that there was no error. The defendants learned from Nationstar that Mr. Burke's income from his job had not been included in their analysis because a Profit and Loss Statement was not received. Defendants' counsel adamantly asserts that such document was never requested or noticed to be missing by plaintiff's counsel or Nationstar's representatives. The defendants protested the denial. On July 23, 2014, Nationstar sent a letter indicating that it "did not receive sufficient information to address your concerns regarding the loan modification decision within the allotted timeframe" and invited the defendants to complete a new loan modification application.[2] Mr. Burke submitted a third application, which, after complying with missing document letters and exchanging telephone calls, was completed on or about October 31, 2014. At that point, however, the loan changed servicers, causing further delays. Following transfer of the loan from Nationstar to Select Portfolio Servicing (SPS) on November 1, 2014, court conferences were adjourned to allow the new servicer time to reevaluate the pending loan modification application. The defendants' counsel quickly expressed her concern to a representative at plaintiff's counsel assigned to SPS's cases that the defendants' submissions would become stale before this new review could take place. In an effort to avoid this situation, defendants' counsel provided additional documents to plaintiff's counsel. The defendants subsequently received letters from SPS requesting an extensive set of documents, without mention of the documents already provided to the foreclosure assistant at plaintiff's counsel. SPS and plaintiff's counsel continued to send requests for documents that had been recently provided. Despite the defendants' efforts to comply with these repetitive requests, SPS never reviewed the application because another servicer change took place in December 2014. By February 2015, the defendants began receiving missing documents letters from new servicer Rushmore, requesting documents that had previously been provided in November and December 2014. Following a February 26, 2015 conference with the court, Court Attorney-Referee Bavaro referred this matter to this part for continuing settlement conferences and for consideration of bad faith conduct by the plaintiff.

---

[2]Nationstar's letter indicated that it had not requested a Profit and Loss Statement regarding Mr. Burke's income from A&D Management because this income was not provided on the Request for Modification Affidavit Form (RMA), however the defendant apparently contends that the full income was reported on the RMA.

According to the defendants, while they complied with the document demands from Rushmore on or about March 16, 2015, they received a letter on or about that same date from Rushmore indicating that since it had not received a completed "Home Retention Package," it was closing its file. Rushmore subsequently acknowledged receipt of Mr. Burke's application and provided an extensive missing documents list, essentially requesting a whole new set of documents. Although defendants' counsel protested these requests, new documents were provided on or about April 14, 2015. On April 15, 2015, the parties appeared before this part for a conference. A representative of Rushmore requested that the defendant submit the complete package directly to him, which he did on or about May 19, 2015. Rushmore denied this application on June 16, 2015, in part due to insufficient income. The defendants contended that once again, the servicer considered an incorrect income amount in making this determination. At a conference with the court on June 17, 2015, Rushmore indicated that it had not considered Mr. Burke's job income because he had not submitted a three moth Profit and Loss Statement. The defendants indicated that this was because he had been sick in the hospital throughout much of the relevant time period. Rushmore agreed to accept a Profit and Loss Statement for the three months before the conference. On June 30, 2015, plaintiff sent a missing documents letter requesting updated documents, which were provided on or about July 13, 2015. By letter dated July 24, 2015, Rushmore denied Mr. Burke's HAMP application due to negative net present value (NPV). On August 18, 2015, Mr. Burke appealed the denial based on his dispute of the valuation of the property. While it appears that Rushmore then used the lower valuation in its assessment, it still denied the application on September 10, 2015 due to a negative NPV. In September 2015, Rushmore offered the defendants a Trial Modification Agreement which the defendant declined. At a court conference on October 14, 2015, the parties discussed possible alternative resolutions. According to the defendant, Mr. Burke attempted to obtain financing for these options, but he was unsuccessful. While the defendants appealed Rushmore's denial of his appeal challenging the calculation of the NPV, Rushmore indicated that it was using a higher Discount Risk Yield Premium, and was therefore producing a negative NPV which prohibited modification. On October 28, 2015, when it became clear that a resolution could not be reached, the court gave the defendant the option to make a motion seeking to find that the plaintiff failed to negotiate in good faith.

In opposition, the plaintiff does not contest or deny the detailed account of the negotiation process presented by the defendants, but reiterates that the defendants were considered three times for a HAMP modification and received detailed denials, and that they were presented two modification offers in writing as well as two more verbal offers at the October 14, 2015 settlement conference, but an agreement could not be reached. The plaintiff further argues that the defendants took considerable time in providing loan modification documents to the loan servicers, and that it is common knowledge that loan modification documents go stale after 90 days.

The Court finds that the totality of the circumstances clearly demonstrates that, for a substantial portion of the negotiation process, the plaintiff failed to negotiate in good faith. Throughout the time period that this matter was in the foreclosure settlement part, the plaintiff engaged in extensive dilatory conduct, making numerous piecemeal and repetitive document requests and providing conflicting information, which necessitated repeated clarifications and resubmissions by the defendant. Despite the defendants' extensive efforts to comply with the loan servicers' demands and follow-up on the status of their applications and appeals, the defendants received conflicting information regarding what documents were needed and struggled to obtain specific reasons for the denials of their loan applications. In particular, the defendants claim they while they received and complied with several missing document requests from the plaintiff, they were not told that a Profit and Loss Statement was

needed until after pursuing months of appeals. Defense counsel avers that she was not even told the proper place to submit the appeal of the loan modification denial, leading to even further delay. The subsequent transfer of the loan servicer led to extensive confusion and delay, as the defendant was required to resubmit documents that had already recently been provided, only to find out a short time later that another servicer change would require them to resubmit all over again. While any one of the plaintiff's various delays and miscommunications, standing alone, would not rise to the level of lack of good faith, viewing the plaintiff's conduct in totality, it is clear that the plaintiff's conduct delayed and prevented any possible resolution of the action and substantially increased the balance owed by the defendants on the subject loan. Even if the plaintiff was ultimately correct that the defendant was not entitled to a modification, their conduct throughout the process created "an atmosphere of disorder and confusion" that made it difficult to discern such a fact (***US Bank, N.A. v Sarmiento***, 121 AD3d at 206, *supra*).

The Court notes, however, that the plaintiff did negotiate in good faith towards the end of the negotiating process when this Court began presiding over the conferences. Accordingly, if and when the plaintiff ultimately prevails in the in the instant foreclosure action, the Court tolls the accumulation and collection of interest, costs and attorneys' fees that accrued during the period of time that the Court finds the plaintiff failed to negotiate in good faith, *to wit*, from March 5, 2013 through April 15, 2015.

The plaintiff shall include a copy of this decision with any subsequent application for summary judgment and an order of reference.

DATED: May 22, 2017

C. RANDALL HINRICHS, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION