7682,177 RL

At an IAS Term, Part 69, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 141 Livingston Street, Brooklyn, New York, on the 21th day of October 2013.

PRESENT:

HON. NOACH DEAR,

A.J.S.C.

Index No.: 16840/10

CITIMORTGAGE INC,

Plaintiff,

DECISION AND ORDER

-against-

BETTY ESPINAL,

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Moving Papers and Affidavits Annexed	1, 2
Answering Papers and Supplement	3
Transcript of 5/10/13 Hearing	4
Defendant's Motion for a Bad Faith Hearing/Opp	5, 6

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

I. Background

Plaintiff Citimortgage (henceforth, "Plaintiff" or "Citi") holds a note executed by Defendant Betty Espinal (henceforth, "Defendant" or "Espinal"), such obligation secured by a mortgage lien on the real property located at 638 Autumn Avenue. Having made payments for several years, Espinal defaulted in late 2009. Settlement conferences were held without success. JHO William Davis issued a directive referring the case to this Court for a possible bad faith hearing in light of Defendant's repeated unavailing applications for modification.

Defendant moved this Court for a finding of bad faith on the part of Citi and Plaintiff opposed. On the return date, Defendant invoked *Flagstar Bank, FSB v. Walker,* 37 Misc.3d 312 [Sup Ct, Kings County 2012] and argued that Plaintiff was required to consider Espinal for a modification pursuant to the HAMP guidelines and that she had sufficient income under such an analysis. Plaintiff countered that it was bound by a contract with an investor, Hudson City, and that, as a result, there were severe limitations on its ability to renegotiate with Espinal. As Hudson City was not a HAMP participant and had policies that, in effect, precluded HAMP modifications, Plaintiff noted that it could not consider Defendant pursuant to HAMP guidelines but could and did consider her for a repayment plan but that her verifiable income was insufficient. On the return date, counsel for each party appeared in Court. Again, Michael Pontone, appearing for Defendant, stressed that his client could afford a HAMP modification were one to be offered and, he contended, Plaintiff was required to utilize a HAMP analysis in considering her financials. Plaintiff's counsel, Robert Link, again countered that his client had done what it could subject to the investor restrictions in place. The Court granted the motion in part, setting this matter down for a hearing to allow a better assessment of whether Plaintiff had lived up to its obligations under CPLR 3408.

Prior to holding a formal hearing, the Court spoke to the parties on March 15, 2013 and, in an effort to reach an amicable resolution, ordered Citi to request that Hudson City make an exception to its general policies and consider Espinal for a modification (as opposed to repayment plan, short sale, or deed-in-lieu). Based on the testimony and documentary evidence presented to this Court, it appears that Plaintiff complied with the March 15th order and passed along the Court's order to Hudson City. Hudson City responded in writing, rejecting a modification on the grounds that Espinal's debt to income ratio was too high.

The Court scheduled a bad faith hearing for May 10, 2013. Prior to testimony, a pre-trial

conference was held and the parties agreed that the issue that would need to be decided was not – as Defendant had argued until then – whether Plaintiff's failure to offer a HAMP modification was in-and-of-itself bad faith, but the, in this case related, issue of whether Plaintiff negotiated in good faith in light of the investor restriction. Put differently, the parties disagreed as to the interplay between the obligation to negotiate in good faith pursuant to CPLR 3408(f), on one hand, and a provision of a contract between the servicer and the investor that limited Citi's ability to modify many terms of the note, on the other hand.

The hearing was then held. Respective counsel delivered opening statements, Espinal and Katherine Subleski, a negotiation litigation support analyst for Citi, testified, and counsel delivered closing remarks. To summarize the arguments made, Defendant postulated that Hudson City was pulling the strings from behind the scenes but never appeared and that Citi did not have settlement authority. Health issues in Defendant's family were detailed, as was the fact that she unsuccessfully applied for a modification four times. Repayment plans were derided as impractical for someone behind on a mortgage. Plaintiff spelled out the unsuccessful efforts made to get Hudson City to waive its restrictions and that Defendant could not, in Citi's and Hudson City's views, afford a modification were one offered.[1] The Court granted leave to the parties to submit post-hearing briefs. Neither party did so.

On June 26, 2013, this Court issued an opinion finding that Citi had not failed to negotiate in good faith in this case. There are several points raised therein that are important for considering the instant motion. First, 3408(f) requires that the parties "negotiate in good faith to reach a mutually

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[1]The Court found it slightly troubling that Defendant and her counsel kept arguing that Defendant's income is sufficient for her to afford a modification but that Defendant had a bank balance of $689.77 despite not paying her mortgage for three and a half years. Serious questions would appear to exist as to the amount of available income Espinal actually has.

agreeable resolution, including a loan modification, if possible." The negotiation must, thus, be toward a mutually agreeable resolution and a possible modification is only one potential resolution that the parties could agree to. Other possibilities include deed-in-lieu, short sale, and repayment plans. Further, there must be negotiation – there need not be success. Second, based on the record prior to the hearing – JHO Davis's directive, the motion papers, and the arguments advanced orally by Defendant's counsel – that Plaintiff's failure to consider Defendant for a HAMP-like modification was the alleged bad faith, the Court noted that the HAMP guidelines themselves merely require that the servicer use "reasonable efforts to remove any prohibitions and obtain waivers or approvals from all necessary parties in order to carry out the requirements of the [HAMP Servicer Participation Agreement]." The Court found that Citi had done so – asking Hudson City on several occasions for an exception to the investor restriction, albeit unsuccessfully. Finally, the Court noted that CPLR 3408 does not supercede or impair an agreement between servicer and investor[2]. It was, however, noted that an investor cannot merely hide behind an investor restriction. Similarly to the language of the HAMP guidelines[3], the Court stressed that efforts need to be made to reach out to the investor to see if restrictions could be lifted or, in the alternative, what options for resolution are available. In sum, the Court found that Citi had acted appropriately in this case.

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[2]The Court cited *Wells Fargo v Meyers,* 108 AD3d 9 [2d Dept 2013] as support for this proposition. As discussed, *infra*, this proposition is actually based on the Contract Clause of the US Constitution.

[3]This should not be taken as an endorsement of *Flagstar's* one size fits all standard for evaluating good faith. In fact, this Court has in other opinions utilized the somewhat more logical "totality of the circumstances" analysis advanced in *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638 [1st Dept 2012] and seemingly applied by the Second Department in *Meyers*.

II. The Instant Motion

Defendant filed a notice of appeal and the instant motion for reargument.[4] A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). Defendants arguments can be broken into three general categories. The first, though couched as a misinterpretation of *Meyers*, is more accurately that the Court should not have allowed Plaintiff to limit its negotiation position based on an investor restriction and that, in fact, Citi should have been required to breach its contract with Hudson City in light of CPLR 3408. Second, that the Court misunderstood what happened in negotiations, stressing HAMP in the opinion when there were no modifications offered, only repayment. Finally, Defendant argued that the Court failed to take equitable factors, more specifically the poor health of Defendant's family, into consideration. The Court will address each group of arguments separately.

A. Investor Restrictions

As a preliminary matter, Plaintiff is correct that Defendant inappropriately raises many new arguments in the instant motion. Nonetheless, as Defendant's contentions are unavailing, they will be addressed. Though addressed to *Meyers* and the Court's use thereof, Defendant essentially argues that the agreement between Citi and Hudson City should have been abrogated in light of CPLR 3408 and the mortgage and note.

Defendant appears to believe that this Court relied solely on *Meyers* in making its decision. That is incorrect. Following a discussion about the specific conduct in this case, the Court made a general statement that CPLR 3408 does not supercede or impair a contract between parties. It is for

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[4] The notice of motion only mentions reargument, though the title of the affirmation also mentions renewal. As the substantive text of the supporting affirmation does not mention renewal or provide any support for renewal, this opinion will only address reargument.

that proposition that *Meyers* was cited. This Court could, as the Second Department did in *Meyers*, equally as easily have cited the United States Constitution, "No State shall ... pass any .... Law impairing the Obligation of Contracts..." (US Constitution, Article I, §10). Though not absolute, the Contract Clause should seemingly be applied here. As with the modification of mortgage terms in *Meyers*, limiting the right to freely transfer all or part of a mortgage obligation would not "safeguard the vital interests of [the] people," and, in fact, would significantly impair people's ability to get financing to purchase homes.

It is a reality in today's world that mortgage liens are sold and, in some cases, securitized. Most notes, including that signed by Defendant, reflect that fact, specifying that the mortgage and note may be sold one or more times without notice to her [Mortgage p. 8, ¶20]. Thus, Defendant's assertion that Espinal did not contract with Hudson City, while literally true, is not accurate as a practical matter. As she authorized Citi to enter into such an agreement, she should be bound by its terms.[5] It is true that Plaintiff is a HAMP participant and Hudson City is not and the two have different parameters as to acceptable resolutions of mortgage default actions. Nonetheless, allowing the note and lien to be transferred also inherently permits the acquirer to apply its own policies as to matters not explicitly spelled out in the note and security agreement.

Thus, neither CPLR 3408 nor the agreements signed by Espinal supercede Citi's contract with Hudson Citi and Citi was required to, and apparently did, operate subject to the investor restrictions. This Court cannot and will not abrogate a lienholders unfettered right to transfer all or part of the note and mortgage, despite the resultant limitations on the negotiating position available in a future dispute with the householder.

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[5]This, of course, presumes that the terms are such that Citi had a right to agree to them. Logic dictates that Citi could not transfer rights to Hudson City if it did not have such rights itself and could not contract with the investor to change the explicit terms of agreements with others.

B. Citi's Duty to Negotiate in Good Faith

Defendant contends that, regardless of the agreement with Hudson City, Plaintiff failed to negotiate in good faith and that the Court misapprehended the nature of the negotiations between the parties. The Court disagrees. It is undisputed that Citi offered a repayment plan rather than a modification of the amount, term, or interest rate of the mortgage – since this is what was allowed pursuant to Hudson City's restrictions. When pushed by the Court, Hudson City was again asked by Citi to consider Espinal for a modification and, having agreed to do so, determined that she did not qualify based on a very high debt to income ratio.

Contrary to Defendant's apparent contention, failure to consider a borrower for a modification is not alone bad faith. CPLR 3408 requires the parties to negotiate toward a mutually agreeable resolution and does not, anywhere, specify that the terms of the original note need to be changed. In fact, the *Meyers* court noted that forcing a party to rewrite the terms of their agreement "cannot be deemed a 'mutually agreeable resolution' to the matter" (*Meyers*, 108 AD3d at 23; See also *Van Dyke,* 101 AD3d at 638 ["the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by defendants, and plaintiff's failure to make that offer cannot be interpreted as a lack of good faith."]). Thus, Defendant's contention that Plaintiff needed to offer a particular type of offer to avoid a finding of bad faith is incorrect.

Though it is true that Hudson City never appeared at a settlement conference, Citi made the Defendant aware of the investor limitations[6] – the Hudson City policy letter (attached, among other

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[6]Defendant's previous affidavits note that Plaintiff told her that the reason for the repeated denials of modifications was that Plaintiff [likely, meaning the investor] was not a HAMP participant (Affirmation of Michael J.S. Pontone dated 8/21/12 ["Pontone Aff."], at ¶19; Affidavit of Betty M. Espinal dated 8/24/12 ["Espinal Aff."], at ¶15) and that she did not qualify for Plaintiff's [likely, meaning the investor] internal modification guidelines (Pontone Aff., at

places, as Ex. D to the Affirmation in Support of Defendant's Motion to Renew and Reargue) was provided setting forth the available options (repayment, limited deferment, short sale, deed-in-lieu) and the various limitations to what they allow. Likewise, Plaintiff's prior counsel spelled out what Citi could and could not do in a 2011 letter to a prior attorney for Defendant (attached as Ex. B to Affirmation in Opposition to Defendant's Motion to Renew and Reargue). It is not as if Citi refused to work with Defendant or made one take-it-or-leave-it offer. Ms. Subleski's testimony and the documentary evidence make it clear that Plaintiff repeatedly went back to Hudson City for guidance and operated subject to the limitations placed upon it.

Defendant now argues that the Court misconstrued her arguments as relating to HAMP. Indeed, the previous opinion does focus in several places on HAMP guidelines. This should not be surprising to Defendant's counsel. Citi is a HAMP participant and is, thus, subject to commensurate obligations. In this case, Plaintiff was obligated to use reasonable efforts to get the investor to waive its restrictions and allow a HAMP modification to be considered. It behooved the Court to see whether Citi had done so and, after considering the evidence, the Court found that Plaintiff had, albeit unsuccessfully. Further, Defendant's contention that her bad faith arguments were unrelated to Plaintiff's failure to consider her for a HAMP modification is inaccurate. From the end of settlement conferences until the day of the hearing, Defendant's counsel repeatedly invoked *Flagstar* and stressed that a failure to offer a modification under HAMP-like terms is prima facie bad faith (see, for example, Pontone Aff., at ¶¶28-37). Counsel orally stressed this argument as well at every conference until the Court pointed out to him that the HAMP guidelines make provision for investor restrictions. Thus, Defendant is correct that HAMP was not the primary focus of her hearing arguments – but does

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¶27). This latter reason is noteworthy in light of Defendant's current claim that Plaintiff never considered her for an internal modification.

not mention that it was the thrust of her original motion for a finding of bad faith and her counsel's oft repeated arguments.

In sum, Defendant's arguments that this Court misapprehended the nature of the negotiation between the parties and framed the issue as being HAMP compliance rather than good faith negotiations is incorrect and rejected.

C. Equitable Factors

Defendant's counsel mistakenly believes that stressing Espinal's poor health and the ailments afflicting her family in recent years helps her cause.[7] Like the mentions of her limited income, lost contributions from her brother, and past employment difficulties, this makes her less, rather than more, likely to be able to successfully fulfill her obligations under any modification or repayment plan. Accordingly, were the Court to ascribe any significant weight to such concerns, the resultant equities would, to say the least, not favor Defendant.

III. Conclusions

This case raises a very pivotal issue that will likely be the subject of future appellate decisions and/or clarifying amendments to CPLR 3408. Investors and resultant negotiating restrictions are very much a part of the foreclosure landscape and their effects on the settlement process are readily apparent. Less clear, however, is how the courts should judge "good faith" when a servicer and investor have different policies. This Court strongly believes that, as is the case in the HAMP context, reasonable efforts need to be made to get the investor to waive any limitations that hamper

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[7] For details, see Pontone dated Aff., at ¶¶6-7; Espinal Aff., at ¶¶2-4; Hearing Transcript at 6:13-17, 17:13-20:22.

negotiations. There is no obligation, however, for the restrictions to be removed. Just as the parties need to negotiate in good faith toward a mutually acceptable resolution but cannot be forced to make specific offers, so too a servicer and an investor can limit the negotiable parameters. It would, seemingly, be helpful in some cases to have the investor appear at the settlement conferences, albeit that is an issue more appropriate for the individual referee to decide on a case-by-case basis.

In this case, the Court properly applied precedents, including *Meyers*, in determining that Citi's conduct was appropriate under the circumstances and not bad faith. There was significant contact with the investor seeking guidance and various options, albeit not a modification of various key terms of the note, were presented and rejected. The Court's opinion addressed the HAMP guidelines both as Citi is a HAMP participant and as Defendant repeatedly raised the issue in seeking the hearing. Testimony about Defendant's family health and past employment difficulties was considered and not utilized to her detriment, as equity would suggest.

Based on the above it is hereby

ORDERED that Defendant's Motion to Reargue is **DENIED**.

The foregoing constitutes the decision and order of the Court.

ENTER:

Hon. Noach Dear, A.J.S.C.

HON. NOACH DEAR