

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IAS PART 12

<hr/>	X	INDEX NO. 8887/08
WELLS FARGO BANK, et al.		MOTION SEQ. NO. 2
- against -		BY: Butler, J.
BARBARA SMALL, et al.	X	DATED: February 16, 2010
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Plaintiff commenced this foreclosure action on April 8, 2008, alleging Small's nonpayment on a note and mortgage dated February 14, 2005, for \$576,947.71, covering the real property known as 253-52 149th Road, Rosedale, New York (the premises). Small interposed an answer by letter, stating that she had recently been laid off from her job and her tenants had unexpectedly vacated the premises, but would be starting another job in six months. On October 14, 2008, upon an unopposed motion, plaintiff was awarded summary judgment and an order of reference. A referee was appointed to compute the sums owing, and to ascertain whether the premises could be sold in parcels. The referee's report was made on November 18, 2008.

The instant motion, made on April 28, 2009 and submitted on December 9, 2009, is for a judgment of foreclosure and sale, and for an order declaring invalid and extinguishing as prior adverse liens of record mortgages held by defendants Continental Capital Corp. (Continental) and Mortgage Electronic Systems, Inc. (MERS) pursuant to

RPAPL Article 15. Neither Continental nor MERS appear to have interposed an answer to the complaint or otherwise appeared in this action, and they have been found in default by the court.

Eleven days before the instant motion was made, the servicer of Small's loan for plaintiff, Bank of America, N.A. (Bank of America), entered into a Servicer Participation Agreement (the Agreement) with the Federal National Mortgage Association (Fannie Mae). The Agreement was executed under the Home Affordable Modification Program (HAMP or the Program), and, along with the incorporated by reference Program Guidelines and Supplemental Directives, requires Bank of America to consider all applications for the home loans, and keep records of the documentation.

During the pendency of plaintiff's motion, Small obtained counsel from the Legal Aid Society, Sumani Lanka, who appeared in this action for Small in June 2009. Ms. Lanka requested that Small's loan be reviewed under HAMP for modification. Among the submissions are a July 24, 2009 facsimile cover sheet from Ms. Lanka to Jan Ferguson at Bank of America, stating that it is enclosing Small's financial information, required for consideration for HAMP modification: two months of pay stubs from Small's jobs at Excuria Recovery Services (Excuria) and Queens Borough Public Library; proof of Small's pension payment from Verizon's Benefit Center; Small's W-2 forms from Excuria, and her Form 1099-R from Verizon Pension Plans; her 2008 Tax Return; and a hardship letter. The same type of financial information of Small's son-in-law, whom she stated would be contributing

to the modified mortgage payments, was also listed on the cover sheet, as well as a joint budget, and stated that Small has \$4,000 in cash. Ms. Lanka concludes the cover sheet by stating that Small is eligible for modification under HAMP.

By letter dated August 20, 2009, plaintiff's loan servicer informed Small that "[m]odification is not an option for this loan." That appears to be the extent of Bank of America's communication to Small. Ms. Lanka sent plaintiff's loan servicer a letter in response, asking for specific reasons why Small's request for loan modification was denied. An answer not forthcoming, on September 14, 2009, Small cross-moved to dismiss the complaint for plaintiff's failure to comply with the Agreement and Program Guidelines, or, in the alternative, for an order staying this action and directing Bank of America to review Small's loan under HAMP.

Small also submitted her affidavit, stating that in October 2007 she began experiencing significant financial hardship; that her income was reduced due to lay offs; that her tenants began refusing to pay rent; that the sudden and unexpected decrease in income caused her to fall behind on her mortgage payments; that the following month she contacted the then-servicer of her loan to inquire about loan modification; that her financial information was taken over the telephone, and that she was told to await a reply; that Small did not receive a reply prior to commencement of the foreclosure action in April 2008; that by May 2009 Small's financial situation had improved, due to the income from her two jobs,

combined with pension payments from Verizon and household income from her son-in-law; and that she could afford to make payments if she received a reasonable loan modification.

Since plaintiff has already been granted summary judgment, Small's cross-motion is properly viewed as a cross-motion to vacate the grant of summary judgment, which requires demonstration of a reasonable excuse for the default and a meritorious defense to the action (CPLR 5015 [a] [1]; *NYCTL 1996-1 Trust v Jellerette*, 48 AD3d 769, 770 [2008]).

There is clearly an issue of fact as to whether Bank of America complied with the Agreement, Program Guidelines, and Supplemental Directives, as plaintiff does not dispute that Bank of America received Small's financial information, and did not submit any evidence of the analysis that Bank of America supposedly performed in consideration of Small's application for modification under HAMP. It is thus understandable that Small would desire more than what amounts to a simple "no" in response to her application for modification.

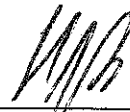
However, an alleged breach of the Agreement cannot form the basis of a defense, because Small cannot be considered an intended beneficiary of the Agreement, as there is neither evidence nor allegation that it was Bank of America's intention to benefit homeowners in entering into the Agreement (*see Peckham Rd. Corp. v Town of Putnam Valley*, 218 AD2d 789, 790 [1995]; *see also Escobedo v Countrywide Home Loans, Inc.*,

2009 US Dist LEXIS 117017, *6-7 [SD Cal 2009]). As Small has failed to put forth a meritorious defense, the grant of summary judgment may not be vacated.

Since Continental and MERS defaulted in the action, their mortgages may be extinguished as prior liens of record.

Accordingly, plaintiff's motion is granted in its entirety, and Small's cross motion is denied in all respects.

Settle order.



Denis J. Butler, J.S.C.