

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

DEUTSCHE BANK NATIONAL
TRUST CO., as Trustee for
HASCO 2007-NCI,

Plaintiff/
Appellee,

vs.

Case No. 2009-2627-AV

SUSAN HASS and ROBERT HASS,

Defendants/
Appellants.

OPINION AND ORDER

This matter is before the Court on an appeal from the May 8, 2009 Possession Judgment that was entered in the 41-B District Court.

I. Background & Procedural History

On November 29, 2006, Susan and Robert Hass (“Appellants”) purchased property commonly known as 19844 Blackfoot Drive, Clinton Township, Michigan 48038. They obtained a variable-rate loan for \$363,317.68, at the annual percentage rate of 11.349%, from Home123 Corporation (“Home123”). Mortgage Electronic Registration Systems (“MERS”) held the security as nominee for Home123 and Home123’s successors and assigns. Thereafter, on November 7, 2007, MERS assigned all of its rights, title and interest in the subject mortgage to Deutsche Bank National Trust Company, as Trustee for HASCO 2007-NCI (“Appellee”).

During Spring 2008, Appellants fell behind on their mortgage payments after they both lost their jobs. They contacted American Servicing Company (“American”), the alleged servicer

of their loan, regarding a possible mortgage modification. They proposed that their arrearage be placed at the end of their loan and that their \$2,531.25 monthly payment be reduced by \$1,000.00 for 12 months, or until their income increased, whichever occurred first. However, American rejected their modification proposal and instead demanded immediate and full payment of the arrearage without any reductions.

Appellee then commenced foreclosure proceedings against Appellants, with Appellee purchasing the subject property at the July 18, 2008 Sheriff's Sale for \$201,000.00. On February 21, 2009, Appellee filed a Complaint for Possession and Termination of Tenancy against Appellants in 41-B District Court. Appellants denied that they were unlawfully holding over and unlawfully in possession. Among other things, they argued that Appellee's refusal to implement a loan modification or workout plan violated recently enacted federal statutes/directives requiring Appellee to work with them to modify their mortgage loan and prevent foreclosure. They further maintained that Appellee's and American's successor/parent company, Wells Fargo, signed an agreement with the federal government requiring it to provide mortgage relief to individuals in their situation and that said contractual obligation extended to Appellee and American by virtue of their relationship to Wells Fargo.

At the conclusion of the May 8, 2009 hearing on Appellee's Motion for Possession, the District Court concluded that the federal provisions were not applicable inasmuch as the Sheriff's Sale had occurred prior to their enactment. [Tr. at 9-10]. Accordingly, the District Court orally ruled in favor of Appellee. [Tr. at 10]. The corresponding Possession Judgment was entered on the same date. Appellants' motion for reconsideration was subsequently denied pursuant to a May 29, 2009 Order that was entered after oral argument was held thereon.

II. Outstanding Issues

Appellants presently contend that Appellee is merely a trustee for HASCO 2007-NCI and that Wells Fargo is the actual owner and/or servicer of HASCO 2007-NCI. They further assert that Appellee and Wells Fargo are essentially the same. Alternatively, they maintain that there is a genuine issue of material fact regarding such relationship. In support of their position, they attached a copy of an Internet search regarding HASCO Trust 2007-HE2, which sets forth information about the trust on the United States Securities and Exchange Commission Form 10-K and which designates Wells Fargo as the Master Servicer, Custodian, and Securities Administrator. [Appellants' Exhibit 5]. They also attached a copy of the Assignment of Mortgage from MERS to Appellee [Appellants' Exhibit 4], a copy of a white pages search on the Internet [Appellants' Exhibit 5], and a copy of the Sheriff's Deed on Mortgage Sale [Appellants' Exhibit 7], which show that Appellee and Wells Fargo have the same address. At the same time, they also assert that American, the entity which denied their request for a loan modification, is also part of the Wells Fargo corporate structure.

In response, Appellee denies that Appellants have established a relationship between itself and Wells Fargo. Appellee further argues that if such were the circumstances, then Wells Fargo should have been made a party to the action. Appellee agrees with the District Court that Appellants are not entitled to relief under the pertinent federal statutes/directives since they were enacted/promulgated subsequent to the Sheriff's Sale.

After careful consideration, the Court is persuaded that there are numerous issues of material fact, including, but not limited to, whether Wells Fargo is the actual owner/servicer of the loan, the nature and extent of the relationship, if any, between Appellee and Wells Fargo, the nature and extent of the relationship, if any, between Wells Fargo and American, and whether

Wells Fargo should have been made a party to the action. If it is ultimately found that Wells Fargo is the servicer of the subject loan, then it is bound by the terms of its written agreement with the federal government, as will be addressed below. If Appellee and/or American are found to constitute part of the Wells Fargo “family,” the District Court must decide whether Wells Fargo’s agreement with the federal government is likewise binding on them.

Accordingly, the District Court’s decision shall be reversed and the matter shall be remanded for a determination of said issues. Of course, the District Court shall also address any and all other outstanding issues that are necessary to a resolution of this action.

III. Wells Fargo’s Contract

On April 13, 2009, Wells Fargo, as Servicer, signed a Commitment to Purchase Financial Instrument and Servicer Participation Agreement for the Home Affordable Modification Program Under the Emergency Economic Stabilization Act of 2008 (“the Contract”). The other party to the Contract was the Federal National Mortgage Association (“Fannie Mae”), a federally chartered corporation and financial agent of the United States. Pursuant to the Contract, Wells Fargo agreed to be bound by the terms and conditions therein relative to mortgage loans, particularly with respect to loan modifications and other foreclosure prevention services. Pursuant to Page 3 of the Contract, Wells Fargo was to receive \$2,873,000,000 in exchange for its participation in the subject program.

On Page 2, Wells Fargo specifically agreed to comply with all program guidelines and procedures established by the Department of Treasury, including:

...any supplemental documentation, instructions, bulletins, letters, directives, or other communications, including, but not limited to, business continuity requirements, compliance requirements, performance requirements and related remedies, issued by the Treasury, Fannie Mae, or Freddie Mac in order to change, or further describe or clarify the scope of, the rights and duties of the Participating Servicers ...

Also on Page 2, Wells Fargo contracted to:

...use reasonable efforts to remove all prohibitions or impediments to its authority, and use reasonable efforts to obtain all third party consents and waivers that are required, by contract or law, in order to effectuate any modification of a mortgage loan under the Program.

Moreover, Page 10 provided that “[t]he Agreement shall be governed by and construed under Federal law and not the law of any state or locality...”¹ Since federal and Michigan law do not differ as to the rules of contract interpretation, the Court finds it useful to look to state law. *Textile Workers Union of America v Lincoln Mills of Alabama*, 353 US 448, 457; 77 S Ct 912; 1 Led 2d 972 (1957). Pursuant to Michigan law, the Contract must be enforced as written inasmuch as Wells Fargo’s obligations thereunder are clear and unambiguous. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). That is, Wells Fargo was obligated to offer mortgage payment assistance to individuals who were eligible under the subject federal program. As will be addressed below, Appellants met the eligibility requirements for such assistance.

If Wells Fargo is ultimately found to be the actual loan servicer, it therefore breached its contractual duty by failing to offer relief to Appellants pursuant to the prevailing federal authority. Similarly, if Appellee and/or American are ultimately determined to be bound by the contractual terms, they must also be found to have been in violation thereof for failing to offer Appellants a mortgage modification. In turn, a breach of contract by any of these entities means that foreclosure proceedings should never have been commenced and the Sheriff’s Sale should not have been held.

¹ The Contract also provides that any disputes between Wells Fargo and the federal government shall be brought solely and exclusively in the federal courts located in the District of Columbia. The Court is not persuaded by Appellee’s argument that the instant controversy should have been brought in federal court since the federal government, through its agency, Fannie Mae, is not a party.

IV. Program Eligibility Requirements

At the outset, the Emergency Economic Stabilization Act of 2008² (“the Act”) became effective on October 3, 2008. One of its stated purposes was to preserve home ownership. 12 USC 5201(2)(B). The Act provided that, in exercising its authority thereunder, the Treasury Department shall take into consideration “the need to help families keep their homes and to stabilize communities.” 12 USC 5213(3).

Moreover, 12 USC 5219(a)(1) contained the following language:

...the Secretary shall implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages...to take advantage of...available programs to minimize foreclosures. In addition, the Secretary may use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.

On February 18, 2009, the Obama Administration announced the Homeowner Affordability and Stability Plan, which was designed to assist approximately 7 to 9 million families restructure or refinance their mortgages so as to avoid foreclosure. [Appellants’ Exhibit 13]. As part of this Plan, the Treasury Department announced a national mortgage modification program, which resulted in the March 4, 2009 issuance of uniform guidelines for mortgage modifications across the country. [Appellants’ Exhibit 13].

On April 6, 2009, the Department of Treasury issued Supplemental Directive 09-01, which set forth additional guidelines to participating servicers relative to the adoption and implementation of the Home Affordable Modification Program (“HMP”). [Appellants’ Exhibit 13]. Said Supplemental Directive delineated certain eligibility requirements for the HMP on Pages 2-3, including, but not limited to, the following:

- The mortgage loan is delinquent or default is reasonably

² This Act created the Troubled Asset Relief Program, commonly known as TARP. 12 USC 5202(8); 12 USC 5211(a)(1).

foreseeable; loans currently in foreclosure are eligible.

- The property securing the mortgage loan must not be vacant or condemned.
- A borrower in active litigation regarding the mortgage loan is eligible for the HMP.

It is noteworthy that all pertinent documentation, including supplemental directives, were made part of the Wells Fargo Contract pursuant to Page 10 thereof.

Once again, the Court deems it instructive to consult state law inasmuch as it is compatible with its federal counterpart on the matter of statutory construction. *Textile Workers Union of America, supra*. Under Michigan law, it is the Court's obligation to discern and give effect to the legislative intent as expressed in the statutory terms. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). When reviewing a statute, the Court should assume that every word has a purpose and, as far as practicable, give effect to every clause and sentence. *Id.* Further, care should be taken so as to avoid a construction that would render any part of a statute surplusage or nugatory. *Id.* at 684. The rules of statutory construction apply to agency rules. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993). This Court reviews the question of statutory interpretation *de novo*. *People v Krueger*, 466 Mich 50, 33; 643 NW2d 223 (2002).

With respect to the first eligibility requirement listed above, the Court is convinced that the District Court improperly concluded that the July 18, 2008 Sheriff's Sale was the cut-off date for the purpose of Appellants' eligibility to participate in the federal mortgage relief program. Indeed, such a conclusion is contrary to the clear Congressional intent to provide assistance to financially challenged homeowners with the ultimate goal of preserving their ownership status, as reflected in 12 USC 5201(2)(B) and 5213(3). *Pohutski, supra*. It is also in contravention of

the Obama Administration's intent to provide such relief. [See Appellants' Exhibit 14, which contains a portion of the federal government website at www.financialstability.gov].

Appellee does not dispute the accuracy of the information contained in Appellants' Exhibit 15, which is a national survey of foreclosure practices. The survey reflects that Michigan has a shorter foreclosure process than most other states, but a longer redemption period.³ In reality, this means that Michigan borrowers still have a window of opportunity after the Sheriff's Sale within which to recover their property.⁴ Thus, finality is not necessarily achieved at the time of the Sheriff's Sale in this jurisdiction.

Neither the federal statutory provisions nor the subject directive singles out Michigan borrowers by holding them to a shorter eligibility period than their counterparts in other states.⁵ Not only would it be patently unfair to establish a reduced eligibility period for Michigan residents, such a result would contravene the language on Page 1 of Supplemental Directive 09-01, which stated that "[u]nder the HMP, a servicer will use a uniform modification process to provide a borrower with sustainable monthly payments." [emphasis added]. To the extent that Michigan's foreclosure procedure may be in conflict with or poses an impediment to federal law, federal law preempts the field. *Gade v Nat'l Solid Wastes Mgt Ass'n*, 505 US 88, 98; 112 S Ct 2374; 120 L Ed 2d 73 (1992). The Court opines that the federal Act's purpose, as addressed above, evidences a Congressional intent to implement a mortgage assistance program that is consistent throughout the country since it was designed to address the widespread financial hardship of homeowners during an historical economic downturn.

³ According to the survey, many states do not even have a redemption period.

⁴ The redemption period may be 30 days 1 year, depending on certain factors, such as the date the mortgage was executed and the type of property involved. MCL 600.3240.

⁵ On page 14 of the Supplemental Directive, for example, borrowers in Georgia, Hawaii, Missouri, and Virginia are singled out in terms of when they are deemed to have failed the trial period plan.

In any event, the Court must construe the quoted three factors under Supplementary Directive 09-01 as a whole. *Pohutski, supra*. If the Sheriff's Sale were to be used as the eligibility cut-off date for the purpose of the first factor, such result would render the remaining two factors meaningless, contrary to well-established rules of statutory construction. *Id.* For example, Appellants have satisfied the second factor since their home is not vacant or condemned; indeed, it was reported that Appellants are, in good faith, depositing their monthly mortgage payments in escrow. Notwithstanding, such requirement would be reduced to mere surplusage under the District Court's holding since the Sheriff's Sale cut-off date would render it moot. Pursuant to the third factor, Appellants are not eliminated from participation merely because they were, and still are, engaged in active litigation. Once again, the District Court's holding would trump such factor and remove it from consideration. Had the second and third factors not been intended for consideration, they would not have been included in the first place. *Id.*

In short, the Court is satisfied that Appellants have met the three quoted eligibility requirements. Appellee has failed to demonstrate that Appellants failed to meet any of the other requirements. The Court is not convinced that a ruling in Appellants' favor would amount to a retroactive application of the law since the Act became effective during Appellants' redemption period and since they had also sought a loan modification during such time. Further, Supplementary Directive 09-01 became effective while they were in active litigation in District Court.

The Court finds no merit to Appellee's argument that Appellants are attempting to create a cause of action where none was established by statute. Appellants, as Defendants in the lower

court proceedings, were merely raising the federal provisions/directive as a defense to Appellee's claim for possession/eviction.

Finally, the Court need not address any of Appellants' remaining arguments inasmuch as the issues already considered provide sufficient grounds for relief.

V. Conclusion

For the reasons set forth above,

The May 18, 2009 Possession Judgment entered in the 41-B District Court is REVERSED.

This matter is HEREBY REMANDED for proceedings consistent with the instant *Opinion and Order*.

The instant decision closes the case.

This Court retains jurisdiction.

IT IS SO ORDERED.

Dated: September 30, 2009

DONALD G. MILLER
Circuit Court Judge

CC: Matthew D. Levine
Jerome D. Goldberg

DONALD G. MILLER
CIRCUIT JUDGE

SEP 30 2009

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CARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk