SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WELLS FARGO BANK, AS TRUSTEE FOR SECURITIZED ASSET BACKED RECEIVABLES LLC 2005-FR5 MORTGAGE PASS-THROUGH CETIFICATES, SERIES 2005-FR5
C/O Countrywide Home Loans, Inc.
400 Countrywide Way
Simi Valley, CA 93065

Plaintiff,

-against-

ZAFAR SALYAMOV, ALISHER SALYAMOV, COUNTRYWIDE FINANCIAL CORPORATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FREMONT INVESTMENTS & LOAN, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BOARD, NEW YORK TRANSIT ADJUDICATION BUREAU, PEOPLE OF NEW YORK 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.

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TP9

Present:

HON. ANTHONY I. GIACOBBE

DECISION AND ORDER

Index No. 102828/07

Motion No. 001

The following papers numbered 1 to 3 were marked fully submitted on the 16th day of November, 2012:

Notice of Motion, with supporting papers
(dated October 10, 2012).....1
Affirmation in Opposition with supporting papers
(dated October 30, 2012).....2
Rely Affirmation with supporting papers
(dated November 15, 2012).....3

Upon the foregoing papers, the motion of defendants Zafar Salyamov and Alisher Salyamov ("Salyamovs") is denied.

This matter arises out plaintiff's attempt to foreclose a residential mortgage on property located at 865 Nugent Avenue, Staten Island, New York. It appears undisputed that on June 2, 2005, the

Salyamovs executed an adjustable rate note and mortgage in the amount of $319,465.00, upon which they had defaulted by 2007. A Judgment of Foreclosure and Sale was entered on June 4, 2008, but was automatically stayed when the Salyamovs filed for Chapter 13 bankruptcy on August 26, 2008. It is also conceded that: (1) pursuant to a forbearance agreement entered into with plaintiff, the Salyamovs made the required payments for eighteen consecutive months, from early 2009 through 2010;(2) at the conclusion of the eighteen months, plaintiff advised these defendants that it was terminating the forbearance agreement and proceeding with the foreclosure; (3) the Salyamovs were informed in writing on November 30, 2011 that their request for a loan modification from plaintiff had been denied; (4) this Court subsequently instructed plaintiff to furnish the Salyamovs with a detailed letter explaining its reasons for denying the loan modification; and (6) to date plaintiff has not furnished any such letter.[1]

At bar, the Salyamovs seek the entry of an order, in effect, barring plaintiff from proceeding with the foreclosure on the grounds that (1) it acted in bad faith during the settlement conferences herein in contravention of CPLR 3408(a); (2) declaring that the accumulation of interest be waived as of the date of their default; and (3) awarding them costs and attorney's fees. In support, Mr. Salyamov claims that under HAMP (the Home Affordable Modification Program) guidelines, he now

[1]However, it is undisputed that Bank of America, the entity which services the subject loan, wrote to the Salymovs on November 30, 2011, informing them that their loan "[was] not eligible for a modification because we service your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan" (*see*, Salyamovs' Ex. C).

earns enough income to warrant a modification, which is still being arbitrarily denied because he allegedly is not qualified to participate in the program.

In opposition, plaintiff asserts that (1) defendant has failed to establish his *prima facie* entitlement to the relief requested; (2) it attended and participated in the numerous mandatory settlement conferences held herein; (3) it has negotiated with these defendants in good faith; (4) it has made reasonable and good faith efforts consistent with the usual and customary industry standards to employ appropriate loss mitigation options to the Salyamovs' situation; (5) it has offered loss mitigation options to defendants which failed to result in a mutually agreeable resolution, and (6) it has otherwise acted in a matter consistent with fairness, good conscience and justice.

As applicable, CPLR 3408(a) mandates that a settlement conference be held in every "residential foreclosure action" involving a home loan as defined in RPAPL §1304, "in which the defendant is a resident of the property subject to foreclosure." The statute further provides that both the mortgagor and mortgagee "shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (CPLR 3408[f]). In this context, "[c]onduct such as providing conflicting information, refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations have been held to constitute bad faith" (*Flagstar Bank, FSB v. Walker*, 37 Misc3d 312, 317 fn6 [S.Ct. Kings Co. 2012]; *see also*, *One West Bank, FSB v. Greenhut*, 36 Misc3d 1205[A] [S.Ct. Westchester Co. 2012]). Moreover, this concept has been extended by some courts to ascribe a lack of good faith to a plaintiff-

mortgagee, which had engaged in dilatory tactics and "failed to provide proper review and extend to defendant an affordable loan modification" (*see, Deutsche Bank Trust Co. of America v. Davis*, 32 Misc3d 1210[A] [S.Ct. Kings Co. 2011]). Also cited has been the failure to attend mandatory conferences and "work out a loan modification, as required by statute, with a homeowner who is gainfully employed" and "earns income [sufficient] to sustain a modified payment" (*see, BAC Home Loans Servicing v. Westervelt*, 29 Misc3d 1224[A][S.Ct. Dutchess Co. 2010]). Contrariwise, other courts have held that where "a foreclosing bank [] is under no legal obligation to modify such a loan," the refusal to do so "is not unconscionable conduct and does not constitute bad faith" (*see, JPMorgan Chase Bank, N.A. v. Ilardo*, 36 Misc3d 359, 379-380[S.Ct. Suffolk Co. 2012]).

In either event, if a party has been found to have acted in bad faith, the courts have not been hesitant to order the tolling or forfeiture of interest on the underlying loan *(see, US Bank National Association v. Padilla*, 31 Misc3d 1208[A] [S.Ct. Dutchess Co. 2011]; *BAC Home Loans Servicing v. Westervelt, supra*; *see also, Bank of America N.A. v. Lucido*, 35 Misc3d 1211[A][S.Ct. Suffolk Co. 2012]). Moreover, it is well settled "'that [while] a mortgagor is bound by the terms of his [] contract and cannot be relieved from his [] default *** in the absence of waiver [] or estoppel, [a mortgagee's] bad faith, fraud, oppressive or unconscionable conduct'" may be similarly sanctioned (*Levine v. Infidelity, Inc.*, 285 AD2d 629, 630 [2nd Dept.], *lv denied*, 97 NY2d 606 [2001], *quoting Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, 183 [1982]). Notwithstanding the

foregoing, this Court cannot ignore the recent admonition by the Second Department that the "'stability of contract obligations must not be undermined by [considerations of] judicial sympathy'" (*Emigrant Mortgage Co., Inc. v. Fisher*, 90 AD3d 823, 824 [2nd Dept. 2011][internal citations omitted]).

Here, it appears that plaintiff has attended and participated in all settlement conferences, and has tendered an arguable reason for the denial of the Salyamovs' HAMP modification. In this context, the Bank of America's November 11, 2011 letter regarding the Salyamovs' modification application should be viewed as substantially complying with this Court's request for a "detailed explanation" of the denial of defendants' modification application rather than an act of bad faith.

Accordingly, it is

ORDERED, that the motion is denied.

E N T E R,

Dated: December 20, 2012

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J.S.C.