

U.S. Bank Natl. Assoc. v Courtney

2012 NY Slip Op 33024(U)

December 10, 2012

Supreme Court, New York County

Docket Number: 103713/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

US BANK NATIONAL ASSOCIATION

INDEX NO.: 103713/08

Plaintiff,

MOTION DATE:

- v -

MOTION CAL. NO. 006

TODD COURTNEY,
Defendants.

MOTION SEQ. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes No

Upon the foregoing papers, it is ordered that this motion is dismissed in accordance with the annexed decision and order.

FILED
DEC 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 10 2012

J.S.C.

Check one: FINAL DISPOSITION

[] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR GSAA HOME EQUITY TRUST 2007-7, ASSET-
BACKED CERTIFICATES, SERIES 2007-7,

INDEX NO. 103713/08

Plaintiff,
-against-

TODD COURTNEY A/K/A TODD A. COURTNEY, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, THE BOARD OF MANAGERS OF THE
CHADWIN HOUSE CONDOMINIUM, WELLS FARGO
BANK, N.A.,

Defendants.

FILED
DEC 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this mortgage foreclosure action, defendant The Board of Managers of the Chadwin House Condominium (the "condominium") moves for an order directing plaintiff U.S. Bank National Association, as Trustee for GSAA Home Equity Trust 2007-7, Asset Backed Certificates, Series 2007-7 (the "bank"), to immediately schedule and conduct a foreclosure sale pursuant to the Judgment of Foreclosure and Sale entered in this action on July 14, 2010.¹

Plaintiff bank initially submitted papers opposing the condominium's motion, but subsequently

¹On December 20, 2008, defendant condominium filed a Lien of Common Charges based on defendant Courtney's failure to pay condominium common charges. The condominium's motion papers assert that he has not pad common charges for his unit since May 1, 2008 and as of December 2011, the arrears totaled more than \$35,000. During the pendency of the instant motion, Mr. Courtney made four payments of common charges, each in the amount of \$589.63. It is unclear from the record, whether those payments were for the months of June, July, August and September 2012, or July, August, September and October 2012.

submitted a Reply Affirmation stating that “[a]t this time, plaintiff does not disagree with the court granting this motion.”

The motion was originally made by an order to show cause signed by this court on December 16, 2011, and returnable January 4, 2012. Defendant condominium and plaintiff bank executed a stipulation adjourning the return date to January 19, 2012. Defendant mortgagor Todd Courtney initially appeared pro se and later by counsel. At the court’s urging and with the consent of the bank and the condominium, the court held the motion in abeyance to give Mr. Courtney an opportunity to submit the documents necessary to negotiate a loan modification agreement with plaintiff bank.

To the extent the following background information is not contained in the court record, it is taken from the bank’s June 19, 2012 affirmation. Plaintiff’s predecessor in interest, Wells Fargo Bank, N.A., commenced this action in March 2008 seeking to foreclose on the mortgage on defendant Courtney’s condominium unit located at 140 Seventh Avenue, Unit 5P, New York, New York.² Defendant Courtney did not appear or answer the complaint, and on July 14, 2010 the court entered a Judgment of Foreclosure and Sale in the amount of \$895,319,75.

According to the bank, the foreclosure sale was initially scheduled for August 25, 2010, but was “cancelled due to defendant seeking loss mitigation.” The bank states that on or about August 9, 2010, Mr. Courtney “submitted financial documents to be reviewed for HAMP,” and after reviewing those documents, the bank determined that he “was not eligible for the program as the property was non-owner occupied and the unpaid principal balance exceeded the HAMP

²Plaintiff bank states that the original amount of the loan was \$850,000 and was reduced pursuant to a modification agreement to \$797,000.

limits.” In September 2010, the bank notified Mr. Courtney that he had been approved for a three month moratorium “to allow him to increase his income and decrease expenses” and the bank notified its counsel to place the foreclosure action “on hold.” On or about November 1, 2010, Mr. Courtney “contacted the loss mitigation representative and advised that he would like to be reviewed for other loss mitigation options.”

The bank states that on or about November 24, 2010, Mr. Courtney submitted updated financial documents and requested that the moratorium be cancelled. After reviewing the documents, the bank determined that his “debt/income ratio was not conducive to a successful modification,” since his “income totaled about \$2,250.00 and his monthly expenses were around \$6,300.00.” During December 2010, the bank sent Mr. Courtney “a loan modification financial packet.” and when he failed to return the documentation, the bank “removed” him from loan modification program.

On or about December 30, 2010, the bank sent Mr. Courtney a letter “indicating that he may be eligible for a short sale or other loss mitigation options.” The bank contacted him again in January 2011, and Mr. Courtney responded by submitting “updated financial documents” and advising that he had “moved back into the property.” After reviewing the documents, the bank notified Mr. Courtney that he needed to provide additional information. The bank states that on or about January 28, 2011 and February 2, 2011, Mr. Courtney contacted the loss mitigation representative seeking, inter alia, clarification regarding the additional documentation. In March 2011, the loss mitigation representative made several attempts to contact Mr. Courtney to provide an “updated Financial Worksheet, signed and dated, and to provide his four most recent pay stubs.” On or about April 4, 2011, the bank sent him a “denial letter . . . due to his failure to

provide the necessary financial documents to complete a review.”

The bank states that on or about April 6, 2011, Mr. Courtney “contacted the loss mitigation representative and advised that he did not want to complete the Short Sale loss mitigation option,” and on or about April 19, 2011, he submitted a “workout package.” After reviewing the package, the bank requested specific information, including an explanation of his expenses for food, transportation and utilities, the number of his personal vehicles, how often he receives commission checks from his employer, the source of the “other income” listed on his financial worksheet, the “other mortgage” from Chase Bank, payments towards credit card debt, 30-days worth of consecutive pay stubs, an explanation of “wage assignment” deductions, verification that “HOA dues are \$509.39/mo,” and how long he has been working for Genzyme. The bank states that on or about June 25, 2011, Mr. Courtney provided some, but not all of the requested information: commissions are received every three months or quarterly; “wage assignments” are for a credit card garnishment; he owns 0 vehicles; his transportation expenses are low because he has a company vehicle; and his utilities are low because his employer helps pay for some of those expenses. On or about August 10, 2011, the bank sent Mr. Courtney a letter advising that his request for loss mitigation options was denied “as he failed to provide the remaining information within the time” needed by the bank. According to the bank, Mr. Courtney did not provide any new financial documents during the period from August 2011 to February 2012.

In December 2011, defendant condominium filed the instant order to show cause seeking to compel the bank to proceed with the foreclosure sale of Mr. Courtney’s unit. As noted above, plaintiff bank initially opposed the motion, but subsequently advised that it “does not disagree

with the court granting this motion.” Also as noted above, Mr. Courtney originally appeared pro se in opposition to the motion and later retained counsel who appeared in his behalf in July 2012.

From the parties’ first appearance on the condominium’s order to show cause in January 2012 to its final submission in August 2012, the parties have made numerous appearances before this court, and the court has held the motion in abeyance and granted Mr. Courtney numerous adjournments to afford him the opportunity to submit the documents necessary for plaintiff bank to conduct a loss mitigation or loan modification review. For example, at the February 14, 2012 appearance, Mr. Courtney advised that he was currently unemployed but expected to have a job within the next 30 days. The court granted an adjournment to March 13, 2012, and on that day, Mr. Courtney again requested additional time. The court adjourned the matter to May to give Mr. Courtney a chance to qualify for loss mitigation and to provide the bank with additional financial documentation. When the parties appeared in May, Mr. Courtney requested another adjournment. The court granted an adjournment to June 4, 2012 with the instruction that Mr. Courtney submit the necessary financial documents no later than May 22, 2012. On June 4, 2012, Mr Courtney advised that his new employer had sent him out of the country, so he was not able to obtain all the financial documents. The court adjourned the matter to June 25, 2012, marked the matter “final” and directed Mr. Courtney to provide the documents by June 14, 2012. According to the bank, Mr. Courtney provided statements from his bank on June 13.

In connection with the June 25, 2012 court appearance, the bank submitted an affirmation dated June 19, 2012, explaining, inter alia, that since Mr. Courtney had submitted “the required documentation in pieces, many of the previously submitted documents have become stale,” and the bank needed a “complete, updated financial packet” before conducting

any further review, and listed twelve separate items. On June 25, 2012, the court gave Mr. Courtney a choice either to submit opposition papers to the condominium's motion no later than July 16, 2012 or to submit a new loss mitigation packet while the sale moved forward. Mr. Courtney chose to submit opposition papers and thereafter retained counsel, who submitted a 3½ page Affirmation in Opposition with no supporting documents, asserting that Mr. Courtney "should be given the opportunity to do a HAMP Loan Modification Agreement with Plaintiff."

Plaintiff bank submitted a Reply Affirmation dated July 20, 2012, which again stated that the documents Courtney previously submitted "have now gone stale," and that as of the last appearance on June 25, he "still could not show affordability for any payment on the loan," and that his "most recent bank statement reflected only \$140.00 and was missing pages including itemization of credits, debits or deposits." The bank notes that Mr. Courtney previously told the court that "he does not deposit his paycheck but rather just cashes them and lives paycheck to paycheck." In response to Mr. Courtney's opposition, the bank argues that while his counsel claims that he has income of \$95,000 per year, he "has still not provided proof of the satisfaction of liens as well as any savings or proof of financial condition." The bank also argues that for more than two years it has been attempting to obtain documents from Mr. Courtney required for a loan modification review, and he has yet to provide a "complete and current financial packet."

On August 2, 2012, the parties, including Mr. Courtney's counsel, appeared before this court. The condominium's motion was marked submitted and the parties executed a so-ordered stipulation, which provides in its entirety as follows:

Defendant Todd Courtney will submit all requested paperwork that the service requires to determine what home retention options (including loan modification) are available, if any. Said paperwork will be submitted to plaintiff's counsel no

later than 8/16/12. Plaintiff agrees to make a good faith effort to review the defendant's completed package. In the event that a loan modification agreement cannot be reached by 9/10/12, plaintiff's counsel will notify the court of same, and the court will resolve all pending motions. If appropriate, the court will then appoint a successor referee and permit the foreclosure sale to proceed.

In accordance with the stipulation, plaintiff's counsel wrote to court on September 11, 2012 advising that Mr. Courtney's financial packet was received on August 17, 2012, and that "[t]o date, Mr. Courtney has failed to provide a complete financial packet and all supporting documents for a review."³ Addressing the specific documents that were submitted, plaintiff's counsel objected as follows:

A review of the few documents submitted by Mr. Courtney shows that the documents presented are also not acceptable. The extension Mr. Courtney filed for filing his 2011 tax returns has expired, so my client would need the 2011 and 2010 tax returns with the 4506T form for 2009, 2010 and 2011 tax returns. The Bank statements provided by Mr. Courtney are also insufficient. Mr. Courtney provides one page printouts of his account. Mr. Courtney must either provide physical bank statements or a complete printout signed by the bank. The amounts shown on the bank printout provided also do not support the income and expenses that the defendant has claimed on his worksheet. Mr. Courtney must also submit signed copies of his pay stubs which were not provided. The last problem with Mr. Courtney's submission is the \$1,000.00 claimed as rental income. If this amount is truly rental income, Mr. Courtney needed to provide a rental agreement and proof of payments received. If this amount is contribution from Mr. Courtney's co-occupant, then a letter of contribution, non-borrower occupancy statement and financial documents from the non-borrower contributor must also be submitted. Nothing was submitted to support this claimed income.

The letter further states that "Mr. Courtney was required to have a complete financial packet and proofs submitted to the [bank] by August 16, 2012, which was not done" and "[d]ue to the

³Plaintiff's counsel sent the court two letters dated September 10 and September 11, 2012. On September 10, counsel explained that her client's "system has been down today to get an accurate update," but "from the review of the packet, it appears the packet is incomplete." The next day, counsel sent the second letter as a follow-up, after the bank's system was up and running.

continuation of Mr. Courtney's habitual piecemeal submission of incomplete and unacceptable documents, this loan cannot be reviewed for a loan modification at this time. . . . Plaintiff respectfully requests that it be allowed to proceed to sale and for the court to appoint a substitute referee to conduct the sale."

Based upon the foregoing, and in the absence of any showing to the contrary, the court concludes that Mr. Courtney has failed to comply with the stipulation which required him to submit a complete and current financial package with all the necessary documents to plaintiff bank by August 16, 2012. Although Mr. Courtney subsequently provided the bank with some additional documentation on or about October 8, 2012, that was beyond the he parties' stipulated deadline. Moreover, in her October 11, 2012 letter to Mr. Courtney's counsel, plaintiff's counsel once again states that "[d]ue to the submission of a few documents here and there needed to review the loan for a modification, the original documents submitted in August will become stale by the time the remaining documents are sent to my office. As such, please submit an entirely new, complete and current packet of financial documentation."

Therefore, pursuant to the parties' stipulation, the condominium's motion is granted and plaintiff shall forthwith proceed with the foreclosure sale. In addition, the Judgment of Foreclosure and Sale entered July 14, 2010 shall be amended to appoint a substitute referee to conduct the sale.

Notwithstanding the foregoing determination, the parties are urged to continue loan modification negotiations, and in the event defendant Mr. Courtney submits a complete and current package with required documentation within a reasonable time prior to the sale, plaintiff shall timely review the package to determine if he is eligible for loan modification. Notably,

plaintiff's counsel advises that even if the court grants the instant motion, plaintiff bank "would have another 30 days or so prior to the sale to continue to attempt to review the loan for a modification should all financial information be provided."

Accordingly, it is

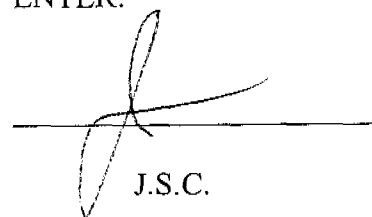
ORDERED that the motion is granted and plaintiff shall forthwith proceed with the foreclosure sale; and it is further

ORDERED that the Judgment of Foreclosure and Sale entered July 14, 2010, is amended to substitute CAROL LILIENFELD, ESQ, 708 THIRD AVENUE, SUITE 15W, NEW YORK, NEW YORK 10017, telephone #212-683-3344, as the Referee appointed for the purpose of conducting the sale, and to substitute CAPITAL ONE BANK, 31 EAST 17TH STREET, NEW YORK, NEW YORK, 10003, as the bank in which said Referee shall deposit the balance of the proceeds of the sale in her own name as Referee.

December 10, 2012

FILED
DEC 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J.S.C.