DECISION AFTER HEARING INDEX NO. 34954/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR TRUSTEE TO WACHOVIA BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR16,

Plaintiff,

-against-

JOSHUA L. GOTTLIEB A/K/A JOSHUA GOTTLIEB, AUDREY GOTTLIEB, and "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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Following this Court's decision dated January 19, 2017 and a hearing conducted on August 14, 2018, August 15, 2018 and August 16, 2018 and upon consideration of the following: (1) Plaintiff's Post-Hearing Memorandum on the Issue of Seeking a Waiver of Limitations That Prevent HAMP Modifications, dated September 14, 2018, and supporting case law; and (2) Post-Hearing Memorandum by the defendants, dated September 14, 2018.

ORDERED that, due to the plaintiff's failure to negotiate in good faith pursuant to CPLR 3408(f), this Court hereby tolls the accumulation and collection of interest on the unpaid principal balance, as well as costs and fees excluding tax advances and hazard insurance, for a period beginning on the date of the first foreclosure settlement conference, April 15, 2013, and running until the conclusion of the bad faith hearing on August 16, 2018; and it is further

ORDERED that the referee shall complete his computation in accordance with this decision, and the plaintiff may then move for confirmation of the referee's report and a judgment of foreclosure.

The plaintiff commenced the instant foreclosure action on November 16, 2012 to foreclose the lien of a July 15, 2005 mortgage given by the Gottlieb defendants to Wells Fargo Bank, N.A. to secure a mortgage note in the amount of $520,000.00, given on the same date. On June 30, 2010, the terms of the loan were modified to defer a portion of the principal. The modified loan went into default on December 1, 2011. The Gottlieb defendants appeared in the action by counsel who interposed an answer on their behalf. Settlement conferences of the type contemplated by CPLR 3408 began on April 15, 2013 and concluded on September 4, 2013. The parties failed to reach a resolution and the referee presiding over the settlement conferences referred this matter to the Court for an inquiry into whether a "bad faith" hearing was necessary. Following a conference with this Court on January 15, 2014, motion practice ensued. The Court conferenced this matter again on March 8, 2017, June 7, 2017, August 9, 2017, September 20, 2017, May 9, 2018 and May 30, 2018.

By order dated January 19, 2017, this Court granted the plaintiff's motion for summary judgment and an order of reference (001). The Court further granted the Gottlieb defendants' cross-motion (002) solely to the extent that a bad faith hearing was ordered and the parties were directed to appear for a conference to discuss its scope and parameters.

In its decision dated January 19, 2017, this Court found that the defendants' submissions raised a factual issue as to whether the plaintiff failed to negotiate in good faith (*see* CPLR 3408, 22 NYCRR 202.12-a[c][4]). Accordingly, the Court held a hearing on this issue commencing on August 14, 2018 and ending on August 16, 2018. As the parties seeking a determination that the plaintiff failed to negotiate in good faith, the defendants bore the burden of proof on this issue, and were required to establish the plaintiff's lack of good faith by a preponderance of the evidence (*see, e.g.*, *Deutsche Bank Nat'l Trust Co. v Twersky*, 135 AD3d 895, 896, 24 NYS3d 193, 194 [2d Dept 2016]; *LaSalle Bank, N.A. v Dono*, 135 AD3d 827, 829, 24 NYS3d 144, 146-147 [2d Dept 2016]; *Bank of N.Y. v Castillo*, 120 AD3d 598, 600, 99 NYS2d 446, 448 [2d Dept 2014]; *Citibank, N.A. v Barclay*, 124 AD3d 174, 177, 999 NYS2d 375, 378 [2d Dept 2014]; *see also*, *U.S. Bank Nat. Ass'n v Vasquez*, 47 Misc.3d 1023, 1025, 10 NYS3d 386, 388 [Sup. Ct, Rockland County, 2015]; *One West Bank, FSB v Greenhut*, 36 Misc. 3d 1205[A], 2012 N.Y. Slip Op. 51197[U], 2012 WL 2478213 (N.Y. Sup.) at *7 [Sup. Ct., Westchester County 2012]; *HSBC Bank USA, Nat. Ass'n v McKenna*, 37 Misc3d 885, 952 NYS2d 746 [Sup. Ct., Kings County 2012]).

The Court finds that the issue central to its determination is whether Wells Fargo, a participant in the Home Affordable Modification Program ("HAMP"), made a reasonable effort to seek a waiver of investor restrictions which prevented the review of the Gottliebs loan for a possible HAMP modification and whether the totality of the circumstances demonstrates that the plaintiff failed to negotiate in good faith pursuant to CPLR 3408(f). Following the hearing and consideration of the parties' post-hearing memoranda, the Court finds that the plaintiff failed to made such a reasonable effort as required by the HAMP guidelines and failed to made a meaningful effort to resolve this case as required by CPLR 3408(f).

TESTIMONY AND EVIDENCE

A major portion of the testimony during the three-day hearing centered around the defendants' contention that for other loans in the same pool as that of the Gottliebs, Wells Fargo granted loan modifications that apparently deviated from the investor restrictions. This contention was based primarily on the testimony of the defendants' expert, Bernard J. Patterson, a Certified Fraud Examiner, and the data he extracted from a Wells Fargo reporting site called "CTS Link." There was conflicting testimony on this issue. Mr. Patterson noticed discrepancies between the data reported in CTS link and the data reported in the actual loan modification documents, and witness Jeremy Vaught, a Lending Officer in Home Preservation at Wells Fargo, testified that he was unaware of any waiver or deviation from the investor restrictions on loan modifications ever being granted for any loan.

The remainder of the testimony centered around the plaintiff's conduct in reviewing the Gottliebs for a loan modification.

Mr. Vaught testified that Wells Fargo was a HAMP participant. Defendants' Exhibit Y is a letter dated August 31, 2012 from Wells Fargo to the Gottliebs indicating that they do not meet the requirements of HAMP because Wells Fargo services loans on behalf of an investor that has not given the contractual authority to modify their loan. A second denial letter dated July 16, 2013 (Defendants' Exhibit R) stated that Wells Fargo did not have the contractual authority to modify their loan under HAMP because of limitations in their servicing agreement. A letter dated July 31, 2013 (Defendants' Exhibit S) indicated that this mortgage loan was also not eligible for a traditional modification because the Gottliebs previously had a modification in July 2010 on which they defaulted, and the investor only allows one modification for the lifetime of the loan. The letter further indicated that while the Gottliebs were reviewed for a repayment plan, the investor required that such a plan provide that the loan's delinquency be eliminated by the 21st month of delinquency. According to the letter, the Gottliebs were now in their 21st month of delinquency, and therefore the only workout option available to them was to cure the default by tendering funds to reinstate the mortgage loan. Defendants' Exhibit T was another letter dated October 11, 2016 denying the Gottliebs' request for HAMP relief for the same reasons recited in previous denial letters. Mr. Vaught indicated that the Gottlieb's loan could not be reviewed for HAMP because Wells Fargo was limited to the waterfall allowed by each specific investor.[1] The investor restrictions for the Gottliebs' pool of loans prohibited extending the term, permanently reducing the interest rate, and capitalizing the arrearage into the interest-bearing principal balance. Mr. Vaught indicated that the tools they use to review loans that are HAMP eligible have the HAMP guidelines and waterfall built-in.[2] He indicated that the Gottliebs were reviewed pursuant to Wells Fargo's in-house guidelines for mortgage-backed securities (MBS). He also indicated that the Gottliebs' loan was run through the HAMP tool but it had a hard stop because either the investor did

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[1] A "waterfall" is a multiple-step process that is to be applied in a particular sequence, one step at a time, in connection with a modification review (*see US Bank N.A. v Sarmiento*, 121 AD3d 187, 198, 991 NYS2d 68 [2d Dept 2014]).

[2] The witness explained that the "tool" he refers to is the "home preservation application" or "home preservation tool." He explained that the tool is an application on the computer which pulls all of the information regarding a loan from the system of record and runs it through the waterfall to give a decision on an application. The tool is built incorporating more than 400 different types of investor guidelines.

not participate in HAMP or there were investor limitations. When asked if Wells Fargo ever sought a waiver of the investor restrictions, Mr. Vaught referred to defendants' Exhibit E, a letter from a Vice President of Wells Fargo Bank, N.A. to Wells Fargo Corporate Trust Services dated May 11, 2012. A copy of the relevant portion of the letter, Exhibit E, is annexed hereto.

The letter states in pertinent part:

> As you may be aware, Wells Fargo has agreed to participate in the Treasury's Making Home Affordable (MHA) Programs and to work with customers to modify certain mortgage loans in accordance with the Programs and all applicable Supplemental Directives...provided by the Treasury. MHA has extended their program, per Supplemental Directive 12-02 Making Home Affordable Program-MHA Extension and Expansion. **We will continue to service your loans including offering MHA modifications unless you contact us to let us know you no longer want to participate in MHA programs based on the expanded eligibility noted in Supplemental Directive 12-02...**
>
> Participation in MHA provides a unique opportunity to work together to help Americans stay in their homes. Certain MHA modifications may not be permitted under the terms of the Servicing Agreements pursuant to which we service loans on your behalf.
>
> **By countersigning this letter agreement, you are consenting to each future Modification of a Mortgage Loan provided by the MHA Program under the Servicing Agreement and waiving any approval or consent rights contained therein (including by third parties, such as master servicers, on your behalf) as well as waiving any restrictions or limitations that would prohibit Modifications under the MHA Program.**

The witness indicated that this letter would have been sent to each investor asking for confirmation of their willingness to participate in HAMP. He did not personally see this letter mailed from Wells Fargo to Wells Fargo Corporate Trust Services ("CTS") concerning the Gottliebs' trust, but believed it would have been sent to all the investors. Mr. Vaught indicated that for this pool of loans, US Bank was the Trustee, the investors were the certificate holders, Wells Fargo Corporate Trust was the master servicer and Wells Fargo Home Mortgage was the servicer. Mr. Vaught indicated that his employer, Wells Fargo Home Mortgage, and Wells Fargo Corporate Trust Services were different departments within Wells Fargo. The witness explained that the underwriting group at Wells Fargo would have to submit a request for an exception to, or waiver of, the investor restrictions to CTS. Mr. Vaught was not sure what type of relationship existed between CTS and the investors. The witness testified that it was his understanding that the May 11, 2012 letter constituted a waiver request. When asked if a response to this letter was ever received, he testified that he did not have any other letters in his records. It was his understanding that if no response was received from CTS, the pool would continue to *not* participate in MHA modifications. If the letter had been countersigned and returned, it was the witness's belief that there would be a waiver and the pool would then be allowed to participate in the HAMP program, tier 2. The witness conceded that it did not state in the letter that not countersigning indicated an explicit lack of consent. He had no personal knowledge of the letter

being signed or not signed. Mr. Vaught testified that he was not aware of any instances when a waiver of the restrictions for loan modifications in an MBS pool had been granted when requested. He testified that if an investor had decided to waive a restriction, he would have received an email regarding the criteria change, and he did not in this instance. The witness indicated that if the Trust had agreed to participate in HAMP and to accept the HAMP waterfall, the Gottliebs would have been eligible for HAMP review. The witness further testified, however, that had the Gottliebs been reviewed under HAMP, he did not believe they would have been offered a HAMP modification because they fell below the 31% housing ratio.

In 2017, the Court asked the plaintiff to perform a hypothetical review for a modification with the borrowers contributing $25,000.00. The witness explained that if Wells Fargo was to proceed with this option, it would have needed to make two exceptions. First, it would have had to pay the remaining $194,000.00 to the Trust on behalf of the Gottliebs, and secondly, it would have had to accept a negative net present value (NPV). According to the witness, the application was denied because Wells Fargo was not willing to do so.

APPLICABLE LAW

The defendants allege that the plaintiff failed to negotiate in good faith. CPLR 3408(a) (L. 2013, ch. 306, § 2, eff. August 30, 2013) provides for mandatory conferences in certain residential foreclosure actions, such as this one, "for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution..." CPLR 3408(f) mandates that the parties "shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."[3] "'The purpose of the good faith requirement [in CPLR 3408] is to ensure that both plaintiff and defendant are prepared to participate in a *meaningful effort* at the settlement conference to reach resolution'" (emphasis added) (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 200, 991 NYS2d 68 [2d Dept 2014]). "Compliance with the obligation to negotiate in good faith ... shall be measured by the totality of circumstances" (CPLR 3408(f); *see also US Bank N.A. v Sarmiento, supra*). While CPLR 3408(f) requires the parties to negotiate in good faith, "it is obvious that the parties cannot be forced to reach an agreement" (*Wells Fargo Bank N.A. v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *see also, Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 638, 958 NYS2d 331 [1st Dept 2012] ["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."].

[3] The court's procedures and rules for CPLR 3408 settlement conferences further state that "[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner" (22 NYCRR 202.12-a[c][4]).

The commentary to CPLR 3408 states that the test for determining whether a party participated in good faith might be reducible to one word: reasonableness. "Did the party, in light of all the circumstances attendant to the statutory conferencing of the foreclosure action, including the relevant requirements of the HAMP, act reasonably?" (*Commentary to CPLR 3408, 2015 entry "Penalizing a Party for Failing to Negotiate in 'Good Faith' [or Lack Thereof]?"*). A plaintiff's failure to follow HAMP regulations and guidelines has been held to constitute a failure to negotiate in good faith pursuant to CPLR 3408(f) (*see, U.S. Bank N.A. v Smith*, 123 AD3d 914, 999 NYS2d 468 [2d Dept 2014]; *Onewest Bank, FSB v Colace*, 130 AD3d 994, 15 NYS3d 109 [2d Dept 2015];*U.S. Bank N.A. v Vasquez*, 47 Misc.3d 1023, 10 NYS3d 386 [Sup Ct, Rockland County 2015]; *U.S. Bank, N.A. v Rodriguez*, 41 Misc.3d 656, 664, 972 NYS2d 451 [Sup. Ct., Bronx County 2013]; *Flagstar Bank, FSB v Walker*, 37 Misc.3d 312, 316, 946 NYS 2d 850 [Sup. Ct. Kings County 2012], *revd. on other grounds* 112 AD3d 885, 977 NYS2d 359 [2d Dept 2013]).[4]

Furthermore, "[a] foreclosure action is equitable in nature and triggers the equitable powers of the court ... Once equity is invoked, the court's power is as broad as equity and justice require (internal citations and quotation marks omitted)" (*U.S. Bank Natl. Assn. v Losner*, 145 AD3d 935, 937, 44 NYS3d 467 [2d Dept 2016]; *U.S. Bank N.A. v Williams*, 121 AD3d 1098, 1101-2, 995 NYS2d 172 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 15, 966 NYS2d 108 [2d Dept 2013]).

While the Guidelines for Servicers participating in HAMP (U.S. Department of Treasury, Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages, Version 5.0*, January 6, 2016) provide that servicers are not required to consider mortgage loans for HAMP modification where prohibited by a PSA or other investor servicing agreement, the Guidelines do require that participating servicers use reasonable efforts to obtain waivers of investor restrictions on such modification. Specifically, section 1.1 ("Servicer Participation Agreement" [SPA]) states, in pertinent part: "[P]articipating servicers are required to 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 SPA."

Section 1.3 ("Investor Solicitation") provides, in pertinent part:

> Within 30 days of identifying an investor as a non-participant, or as unwilling to extend its participation in MHA to include any extension or expansion of an MHA program, or identifying a servicing agreement that limits or prohibits a servicer from offering assistance under MHA...the servicer must contact the investor in writing at least once, encouraging the investor to permit modifications and other assistance available under the extended and expanded MHA programs....

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[4] The Court notes, and is also informed by, the 2016 amendments to CPLR 3408(f) which codified the totality-of-the-circumstances standard articulated by the courts and listed a number of factors to be considered in the analysis, including "compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards ... avoiding unreasonable delay ... and providing accurate information to the court and parties."

Finally, section 6.5 ("Prohibition on Modification of Waterfall Steps"), provides in pertinent part:

> If a servicing agreement, investor guidelines or applicable law restricts or prohibits a modification step in the standard or alternative HAMP modification waterfalls and the servicer partially performs it or skips it, the modification may still qualify for HAMP. If the servicer is subject to restrictions that make it unfeasible to complete the modification waterfall steps, the servicer should identify this prior to performing the NPV evaluation and not perform an NPV evaluation. Servicers must maintain evidence in the loan file documenting the nature of any deviation from taking any sequential modification step in the modification waterfall and the fact that the applicable servicing agreement, investor guideline or law restricted or prohibited fully performing the modification waterfall step. The documentation must show that the servicer made a reasonable effort to seek a waiver from the investor and whether that waiver was approved or denied.

ANALYSIS & DECISION

Based on the evidence presented, it is the Court's view that the defendants failed to establish their initial premise that loans in the same pool as the Gottliebs' loan were allowed a broader array of modifications and/or were modified in contradiction of contractual restrictions. Rather, the credible testimony of Mr. Vaught, established that Wells Fargo did not deviate from its investor restrictions and offered its in-house MBE options to the vast majority of loan modification applicants, as it did for the Gottliebs. In fact, Mr. Vaught testified that he was not aware of *any* instances in which a waiver of investor restrictions for this pool of loans was granted.[5]

Both parties concede that Wells Fargo, as the servicer of the subject loan, is a participant in HAMP. The plaintiff does not dispute that the applicable HAMP guidelines required Wells Fargo to seek a waiver of the applicable investor restrictions. The Court's determination, therefore, centers around whether the plaintiff made a reasonable effort to seek such a waiver and whether it made a meaningful effort to resolve this case as required by CPLR 3408(f).

The defendants established, prima facie, that the plaintiff failed in this regard. At the heart of this issue is the letter from Wells Fargo Bank, N.A. to Wells Fargo Corporate Trust Services dated May 11, 2012, which the plaintiff contends constituted the required waiver-request. On its face, the letter is a blanket request that fails to make any reference to the Gottliebs' pool of loans or the Gottliebs' loan itself. Additionally, from the credible testimony adduced at the hearing and a simple review of the letter itself, it is apparent that the letter is unclear at best, if not duplicitous. The language

[5] The defendants also contest the existence of the contractual restrictions and whether they could be enforced in the event of a breach. The Court notes that the Pooling and Servicing Agreement and Servicing Agreement were admitted into evidence on consent as Exhibits "A" and "B." The Court has considered the defendants' remaining contentions and finds them to be without merit or irrelevant to the final outcome.

contained in the first paragraph suggests that the recipient needed to contact Wells Fargo if it wanted to *stop* participating in MHA programs (to "opt-out"), while the language in the third paragraph suggests that the recipient needed to countersign and return the letter in order to affirmatively waive any restrictions and consent to participating in the MHA programs (to "opt-in"). The letter does not specify what happens if no response is received. Moreover, there appear to be questions regarding whether the letter was sent to the proper party/parties and whether there is sufficient proof of its mailing, especially in light of the fact that a response was never received or documented. In any event, it is clear to the Court that the non-specific and ambiguous May 11, 2012 letter -- the sole evidence of plaintiff's compliance with HAMP's requirement -- is insufficient to constitute a "reasonable effort" to seek a waiver of the investor restrictions prohibiting review of the Gottliebs' loan for a HAMP modification (*see, U.S. Department of Treasury, Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, ch 2, Version 5.0, sections 1.1, 1.3, 6.5*). The plaintiff also failed to comply with the requirement that it maintain documentation as to whether the requested waiver was approved or denied (*id, section 6.5.*). The plaintiff's failure to follow the HAMP guidelines constitutes a failure to negotiate in good faith (*see, U.S. Bank N.A. v Smith, supra*, 123 AD3d at 917).

The plaintiff failed to rebut the defendants' showing. In its post-hearing brief, the plaintiff cites to three unreported decisions to support its position that the May 11, 2012 letter constituted a waiver request in compliance with the HAMP guidelines (*HSBC v Diaz* (Index No. 11583/13, [Sup. Ct. Kings Cnty, Oct. 3, 2016]); *HSBC Bank USA v Ocasio*, (58 Misc.3d 1218(A), 2016 WL 10891627 [Sup. Ct. Orange Cnty, Sept. 15, 2016]); *HSBC v Lucas* (Index No. 381244/2012, [Sup Ct. Orange Cnty, Sept. 15, 2016]). While these unreported decisions are entitled to respectful consideration, such decisions are of little or no precedential value (*see, Dubai Islamic Bank v Citibank, N.A.*, 126 F. Supp.2d 659, 669 fn. 14 [S.D.N.Y. 2000] [applying New York law]; *Eaton v Chahal*, 146 Misc.2d 977, 553 NYS2d 642, 646 [N.Y. Sup. Ct. 1990]). In any event, the Court notes that in each of the three cases, there was an additional subsequent letter sent by the servicer to the investor, specifically referencing the defendant's loan and requesting a waiver of investor restrictions in unequivocal terms. No such additional letter was sent by the plaintiff herein.

The Court further notes that the subject letter, dated and allegedly sent in 2012, predates the start of the foreclosure settlement conferences, which commenced in April of 2013. Throughout the time period that this matter was being conferenced in the foreclosure settlement part pursuant to CPLR 3408, there is no evidence that the plaintiff made any attempt to seek a waiver of the investor restrictions and make a meaningful effort to reach a resolution. Rather, this Court received a referral for a possible bad faith hearing from the Court Attorney-Referee who presided over the foreclosure settlement conferences. Her referral indicated that after five months of considering submissions in connection with the defendants' loan modification application, the plaintiff's attorney informed the court, for the first time, that no type of modification would be allowed due to investor restrictions.[6] Subsequently, this Court held a series of conferences with the parties during which, as per its standard

[6] The pertinent investor restrictions allowed only one modification for the lifetime of the loan and also prevented a repayment plan from being offered because the loan had been in default for over 21 months.

practice, it sought to put the bad faith allegations aside and attempt to reach a resolution.[7] Throughout this entire time period during which the Court devoted ample time and resources, the plaintiff made no effort whatsoever to obtain a waiver of investor restrictions that clearly prevented any meaningful negotiation on this case. Not even a simple phone call. Rather, when the plaintiff considered the Gottliebs' applications for loan modifications in 2013, 2016 and 2017 and hit a "hard stop" in its "home preservation tool" due to investor restrictions, the plaintiff failed to take any further action whatsoever.

The good faith requirement of CPLR 3408 does not carve out exceptions for mortgage-backed securities with investor restrictions (*see Flagstar Bank, FSB v Walker*, 37 Misc.3d 312, 946 NYS2d 850 [Sup Ct, Kings County 2012] ["There is only one standard for good faith under CPLR 3408. That standard exists regardless of insurance regulations by FHA, or others and independent of investor restrictions"], rev'd on other grounds 112 AD3d 885). Thus, when the plaintiff came to the Court and participated in conferences, it was required to act reasonably and make a meaningful effort to reach resolution (*see, Bank of Am., N.A. v Rausher*, 43 Misc.3d 488, 491-492, 981 NYS2d 269 [Sup Ct, Ulster County 2014]; *U.S. Bank, N.A. v Shinaba*, 40 Misc.3d 1239(A), 977 NYS2d 671 [Table] [Sup Ct, Bronx County 2013]). Here, the plaintiff failed to do so. For several years, the plaintiff considered the Gottliebs' applications as well as the Court's recommended resolutions, without ever having made a genuine attempt to seek a waiver of the investor restrictions which would clearly prohibit any such resolutions. One form letter, sent prior to the settlement conferences, with no reference to the Gottliebs' loan, contradictory instructions, to which no response was received or documented, is not a genuine attempt nor is it sufficient to constitute compliance with HAMP guidelines. Even outside the context of HAMP, the plaintiff's conduct throughout years of conferences with the Court, during which it considered repeated applications only to deny them months later citing investor restrictions, fails to constitute a reasonable or meaningful effort to reach resolution as required by CPLR 3408(f). Considering the totality of the circumstances, the Court finds that the plaintiff has failed to negotiate in good faith (*see US Bank N.A. v Sarmiento, supra*).

"Courts are authorized to impose sanctions for violations of CPLR 3408(f)" (*U.S. Bank N.A. v Smith*, 123 AD3d at 916). Prior to the 2016 amendments to the statute, CPLR 3408 did not set forth any specific remedy for a party's failure to negotiate in good faith (*see LaSalle Bank, N.A. v Dono*, 135 AD3d at 829). "Although CPLR 3408 is silent as to the sanctions or remedies that may be employed for violation of the good faith negotiation requirement, "[i]n the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case" (*US Bank N.A. v Sarmiento*, 121 AD3d at 207 *citing Wells Fargo, NA v Meyers*, 108 AD3d at 23; *see also*, *U.S. Bank N.A. v Smith*, 123 AD3d at 917). Available and authorized remedies include barring the plaintiff from collecting interest and fees, and imposing a monetary sanction on the offending party or counsel. A sanction on a particular party should be commensurate with that party's disobedience (*see*, Commentary to CPLR 3408, Cumulative Pocket Part, 2015 entry, "Penalizing a Party for Failing to Negotiate in Good

[7] These conferences resulted in the Court asking plaintiff to perform the hypothetical review with the borrowers contributing $25,000.00 towards a modification.

Faith–What Penalty to Impose on a Party That Has Not Negotiated in Good Faith?"). Although not applicable to the instant case, this Court is also informed by the amended version of the statute, specifically CPLR 3408(j) which provides that upon a finding that the plaintiff failed to negotiate in good faith, "[t]he court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff...."

Accordingly, the court tolls the accumulation and collection of interest on the unpaid principal balance, as well as costs and fees excluding tax advances and hazard insurance, for a period beginning on the date of the first foreclosure settlement conference, April 15, 2013, and running until the conclusion of the bad faith hearing on August 16, 2018. While the amended version of CPLR 3408 also provides that the court may award attorneys fees to the defendant where appropriate, under the law prior to the amendment, no similar statutory authority for such an award existed (*see*, *HSBC Bank USA, Nat. Ass'n v McKenna*, 37 Misc.3d 885, 915, 952 NYS2d 746 [Sup. Ct., Kings County 2012]).

With this issue now resolved, the referee may conduct his computation in accordance with this decision, and the plaintiff may then move for confirmation of the referee's report and a judgment of foreclosure.

DATED: January 28, 2019

C. RANDALL HINRICHS, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION