SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 21 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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EDWARD GARDNER, MARILYN GARDNER, BRIAN MCCAFFREY, DANIEL HARRIS SR.,

DECISION AFTER TRIAL

Plaintiff(s),

-against-

WELLS FARGO BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-BC1, TMS MORTGAGE INC d/b/a The Money Store, ROSARIO ROMANO, and JOHN DOE 1-5 and JANE DOE 1-5, the last names being fictitious , said parties intended being undisclosed, unnamed and unknown investors, participants, corporate or other entities, conduits, trustees, servicers, custodians and others, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendant(s),

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Plaintiffs, Edward Gardner (Edward), Marilyn Gardner (Marilyn), Brian McCaffrey (McCaffrey), and Daniel Harris (Harris), commenced this action to expunge a mortgage based upon the statute of limitations for foreclosure having run. By short form order dated January 22, 2019, this court granted Plaintiffs' motion for summary judgment against Defendants TMS Mortgage Inc. d/b/a The Money Store and Rosario Romano, and denied their motion for summary judgment against Defendants, Wells Fargo Bank National Association as Trustee for Structured Asset Securities Corporation, Mortgage Pass-through Certificates Series 2007-BC1 (Wells Fargo). A nonjury trial was held on August 7, 2019, and the parties thereafter were granted leave to submit post-trial memoranda. The court has considered all evidence presented at trial, and the post-trial submissions in making its determination.

The undisputed facts are that Edward and Marilyn own two homes, one in Massapequa and one in Farmingdale. In 2006, the Gardners borrowed $314,000.00 to refinance a mortgage loan on the Farmingdale property. In 2008, the Gardners stopped making payments on the loan, and have never made one since. A foreclosure action was commenced in 2008, but then was discontinued in 2016.

Plaintiffs allege once the foreclosure action was discontinued, the statute of limitations had run and Wells Fargo has now and forever lost the ability to recoup the

loan they gave the Gardeners. Wells Fargo alleges that by discontinuing the foreclosure and offering Plaintiffs opportunities to modify the terms of the loan, they de-accelerated the loan which triggered a new statute of limitations period.

The law is clear that when a mortgagee accelerates the mortgage, the six year statute of limitations for mortgage foreclosure begins to run. *(DLJ Mtge Capital, Inc. v. Hirsch*, 161 AD3d 944 [2d Dept 2018]). A revocation of an acceleration must be done by an affirmative act. (*NNMT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]. The question at this trial is whether Plaintiffs' multiple loan modification applications, and Wells Fargo's willingness to enter into such modifications, as well as whether the fact that Wells Fargo was the party who moved to discontinue the foreclosure action and cancel the *lis pendens* are proof of an affirmative act to revoke the acceleration. *Id.*

During the trial, Plaintiffs called Edward as their first witness. The court found Edward's testimony of little to no value. He had selective memory and admitted to signing numerous official documents, such as loan modification applications and tax returns, that contained allegedly inaccurate information. The information he claimed was inaccurate on those documents directly hurt his arguments in this case. Much of the confusion revolved around whether the Farmingdale property was an investment/rental property or Edward's residence. Depending upon when it was convenient to serve their

purposes and to avoid them being caught in lies, or having committed perjury, Plaintiffs claimed it was both, at different times. Due to an alleged rocky relationship between Edward and Marilyn, Edward claims to have lived at the Farmingdale property for periods of time, only to return to the Massapequa property for periods of time. However, when he received the refinance in 2006, he claimed to be receiving in excess of $3,100.00 per month in rental income. Yet during his testimony he claimed that was not true, and that he was not renting out the property but was "letting people live there with me". These people were not paying rent. In his 2011 tax return, Edward listed the Farmingdale property as an investment property and stated that he did not live there at all during 2011, yet during his testimony he claimed that was untrue, and that it was his accountant who put that incorrect information down. Of course, Edward signed these official documents. There are other examples of Edward's inconsistencies and contradictions to such an extent that the court will not credit his testimony at all.

Regardless of Edward's testimony, Plaintiffs were still able to prove that the foreclosure action was discontinued after the statute of limitations had run. The original foreclosure action was commenced in 2008 and was discontinued in 2016. However, prior to the discontinuance, Wells Fargo agreed to enter into a loan modification with Plaintiffs. On January 31, 2013, Plaintiffs were sent a letter, which is in evidence, agreeing to a loan modification which contained the amount due and new monthly

installments. The court finds this was an affirmative act de-accelerating the loan, and that it was not pretextual.

Further, the court finds Plaintiffs should be prevented from raising the statute of limitations argument by the doctrine of unclean hands. The doctrine of unclean hands is available when one party commits immoral, unconscionable conduct, that conduct was relied upon by the other party and was directly related to the other party's injury. (*Kopsidas v Krokos*, 294 AD2d 406 92d Dept 2002). It is clear that Edward lied about the nature of the Farmingdale property to obtain the refinance, lied about the nature of the Farmingdale property throughout the foreclosure proceedings and conferences, lied about whether or not he received rent, apparently received rent in amounts that exceeded the mortgage payment yet did not make mortgage payments, and told the lender he was going to stop making mortgage payments not because he could not afford them, but because they would not refinance his Massapequa property. Further, it appears clear to the court that Plaintiffs repeatedly alleged they were interested in loan modifications, yet when one was offered they refused to meet its terms. All of these activities appear devised to delay the proceedings, allow Plaintiffs to remain the property without having to pay the expenses, and attempt to position themselves to obtain the property at Defendants' expense.

Therefore, based upon the court's finding, after trial, that Wells Fargo made an

affirmative act in 2013 to revoke the acceleration of the loan, and that Plaintiffs cannot sustain these arguments based upon unclean hands, it is hereby

ORDERED, that the complaint is dismissed.

The court has considered the other arguments made by the parties and finds them to be without merit.

This constitutes the decision and order of the court.

Dated: November 25, 2019
Mineola, New York

JAMES P. McCORMACK, J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE