

REAL ESTATE

CPLR Rule 3408 Addressed by Second Department Again, Again and Again

By Andrew Lieb

In January 2016, the Second Department was again asked to explain the trial court's authority to enforce the good faith negotiation requirement applicable to CPLR Rule 3408 settlement conferences in three separate cases. As the Second Department initially reminds us, "[p]ursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution."¹ In all three cases, the court remained steadfast to its previously set standard for CPLR Rule 3408 as articulated in *US Bank N.A. v. Sarmiento*².

In *LaSalle Bank, N.A. v. Dono*, the court affirmed the trial court's imposition of sanctions "abat[ing] all interest, disbursements, costs, and attorney's fees that had accrued during the period between October 1, 2010, and August 12, 2014," which represented the period "that the Bank had failed to negotiate in good faith." However, the court reversed the trial court's imposition of additional sanctions, which "permanently barr[ed] the Bank from collecting any interest, disbursements, costs, or attorney's fees in the future absent further court order." In *Dono*, the

court's finding of bad faith was based upon "the Bank ... engag[ing] in dilatory conduct by 'making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided'."

In *Aurora Loan Services, LLC v. Nelli Chirinkin, et al.*³, the court was asked to address whether the trial court properly denied an application to restore the action to the mortgage foreclosure settlement conference part calendar. The court affirmed the trial court's denial of the application by holding that "refusing to lower the principal or the interest rate or by rejecting the terms of the defendants' counteroffer" is not bad faith.

In *Deutsche Bank Natl. Trust Co. v. Twersky*⁴, the court held that the refusal by a foreclosing plaintiff to accept "a lump sum payment ... in full satisfaction of the outstanding loan balance," did not constitute bad faith negotiations pursuant to CPLR Rule 3408.

In each of the three cases, the Second Department cited to *US Bank N.A. v. Sarmiento* for the good faith standard applicable to CPLR Rule 3408(f). The standard set forth in



Andrew Lieb

Sarmiento is "considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution." When *Sarmiento* established the totality of the circumstances standard, the court expressly rejected the plaintiff's proposed standard

"of gross disregard of, or conscious or knowing indifference to, another's rights." In fact, the court in *Sarmiento* set forth illustrations of bad faith negotiations that are triggered "by acting negligently," including "[w]here a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution."

CPLR Rule 3408 has a clear standard for enforcement. The result of a CPLR Rule 3408 sanction's application can be predicted by whether the mortgagor has

records to establish that the documents requested for a modification, the dates of such requests and/or the grounds for denial are inconsistent or contradictory. Simply stated, a party who "obfuscate[s], delay[s], and prevent[s] CPLR 3408 settlement negotiations by acting negligently" can be found to have negotiated in bad faith. Nevertheless, a lender is not required to accept a borrower's offer (e.g., a modification with a lower principal or interest rate, or instead, a lump sum payoff) by way of the totality of the circumstances standard. So, there will never be a windfall to a borrower from a meritorious CPLR Rule 3408 application because sanctions are restricted to waiving the interest, disbursements, costs, and attorney's fees that accumulated during the period of bad faith only. Therefore, a sanctions application should only be used as a matter of last resort.

Moving forward, the only question that remains open is the degree that HAMP guidelines play in the totality of the circumstances standard. While this precise issue was raised in *US Bank N.A. v. Sarmiento*, and the court rejected the common-law alternative standard advanced in the case by the plaintiff, it did not expressly hold that HAMP

(Continued on page 25)

CPLR Rule 3408 Addressed (Continued from page 11)

guidelines govern the totality of the circumstances standard. Regardless, Version 5.0 of the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages became available on January 6, 2016⁵. This Handbook, at least, plays an important role in the totality of the circumstances standard and should be studied by both plaintiff and defense counsel who engage in foreclosure litigation. In all, educating lenders on the handbook's requirements is often the most cost effective strategy for a borrower, as opposed to engaging in protracted CPLR Rule 3408 motion practice, if the borrower's ultimate goals are a loan modification and to avoid foreclosure.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.

¹ LaSalle Bank, N.A. v. Dono., 2016 WL 229744 (2d Dept., 2016).

² US Bank N.A. v. Sarmiento, 121 A.D.3d 187 (2d Dept., 2014).

³ Aurora Loan Services, LLC v. Nelli Chirinkin, et al., 2016 WL 143780 (2d Dept., 2016).

⁴ Deutsche Bank Natl. Trust Co. v. Twersky, 2016 WL 314001 (2d Dept., 2016).

⁵ https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/mhahandbook_5.pdf