

STATE OF MAINE
ANDROSCOGGIN, ss.

EIGHTH DISTRICT COURT
Located at Lewiston
Docket No. Re-11-031

JP MORGAN CHASE,)
Plaintiff,)
v.)
CAROLANNE BOUCHLES and)
GEORGE BOUCHLES,)
Defendants.)

**ORDER ON MEDIATOR'S
REPORT OF NONCOMPLIANCE**

The court has before it the Mediator's Report of Noncompliance filed on September 15, 2011. Plaintiff JP Morgan Chase has not filed a response. Under M.R. Civ. P. 93(j) "the mediator shall inform the court" if a party fails to attend a mediation session "or to make a good faith effort to mediate ... and the court may impose appropriate sanctions."

The mediator has reported that Plaintiff has failed to comply with the mediation agreement to permit a review for modification. M.R. Civ. P. 93(g) states "the mediation shall address all issues of foreclosure, including but not limited to ... (2) calculation of the sums due on the note for principal, interest, and any costs or fees, reinstatement of the mortgage, and modification of the loan[.]" The court finds the mediator's report persuasive that Plaintiff failed to comply with the mediation agreement from the first mediation session. In addition, the court notes the mediator's report that Plaintiff's counsel was unresponsive when counsel for Defendants Carolanne and George Bouchles made multiple inquiries regarding the application and the letter of rejection.

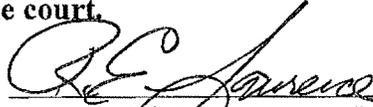
In addition, the mediator reported that Plaintiff has demonstrated a lack of good faith. In particular, the mediator reported that Plaintiff refused to provide guidance regarding its standard for reviewing a request for modification with respect to borrowers interested in selling their homes. Plaintiff's refusal to give the Defendants guidance constitutes bad faith. Plaintiff intentionally made it difficult for Defendants to know whether they qualify for consideration for a loan modification.

Accordingly, the court concurs with the findings of the mediator, and with the mediator's suggested relief. The court orders that Plaintiff pay attorney's fees and costs to Defendants' counsel related to (1) preparing and submitting modification documents following the first mediation, and related efforts to follow-up with Plaintiff and its counsel; and (2) time spent preparing for and attending the second mediation. The court also orders that interest charges be tolled from the date of the first mediation session, June 17, 2011, to the date of the second mediation session, September 8, 2011. These interest charges cannot be applied retroactively by Plaintiff and Plaintiff may not recover interest charges from the period of suspension.

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Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this order into the docket by reference at the specific direction of the court.

Dated: 10/26/11


Rick E. Lawrence, Judge
Maine District Court

STATE OF MAINE
YORK, ss.

DISTRICT COURT
LOCATION: Springvale
DOCKET NO: ~~10-RE-216~~
BIDDC RE-10-215

CITIMORTGAGE, INC.,)
Plaintiff)
v.)
MICHAEL J. DENTE and)
JANET M. DENTE,)
Defendants)

ORDER

This matter came before the court for hearing on Defendant's request for sanctions on May 18, 2011, at the Springvale District Court. Present for this hearing was the Plaintiff, Citimortgage, Inc., represented by Leonard F. Morley, Jr., Esq. Attorney Morley, and a representative from Citimortgage, Inc., participated in this hearing by telephone. Present in court were the two Defendants, Michael and Janet Dente, and their attorney Andrea Boppstack, Esq.

The court heard argument from both the parties, through counsel. The court has reviewed the entire contents of the court's file in docket number 10-RE-215, and the court has read carefully the Foreclosure Mediator's Report dated May 12, 2011 as well as the Mediator's Report of Noncompliance dated May 13, 2011, flowing from the party's second mediation on May 12, 2011.

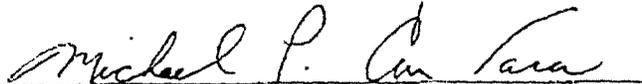
The court finds that Plaintiff has not acted diligently or as expeditiously as required by the court for a party engaged in Maine's Foreclosure Diversion Program and mediation process. Plaintiff's inconsistent position on whether or not the Defendants qualified for a HAMP modification, coupled with Plaintiff's failure to complete the review of Defendants' case for a non-HAMP modification, over the course of over three months after the first mediation, which was held on February 8, 2011, rises to the level of bad faith. Plaintiff's non-compliance has burdened the Defendants with unnecessary legal costs. Had Plaintiff not failed to submit the forms requested of it, and had Plaintiff been more forthright in its HAMP modification decisions, the Defendants would have been spared the resulting loss of time and increased legal fees. The court finds that Plaintiff, Citimortgage, Inc., has not engaged in this mediation process in good faith, to the detriment of the Defendants.

Therefore, Defendants' request for sanctions for Plaintiff's non-compliance is granted, in part. Plaintiff, Citimortgage, Inc. shall not be permitted to charge the Defendants' account for the legal costs and fees associated with the Maine Foreclosure Diversion Program. Further, Plaintiff, Citimortgage, Inc. shall pay \$2000.00 in attorney's fees to counsel for the Defendants. Plaintiff shall pay \$2000.00 to Andrea Boppstack, Esq. no later than June 22, 2011. All other relief sought by Defendants, at this time, is denied.

The mediation process requires that all parties be prepared, and to proceed in good faith. Foot dragging, indecision, and failing to submit requested forms, do harm to the mediation process, as well as to vulnerable parties, and must be avoided in the future.

SO ORDERED.

Date: May 19, 2011


 Michael P. Cantara, Judge
 Maine District Court

Entered on the docket on: 5-20-11
 Copies provided to the parties in hand mailed by the clerk
 Clerk initials: [Signature]

STATE OF MAINE
YORK, ss.

DISTRICT COURT
Located at York
Docket No. RE-09-080

HSBC BANK USA,

Plaintiff

v.

RALPH & PAULA BOWIE

Defendants

ORDER

In 2009, the Legislature amended Maine's foreclosure statutes to provide homeowners facing foreclosure with an opportunity to request mediation, the purpose of which is to explore alternatives to foreclosure that may be beneficial to both the homeowner and the lender. *See* 14 M.R.S.A. § 6321-A. A homeowner who has been served with a foreclosure complaint may request mediation supervised by a court-approved mediator. *Id.* §§ 6321-A(2)(B), 6321-A(6); M.R. Civ. P. 93(c) & (q). The statute requires the parties to conduct a loan modification analysis using the FDIC's methodology. *Id.* § 6321-A(3) ("[m]ediations conducted pursuant to the program must use the calculations, assumptions and forms that are established by the Federal Deposit Insurance Corporation"). The purpose of the analysis is to determine whether the loss to investors will be greater from completing foreclosure or from implementing an affordable loan modification.¹ Parties must mediate in good faith. *Id.* § 6321-A(12). Upon conclusion of the mediation, the mediator is directed to certify that the parties completed the FDIC's loan modification analysis, and may include in the mediation report notice that one or both of the parties "failed to negotiate in good faith." *Id.* § 6321-A(13); M.R. Civ. P. 93(j).

In this case, Plaintiff HSBC Bank USA served Defendants Ralph and Paula Bowie with a summons and complaint for foreclosure on May 14, 2009. Eventually the case was referred for mediation.

The mediator issued a Report of Noncompliance dated October 7, 2010. The report described the noncompliance as follows:

It is unclear to me if the servicer's representative had the full authority to agree to a proposed settlement in this case. Defendants received a PASS on the NPV² and were looking to

¹ *See generally* Rao et al, Foreclosures (National Consumer Law Center, 3d ed. 2010) at § 2.8.2.2.1 (The FDIC's methodology "compares the net present value of the money the servicer would receive if the loan were modified with what would be received if no modification were made").

² "NPV" stands for "Net Present Value", which refers to the FDIC's loan modification analysis. *See* 14 M.R.S.A. § 6321-A(13) ("The mediator's report must indicate in a manner

make payments and receive a modification for their loan. The servicer was not able to stray from the investor guidelines, which we are told would require a lump sum payment under any circumstance with this loan. The borrowers were seeking to have this amount amortized, as they could not come up with said funds due to personal hardship, or possibly reduced, but the servicer was unwilling to go lower or consider other options, as he was bound by said guidelines.

The Report begs the question of whether the Plaintiff's position amounts to failure "to make a good faith effort to mediate" as required by the governing statute and court rule. *See* 14 M.R.S.A. § 6321-A(12) ("Each party and each party's attorney, if any, must be present at mediation ... and shall make a good faith effort to mediate all issues. If any party or attorney fails to attend or to make a good faith effort to mediate, the court may impose appropriate sanctions"); M.R. Civ. P. 93(j) ("If a plaintiff or defendant or attorney fails to attend or to make a good faith effort to mediate, the mediator shall inform the court, and the court may impose appropriate sanctions");³ 14 M.R.S.A. § 6321-A(13) ("As part of the report, the mediator may notify the court if, in the mediator's opinion, either party failed to negotiate in good faith").

On October 12, 2010, Plaintiff's counsel filed a response to the report and requested an opportunity to be heard before sanctions were considered.

Hearing on Plaintiff's objections was held on December 9, 2010 in Springvale District Court. Plaintiff appeared through counsel, William Jordan, Esq., who participated in the hearing by telephone with prior permission. Defendant Ralph Bowie appeared in court and was represented by Mary Katherine Brennan, Esq.

At the hearing on the mediator's report, counsel explained the reasons for the current impasse. As required by statute, in mediating this dispute the mediator employed the FDIC's NPV analysis. Application of the NPV methodology resulted in a proposed modification of the Bowie's loan such that their monthly mortgage payment would be reduced from approximately \$2,000 to approximately \$1,400.

as determined by the court that the parties completed in full the Net Present Value Worksheet in the Federal Deposit Insurance Corporation Loan Modification Program Guide. If the mediation did not result in the settlement or dismissal of the action, the report must include the outcomes of the Net Present Value Worksheet").

³ Rule 93(j) continues by setting forth a non-exclusive list of sanctions, stating, "[s]anctions may include, but are not limited to, the assessment of costs and fees, assessment of reasonable attorney fees, entry of judgment, permitting dispositive motions and/or requests for admissions to be filed, entry of an order that mediation shall not occur, dismissal without prejudice, dismissal without prejudice with a prohibition on refiling the foreclosure action for a stated period of time, and/or dismissal with prejudice." M.R. Civ. P. 93(j).

Plaintiff's representative at the mediation rejected that proposed modification, and instead offered a counterproposal which, as subsequently described in its counsel's response "called for a significant reduction of the interest rate, conversion to a fixed interest rate, capitalization of advances made for taxes and insurance, and a waiver of \$30,000 of past due interest" as well as "that the Defendants make an initial payment of 8 of the 27 delinquent monthly payments and attorneys fees paid by Plaintiff to date." As the court understands, the "initial payment," also referred to as a "gateway payment," amounted to \$25,000.00. *See* Foreclosure Mediator's Report at ¶ 7(3) ("Plaintiff's Servicer agreed to payments of appx. \$1715 to start, with that amount to eventually become appx. \$2053, along with forgiveness of accrued interest and late fees, but this offer was contingent on the \$25,000 initial payment).⁴

Plaintiff's representative stated that he was bound by "investor guidelines" which precluded consideration of any other options, including options for amortizing the upfront payment. When inquiry was made regarding the nature of such "investor guidelines", Plaintiff's representative declined to elaborate, explaining that because the guidelines were proprietary and confidential, they could not be disclosed. Because Defendants' financial circumstances make compliance with Plaintiffs' counterproposal, particularly the \$25,000 gateway payment, unduly onerous if not impossible, the mediation reached an impasse. *See id.* at § 7(4) ("Defendants were unable to produce said lump payment; Plaintiff's Representative was unwilling to consider any other modification arrangements without said payment").

It is Defendants' contention that the position taken by Plaintiff's representative constitutes a failure to mediate in good faith. Rather than being open to negotiation in keeping with the spirit of mediation, its representative appeared with limited authority, and put forward a "take-it-or-leave-it" counterproposal which was unreasonable on its face. According to Defendants, despite the fact that the FDIC's NPV methodology is designed to take into account investors' interests as well as homeowner's interests, Plaintiff nonetheless rejected the result produced by that methodology out of hand, citing "proprietary investor guidelines" which it refused to disclose.

Plaintiff contends that it is under no legal obligation to disclose its proprietary investor guidelines, and that it is likewise under no obligation at mediation to accept any particular offer or to make any counteroffer different from the investor-guidelines-driven counterproposal put forth.

The court acknowledges that Plaintiff is not bound to agree to any particular result at mediation. Both parties are, however, under an obligation to mediate in good faith. The disparity between Plaintiff's counterproposal and the result produced by application of the FDIC's NPV methodology – which is supposed to account for and accommodate the interests of lenders as well as

⁴ Although characterized as a "lump sum payment," the sum, variously cited as \$25,000 and \$25,100 in the Mediator's Report, in fact "consisted of 8 monthly payments and attorneys fees and costs." Foreclosure Mediator's Report at ¶ 7(7).

homeowners -- is striking. Although there is no question that these Defendants are substantially in arrears (they have missed 27 or more mortgage payments), they apparently are equipped to make reduced monthly payments as set by the NPV's amortization schedule.⁵ It strains common sense and notions of fair dealing, however, to expect that they could come up with a "gateway payment" of \$25,000, or anything close to that, given their financial circumstances.

Whether the Plaintiff has satisfied its obligation to mediate in good faith depends, at least in part, on what its investor guidelines provide. Unless those guidelines are disclosed, and with them the basis for the position taken by Plaintiff's representative at mediation, neither the mediator nor the court can fairly assess Plaintiff's conduct. Also relevant to the issue is whether the guidelines, or any other documents governing Plaintiff's relationship with its investors, provide a mechanism by which restrictions on loan modifications may be waived, thereby opening the door to proposals other than that which Plaintiff has put forth. Without a better understanding of the basis for Plaintiff's position, the court is not able to discern whether Plaintiff has mediated in good faith, and is therefore unable to assess what sanction, if any, is appropriate at this time.

Accordingly, it is hereby **ORDERED** as follows:

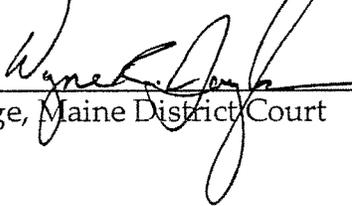
1. Within thirty (30) days of the entry of this order, the Plaintiff shall produce to the court under seal a copy of the investor guidelines, and any other materials upon which it has relied in formulating its position, including documents addressing whether the claimed restrictions on loan modifications may be waived.
2. Also at that time the Plaintiff shall file a proposed protective order that sets out proposed procedures for consideration by the court to protect the confidentiality of said proprietary materials. The proposed protective order shall make provision for the disclosure of the confidential materials to Defendants and their counsel, the mediator, the court, and a consultant or other expert if Defendants' counsel chooses to employ one. After review of the proposed order filed, the court will issue a protective order governing disclosure of the materials submitted.
3. Once the protective order is issued, the court will provide a copy of the confidential materials to Defendants' counsel for review subject to the terms of the protective order.
4. The clerk shall reset this matter for mediation on the first date available after forty-five (45) days from the date the protective order is entered and the confidential materials are provided to

⁵ See Foreclosure Mediator's Report at ¶7(2) ("Based on the PASS from the NPV tool and the amort. schedule from the NPV, the Defendants were hoping to obtain modified payments on the following plan: \$1244 for first 60 mos., \$1419 mos. 60-72, and \$1459.92 thereafter").

Defendants' counsel. The parties shall then resume the mediation process. In the event that mediation is again unsuccessful, the court will review the mediator's report generated after that round, as well as the confidential materials, and will at that time assess whether the parties made the requisite good faith effort to mediate, and, if not, whether sanctions should be imposed.

The clerk may incorporate this order upon the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: February 10, 2011



Judge, Maine District Court

SUPERIOR COURT
Cumberland County

DISTRICT COURT
Location: Portland
Docket No. RE 10-384

THE BANK OF NEW YORK MELLON,)
)
) PLAINIFF)
)
v.)
)
SHANE PITKIN BARDEN,)
)
) DEFENDANT)

TITLE TO REAL ESTATE
IS INVOLVED

281 Spurwink Avenue
Cape Elizabeth, ME
Mortgage Recorded in
Book 23221, Page 159

STATE OF MAINE
Cumberland, ss, Clerk's Office

MAR 31 2011

RECEIVED

ORDER ON REPORT OF NONCOMPLIANCE

HAVING considered the Report of Noncompliance submitted in this action and Defendant's memorandum in support thereof with request for sanctions, and any opposition thereto, it is hereby ordered that:

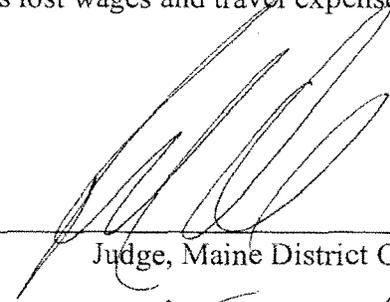
- (1) the Plaintiff is to pay Defendant's attorneys fees and costs related to representation of the Defendant in the action;
- (2) the Plaintiff is to pay to Defendant \$110 for lost wages related to time missed at work, together with travel costs and expenses related to attending two mediation sessions under the Foreclosure Diversion Program;
- (3) Plaintiff is ordered to waive any accrued costs, fees, or interest, including legal fees or costs, from the date of confirming receipt of a complete loan modification packet on October 22, 2010 until a final mediator's report is issued;
- (4) the Plaintiff may not charge to the Defendant's account the legal costs and fees of attending or participating in the Foreclosure Diversion Program; and the following relief:

which this Court deems just and reasonable.

The Defendant shall submit to the Plaintiff an Attorney fee request within 21 days, and Plaintiff shall pay the fee request within 21 days of receipt of the fee request.

Plaintiff shall pay to the Defendant his lost wages and travel expenses totaling \$110.00 within 21 days.

Agil 2, 2011



Judge, Maine District Court
Justin S. [unclear]

STATE OF MAINE
YORK, ss.

Superior Court
Civil Action
Docket No.: RE-09-79

CHASE HOME FINANCE, LLC)
)
Plaintiff)
)
v.)
)
DELTON SARGENT et. al.)
)
Defendant)

**ORDER ON DEFENDANT’S MOTION FOR SANCTIONS PUSUANT TO
M.R.CIV.P. 93**

HAVING considered Defendant’s request for sanctions, and the oppositions thereto it is hereby ordered that: (1) the Plaintiff is to pay Defendant’s attorneys fees and costs related to the repeated mediations including the time to prepare numerous financial statements and packets, time spent at mediation sessions, travel costs related to the mediations; and time spent preparing and prosecuting this motion; (2) the Plaintiff is to pay for Defendant’s lost wages related to time missed at work together with travel costs and expenses related to attending and preparing for sessions under the Foreclosure Diversion Program; (3) Plaintiff is ordered to waive any accrued costs, fees, or interest, including legal fees or costs, from the date of the first mediation session until a final mediator’s report is issued; (4)the Plaintiff may not deny modification or other loss mitigation relief because the loan is more than 12 months in arrears or presently in foreclosure; (5) the Plaintiff may not charge to the Defendant’s account the legal costs and fees of attending or participating in the Foreclosure Diversion Program; and (6) that

entered into by the parties following the first mediation session in the event future mediation does not reach a satisfactory resolution.

The Defendant shall submit to the Plaintiff an Attorney fee request within 21 days for 50 hours at an hourly rate of \$250.00. Plaintiff shall pay the fee request within 21 days of receipt of the fee request.

Plaintiff shall pay to the Defendant his lost wages and travel expenses totaling \$314.50 within 21 days.

May 3, 2011

Michael P. D. Tan
Judge, Maine District Court

Entered on the docket on: 5-6-11
Copies provided to the parties in hand mailed by the clerk
Clerk initials: [Signature]