

COMMON PLEAS COURT
2019 APR 10 PM 3:28

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

U.S. BANK, N.A.

Plaintiff,

vs.

TRACEY A. STRZALA, et al.

Defendants.

CASE NO.: 17CIV0133

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

JUDGE CHRISTOPHER J. COLLIER

**JOURNAL ENTRY WITH
INSTRUCTIONS FOR SERVICE**

This matter came before the Court for non-oral hearing on March 26, 2019, on the Plaintiff, U.S. Bank, N.A.'s (hereinafter, "Plaintiff" or "U.S. Bank") objections to the Magistrate's Decision dated February 12, 2019. The primary Defendants, Tracy A. Strzala (hereinafter, "Defendant" or "Strzala") and Joshua Necak, filed a brief in opposition on March 25, 2019.

Upon careful, independent review of the Magistrate's Decision, the Plaintiff's objections thereto and the Defendants' brief in opposition to the objections, the Court finds the Magistrate's Decision dated February 12, 2019 contains no error of law or other defect. Accordingly, the Magistrate's Decision is hereby affirmed and adopted in full.

This matter came before the Court and Magistrate James Leaver for a bench trial on November 9, 2018. The matter proceeded to trial on the Plaintiff's cause of action for foreclosure, as the Defendants' counterclaims were bifurcated by previous order of the Court. A representative of the Plaintiff was present with counsel. Counsel appeared on behalf of the primary Defendants Strzala and Joshua Necak. Nobody else appeared. The Defendant, John Doe, as a possible spouse of Strzala, does not exist and is hereby dismissed. Any lien of the State of Ohio is statutorily protected.

Each of the findings of fact and conclusions of law contained in the February 12, 2019 Magistrate's Decision are fully incorporated herein. The adopted findings of fact are as follows:

1. Ms. Strzala executed a promissory note on March 31, 2006, in favor of The CIT Group/Consumer Finance, Inc., with an allonge affixed to the note endorsed in blank. Exhibit 1.
2. The note with affixed allonge was attached to the Plaintiff's complaint when this case was filed on February 9, 2017.
3. The promissory note is secured by a recorded mortgage which is dated March 31, 2006. Exhibit 2. The mortgage is in favor of MERS, as nominee for the Lender, The CIT Group/Consumer Finance, Inc.
4. One week after executing the note and mortgage, Ms. Strzala married Defendant Joshua Necak and changed her name to Tracey Necak. Trans. 94:13-16.
5. On January 11, 2011, the mortgage was assigned by MERS to Bank of America, N.A. The assignment was recorded in the Medina County Recorders' office on January 26, 2011. Exhibit 3.
6. The Plaintiff's representative and witness at trial was Diane Weinberger. Ms. Weinberger testified she is employed as a director in the contested default management department of Select Portfolio Servicing, commonly known as SPS. SPS is the loan servicer for U.S. Bank, N.A., Successor Trustee to LaSalle Bank National Association, on behalf of Bear Stearns Asset Backed Securities I Trust 2006-HE6, Asset-Backed Certificates Series 2006-HE6. Trans. 21: 4-22.

7. Plaintiff's Exhibit 4 reveals that Bank of America, N.A. and U.S. Bank, N.A., entered into a purchase agreement whereby U.S. Bank, N.A., acquired the loan at issue on November 11, 2010.
8. Ms. Weinberger testified SPS had physical possession of both the note together with the allonge when the complaint was filed on February 9, 2017. Trans. 27: 12-19; 62: 6-24.
9. In 2015, Ms. Strzala began experiencing financial struggles. The Plaintiff eventually offered her a Streamline HAMP modification. Ms. Strzala was required to make three timely monthly trial payments at a reduced amount in March, April and May of 2016. Exhibit C.
10. The Streamline HAMP process required Ms. Strzala to return a modification application with a notarized HAMP affidavit. The requirements for Streamline HAMP modification were set forth in a letter dated May 14, 2016, from SPS addressed to Ms. Strzala. It is unknown when the letter was actually mailed or when it was received. The letter indicated the documents were due by May 28, 2016, but did not indicate failure to do so by May 28, 2016, was fatal to the process. Exhibit E.
11. The borrower on the required HAMP affidavit was listed as Tracey A. Strzala-Borrower. Exhibit E.
12. The letter indicated the required application and affidavit documents were required to be completed, notarized, and returned to SPS no later than May 28, 2016.

13. Ms. Strzala made all three trial payments and continued making the reduced payment through July, 2016. Exhibit C, pgs. 14-18; and Deposition of D. Weinberger 121:15-22.
14. However, Ms. Strzala was unable to find a notary to notarize her signature on the HAMP affidavit because she had been using her married name (Necak) since 2006.
15. Prior to May, 2016, Ms. Strzala was never required to submit proof of her name change nor required to change her name. On multiple occasions, SPS was able to verify Ms. Strzala's identity over the phone in order to process various loan payments. Exhibit B; Trans. 143: 8-25; and 144:1-9.
16. On May 27, 2016, at 10:38 a.m., Ms. Strzala notified SPS of her troubles obtaining the notarization and indicated her acceptance of the Modification Agreement. Trans. 94:5-6, Exhibit L (May 27, 2016 call recording).
17. The May 27, 2016 audio recording cuts out prematurely. Trans. 96:1-15.
18. However, the case history report of SPS (Exhibit B) contains the following notes regarding the call:

M1 called in Retention Option Borrower Verification entry made:
Borrower was Verified. Consent to Record: Yes
Inbound call from m1loan status: FB verified mailing address and no alternate tel#'s
M1 account name is under her maiden name, m1 tried with 2x bank to get final modification notarized would not do it under her maiden name they said it was not legal, m1 wants to know if we can re-submit documents under her married name, advised we need copy of marriage certificate, provided email address, relationship.manager@spservicing.com m1 will email today, advised will also submit loan res escalation for them to review, m1 aware LPI
19. On May 27, 2016, at 12:54 p.m., Ms. Strzala emailed SPS a copy of her marriage certificate. Exhibit F.

20. The SPS contact history report notes, Exhibit B, indicate that on June 1, 2016:

M1...called concerned modification agreement unable to get notarized due to name not being updated adv would have rm follow up to discuss marriage certificate provided and updated agreement being sent
21. On June 16, 2016, SPS had a phone conversation with Ms. Strzala but no recording of the conversation exists. Exhibit L.
22. The SPS contact history report notes, Exhibit B, indicate that on June 13, 2016, at 8:50 a.m.:

M1 called to see if we received her marriage certificate and when a copy of the updated loan modification documents will be mailed. Located email, but unable to open link. M1 advised that she will re-email the document today.
23. Ms. Strzala re-sent the email with her marriage certificate attached on June 13, 2016, at 11:08 a.m. Exhibit G.
24. The SPS contact history report, Exhibit B, indicates on July 1, 2016:

M1 needs to be notified that what she sent in did not meet verification requirements for the name change and we still need a valid marriage license sent in to update her name accordingly.
25. On July 5, 2016, Ms. Strzala made two phone calls to SPS. Exhibit B. One of the calls only records for ten seconds and the other is not recorded at all. The contact history report notes state:

M1 called into discuss the name change on her mod docs, adv we need the valad [sp] marriage license, she will have to go to the court and get one, verified contact info.
26. The top of the marriage certificate is smudged due to glue from the envelope it was stored in. The content of the certificate is visible. Exhibit G. The marriage certificate is attached hereto and incorporated herein.

27. On July 20, 2016, Ms. Strzala again called SPS. Exhibit B; Exhibit L. On that call, the SPS representative told Ms. Strzala that she owed \$6,772.86 on her account immediately and that her mortgage was in default. Id. Ms. Strzala was told that the Streamline HAMP Modification Agreement expired. Ms. Strzala explained she was never told she was running out of time. She was told her option at this point was to re-apply, but she was no longer eligible for the streamlined modification previously offered. She was given a list of financial documents she would have to supply should she choose to apply for a traditional modification. On this call, she was not informed she could appeal the denial.
28. Ms. Strzala was initially unsuccessful in her attempts to provide SPS with the required notarized Streamline HAMP Documents within the short window required (by May 28, 2016) because of her inability to obtain a notarized affidavit. She then attempted to facilitate the necessary paperwork by changing her name on the loan so she could get the documents notarized.
29. SPS never clearly communicated a consistent deadline for Ms. Strzala to prove her name change. Initially, the deadline was May 28, 2016. Exhibit E. On June 1, 2016, Ms. Strzala was advised an updated agreement was being sent. Exhibit B. By letter dated June 8, 2016, SPS notified Ms. Strzala the documents must be received by June 30, 2016. Exhibit 10. There was no evidence or testimony as to how this particular deadline was determined to be a reasonable amount of time.
30. On June 13, 2016, Ms. Strzala re-sent her marriage certificate to SPS.
31. But then on July 1, 2016, for the first time, the SPS contact history notes indicate the marriage certificate “did not meet verification requirements.” There is no

specific explanation in any of the case history notes as to why the certificate was deemed insufficient. There is no evidence Ms. Strzala was ever notified during any of her calls that SPS was refusing to consider her marriage certificate for name change purposes. In fact, on July 5, 2016, (five days after the June 30, 2016 deadline) Ms. Strzala was still engaging SPS about necessary documents to change her name. Not until July 20, 2016, was she told she was no longer eligible for the Streamline HAMP modification.

32. It took SPS from May 27, 2016 until July 5, 2016 to inform Ms. Strzala that the marriage certificate she sent to prove her name change was not sufficient. Exhibit B. Ms. Strzala was never provided any communication explaining why the document she sent in as her proof of name change was insufficient.
33. The marriage certificate provided by Ms. Strzala is not obliterated. Approximately one inch of the top of the marriage license appears smudged or water damaged. All the relevant information is clearly visible on the certificate. SPS failed to give Ms. Strzala reasonable opportunity to obtain and send a new copy of her marriage certificate.
34. By letter dated August 5, 2016, SPS informed Ms. Strzala her Streamline HAMP modification request could not be processed because the signed agreement was not returned. The letter also explained the process to dispute the denial.
35. Ms. Strzala testified she did not appeal because at that point she felt defeated.
36. Thereafter, Ms. Strzala made a \$2,000 payment to SPS on August 8, 2016. Exhibit B.
37. Ms. Strzala made a \$1,800 payment to SPS on September 13, 2016. Exhibit B.

38. Ms. Strzala made a \$1,730.40 payment to SPS on November 16, 2016. Exhibit B.
39. Ms. Strzala received a document (mailed to her attorney) titled General Change Endorsement dated May 12, 2017. The document indicates a name change regarding an insurance certificate for Ms. Strzala, now recognizing her as Tracey A. Necak. The document lists SPS as the Mortgagee. Exhibit J. Ms. Strzala did not send any document to U.S. Bank or SBS to cause her name to be changed on or about May 11, 2017. Trans. 113:19-22.
40. The loan is in default as of August 1, 2016.
41. As of the date of trial, the amount of principal and interest due is \$195,650.17. Exhibit 9.
42. Because immediate payment of the difference between the regular monthly payment and the reduced payment amount for the months she made reduced payments, Ms. Strzala was not able to reinstate the loan. The last payment was made in November, 2016. Exhibit B; Trans. 112:1-25; and 113:1-6.
43. Ms. Strzala received a discharge in bankruptcy of any and all personal liability related to the Note and Mortgage. Trans. 45:10-46:1.
44. SPS does not have any record that shows each date the note and allonge were attached and detached. Trans 59: 6-23
45. The allonge was not attached to the note on the date of U.S. Bank's deposition. Trans. 72:1-8.

The Magistrate properly applied the findings of fact to reach appropriate conclusions of law. While the Court will not recite, verbatim, the Magistrate's conclusions of law, each of those conclusions is fully incorporated herein.

Strzala was offered a streamline modification of her loan with the Plaintiff under The Home Affordable Modification Program (HAMP). Strzala was required to make trial payments under the streamline modification on March 1, 2016; April 1, 2016; and May 1, 2016. Strzala made the three required monthly payments and therefore accepted the streamline HAMP trial modification offered by the Plaintiff.

Permanent modification of the loan under the streamline HAMP program required all trial payments, as well as all required documents executed by the borrower in a timely manner. SPS mailed the required documents to Strzala along with a letter, dated May 14, 2016, indicating the HAMP affidavit had to be returned by May 28, 2016. Strzala contacted SPS on May 27, 2016 and indicated she was unable to get the affidavit notarized due to her name change by marriage in 2006. SPS told Strzala to email SPS the marriage certificate, which Strzala did later that same day.

After multiple attempts spanning the course of over a month, SPS notified Strzala the attempts to facilitate the name change on the loan were unsuccessful. During this period of time, SPS was still accepting payments from Strzala. SPS informed Strzala the loan was in default and that she owed \$6,772.86 on her account immediately. SPS informed Strzala that the Streamline HAMP Modification Agreement had expired and she was no longer eligible. Strzala never received any correspondence from SPS regarding the alleged insufficient documents provided by Strzala. Strzala was never informed why the marriage license, as submitted, was deemed insufficient. The license was not obliterated and visibly shows all necessary information to show her marriage to Necak.

Foreclosure is a two-step process. "The prerequisites for a party seeking to foreclose a mortgage are execution and delivery of the note and mortgage; valid recording of the mortgage;

default; and establishing an amount due." *Bank of N.Y. Mellon v. Chappell*, 9th Dist. Lorain No. 17CA011114, 2018-Ohio-1879, ¶ 13, citing *CitiMortgage, Inc. v. Firestone*, 9th Dist. Summit No. 25959, 2012-Ohio-2044, ¶ 11. "Once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to decide if foreclosure is appropriate." *Id.*

Here, the Magistrate properly concluded that the Plaintiff offered credible evidence and testimony proving the above elements relating to default. The Plaintiff is the holder of the note and mortgage. Exhibits 1 and 2. The Plaintiff's servicer, SPS, had the note with the allonge endorsed in blank in its vault before the complaint was filed. The mortgage, assignment and the affidavit of acquired assets establishes the chain of transfer and assignments. Exhibits 2, 3 and 4. All conditions precedent have been met. Exhibits 1, 2, 3, 4 and 7. There is no dispute Strzala is in default. As of the date of trial, the amount of principal and interest due is \$195,650.17.

The Magistrate then properly proceeded to consider the equities of foreclosure under the unique set of facts and circumstances presented in this case. The Court adopts the Magistrate's findings on equity and finds it is not equitable to permit the Plaintiff to foreclose on the Defendants' home. A borrower is entitled to a reasonable amount of time to return the Streamline HAMP loan modification application and affidavit to the lender. From the evidence, it appears nobody Strzala spoke with in her multiple calls to SPS knew of a firm deadline. If they did, they did not pass the information on to Strzala. The situation was aggravated even more when: (1) SPS never specifically told Strzala when or why it rejected her marriage license; (2) SPS did not send a new loan packet as stated in the June 13, 2016 telephone call; (3) SPS never had a relationship manager involved; (4) SPS did not notify Strzala it was unable to open the first email containing the marriage certificate causing significant further delay; and finally, (5) SPS

caused Strzala's name to be changed to her married name on the homeowners insurance policy's insurance policy endorsement. It is difficult to reconcile how whatever information SPS used to justify the insurance policy name change was insufficient to permit the same change to the loan documents.

Equity is a determination of what is just, fair, and right upon consideration of the unique facts and circumstances of an individual case. In its broadest sense, equity is fairness. HAMP rules require a borrower be allowed a reasonable amount of time to return the documents. Upon consideration of the unique facts in this particular case, it is not fair nor equitable for the Plaintiff to require strict compliance with the arbitrarily determined June 30, 2016 deadline.

Considering the present facts of this particular case, it is not equitable to permit foreclosure. Accordingly, judgment is hereby rendered in favor of the Defendants on the Plaintiff's complaint for foreclosure. The Plaintiff's complaint for foreclosure is dismissed without prejudice.

The Plaintiff has set forth two specific objections to the Magistrate's Decision. The Plaintiff argues that 1) the Magistrate erred by concluding it would be inequitable for Plaintiff to enforce its right to foreclose the mortgage, and 2) the Magistrate improperly relied upon extrinsic evidence to re-write the terms of the parties' unambiguous contractual agreement. In an attempt to specifically address each of the Plaintiff's specific objections to the Magistrate's Decision, the Court further finds as follows:

The Plaintiff's first objection argues that the Magistrate erred by concluding it would be inequitable for Plaintiff to enforce its right to foreclose the mortgage. The Court disagrees. The Plaintiff sets forth a number of different arguments within this objection. The Plaintiff argues the Magistrate failed to cite any case law or other authority supporting the conclusion that

foreclosure would be inequitable in this situation. While the Magistrate did not specifically cite any case law, that fact alone has nothing to do with the issue of whether the Magistrate properly weighed the equities of foreclosure in this case. Weighing the equities requires the Magistrate to examine the unique facts and circumstances of *this* case. As no two cases are likely to present the same exact facts and circumstances, decisions in other foreclosure cases involving equity will provide no mandate as to what the Court is required to decide in this particular matter. The Magistrate properly weighed the equities of this case when making his decision.

Further, the Court does not agree with the Plaintiff's argument that under Ohio case law a lender must make a material misrepresentation and a borrower must cure the deficiency on the loan before a court can find foreclosure inequitable. Even if such a requirement existed, and even if not specifically labeled by the Magistrate as a material misrepresentation, the Court finds there was sufficient evidence to conclude the Plaintiff made a material misrepresentation to Strzala.

Whether the Plaintiff was required by guidelines to offer the HAMP modification to Strzala, or whether the Plaintiff voluntarily offered the HAMP modification, the Plaintiff put a procedure in place that deprived Strzala of any meaningful opportunity to submit the appropriate documents. The Plaintiff informed Strzala that she would qualify for the modification if she followed the outlined procedure. Strzala attempted to obtain the notarized affidavit, and was unsuccessful because of her previous name change. SPS told Strzala she could submit a copy of her marriage certificate to facilitate the name change.

It is the Plaintiff's position in this case that the marriage certificate submitted by Strzala was "obliterated." The Court could not disagree more. Merriam-Webster's Dictionary defines obliterate, in pertinent part, as: 1) to remove utterly from recognition or memory, 2) to remove

from existence : destroy utterly all trace, indication, or significance of, 3) to cause (something, such as a bodily part, a scar, or a duct conveying body fluid) to disappear or collapse, or 4) to make undecipherable or imperceptible by obscuring or wearing away. The Court has reviewed the copy of the marriage certificate submitted to SPS by Strzala. It in no way meets any of the definitions of obliterated.

In the Plaintiff's objection, the Plaintiff specifically states that "it is undisputed the only version of the marriage certificate Strzala presented to Plaintiff was obliterated and deemed insufficient by Plaintiff to satisfy the requirement of changing her name on the loan." In a footnote, the Plaintiff further states "it is undisputed Strzala failed to provide a copy of the marriage certificate in a manner that was acceptable to Plaintiff and [SPS], under Regulation X, has the discretion to determine what documents a borrower needs to submit for loss mitigation efforts."

The Plaintiff is correct that it has some discretion to determine what documents a borrower needs to submit. However, when SPS refused to accept the document that was perfectly legible and provided all the necessary information to effectuate the name change, it is certainly a factor to consider when weighing the equities in this case. The decision of SPS to characterize the document as obliterated and insufficient seems at the very least suspect, and at most disingenuous. If SPS (and the Plaintiff) can offer the trial modification and accept trial payments from Strzala, while at the same time adopting a policy that allows SPS to unilaterally reject a perfectly legible document based on suspect rationale, SPS (and the Plaintiff) certainly misled Strzala.

As such, the Plaintiff's first objection to the Magistrate's Decision is not well-taken and is overruled.

The Plaintiff's second objection to the Magistrate's Decision argues that the Magistrate improperly relied upon extrinsic evidence to re-write the terms of the parties' unambiguous contractual agreement. At issue in this objection is the Magistrate's review of the telephone conversations between Strzala and SPS. The Court finds the Magistrate properly reviewed these conversations when addressing the equities in this matter. The Magistrate did not re-write the terms of the contractual agreement between the Plaintiff and Strzala. In fact, the Magistrate determined that Strzala was in default on her obligations to the Plaintiff, and such obligation was secured by a mortgage. However, when it comes to weighing the equities of the case to determine whether foreclosure is appropriate, the Magistrate was not confined to a review of the note and mortgage agreement. As such, the Plaintiff's second objection to the Magistrate's decision is not well-taken and is overruled.

Any additional objection or portion of an objection not specially dealt with herein is hereby overruled. The Court recognizes that the Plaintiff's claims have been resolved by this Entry, but the Defendants' bifurcated counterclaims remain pending. In an effort to give the Plaintiff a prompt and meaningful opportunity to appeal prior to adjudication of the bifurcated counterclaims, the Court hereby enters final judgment pursuant to Civ.R. 54(B) as to the claims resolved by this Entry and makes an express determination that there is no just reason for delay.

IT IS SO ORDERED.


CHRISTOPHER J. COLLIER
JUDGE

COPY

The Clerk of Courts is instructed to send copies of the foregoing Journal Entry to the following parties or their counsel of record.

Atty. Kohl
Atty. Johnson
Atty. Hanson
Atty. Schisler
State of Ohio, Department of Taxation
City of Brunswick
Medina County Prosecutor

Copies of this Entry were mailed by the Clerk of Courts on 4-11-19.

Christy Simmons
DEPUTY CLERK OF COURT