2017 IL App (1st) 160944-U

FOURTH DIVISION
March 23, 2017

No. 1-16-0944

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILMINGTON TRUST, NATIONAL ASSOCIATION NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR VM TRUST SERIES 1,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	No. 12 CH 19890
v.	)	
GALE L. SMITH,	)	Honorable Pamela Meyerson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's order granting plaintiff's motion to confirm sale of defendant's property and the trial court's order denying defendant's motion to vacate the sale; defendant failed to prove a material violation of the Illinois Mortgage Foreclosure Law because plaintiff is not required to participate in the Home Affordable Modification Program and defendant did not prove that she met the criteria for a loan modification.

¶ 2 This appeal arises from a mortgage foreclosure action involving a property owned by defendant, Gale Smith. After plaintiff, Wilmington Trust, National Association not in its individual capacity, but solely as trustee for VM Trust Series 1, filed a motion to confirm the sale of defendant's home, defendant attempted to set aside the foreclosure sale by arguing the sale violated the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508 (West 2010)) because defendant applied for and did not receive assistance under the Home Affordable Modification Program (HAMP)[1]. The trial court granted plaintiff's motion to confirm the sale, and denied defendant's motion to vacate the order confirming sale. This appeal followed. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 This appeal follows from a foreclosure action brought by JP Morgan Chase Bank against defendant, Gale Smith. Defendant appeals from an order denying her motion to vacate an order confirming the sale of her home.

¶ 5 On February 25, 2008, defendant obtained a mortgage from JP Morgan Chase Bank, National Association for $203,507 to purchase the home at 743 Ash Street, Flossmoor, Illinois. On April 1, 2010, defendant requested a loan modification because she was experiencing financial hardship that would result in a default under the loan. Chase Home Finance, LLC approved the loan modification agreement where defendant agreed to a new principal balance, a new interest rate of 5.125% annually, and monthly payments of $1,265.80 for 360 months. On April 27, 2011, Chase Home Finance, LLC merged with JP Morgan Chase Bank, National

[1]The Home Affordable Modification Program was implemented by the U.S. Department of Treasury as part of the Making Home Affordable program after the collapse of the housing market in 2008; HAMP was incorporated into Illinois law in 735 ILCS 5/15-1508(d-5) (West 2010).

Association, and the surviving entity was JP Morgan Chase Bank, National Association (JP Morgan). In a letter dated August 19, 2011, the Chase Home Lending Executive Office informed defendant that it reviewed her loan for modification under HAMP and other possible modification plans. The letter further claimed defendant was placed on a forbearance plan on February 25, 2011, and that defendant failed to make any of the payments. On May 30, 2012, JP Morgan filed a complaint to foreclose defendant's mortgage.

¶ 6 JP Morgan assigned the mortgage on the 743 Ash Street property to the Secretary for Housing and Urban Development and recorded the assignment on May 27, 2014. The Secretary for Housing and Urban Development, through Shellpoint Mortgage Servicing (Shellpoint), then assigned the mortgage to plaintiff and recorded the assignment on July 16, 2014. Shellpoint serviced the mortgage for plaintiff. On September 15, 2014, JP Morgan filed a motion for summary judgment and a motion to substitute party plaintiff as it had assigned the mortgage, and requested the court name as plaintiff the investor owning the loan, Wilmington Trust, National Association not in its individual capacity, but solely as trustee for VM Trust Series 1. The court granted both motions on April 22, 2015. In addition to granting the motions, the court entered judgment for foreclosure and sale of the 743 Ash Street property. On July 20, 2015, defendant sent Shellpoint an application for loan modification under HAMP. Plaintiff was scheduled to sell the property on July 24, 2015, but on July 21, 2015, defendant filed an emergency motion, *pro se*, to stay the sale because she was in the process of negotiating a loan modification. The court granted defendant's motion on July 22, 2015, and extended the stay of sale until September 18, 2015.

¶ 7 Shellpoint sent a letter to defendant on October 1, 2015, finding defendant did not qualify

for a loan modification. Shellpoint's letter claimed defendant's last mortgage payment was due on June 1, 2010, that defendant's remaining principal balance on the loan was $232,202.11, and that defendant needed to immediately pay the full mortgage payment and late charges totalling $134,872.91 to avoid foreclosure. Shellpoint wrote it was unable to grant defendant loan modification under HAMP because Shellpoint serviced the loan on behalf of plaintiff, an investor group that did not grant contractual authority to modify the loan under HAMP. Shellpoint additionally wrote that it was unable to offer defendant a standard loan modification because Shellpoint found defendant had a negative net present value (NPV) for a loan modification. Shellpoint included the values it used to calculate defendant's NPV to determine defendant's non-HAMP modification eligibility. Defendant wrote back to Shellpoint on November 5, 2015, explaining how under HAMP the servicer is still required to contact its investor group to seek an exception to the investor group's contractual prohibition on HAMP modifications. Defendant also explained that Shellpoint did not conduct a NPV because the NPV calculations were used to determine non-HAMP eligibility, and requested Shellpoint calculate her NPV for HAMP eligibility. Defendant did not explain how the calculation of her NPV would differ, or whether there were alternate standards of calculating a NPV. Nor did defendant claim she would not have a negative NPV under any standard of calculation. Plaintiff sent its notice of sale to defendant on November 9, 2015. On November 25, 2015, Shellpoint replied to defendant's November 5 letter. Shellpoint wrote that it may be able to re-evaluate defendant for a loan modification if defendant experienced any change in financial circumstances since she last applied for a loan modification. Defendant did not again apply for a loan modification.

¶ 8 Defendant's residence was scheduled to be sold on December 8, 2015. On December 7, 2015, defendant filed another emergency motion to stay the sheriff's sale, but the court denied her motion on December 8, 2015. The sale went forward, and plaintiff purchased the 743 Ash Street property for $166,003.59, which left a deficiency of $186,043.22 on the judgment. Plaintiff filed its motion to confirm the sale on December 30, 2015. On February 16, 2016, defendant filed her response to plaintiff's motion. Defendant argued that the sale must be set aside pursuant to the Foreclosure Law because the sale of the home violated the Making Home Affordable Guidelines. On February 17, 2016, defendant failed to appear in court because she had to take her niece to the hospital, and the court granted plaintiff's motion to confirm the sale. On March 8, 2016, defendant filed a motion to vacate the order confirming the sale. The court denied defendant's motion on April 1, 2016. On April 4, 2016, defendant filed her notice of appeal.

¶ 9 ANALYSIS

¶ 10 Defendant claims on appeal that the foreclosure sale of her home was confirmed by the trial court despite "material violations of Illinois law" under sections 1508(b)(iv) and 1508(d-5) of the Foreclosure law. 735 ILCS 5/15-1508(b)(iv) (West 2010); 735 ILCS 5/15-1508(d-5) (West 2010). The parties disagree on the standard of review in this case. Defendant argues *de novo* review is proper because defendant's motion to reconsider raises a question of whether the trial court erred in its previous application of existing law, relying on *JP Morgan Chase Bank v. Frankhauser*, 383 Ill. App. 3d 254, 259 (2008). Plaintiff argues that a trial court's confirmation of a judicial sale should not be disturbed absent an abuse of discretion. This exact issue came before the court in *CitiMortgage, Inc. v. Johnson*, and the court found that the holding in

Frankhauser did not support *de novo* review where defendants appealed a trial court's confirmation of sale. *CitiMortgage, Inc. v. Johnson,* 2013 IL App (2d) 120719, ¶¶ 17-18. "[T]he standard of review for whether the trial court correctly confirmed the sale is the abuse-of-discretion standard." *Id.* at ¶ 18. A court abuses its discretion when its ruling rests on an error of law or where no reasonable person would take the view adopted by the court. *Citimortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57.

¶ 11 Defendant argues that her home was sold in violation of Illinois law because justice was not otherwise done, and because defendant's home was sold in material violation of HAMP. Under Section 1508(b) of the Foreclosure law:

> "Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that *** (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b)(iv) (West 2010).

Section 1508(d-5) lays out Illinois' Making Home Affordable Program, which incorporates HAMP into Illinois law:

> "The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American

> Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale." 735 ILCS 5/15-1508(d-5) (West 2010).

Defendant's claim that the sale should be voided rests on her assertion that her loan modification application was not properly reviewed under HAMP. However, defendant has the burden of proving by the preponderance of evidence that a material violation of HAMP occurred in order to set aside the judicial sale. *CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 49.

¶ 12 For defendant to have a claim that her home was sold in violation of the Foreclosure law, defendant must first prove a material violation of HAMP. *Id*. Defendant argues her home was sold in material violation of HAMP for three reasons: Shellpoint failed to contact the investor group to request modification under HAMP, failed to calculate her NPV, and failed to confirm receipt of her initial package within 10 days. However, plaintiff maintains that it does not participate in HAMP, nor is it required to because it is not a Government Sponsored Entity (such as the Federal National Mortgage Association). See *Edwards v. Aurora Loan Services, LLC*, 791 F. Supp. 2d 144, 151 (D.D.C. 2011). If the mortgage is owned by a non-government sponsored entity, the investor group is not required to agree to a loan modification. For defendant to have a claim of entitlement to a loan modification, the servicer has to agree to participate in HAMP and the investors must first agree to permit modifications. *Id*. The Making Home Affordable Program provides a handbook for servicers of non-government sponsored entities, which contains certain guidelines servicers must follow when the investor group does not participate in HAMP. See Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages (June 1, 2015),

https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_45.pdf. In order to prove actual injury from a servicer's failure to adequately follow the guidelines, defendant faces the threshold burden of proving she would have qualified for assistance under HAMP. "If Plaintiffs were not eligible for a modification even with a review of their financial information, then their decision to forego other possible options while the review was underway would have been irrelevant." *Etts v. Deutsche Bank National Trust Co.*, 126 F. Supp. 3d 889, 901-02 (E.D. Mich. 2015). For the following reasons, we find defendant failed to prove she would have been granted a loan modification under HAMP, and has not proven any material violation of HAMP.

¶ 13 Defendant argues it was a material violation of HAMP for Shellpoint to not contact plaintiff to request an exception to plaintiff's rule prohibiting loan modification under HAMP. Under guideline 1.3, if an investor is a non-participant in HAMP, "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." (Emphasis added.) Handbook for Servicers of Non-GSE Mortgages at 13. The guidelines do not support defendant's position. The servicer, Shellpoint, was required to contact the investor group, plaintiff, to encourage assistance actually available under HAMP. However, Shellpoint determined that defendant had a negative NPV and was disqualified for HAMP eligibility. Defendant has not shown any assistance was available to her under HAMP. Thus, even if it were a violation of HAMP guidelines for a servicer to not contact an investor group requesting modification, defendant cannot establish this was a material violation of HAMP. We follow the reasoning applied by a federal district court when the same issue was raised in *Etts v. Deutsche*

Bank National Trust Company, 126 F. Supp. 3d 889 (E.D. Mich. 2015). The *Etts* court found the plaintiff could not claim any injury from defendant not considering their financial eligibility because the plaintiffs failed "to allege that they would have been granted a loan modification had Defendants considered their financial eligibility." *Id*. at 901. The plaintiffs also failed to claim "that the investor would have granted an exception to the one-modification restriction if requested." *Id*. at 902. The court found plaintiffs' "asserted harms are, therefore, wholly speculative, particularly given Plaintiffs' failure to affirmatively allege that they would have been granted a modification had the proper review been completed." *Id*. We find defendant's situation in the present case analogous: defendant cannot show an injury from Shellpoint's failure to contact the investor group because even had Shellpoint contacted the investors, defendant has not shown that defendant was eligible for loan modification under HAMP and has not claimed the investor group would have granted a modification. Thus, we cannot say the trial court abused its discretion when it found no material violation of HAMP based on defendant's allegation that Shellpoint failed to contact plaintiff concerning loan modification.

¶ 14 Defendant also argues the court abused its discretion in not finding a material violation of HAMP due to Shellpoint's failure to conduct a NPV. However, defendant provides no support for her claim that Shellpoint failed to conduct a NPV. The record indicates Shellpoint wrote a letter to defendant on October 1, 2015 explaining that she was denied a loan modification and was provided the values used to compute her negative NPV. Plaintiff contends a NPV was properly conducted, and that defendant experienced no change in circumstance that would alter the NPV. Defendant relies on *Citimortgage, Inc. v. Johnson* for the proposition that she was entitled to have her application reviewed again under a different NPV analysis. *CitiMortgage,*

Inc. v. Johnson, 2013 IL App (2d) 120719. We disagree. In *Johnson*, the loan servicer found the borrower had a negative NPV when the borrower first applied for a loan modification. "Per HAMP guideline 1.2, a mortgage loan may be reconsidered under HAMP if, after meeting basic criteria but being disqualified due to a negative NPV—as was defendants' first application in July 2010—the borrower experiences a change in circumstance." *Id.* at ¶ 32. In *Johnson*, the court found a material violation of HAMP because the borrower was released from bankruptcy and experienced a change in circumstance triggering reevaluation under HAMP. *Id.* The present case is inapposite. Defendant was initially offered a loan modification and failed to make those payments. After her loan was sold to plaintiff, defendant applied for loan modification. On defendant's subsequent application for modification under HAMP, defendant had a negative NPV. The record does not reveal defendant experienced a change in circumstance that would alter her negative NPV, and defendant does not argue that she would not have a negative NPV under HAMP. Rather, her only claim is that the servicer failed to perform a NPV, which we find no support for in the record. Even if defendant did show that she had a change in circumstances that could have altered her NPV, that

> "only gets [defendant's] proverbial feet in the door. In order to set a sale aside, section 15–1508(d–5) requires that a defendant file a motion before confirmation of the sale and prove, by a preponderance of the evidence, that the defendant applied for assistance under the MHA and that the sale took place in *material violation* of the MHA's requirements, *i.e.,* the HAMP guidelines, for proceeding to a judicial sale. [Citation.]" (Emphasis in original.) *Id.* at ¶ 33.

Defendant has neither shown she experienced a change in circumstance that would have altered

her NPV, nor has she shown that she would have a positive NPV under HAMP. Defendant has the burden of proving by a preponderance of evidence that the confirmation of sale occurred in material violation of HAMP, and has not provided any evidence on these matters. Because defendant has not shown plaintiff failed to conduct a NPV nor that she even would have passed a NPV, she has not shown a material violation of HAMP by a preponderance of evidence.

¶ 15 Defendant argues that she has shown it was a material violation of HAMP for Shellpoint to not evaluate her NPV again, claiming her case is analogous to the defendant in *CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272. Relying on *Lewis*, defendant also argues the trial court abused its discretion in not allowing for limited discovery as to whether a NPV was conducted. We disagree. In *Lewis*, the defendant submitted an application for loan modification. *Id.* at ¶ 12. The plaintiff then sent a letter to defendant Lewis stating she was denied loan modification under HAMP. Two days later the plaintiff sent a contradictory letter thanking Lewis for her participation in HAMP and stating that it would take approximately 30 days to evaluate her application. *Id.* Under HAMP guidelines, all judicial sales must be suspended while a HAMP application is pending. *Id.* at ¶ 52. However, before the expiration of the 30 day evaluation period stated in the letter, the property was sold at a judicial sale. On appeal, Lewis argued that her loan modification was improperly denied because the servicer evaluated her application using incorrect income. *Id.* at ¶ 13. Lewis further argued that based on her actual income she would have been granted assistance under HAMP. *Id.* at ¶ 20. Because the judicial sale was conducted before the evaluation of Lewis' application was completed, as evidenced by the plaintiff's second letter, we granted limited discovery to hold an evidentiary hearing to determine whether Lewis' home was sold in material violation of HAMP. *Id.* at ¶¶ 52-54.

¶ 16 Unlike the defendant in *Lewis*, defendant Smith did not have a pending application prior to the foreclosure sale. Additionally, defendant did not show her application was reviewed using incorrect data. The record reveals Shellpoint sent a letter detailing the values it used to calculate defendant's NPV, and defendant has not shown that she would not have a negative NPV under HAMP. Thus, defendant has not supported her position that Shellpoint failed to conduct a NPV and has not shown any material violation of HAMP in the NPV analysis. We find the trial court did not abuse its discretion in not ordering limited discovery on the issue of whether Shellpoint conducted a NPV because defendant has not shown the trial court made any error of law or that no reasonable person would take the same view as the trial court. *Bermudez*, 2014 IL App (1st) 122824, ¶ 57.

¶ 17 Defendant next argues the failure to timely confirm receipt of her initial package was a material violation of HAMP. Under the guidelines, "a servicer may evaluate a borrower for HAMP only after the servicer receives the *** 'Initial Package'." Handbook for Servicers of Non-GSE Mortgages, at 81. The Initial Package must contain a number of forms declaring rental properties, tax returns, evidence of income, and Dodd-Frank Certification. *Id.* at 81-82.

> "Within 5 business days following receipt of any component of Loss Mitigation Application, the servicer must acknowledge in writing the borrower's request for HAMP participation by sending the borrower confirmation that the Loss Mitigation Application was received and inform the borrower whether their application is complete or incomplete." *Id.* at 86.

Once the servicer has received the borrower's complete loss mitigation application, it must evaluate the borrower for HAMP eligibility within 30 days.

> "The servicer must review and evaluate the borrower within 30 calendar days from the date a complete Loss Mitigation Application is received. If the borrower qualifies for HAMP, the servicer must send the borrower a TPP Notice. If the borrower does not qualify for HAMP, the servicer must send the borrower a Non-Approval Notice". *Id.* at 87.

Though failure to confirm receipt of defendant's initial package may violate the guidelines under HAMP, defendant has not shown how this was a *material* violation and provides no authority supporting how failure to acknowledge receipt of the initial package would be a material violation. Defendant did not explain how she was injured in any way from the delay in her evaluation under HAMP. She did not claim her application was incomplete, or that it was reviewed based on incorrect information. Nor has defendant shown how she would have benefited from faster review or earlier response. To have a claim that her home was sold in violation of HAMP, defendant must not only demonstrate the guidelines were violated, but also that the violation was material. *Lewis*, 2014 IL App (1st) 131272, ¶ 49. Defendant has not shown by a preponderance of evidence that it was a material violation of HAMP for Shellpoint to fail to respond within 30 days of receiving her initial package. Defendant provides no authority for, nor does defendant explain how the trial court made any mistake of law. Additionally, defendant did not argue that no reasonable person would take the view the trial court took in finding no material violation of HAMP. Accordingly, we find defendant failed to show the trial court abused its discretion in not finding a material violation of HAMP due to the servicer's failure to confirm receipt of defendant's loan modification application in a timely manner.

¶ 18 Finally, we address defendant's argument that the sale of her home should be set aside

because justice was not otherwise done. Defendant argues justice was not done because Shellpoint never properly reviewed defendant under HAMP. Defendant relies on *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252. However, we were clear in *Adeyiga* that:

> "in order to vacate a sale and the underlying judgment, a defendant must: (1) have a meritorious defense; and (2) 'establish under section 15–1508(b)(iv) that justice was not otherwise done because either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or [that] *the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests.*' " (Emphasis in original) *Id.* at ¶ 121.

We find our ruling in *Adeyiga* does not support defendant's argument that justice was not done because defendant failed to prove she had a meritorious defense and failed to prove the lender committed fraud or misrepresentation. In *Adeyiga*, we remanded to the trial court to determine whether the bank filed a grace period notice because such a notice is required before foreclosure action may be taken. *Id.* at ¶ 11 (citing 735 ILCS 5/15-1502.5(b) (West 2010)). Defendant has not claimed plaintiff violated the rule against sending a grace period notice prior to foreclosure sale. Defendant claims Shellpoint did not conduct a NPV, but the record indicates Shellpoint provided defendant with a report detailing the values used to calculate defendant's negative NPV. Defendant bears the burden of proving the trial court abused its discretion in confirming the sale of her home. *Johnson,* 2013 IL App (2d) 120719, ¶ 18. Her case is not analogous to *Adeyiga*, and we find that defendant has not met her burden of proving the trial court made an error of law or that no reasonable person would agree with the trial court's judgment.

¶ 19 In order to demonstrate that the trial court abused its discretion and confirmed sale of defendant's home in violation of Illinois law, defendant had to first prove a material violation of HAMP. *Lewis*, 2014 IL App (1st) 131272, ¶ 49. Defendant failed to do so. Therefore, we find defendant failed to prove that the trial court committed an error of law or that no reasonable person would agree with the judgment of the trial court. *Johnson,* 2013 IL App (2d) 120719, ¶ 18. We affirm the judgment of the trial court.

¶ 20 CONCLUSION

¶ 21 The trial court's order confirming foreclosure and order denying defendant's motion to vacate the confirmation of sale are affirmed.

¶ 22 Affirmed.