Supreme Court of the State of New York

20 County Center
Carmel, NY 10512

Hon. Francis A. Nicolai
Presiding Judge
Appellate Term
9th & 10th Judicial Districts

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Sept. 13, 2012

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Attn: Owen M. Robinson, Esq.

Schlanger & Schlanger, LLP
1025 Westchester Avenue Suite 108
White Plains, New York 10604
Attn: Daniel A. Schlanger, Esq.

Re: U.S.Bank National Associattion et al
v Lisa Ann Pia and Xavier F. Pia
Index #776/2007

Dear Counsel:

Enclosed please find a copy of the Referee's Report in the above referenced matter. A copy of the transcript of proceedings and exhibits, along with the Referee's Report, have been filed in the Office of the Putnam County Clerk in accordance with CPLR 4320. Please proceed accordingly. (See 22NYCRR202.44)

Thank you for your attention to this matter.

Sincerely,

Lisa M. Florio, Esq.
Principal Law Clerk to the
Honorable Francis A. Nicolai

LMF:mal
Encl.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM
FORECLOSURE SETTLEMENT CONFERENCE PART

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U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF MARCH 1,2006 ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES NC-2006-HE2 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES NC 2006-HE2,

REPORT TO COURT

Plaintiff,

-against-

Index No.: 776 / 07

LISA ANN PIA and XAVIER F. PIA,

Defendants.

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ALBERT J. DEGATANO,
Court Attorney-Referee

Appearances:

Plaintiff: Rosicki, Rosicki & Associates, PC, by Owen M. Robinson, Esq.

Defendants: Schlanger & Schlanger, LLP, by Daniel A. Schlanger, Esq.

This is an action to foreclose on a mortgage and a counterclaim to rescind the mortgage based upon plaintiff's violations of the Truth in Lending Act (hereafter, "TILA"; 15 USC § 1601 *et seq*). On March 28, 2011, a framed-issue hearing was held before Hon. Francis A. Nicolai, Justice of the Supreme Court, Putnam County. Following the framed-issue hearing, inter alia, Justice Nicolai held that plaintiff, an assignee of the original creditor, was bound by and liable for its predecessor's undisputed violation of the TILA, that defendants had a right to rescind the mortgage and that the mortgage was rescinded. (*See* Amended Decision, Judgment And Order dated October 19, 2011 [hereafter, the "10/19/11 Order"], which is incorporated herein by reference). Justice Nicolai then referred this matter "to the Foreclosure Settlement Conference Part for a Referee to hear and report on the sums due upon rescission, whether repayment by the Pias is feasible, and, if so, whether the parties are amenable to an appropriate restructuring of the Pias' repayment of principal, subject to

the Bank's prior tender of all sums received and termination of the security interest in the residence." (10/19/11 Order at 4-5).

On January 23, 2012, a conference was held by and before Albert J. Degatano, Court Attorney-Referee (hereafter, "this Referee"), in the Foreclosure Settlement Conference Part for the Supreme Court, Putnam County. At that conference this Referee set a schedule for the submission of memoranda of law concerning the issues to be addressed pursuant to the 10/19/11 Order.

The following 14 documents, deemed fully submitted on March 16, 2012, were read by this Referee:

Defendants/Third Party Plaintiffs' Memorandum Of Law (hereafter, "Pia MOL") - Exhibits	1-6
(Plaintiff's) Memorandum Of Law (hereafter, "Plntf MOL")	7
Defendants/Third Party Plaintiffs' Reply Memorandum Of Law - Exhibits - Affidavit (hereafter, "Pia Aff") - Exhibits	8-13
(Plaintiff's) Memorandum Of Law (in Reply)	14

A second conference was held on March 27, 2012, during which the parties also brought up an application which defendants had made before Justice Nicolai for an order directing plaintiff to pay defendants attorneys fees and costs. At Justice Nicolai's direction, this Referee attempted to mediate a global settlement in which the issue of attorneys fees and costs could be incorporated. At its conclusion, the second conference was adjourned to April 30, 2012, then adjourned again at the parties' mutual request to June 4, 2012, for counsel to review the possibility of a global settlement with their clients.

However, on June 4, 2012, this Referee received an e-mail message from plaintiff's counsel which said: "I have communicated with my client and they are unwilling to propose a settlement with respect to the Pia's legal fees which is anywhere close to the amounts claimed by the Pia's attorney. Therefore, I believe that the conference scheduled for this afternoon would be fruitless." On that same date I received a response from defendants' counsel which said: "In light of [plaintiff's

counsel's] latest email, it is clear that today's settlement conference would serve no purpose." Given those representations, I cancelled the conference. This Referee has had no further communication from the parties.

Discussion

As Justice Nicolai stated, TILA "generally creates a three-step rescission process: (1) the debtor notifies the creditor that it is exercising rescission rights; (2) the creditor tenders back all payments received from the debtor and terminates its security interest in the residence [hereafter, "Step 2"]; and (3) the debtor tenders the loan proceeds to the creditor [hereafter, "Step 3"] (15 USC § 1635[b] [other citations omitted])." (10/19/11 Order at 3). Plaintiff now contends that the amounts it must tender back to defendants under Step 2 can be taken by defendants as a credit against the amount of the loan proceeds which defendants must tender under Step 3. (*See generally* Plntf MOL). However, Justice Nicolai expressly held that the Court "will adhere to the ordered approach sanctioned by the TILA statute" (10/19/11 Order at 4). *See also Berkeley Fed. Bank & Trust v Siegel*, 247 AD2d 498, 499 (2nd Dep't 1998) (holding that upon rescission by a borrower under the TILA, the creditor is required to "return any money or property and take action to terminate the security interest created under the transaction" before the borrower is required to tender anything back to the creditor). Consequently, plaintiff must tender to defendants such sums as are due under Step 2 before defendants are obligated under Step 3 to pay plaintiff any part of the loan proceeds. The total amount which plaintiff must tender to defendants under Step 2 is comprised of costs and fees which defendants paid at closing and monthly payments made by defendants prior to rescission.

The parties agree that the total costs and fees that defendants paid at closing was $14,110.57. The parties agree that plaintiff is not required to tender back to defendants the sum of $1,999.99, which plaintiff collected from defendants at closing for real estate taxes on the subject property. Also, plaintiff is not required to tender back the sum of $296.19, the net sum collected by plaintiff to fund escrow. Therefore, the total sum of closing costs and fees which plaintiff must tender back

to defendants under Step 2, is $14,110.57 (-) $1,999.99 (-) $296.19 = $11,814.39.

The parties agree that defendants made twelve monthly payments before defaulting on the loan, that principal and interest accounted for $2,138.21 of each payment and, therefore, that the total sum which defendants paid for principal and interest, and which under Step 2 plaintiff must tender back to defendants (*see, e.g., Semar v Platte Val. Fed. Sav. & Loan Assn.*, 791 F2d 699, 705-706 [9th Cir. 1986] [holding that "(i)nterest is a finance charge," for which a borrower is not liable when he/she rescinds a loan under the TILA]), is 12 x $2,138.21 = $25,658.52. Defendants do not allege that they made any payments which plaintiff accepted after they defaulted on the loan. The parties also agree that plaintiff is not required under Step 2 to tender back the portions of the monthly payments used to pay real estate taxes on the subject property.

Defendants contend that under Step 2 plaintiff must tender back to them those portions of the monthly payments used to pay the premiums for property/hazard insurance, i.e., 12 x $73.59 = $883.08, as well as $220.77 for the cost of three months of premiums for property/hazard insurance required by the lender at closing. However, defendants are not entitled to reimbursement for the cost of property/hazard insurance premiums because such sums do not constitute repayment of principal or consideration to the lender for the giving of the loan, but rather represent a necessary expense incurred to protect the interests of both parties in the subject property. Thus, while interest is among the list of "finance charges" for which a rescinding borrower is not liable under the TILA, real estate taxes and the cost of premiums for property/hazard insurance are not. *See 15 USC § 1605*(a). Therefore, the total sum of closing costs and fees, and monthly payments, which plaintiff must tender back to defendants under Step 2, is $11,814.39 + $25,658.52 = $37,472.91. Defendants should be awarded statutory interest of nine per cent per annum on the sum of $37,472.91 from October 19, 2011, the date of the decision in which Justice Nicolai adjudged that defendants had rescinded the mortgage under the TILA, to the date of entry of final judgment. *See* CPLR 5002 and 5004.

Defendants' application for an award of statutory interest "from July 8, 2007, twenty days after the Pia's first rescission demand to U.S. Bank" (Pia MOL at 11) should be denied. There is no provision in the TILA, nor any other federal authority, for the imposition of interest on the sum

which a creditor is required to tender back to a debtor following rescission.[1] And defendants are not otherwise entitled under New York State law to interest from the date which they invoke. Pursuant to CPLR 5001(a) a prevailing party is entitled to interest computed from a date prior to a verdict, report or decision, "upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." The instant action involves no such claims; it involves instead, a claim for foreclosure and a counterclaim for rescission, both of which are equitable in nature. *See Berkeley Fed. Bank & Trust v Siegel*, 247 AD2d at 499; *Norstar Bank v Morabito*, 201 AD2d 545 (2nd Dep't 1994). Consequently, for the period before the fact of rescission and defendants' rights pursuant thereto were determined by the 10/19/11 Order, it is "in the court's discretion" whether, from what date and at what rate defendants should be granted interest. *See* CPLR 5001(a).

Defendants should not be granted any pre-determination interest. "An award of interest is founded on the theory that there has been a deprivation of the use of money or its equivalent, and that an award of interest will make the aggrieved party whole; it is not to provide a windfall [internal citations omitted]." *Spodek v Park Prop. Dev. Assoc.*, 279 AD2d 467, 468 (2nd Dep't 2001) *affd* 96 NY2d 577 (2001). Nor is interest "a punishment [to be] arbitrarily levied upon a culpable party." *Matter of Aurecchione v New York State Div. Of Human Rights*, 98 NY2d 21, 27 (2002). Defendants herein were not deprived of the use of any of the money which plaintiff is required to tender back to them. That money consisted of closing costs and fees and monthly payments of principal and interest, in consideration for which the loan proceeds were disbursed in behalf of, and title to and possession of real property was acquired by, defendants. Not only were defendants not deprived of the use of said money, but they used it for precisely the purpose they intended, to refinance their home; and since that circumstance would not have been different had their been no

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[1] The judicial opinions which defendants cite in purported support of their argument (*see* Pia MOL at 11) are wholly inapposite. Indeed, each of the three opinions cited concerned the imposition and computation of interest on the amount of the principal balance which the debtors had to tender to the creditors under Step 3. *See Raghach v Cogswell*, 547 F2d 502, 505 (10th Cir. 1977); *In re Dawson*, 411 BR 1, 43-44 (Bkrtcy. D. Dist. Col. 2008); *City Consumer Servs., Inc. v Horne*, 578 F Supp 283, 288-289 (D. Utah 1984).

justification for defendants to rescind the transaction, an award of pre-determination interest is not needed to make defendants whole. Nor is this a situation in which the denial of pre-determination interest would constitute a windfall for the losing party. *Compare, e.g., Matter of Aurecchione v New York State Div. Of Human Rights*, 98 NY2d at 26-27 (holding that failure to award the prevailing employee pre-determination interest on an award of wrongfully withheld wages in an employment discrimination case was an abuse of discretion because it "would be tantamount to an 'interest-free loan' to" the employer). Rather, in this instance, such an award would constitute no more than a penalty against plaintiff with a corresponding windfall to defendants. Therefore, defendants should not be granted interest from any date prior to October 19, 2011.

It is not feasible that defendants could tender back to plaintiff the loan proceeds in a lump sum payment. The parties agree that the sum which defendants would be required to tender to plaintiff under Step 3, after plaintiff tenders the amounts due defendants and terminates its security interest in the subject property under Step 2, is $233,750.00. Upon reviewing all of the party's submissions, including the affidavit of defendant, Lisa Ann Pia (hereafter, "Pia Aff"), and exhibits annexed thereto, this Referee reports that defendants have a gross annual household income of approximately $44,300.00, and no discernible assets other than the sum of $37,472.91, plus statutory interest, to which they are entitled under Step 2 as discussed, *supra*. Assuming defendants tendered back to plaintiff all of the money tendered to them under Step 2, it is likely that the balance of the loan proceeds would still be in excess of $190,000.00. Defendants would be unable to make a lump sum payment in that amount unless they were able to obtain another mortgage on the subject property, which for several reasons is so unlikely as to be virtually impossible.

Plaintiff argues that "[w]ithout a demonstration of the present day ability to repay what is determined to be the balance of the loan, the right of rescission is unavailable to the borrower." (*See* Plntf MOL at 9). In certain circumstances the right of rescission under the TILA may be conditioned upon the borrower's ability to pay the outstanding principal balance in a lump sum. *See Berkeley Fed. Bank & Trust v Siegel*, 247 AD2d 498, 499. However, the right of rescission may be upheld despite such disability where it is feasible that the borrower would be able to repay the balance in

instalments over a reasonable and finite period of time pursuant to an arrangement in which the lender's interest is not wholly unsecured. *See, e.g., Shepeared v Quality Siding & Window Factory, Inc.*, 730 F Supp 1295, 1306-1308 (D. Del. 1990); *Fed. Deposit Ins. Corp. v Hughes Dev. Co., Inc.*, 684 F Supp 616, 625-626 (D. Minn. 1988); *compare Cervini v Zanoni*, 95 AD3d 919, 921 (2nd Dep't 2012) ("'[I]t was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest' [internal citations omitted]"). It is clear that in referring this matter to the Foreclosure Settlement Conference Part, Justice Nicolai has determined that in the instant circumstances conditioning defendants' rescission rights on a lump sum payment of the principal balance would be inappropriate, provided it was *feasible* that defendants would be able to undertake a reasonable instalment agreement in which plaintiff's interest was not left unsecured. (*See* 10/19/11 Order at 4-5).

This Referee reports that it would be feasible to restructure the subject loan so as to provide a lump sum payment of part of the loan proceeds followed by a schedule of affordable monthly instalments pursuant to which defendants could repay the balance. Defendants could tender back to plaintiff the sum of $37,472.91, thereby reducing to $196,277.09 the loan proceeds which they must repay under Step 3. Defendants could then repay that balance in monthly instalments calculated by using the standard of eligibility for the modification of residential mortgage loans under the federal Home Affordable Modification Program (hereafter, "HAMP"): monthly housing debt – i.e., principal and interest on the loan plus real estate taxes and premiums for property/hazard insurance – should be no more than 31% of gross monthly household income – i.e., after federal and state income taxes but not subtracting household expenses.[2]

Defendants allege that their annual household income after federal and state income taxes is approximately $40,000.00. (*See* Pia Aff at ¶¶ 6-9). Thus, using the HAMP guidelines, defendants' gross monthly household income is approximately $3,333.33. Using a DTI of 31%, the

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[2] Under HAMP, in other words, if the ratio of housing debt to gross income (hereafter, "DTI") is 31% or less, the homeowner is not eligible to be considered for a loan modification under HAMP; if the DTI under the original loan is higher than 31%, the lender is required to attempt to modify the loan through interest rate reduction, term extension and/or principal forbearance so that the DTI is 31%.

amount of housing debt which they should be able to afford is approximately $1,033.33 per month. Defendants allege that the monthly cost of property/hazard insurance and real estate taxes for the subject property is approximately $300.00 (*see id.* at ¶ 11), thereby leaving approximately $733.33 per month to repay the balance of the loan proceeds. Consequently, defendants should be able to repay the balance of $196,277.09 in two hundred sixty seven monthly payments of $733.00, and one final payment of $566.09. Defendants' obligation would be secured by a new, interest free mortgage on the subject property.[3]

Restructuring the loan in this fashion would be appropriate. The loan which defendants rescinded was "an adjustable rate mortgage for 30 years." (10/19/11 Order at n.3). Under the loan's *original* terms, defendants were required to make three hundred fifty nine monthly payments commencing on February 1, 2005, and a lump sum "balloon" payment on January 1, 2035. (*See* Truth In Lending Disclosure Statement, a copy of which is annexed as part of Exhibit A[1] to the Pia MOL). Therefore, assuming the first monthly payment was due October 1, 2012, and defendants tendered back to plaintiff $37,472.91 on or before that date, restructuring the loan would enable plaintiff to fully recoup the loan proceeds – minus the interest to which it is no longer entitled – on January 1, 2035, the same date on which the final payment would have been due under the original loan terms. Moreover, defendants would be making those payments on a secured loan, whereas if defendants were not permitted to rescind the original loan and plaintiff is successful in the foreclosure action it would receive no payments from defendants and little more than title to property for which the fair market value is probably less than the principal balance and the right to pursue what would likely be a worthless deficiency judgment. Restructuring would also permit defendants to retain possession of their home without trying to obtain another interest bearing mortgage to satisfy their obligation under Step 3. Unfortunately, the parties are not amenable to a settlement because of defendants' pending application for an award of attorney fees and costs.

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[3] This Referee is unaware of the current fair market value of the subject property, but even assuming that the value is less than the balance of the loan proceeds, the type and amount of plaintiff's security would be no different and no less than it is in the instant foreclosure action.

Accordingly, for the foregoing reasons, this Referee reports that it is feasible for defendants to repay to plaintiff the proceeds of the subject loan if said loan were to be restructured as aforesaid, but that the parties are not amenable to a settlement due to defendants' pending application for an award of attorneys fees and costs. Consequently, this Referee respectfully recommends that the Court: (1) sever and determine by separate Decision and Order defendants' application for an award of attorneys fees and costs, as well as any other applications, claims or issues that may be pending; (2) direct plaintiff to satisfy its obligation under Step 2 forthwith by tendering back to defendants the sum of $37,472.91, plus statutory interest, and terminating its security interest in the subject property, and; (3) direct that upon plaintiff's completion of its obligations under Step 2, defendants are to satisfy their obligation under Step 3 by tendering back to plaintiff the sum of $37,472.91, followed by two hundred sixty seven monthly payments of $733.00, and one final payment of $566.09, said obligation to be secured by a new, interest free mortgage on the subject property.

Dated: White Plains, New York
August 20, 2012

Respectfully submitted by,

ALBERT J. DEGATANO
Court Attorney-Referee

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