

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

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KAREN MICHELE SALA MICHAELS)	
)	
	Plaintiff,)	Civil Action No. 1:10-cv-11471
v.)	
)	
WELLS FARGO HOME MORTGAGE, a)	
Division of WELLS FARGO BANK, N.A,)	
)	
	Defendant.)	
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**WELLS FARGO HOME MORTGAGE'S OPPOSITION TO PLAINTIFF'S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS AND TO CONTINUE THE HEARING
ON WELLS FARGO HOME MORTGAGE'S MOTION TO DISMISS**

Following a Rule 7.1 Conference, Wells Fargo Home Mortgage ("Wells Fargo") filed a Notice Regarding Efforts to Effect a Loan Modification on January 7, 2011. The Notice detailed Wells Fargo's efforts to effect a loan modification under the U.S. Government's Home Affordable Modification Program ("HAMP") pursuant to the Court's advice at the November 19, 2011 hearing. Also on January 7, 2011, Plaintiff filed a Motion to Compel Production of Documents and To Continue the Hearing of the Defendant's Motion to Dismiss.¹ Plaintiff's Motion must be denied in its entirety for several reasons. First, Plaintiff's Motion to Compel is procedurally improper as discovery in this case has not yet begun. Secondly, as set forth in its Notice to the Court Regarding Efforts to Effect a Loan Modification with the Plaintiff, Wells Fargo has complied with the Court's advice that the parties work to find a way to keep the Plaintiff in her home by offering to reconsider Plaintiff for a permanent loan modification. Third, the documents Plaintiff seeks are wholly irrelevant to the Court's instruction for the

¹ The caption of the Plaintiff's Motion to Compel and accompanying Memorandum of Law state that it is the "Plaintiff's Motion to Dismiss." It is the Defendant's Motion to Dismiss, as reflected in the docket.

parties to work to find a way to keep Plaintiff in her home. Finally, Plaintiff's request to move the hearing on Wells Fargo's Motion to Dismiss would not be productive, given Plaintiff's rejection of Wells Fargo's offer to reconsider her for a HAM P permanent loan modification. Accordingly, this Court should deny Plaintiff's Motion in its entirety.

FACTUAL BACKGROUND

The facts essential to understanding the current posture of the loan modification efforts are undisputed.² On December 2nd, Plaintiff sent correspondence to Defendant enclosing some, but not all, of the additional financial documents needed by Wells Fargo. Specifically, the correspondence attached only Plaintiff's bank statements and copies of checks (not cancelled checks) meant to apparently reflect receipt of alimony and/or child support. It did not include an updated profit and loss statement or a certification. On December 10th, counsel for Wells Fargo sent correspondence to Plaintiff offering to reconsider her for a HAMP loan modification if the specific financial documents required by HAMP were submitted. The December 10th letter also declined Plaintiff's request for production of documents regarding the prior denial as Wells Fargo had already agreed to reconsider Plaintiff de novo for a permanent HAMP loan modification.³

² Wells Fargo hereby incorporates by reference its Notice to the Court Regarding Efforts to Effect a Loan Modification with Plaintiff.

³ The December 9th correspondence from Plaintiff's counsel requested:

1. All documents showing the components, elements, and calculations used to determine the Trial Period Plan offered by Wells Fargo Home Mortgage to Karen M.S. Michaels on November 20, 2009.
2. All documents showing the components, elements, and calculations used to determine, in May, June or July 2010, that Karen M.S. Michaels was not able to continue to make the temporary payment play modified loan payments to Wells Fargo Home Mortgage.
3. All correspondence, including all internal communications, concerning the Wells Fargo Home Mortgage loan (loan number [xxx xxxxxxxxxxx]) during the period from June 1, 2010 until the present.
4. All correspondence, including all internal communications, leading to the e-mail message from Attorney Scott c. Owens stating: 'My contact at Wells Fargo . . . has also reviewed his notes and

Plaintiff then sent a December 15th letter refusing to provide any additional financial information and demanding that Wells Fargo produce documents regarding the prior denial. Recognizing the disagreement, the parties scheduled a Rule 7.1 conference, which was held on December 23, 2010. In the call, Wells Fargo explained that, under the HAMP guidelines, in order to reconsider Plaintiff for a modification, Wells Fargo needed updated financial information and supporting documentation. Wells Fargo offered Plaintiff two options for submission of this information, either through the submission of an entirely new HAMP application, or the submission of certain requested financial documents to be considered by Wells Fargo in conjunction with other previously submitted information. Wells Fargo also explained to Plaintiff's counsel that the documents sought by Plaintiff regarding the prior denial of her HAMP application were wholly irrelevant because Wells Fargo was conducting an entirely new review of Plaintiff, and not relying on the previous denial in any way. Nevertheless, Plaintiff refused to provide any of the documents requested by Wells Fargo and required by HAMP. Rather, Plaintiff has filed the instant Motion to Compel, despite the fact that the documents sought have nothing to do with whether Plaintiff qualifies for a HAMP modification now, and thus nothing to do with the Court's instruction to work through and find a way to keep Plaintiff in her home.

ARGUMENT

I. Plaintiff's Motion to Compel Should Be Denied As It Is Procedurally Improper and Seeks Documents which Are Irrelevant to the Court's Request to Work on a Current Modification for Plaintiff.

has confirmed that the issue appears to be that self-employment income was not factored into your client's gross income for the purposes of HAMP calculations."

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

- (i) a deponent fails to answer a question asked under Rules 30 or 31;
- (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
- (iii) a party fails to answer an interrogatory submitted under Rule 33; or
- (iv) a party fails to respond that inspection will be permitted – or fails to permit inspection – as requested under Rule 34.

It is undisputed that discovery has not been served on Wells Fargo in this action. Accordingly, to the extent Plaintiff moves to compel, such a motion is procedurally improper. Second, to the extent Plaintiff appears to move for production of these irrelevant documents based upon the Court's *advice* that the parties work to find a way to keep Plaintiff in her home, Plaintiff's motion must be denied as irrelevant to the Court's advice. As discussed in the Notice and *infra*, Plaintiff's request for documentation regarding the prior denial of Plaintiff's application for a permanent HAMP application is entirely irrelevant because Wells Fargo has already agreed to conduct a de novo review of Plaintiff's financials for a HAMP modification. Regardless of what happened previously, Wells Fargo is trying to find a way to keep Plaintiff in her house now as requested by the Court. The documents requested by Plaintiff have nothing to do with that.

II. It is Plaintiff Who Is Refusing to Adhere to the Court's Advice by Refusing to Provide the Documents Required under HAMP

In her Memorandum of Law in Support of her Motion, Plaintiff incorrectly asserts that "there has not yet been an exchange of documents and consequently there has not yet been an opportunity for counsel to try 'to frame an arrangement that will, if at all possible, permit Plaintiff and her daughter to continue to live in her house.'" Contrary to this assertion, Wells

Fargo has already informed Plaintiff that the only way for her to stay in the home is through a loan modification and that Wells Fargo will consider her for a loan modification if she will simply submit the financial information required by HAMP. Specifically, Wells Fargo informed Plaintiff's counsel of two ways in which it could reconsider Plaintiff for a loan modification under HAMP. The first and preferred option was submission of an entirely new HAMP application, with all of the required supporting documentation. Given the disagreement about what had been submitted in connection with Plaintiff's previous application which was denied, this option seemed preferable and would afford the Plaintiff the opportunity to submit any and all income documentation to support her income. Wells Fargo also offered to pay any copying costs associated with the submission of the new HAMP application. The second option offered to Plaintiff was that she could submit particular requested documentation—namely, an updated and signed profit and loss statement for the most recent quarter or year-to-date, as required by HAMP, bank statements highlighting or noting receipt of child support and/or alimony within the last 90 days, and Plaintiff's signature that all of the documentation she is submitting is correct.

It cannot be disputed that HAMP requires this particular documentation of income, and requires that this income verification documentation may not be older than 90 days.⁴ See S. D. 09-01; Handbook (Dec. 2010) § 4.3. While Plaintiff has submitted some additional financial information, she has not submitted a Profit & Loss statement for the most recent quarter or

⁴ When the HAMP program began, the US Treasury issued Supplemental Directives to aid servicers. See S.D. 09-01. These Supplemental Directives were in effect until September 22, 2010, when they were superseded by the Handbook for Servicers of Non-GSE Mortgages. This handbook was in turn superseded on December 2, 2010 by the newest version (version 3.0) of the Handbook for Servicers of Non-GSE Mortgages. Nevertheless, under both the Supplemental Directives and both Handbooks, documentation of income cannot be more than 90 days old.

year-to-date, as HAMP requires.⁵ Wells Fargo is simply requesting the documentation that HAMP requires in order to reconsider her for a permanent loan modification. For whatever reason, Plaintiff has unilaterally refused to provide the documents required, and thus, Wells Fargo cannot move forward to attempt to modify Plaintiff's loan under HAMP.

While Plaintiff alleges that Wells Fargo's conduct evidences an intent to delay modification efforts in an attempt to have its Motion to Dismiss heard, this allegation shows a fundamental misunderstanding of the process. HAMP is a voluntary government program governed by the HAMP directives (or applicable Handbook) and the applicable investor guidelines. Pending litigation does not affect eligibility for HAMP or the HAMP program analysis. In other words, the Court's ruling on the motion to dismiss would have zero impact on Plaintiff's ability to qualify for a HAMP modification. So, Wells Fargo has no incentive to delay anything. If Plaintiff wants to be considered for a modification, she must only submit the documents and she will be considered. This is true regardless of when the Court hears the Motion to Dismiss and whether the Court grants the Motion to Dismiss.

⁵ Plaintiff's assertion that that Wells Fargo "did not even suggest to this Court on November 19 that all of the documentation that Ms. Michaels had submitted to it before that date was 'stale'" is directly contrary to the colloquy at the hearing. See Plaintiff's Memorandum in Support of Motion to Compel, Page 11. Indeed, at the November 19, 2010 hearing, Attorney Clendenen stated on the record "and what I would like from my brother and kind of put on the record so I'm very clear with Your Honor, *because, as I said, this information gets stale*, is I would like the most recent two months' bank statements or cancelled checks for both child support and alimony . . . the most recent year-to-date pay stubs that reflect the employer name, and for all self-employment income an updated profit and loss and bank statements that show gross income and expense figures. I understand – I've been with opposing counsel and plaintiffs that are self-employed. I understand the issues. My point is we need that bundled up in a nice little bow." November 19, 2010 Hearing Transcript, Pages 29-30, lines 18-17 (emphasis added). For Plaintiff to suggest that the issue of required up-to-date documentation under HAMP was not brought up at the hearing is and brought to her attention is entirely incorrect. Plaintiff also takes issue with the request that she submit a new application. It is undisputed that Plaintiff's prior application was denied. In light of the colloquy in court and the issue of stale documentation, Wells Fargo, as it indicated in Court, simply requested a new application "bundled up in a nice little bow." After Plaintiff refused, Wells Fargo even offered to accept certain other documents without the entire application. Finally, with regard to submission of information in piecemeal fashion, Wells Fargo simply informed Plaintiff that submission of information under HAMP cannot be in piecemeal fashion where, as here, some of the information required under HAMP is stale.

To be clear, undersigned counsel has handled dozens and dozens of similar cases for this and other lenders. The cases are routinely resolved through modifications. Mr. Morris is the first counsel, who on behalf of his client, refuses to provide the required documents which effectively prohibits Wells Fargo from even considering a HAMP modification. Far from this being an intentional part of a plan to by Wells Fargo to delay, Plaintiff's decision to block the modification process appears to be an intentional (but misguided) strategic decision by Plaintiff's counsel to create some kind of leverage. Of course, it does not create any leverage. It simply denies Plaintiff any opportunity to be considered for a loan modification which might save her home.

CONCLUSION

Accordingly, for the reasons stated herein, Wells Fargo requests this Court deny Plaintiff's Motion to Compel Production of Documents and Plaintiff's Motion to Continue the hearing date on Wells Fargo's Motion to Dismiss.

Respectfully submitted,

Wells Fargo Bank, N.A.,
By its attorneys,

/s/ Jeffrey S. Patterson
Jeffrey S. Patterson (BBO #671383)
jeffrey.patterson@nelsonmullins.com
Patrick T. Clendenen (BBO # 564165)
pat.clendenen@nelsonmullins.com
Heather L. Bennett (BBO #673083)
heather.bennett@nelsonmullins.com
Nelson Mullins Riley & Scarborough, LLP
One Post Office Square, 30th Floor
Boston, MA 02109
(617) 573-4700

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this document has been filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Date: January 13, 2011

/s/ Jeffrey S. Patterson