

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

_____)	
KAREN MICHELE SALA MICHAELS)	
)	
Plaintiff,)	Civil Action No. 3:10-cv-11471
v.)	
)	
WELLS FARGO HOME MORTGAGE, a)	
Division of WELLS FARGO BANK, N.A,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S NOTICE REGARDING EFFORTS TO EFFECT
A LOAN MODIFICATION WITH THE PLAINTIFF**

On November 19, 2010, this Court granted Plaintiff's Motion for a Preliminary Injunction. As the Court made clear during oral argument, and as reflected in its written order, the Court advised "Counsel for both parties [to] work with vigor and resourcefulness to frame an arrangement that will, if at all possible, permit Plaintiff and her daughter to continue to live in her house." Following the hearing, in an attempt to follow the Court's advice and to afford Plaintiff the opportunity to obtain a loan modification agreement under the U.S. Treasury's Home Affordable Modification Program ("HAMP"), Wells Fargo Home Mortgage ("Wells Fargo") offered to re-run Plaintiff for a permanent loan modification under HAMP. Under the HAMP guidelines, in order to reconsider Plaintiff for a permanent modification, Wells Fargo needed complete and updated financial information and supporting documentation from the Plaintiff. Wells Fargo afforded 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. Plaintiff refuses to provide this updated documentation.

Plaintiff's entire complaint is based upon her allegation that she is deserving of a permanent loan modification under HAMP. Indeed, her complaint seeks an order from the Court that Wells Fargo modify Plaintiff's mortgage on terms in conformity with the HAMP guidelines. Incredibly, even as Wells Fargo is now offering to reconsider her for a permanent modification, Plaintiff is refusing to provide the documents that are required by the HAMP program itself. Accordingly, Wells Fargo hereby notifies the Court that it can do nothing else to proceed with a modification given the Plaintiff's refusal to provide the required financial documents.

FACTS

Plaintiff commenced this action in August, and Wells Fargo duly removed the action to the United States District Court for the District of Massachusetts on August 27, 2010. Plaintiff's Complaint alleges three counts: (1) declaratory relief; (2) breach of contract; and (3) breach of the covenant of good faith and fair dealing. Wells Fargo filed a Motion to Dismiss Plaintiff's claims on September 3, 2010 under Fed. R. Civ. P. 12(b)(6). On November 10, 2010, Plaintiff filed a motion for a Preliminary Injunction, and the Court held a hearing on November 19, 2010. This Court granted Plaintiff's motion, noting the irreparable harm to be faced by Plaintiff in possibly losing her home and her "marginal" likelihood of success on the merits. As is evidenced by the hearing transcript and the Court's advice in its November 24, 2010 written order, it urged the parties to work to arrive at a solution that would permit Plaintiff to remain in her home. In order to attempt to accomplish this and based on Plaintiff's

claim that Wells Fargo had not considered all of her income, Wells Fargo offered to reconsider Plaintiff for a permanent modification under HAMP.

On December 10, 2010, counsel for Wells Fargo sent Plaintiff a letter offering to reconsider Plaintiff for a permanent HAMP modification. This letter identified the specific documents that Plaintiff would need to provide under the HAMP guidelines. Wells Fargo asked Plaintiff to re-submit and sign the HAMP application and accompanying financial materials, explaining that the HAMP program requires servicers to obtain up-to-date financials, within the past 90 days, to consider a borrower for a loan modification. As of the December 10th letter, Wells Fargo did not have the HAMP-required Profit and Loss Statement for the most recent quarter or year-to-date for the Plaintiff, did not have any signature or certification of the Plaintiff within the most recent 90 days specifying the information submitted was accurate, and had never received bank statements which identified alleged receipt of child support and/or alimony payments.

By letter dated December 15, 2010, counsel for Plaintiff responded to Wells Fargo's December 10th letter, refusing to provide the documents and reiterating Plaintiff's request for documents relating to the previous denial of Plaintiff's application for a permanent loan modification.¹ Recognizing the apparent disagreement as to whether Plaintiff would provide the documents required by HAMP to reconsider her for a HAMP permanent loan modification,

¹ The documents Plaintiff requests are:

1. "All documents showing the components, elements, and calculations used to determine the Trial Period Plan offered by Wells Fargo Home Mortgage to [Plaintiff] on November 20, 2009.
2. All documents showing the components, elements, and calculations used to determine, in May, June, or July 2010, that [Plaintiff] was not able to continue to make the temporary payment plan 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 has confirmed that the issue appears to be that the self-employment income was not factored into your client's gross income for the purposes of HAMP calculations.'

the parties scheduled a conference under Local Rule 7.1. The conference was held on December 23, 2010 at 10:30 am via telephone.

During the conference, counsel for Wells Fargo informed Plaintiff's counsel that it understood from the Court's order and the November 19th hearing that both parties were to work to find a way for the Plaintiff to remain in the property located at 240 South Silver Lane, Sunderland, Massachusetts ("Property"). Wells Fargo informed Plaintiff's counsel that the only way to try to modify the Plaintiff's loan under HAMP, as Plaintiff seeks, was to reconsider Plaintiff for a permanent modification under the HAMP program guidelines. Wells Fargo further informed Plaintiff's counsel that pursuant the HAMP guidelines, it needed additional up-to-date financial information, within the past 90 days, from the Plaintiff, and that Wells Fargo needed to receive the additional documentation from the Plaintiff within a reasonable time.

To that end, Wells Fargo offered Plaintiff two options. The first and preferred option was for Plaintiff to submit a whole new HAMP application with all of the accompanying documentation required by HAMP. Wells Fargo informed Plaintiff's counsel that this option would be preferable and appeared to make the most sense given the disagreement about what documents had been previously submitted and considered. This new submission would guarantee Plaintiff the opportunity to provide any and all documents to support her claimed income. Further, Wells Fargo communicated to Plaintiff's counsel that it would be willing to pay for the costs of any copying associated with submission of the HAMP documentation.

If Plaintiff did not want to submit a complete new package, Wells Fargo offered Plaintiff a second option. Namely, Wells Fargo informed Plaintiff's counsel that she could submit certain individual documents identified by Wells Fargo during the Rule 7.1 conference

call, which were: an updated, signed profit and loss statement for the latest quarter or year-to-date; bank statements that highlight or otherwise note receipt of child support and alimony within the past 90 days; and Plaintiff's signature or certification that all of the documentation she is submitting is correct. Wells Fargo further communicated to Plaintiff that if Plaintiff chose that option, Wells Fargo would consider this new information along with information previously submitted and do its best to assemble the appropriate information and run Plaintiff for a permanent modification based on that information. For either option, counsel for Wells Fargo assured Plaintiff's counsel that they would be available to communicate regarding Plaintiff's current application and any questions that may arise during this process.

As for Plaintiff's request to conduct discovery on the prior modification efforts, Wells Fargo informed Plaintiff's counsel that the requested documents had no relevance, as Wells Fargo was agreeing to reconsider Plaintiff for a modification. Wells Fargo was *not* relying on its prior analysis and would conduct a *new* analysis of Plaintiff to determine whether she qualifies for a HAMP modification. As a result, counsel for Wells Fargo informed Plaintiff's counsel that "discovery" regarding the *prior* denial of plaintiff's application for a permanent modification was unnecessary and that the Court wanted the parties to focus on finding a solution, not litigating the prior denial.² To be clear, the documents request by Plaintiff have

² This conclusion is borne out by the colloquy during the hearing. During the hearing, it was counsel for Wells Fargo who raised the issue of documentation, and requested that it be able to return to court on the appropriate motion should it not receive the required documentation from the Plaintiff. See Transcript of November 19, 2010 Hearing on Plaintiff's Motion for a Preliminary Injunction (hereinafter "Hearing Transcript"), Pages 26-27, Lines 24-9. The Court stated that it believed Plaintiff had a "huge" incentive to work with Wells Fargo and submit the documents because otherwise, there is no guarantee she would get to keep her home. Hearing Transcript, Page 28, lines 14-22. The Court further stated to Wells Fargo's counsel that while it was not going to issue any order that day, the Court "urge[d] the plaintiff to enter into communications with [Wells Fargo] to clear up whatever has to be cleared up. Now I know what I'm probably going to hear from [Plaintiff's counsel] is she has tried to do that. She's been trying to do that for weeks and months and she is willing to continue to try to do and that's fine. I'll say, Mr. Clendenen, if these informal urgings and your informal contact do not result in the satisfactory disclosure of necessary information, you can file a motion with the Court laying specifically what you have asked for and how you tried to get what you haven't gotten and then I will have something before me that I can actually

no effect on the ultimate question of whether Plaintiff qualifies for a permanent HAMP modification now, and thus, are not relevant to the Court's direction that the parties find a way to keep Plaintiff in the Property. Rather, the documents Plaintiff seeks are relevant only to her claims and the litigation of those claims. Even if Wells Fargo were to give Plaintiff the requested documents, this would not change the fact that in order to process Plaintiff for a permanent modification now, and thus achieve the goal of keeping Plaintiff in her house, the HAMP guidelines require additional up-to-date information. While Wells Fargo would certainly provide those relevant and non-privileged documents during discovery in this case should its motion to dismiss be denied, Wells Fargo explained to Plaintiff's counsel that the efforts at this stage should be focused on a new modification, not on litigating the prior denial.

At the conclusion of the conference, counsel for Plaintiff indicated he would confer with his client regarding Wells Fargo's offer. On December 28th, counsel for Plaintiff informed counsel for Wells Fargo that Plaintiff would not be submitting any additional documents unless Wells Fargo provided Plaintiff all of the documents requested regarding the prior denial.

ARGUMENT

Pursuant to the hearing on Plaintiff's Motion for a Preliminary Injunction and the Court's order granting Plaintiff's motion, Wells Fargo seeks to inform the Court of the status of the loan modification process and its inability to obtain the documents necessary under

rule on." Hearing Transcript, Pages 28-29, Lines 24-11. Furthermore, when Plaintiff's counsel requested what he called a "reciprocal production of documents", the Court did not indicate that Wells Fargo was required to produce any documents, but simply stated "All right. I can tell you one thing I'm quite certain of, which is I'm not going to be able to sort that out in the next five minutes in this courtroom." Page 31, Lines 13-16. Following this statement, the Court stated on the record that it was doing two things: (1) enjoining Wells Fargo from foreclosing on the property at issue; and (2) "strongly urging [the parties] to be as open as you can about the exchange of documents *and see if something could be worked out to help this plaintiff and her child stay in her house if she possibly can and that's where we are.*" Hearing Transcript, Page 31, Lines 17-21; Page 32, Lines 4-8 (emphasis added).

HAMP in order to review Plaintiff for a permanent loan modification. In order for Wells Fargo to enter into a HAMP loan modification with any borrower, including the Plaintiff, it must follow the HAMP guidelines. The pertinent authority comes from the HAMP guidelines, cited by Plaintiff in her Complaint and Motion for Preliminary Injunction, and also cited by Defendant in its Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction. Critically, the HAMP guidelines provide that "documentation of income may not be more than 90 days old as of the determination of eligibility." See Supplemental Directive 09-01, Page 5. For self-employment income, HAMP also requires a profit and loss statement for the most recent quarter or year-to-date. S.D. 09-01, Page 7.

Currently, Wells Fargo does not have a profit and loss statement for the Plaintiff for the most recent quarter or year-to-date, as is specifically required by HAMP. The most recent profit and loss statement from the Plaintiff that Wells Fargo has is for August 2010, which is more than 90 days old and does not cover the most recent quarter. In addition, Wells Fargo requested that the Plaintiff's bank statements be highlighted or otherwise noted to reflect the receipt of child support and/or alimony, and that Plaintiff submit a certification that the documentation submitted is accurate. At this time, Plaintiff has refused Wells Fargo's offer to do any of the foregoing.

While Plaintiff has requested a variety of documents regarding Wells Fargo's prior denial of her application for a permanent HAMP application, this information is wholly irrelevant to the Court's direction that the parties work to arrive at a solution that allows Plaintiff to remain in the Property. Specifically, even if Wells Fargo were to give these documents to Plaintiff, this serves no purpose in effecting a permanent loan modification *now*. As discussed, the HAMP guidelines require certain up-to-date financial information and Wells

Fargo must adhere to these guidelines. The documents Plaintiff seeks are relevant only to what has happened in the past. Certainly, if this Court denies Wells Fargo's Motion to Dismiss and discovery moves forward, Wells Fargo will provide all relevant and non-privileged documents. Nevertheless, as explained to Plaintiff's counsel during the Rule 7.1 Conference, if Plaintiff does not submit the required HAMP documentation now, she will not be able to obtain a permanent loan modification under HAMP, regardless of whether she obtains the documents she seeks regarding her prior denial of the permanent modification.

In light of Plaintiff's refusal to provide the documents required under HAMP, Wells Fargo is unable to proceed with any new consideration or modification of Plaintiff's loan. Accordingly, Wells Fargo hereby notifies the Court of its efforts to comply with the Court's advice given at the November 19th hearing and embodied in the Court's November 24th order.

LOCAL RULE 7.1 CERTIFICATION

Counsel for the Defendant hereby certifies that they have conferred with Plaintiff's counsel in a good faith effort to resolve or narrow the issues set forth herein.

Respectfully submitted,

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

/s/ Jeffrey S. Patterson
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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 7, 2011

/s/ Jeffrey S. Patterson