“Inertia Is Not An Option” – Massachusetts Court Rules Lender May Be Liable For Dragging Its Heels On HAMP Loan Modification

One Of First Reported Rulings On Home Affordable Modification Program Liability

Parker v. Bank of America (BofA), Massachusetts Superior Court, Dec. 15, 2011 (click here for ruling).

The fallout from the subprime and mortgage crisis continues in Massachusetts courts, and some judges are reacting in favor of sympathetic borrowers. In ***Parker v. Bank of America***, Massachusetts Superior Court (Dec. 15, 2011), Judge Thomas Billings considered what is unfortunately now a very common fact pattern in borrowers’ quest to have their lenders approve loan modifications, or loan mods. The ruling is embedded below.

A Common Story of Lost Paperwork and Ineptitude

In 2007, Valerie Parker granted first and second mortgages on her home in Lowell to Bank of America. She paid the loans on time for the first 24 months. As the economy worsened, however, she anticipated difficulty in making payments, and so she called BofA for advice. The bank told her that because the loan was not in default they could not help her, and that she would have to cease payments if she wanted their assistance. (Is this not one of the most ridiculous, yet common, responses lenders give to troubled borrowers?)

After a lengthy period of lost and repeatedly re-submitted paperwork, BofA informed Parker she qualified for HAMP (Home Affordable Modification Program) relief, underwent a lengthy financial audit over the telephone, and was promised follow-up documentation and a halt to further collection and foreclosure efforts. BofA repeatedly lost her paperwork; she had to submit and re-submit documents; and she spent hours at a time on hold, waiting to speak with a human being. She did, however, receive the bank’s verbal assurance that she was “pre-qualified” for the HAMP program and that confirmatory paperwork would be forthcoming. BofA never sent the promised documentation, however, and refused to approve a loan modification. Lengthy and repeated telephone calls produced no documents, no approval, and no progress. Finally, BofA told Parker there was no record of her having qualified for the program. She requested and was given the opportunity to reapply, but the documentation still never came. All while, the collection calls continued and the late fees kept mounting, and the loan was at some point placed in foreclosure.

"Inertia Is Not An Option"

Parker asserted a number of different claims against BofA, but the two which stuck, according to the judge, were her claims for fraud and breach of contract. The judge went through a lengthy history of the recent subprime crisis, the TARP bailout plan, and the HAMP program, concluding that BofA's actions against Parker were unfair under these consumer protection programs.

In a great line, the judge said that "inertia is not an option" when a lender considers a borrower's legitimate request for a HAMP loan modification. Under HAMP, there are strict deadlines by which lenders must respond to a borrower's application, and foreclosure activity must stop during the consideration period. The judge lamented that federal regulators had failed to pass enforcement mechanisms to protect borrowers from lenders such as BofA dragging their heels on loan modifications. Noting that borrowers have no other forum in which their claims may be heard and adjudicated other than the courts, Judge Billings held that Parker could claim "third party beneficiary" status of BofA's participation in the TARP/HAMP program–diverging from several colleagues opinions to the contrary.

Lastly, in a boon for borrowers, the court left open whether lenders could face Chapter 93A liability — with its triple damages and attorneys' fees — for similar conduct. While Parker's counsel dropped the ball by not sending BofA a required demand letter prior to filing suit, this option may be open for other borrowers.

Impact of Ruling

This is one of the first court rulings I've seen siding with a borrower on a lender's liability for dropping the HAMP ball. Clearly, this particular judge is well-educated on what's been going on with the mortgage crisis and was likely fed up with lenders' shoddy treatment of some borrowers. But is his legal reasoning correct? The judge can certainly be accused of legislating from the bench here, as the vast majority of other court rulings have rejected his reasoning. (At least 6 opinions by my count, mostly from federal court).

But his reasoning does have some intrinsic appeal inasmuch as HAMP is clearly a consumer driven program and the judge is basically saying that lenders must treat HAMP applicants fairly in accordance with the program rules. If what Ms. Parker says is true, there is a minimum level of fairness that she did not receive. But what if she simply doesn't qualify for a loan modification? Then every lender who entertains a modification request can be subject to civil liability for rejecting an applicant? Would that chill HAMP modifications even more? Rest assured, we will see more cases like *Parker* reaching the Superior Court and the Massachusetts appellate courts in the near future.

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