

In The Superior Court of Carroll County

State of Georgia

Otis Wayne Phillips

Vs

Case #11 CV 00504

U.S. Bank, NA

FILED
GA. CARROLL COUNTY
CLERK _____ COURT
2011 NOV -2 PM 1:35
Alan J. Lee
CLERK SUPERIOR COURT
CARROLL COUNTY GEORGIA

Order Denying Defendant's Motion to Dismiss

Sometimes, only the courts of law stand to protect the taxpayer. Somewhere, someone has to stand up. Well, sometimes is now, and the place is the Great State of Georgia. The defendant's motion to dismiss is hereby denied.

The court finds the following to be the facts and law applicable to this motion:

1.

- Otis Phillips is behind on his house payments and is in grave danger of foreclosure.

-The United States Government paid taxpayer dollars to the largest of our financial institutions, and to the European Union Banks, in order to prop up those poorly run organizations.

-Twenty Billion of those dollars were handed over to the defendant, U. S. Bank.

-U. S. Bank agreed to participate in the U. S. Government's HAMP program to help struggling homeowners.

-U. S. Bank signed a Service Participation Agreement (SPA), in which the bailed out bank agreed to comply with the HAMP Guidelines for loan modification.

-The HAMP guidelines require U. S. Bank to perform modification services for all mortgage loans it services.

-Otis Phillips applied to modify his mortgage with U. S. Bank.

-U. S. Bank denied the request, without numbers, figures, or explanation, reasoning, comparison to the guidelines, or anything. U. S. Bank would not reveal to Mr. Phillips how his income, or his house, or his expenses would make him ineligible according to HAMP guidelines.

(This court cannot imagine why U. S. Bank will not make known to Mr. Phillips, a taxpayer, how his numbers put him outside the federal guidelines to receive a loan modification. Taking \$20 Billion of taxpayer money was no problem for U. S. Bank. A cynical judge might believe that this entire motion to dismiss is a desperate attempt to avoid the discovery period,

where U. S. Bank would have to tell Mr. Phillips how his financial situation did not qualify him for a modification. Or, perhaps he was qualified, yet didn't receive the modification, in violation of U. S. Bank's Service Participation Agreement (SPA). A cynical judge might think that, if the guidelines clearly prevented Mr. Phillips from getting his modification, then U. S. Bank would have trotted out that fact in mathematic equations, pie charts, and bar graphs, all on 8 by 10 glossy photo paper, with circles and arrows and paragraphs on the back explaining each winning number.¹ U. S. Bank's silence on this issue might heighten the suspicions of such a cynical jurist. I, on the other hand, am sure that nothing of the sort could be true. Maybe U. S. Bank no longer has any of the \$20 billion dollars left, and so their lack of written explanation might be attributed to some kind of ink reduction program to save money. I'm sure there is a perfectly reasonable explanation for why the U. S. Bank will not print out the ONE page of figures that show Mr. Phillip's financials compared to the HAMP guidelines to clear all this up.)

¹ Apologies to Arlo Guthrie, Alice's Restaurant

-Otis Phillips claims to have suffered as a result of U. S. Bank's actions, and

-Otis Phillips wishes to avoid foreclosure.

2.

Georgia law allows third party beneficiaries to sue on contracts that are clearly intended to benefit a third party. Multiple courts from a variety of jurisdictions have extended such standing to third parties harmed as a result of HAMP violations. (HAMP is not old enough to have generated a huge volume of cases.) Clearly, U. S. Bank cannot take the money, contract with our government to provide a service to the taxpayer, violate that agreement, and then say no one on earth can sue them for it. That is not the law in Georgia. In fact, since no administrative review is provided within HAMP, the courts are the only recourse. The Bank claims that the intended beneficiaries of HAMP are the very people who CAN'T sue. Such argument is absurd.

3.

Georgia law allows a third party to sue for negligence. Negligently implementing HAMP could sustain a claim in Georgia.

4.

Georgia law allows claims for breach of a duty of good faith and fair dealing. Here, there are two contracts, the SPA and the loan with Mr. Phillips. U. S. Bank, like all parties to any contract, has a duty of good faith and fair dealing. While difficult to define, jurors know good faith and fair dealing when they see it, and jurors can spot the absence of same.

5.

Georgia allows claims for Negligent Infliction of Emotional Distress by persons who are victim's of malicious, willful, or wanton conduct specifically directed at them, even if not a party to the contract whose breach causes such injury. This is a question for the jury.

6.

Georgia prohibits wrongful foreclosures. In fact, Federal law also prohibits wrongful foreclosures. Mr. Phillips claims that U. S. Bank is not the proper party to pursue such an action, and is merely the servicer of the loan, not the holder. Further, Mr. Phillips asserts that compliance with HAMP guidelines is a condition precedent to foreclosure.

Conclusion

There is no merit to Defendant's motion to dismiss, and same is hereby denied.



Judge Dennis Blackmon