

Bankruptcy judge smacks bank for phony 'investor,' discovery abuses

By: Kris Olson February 21, 2019



It's not uncommon for a struggling mortgagor to ask the bank for a loan modification.

Nor is it unheard of for the debtor to jump through whatever hoops the bank presents, only to have the bank deny the loan modification request.

But it is unusual for the bank's justification for the denial to turn out to be a complete sham.

Yet that's what happened to a client of Boston bankruptcy attorney Richard N. Gottlieb. That and a bevy of discovery abuses caused Judge Melvin S. Hoffman to bring the hammer down on the bank in the recent Bankruptcy Court ruling *In re: Deleveaux*.

Debtor Daisymae L. Deleveaux filed for Chapter 13 bankruptcy on Oct. 17, 2016. A week later, Flagstar Bank, which held a first-position mortgage on Deleveaux's Everett home, filed an objection to her Chapter 13 plan, alleging that she owed the bank over \$220,000, not the \$82,862 she had listed, the difference attributable to the bank's rejection of Deleveaux's request for a loan modification.

Back in 2013, Flagstar had approved Deleveaux for that loan modification on a trial basis. Deleveaux dutifully made the required payments, but the bank then "yanked back" the offer, explaining in a letter that an investor in the mortgage loan had balked at the request, Gottlieb recounted at a Jan. 17 hearing.

Flagstar eventually decided it wanted to foreclose on Deleveaux's home. On May 11, 2017, it filed a motion for relief from the automatic bankruptcy stay.

All the while, Deleveaux had been trying to get a post-petition loan modification, only to be stonewalled, with the bank requesting more information or documentation.

At a May 31, 2018, status conference, Hoffman established deadlines for the completion of discovery in advance of a hearing on the "consolidated contested matters."

Things started going off the rails last fall. Flagstar's Harmon Law Offices attorneys, Richard T. Mulligan and Joshua Ryan, requested a two-week extension to respond to the debtor's discovery requests, and then another extension. Gottlieb graciously assented.



But the new Nov. 15 deadline came and went with no response from Flagstar and no further communication from its attorneys. On Nov. 20, Gottlieb served Flagstar's counsel with a request for a discovery conference, which was held by telephone on Nov. 26. In that call, Flagstar's counsel was unable to say when the bank might respond to the discovery requests.

Gottlieb responded by filing a motion for sanctions against Flagstar. Hoffman set Dec. 20 as the deadline to respond to the motion and scheduled a hearing for Jan. 17.

On Dec. 18, Flagstar's counsel filed a response, admitting all of the factual allegations in the sanctions motion. The bank also represented that, "as of the filing of this response, counsel for the debtor has received Flagstar's responses to interrogatories and request for production of documents."

Technically, that was not true. Gottlieb never received the emailed version of its responses that Flagstar claimed to have sent and only got the copies sent via overnight mail the following day. But that was the least of the problems with Flagstar's response.

Gottlieb told Hoffman at the Jan. 17 hearing he could tell immediately that the responses, which had not been signed under penalties of perjury as required by rule, had not been prepared by Harmon Law Offices.

Moreover, most of the "responses" were nonresponsive. Flagstar objected to a number of the requests as "overly broad and unduly burdensome." One response trailed off, the sentence left incomplete. Flagstar also declined to provide the names or contact information of people involved with reviewing the debtor's loan modification applications. Witnesses' identities were promised at some indefinite point in the future.

At the Jan. 17 hearing, Ryan also acknowledged that Flagstar had been the owner of the loan all along and that there had never been any third-party "investor/owner" of the loan. The same "shocking position" pervaded Flagstar's discovery responses, Hoffman noted in his order on the debtor's motion for sanctions.

Hoffman was not pleased.

"Flagstar apparently thinks that it can treat its obligation to the Bankruptcy Court the same way it treats its obligations to its customers, which is basically to ignore them or be dismissive of them," he said at the hearing. "That is a big mistake."

Flagstar "repeatedly and without justification" refused to supply the debtor with basic information about why, how and by whom she had been rejected for a permanent loan modification, Hoffman noted, finding Flagstar's actions to be "a flagrant violation of this Court's discovery orders and a contempt of court."

Hoffman denied with prejudice Flagstar's motion for relief from the automatic stay, overruled its objection to the confirmation of the debtor's Chapter 13 plan, and sustained the debtor's objection to Flagstar's proof of claim. He also provided other forms of relief.



"He pushed back the hands of time to Aug. 1, 2013," Gottlieb explains.

For the purposes of the bankruptcy case, Hoffman established that the 2013 loan modification "was duly accepted by Flagstar and in full force and effect as of July 31, 2013." That fixed Deleveaux's pre-petition debt to Flagstar at \$82,862.

Hoffman also tripled the award of attorneys' fees Gottlieb had requested, from \$5,400 to \$16,200, a sum that Gottlieb happily reports he has, in fact, been paid.

Though Gottlieb made clear at the Jan. 17 hearing that he did not "place any fault with Harmon Law Offices or Mr. Ryan or anyone else at the law firm," Hoffman said at the hearing that he was considering pursuing a Rule 11 proceeding sua sponte.

Given Harmon's vast experience with responding to discovery requests in almost an "industrial fashion," Gottlieb says he cannot believe the firm is to blame for the apparent communication breakdown.

Dealing with Flagstar may now be someone else's problem. On Jan. 31, two Locke Lord attorneys, Joseph A. Farside Jr. and Krystle G. Tadesse, entered appearances in the bankruptcy case. On Feb. 5, they were joined by Derek A. Castello of Bendett & McHugh in Plainville.

However, Ryan and Mulligan have also yet to file notices of withdrawal in the case. They did not respond to Lawyers Weekly's request for comment.

Farside referred questions to Flagstar spokeswoman Susan E. Bergesen, who says Flagstar "takes its obligations to all courts of the commonwealth seriously and will pursue a resolution to this matter through the court system."