

**IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND**

MARK S. DEVAN, *et al.*,

Plaintiffs,

v.

CAROL G. SULLIVAN, *et al.*,

Defendant.

Civil No. 03-C-12-012422

MOTION TO STAY AND DISMISS

Defendants Carol G. Sullivan and Robert W. Sullivan III move, pursuant to Md. R. 14-211, to stay the sale of the property and [dismiss this foreclosure action](#). As outlined below, the [lender failed to grant a loan modification](#) that should have been granted, and the documents filed in this case misstate the amount of the debt by failing to account for payments.

1. *Affidavits.* This motion is supported by the attached affidavits.
2. *Factual & Legal Bases of Defenses.*

The Documents Filed in this Case Misstate the Amount of the Debt

- 2.1. On August 1, 2012, the substitute trustees sent the borrowers the Notice of Intent to Foreclose filed in this case. (Ex. 1, Notice of Intent to Foreclose.) The notice reflects the date of default as “03/02/2009”. (*Id.* at 5.) However, in its January 25, 2011 correspondence, the mortgage servicer stated, “I am pleased to confirm that the above noted loan is current.” (Ex. 2, ASC’s Jan. 25, 2011 Letter.)

- 2.2. The loan could not have been current in January 2011 if the date of default was in March 2009.
- 2.3. Clearly, there has been an error in the calculation of any past due amounts, amounting to a misstatement of the amount of the debt. The error is the result of failing to factor payments. (*See id.*)
- 2.4. Therefore, if there is a default, the amount thereof is unknown.

The Borrowers Deny that the Entire Mortgage Debt is Due and Payable, As There is No Foreclosure-Triggering Default

- 2.5. The borrowers deny that the entire mortgage debt is due and payable because the mortgage servicer failed to grant loss mitigation that should have been granted, thus there is no foreclosure-triggering default that would permit acceleration of the mortgage balance.
- 2.6. In *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 728 (2007), the Court of Appeals held that, “[U]nder principles of equity, a mortgagee’s commencement of a foreclosure proceeding . . . without first having adhered to the mandatory HUD loss mitigation regulations, may invalidate the mortgagee’s declaration of default.”
- 2.7. In its comment to Md. R. 14-211(a)(3)(B), the Maryland Standing Committee on Rules of Practice and Procedure stated, “The failure to grant loss mitigation that should have been granted . . . may be a defense to the right of the plaintiff to foreclose in the pending action.”
- 2.8. In September 2009, the borrowers entered into a Trial Period Plan (TPP) with the servicer under the Home Affordable Modification Program (HAMP). (Aff. Sullivan ¶ 3; Ex. 3, ASC’s Computer Notes at 16)

(09/24/09 note); Ex. 4, ASC's Oct. 13, 2009 Letter ("Our records also reflect that you have responded to the Home Affordable Modification Program inquiry.") The TPP contract provided that if the borrowers made three timely payments under the TPP, then the servicer would offer to make the TPP a permanent modification. (Aff. Sullivan ¶ 3.) The borrowers made the requisite three timely payments, thus the servicer failed to grant loss mitigation that should have been granted when it failed to offer a permanent modification. (*Id.*; Ex. 5, TPP Payments.)

2.9. In January 2010, the servicer entered into a second TPP with the borrowers. (Ex. 6, ASC's Jan. 14, 2010 Letter ("You did it! By entering into a Home Affordable Modification Trial Period Plan")) The terms of the second TPP contract mirrored the terms of the initial TPP contract. (Aff. Sullivan ¶ 4.) The borrowers again made the requisite three timely payments, thus the servicer again failed to grant loss mitigation that should have been granted when it again failed to offer a permanent modification. (*Id.*; Ex. 5, TPP Payments.)

3. *Supporting Documents & Discovery Requests.* This motion is supported by the attached documents. A request for the discovery of specific supporting documents in the possession or control of the plaintiffs or secured party further accompanies this motion.

4. *Collateral Actions.* The borrowers are unaware of any collateral actions that involve the property.

5. *Service.* The borrowers were served with the Order to Docket (Doc. No. 1) on January 26, 2013.

6. This motion is filed presently for good cause under Md. R. 14-211(a)(2)(C).

WHEREFORE, Defendants Carol G. Sullivan and Robert W. Sullivan III respectfully request an order staying the sale of the property; an order scheduling a hearing on the merits pursuant to Md. R. 14-211(b)(2); and an order dismissing this foreclosure action.

Respectfully submitted,



Jason A. Ostendorf, Esq.

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Dated: January 13, 2016


*Counsel for Carol G. Sullivan & Robert
W. Sullivan III*

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2016, a copy of the foregoing was sent by first-class mail, postage prepaid to:

Richard Lash, Esq.
Robert E. Kelly, Esq.
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Counsel for Substitute Trustees



Jason Ostendorf, Esq.

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ORDER

Upon consideration of the borrowers' Motion to Stay and Dismiss, it is, this ____ day of _____, 2016, ORDERED:

1. The borrowers' said motion is GRANTED insofar as it seeks a stay of any sale of the property pending a merits hearing;
2. Any scheduled sale of the property is hereby STAYED pending a merits hearing;
3. The clerk shall schedule a merits hearing on the borrowers' said motion.

Judge
Circuit Court for Baltimore County, Maryland

cc: Jason A. Ostendorf, Esq.
Richard Lash, Esq.
Robert E. Kelly, Esq.