

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
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NOTICE OF DECISION

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Case Name: **Irvin Joseph Fortin, et al v Green Tree Servicing, LLC, et al**
Case Number: **218-2011-CV-01293**

Enclosed please find a copy of the court's order of September 26, 2014 relative to:

Order on the Merits

September 29, 2014

Raymond W. Taylor
Clerk of Court

(504)

C: William Philpot, JR

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

Irvin Joseph, et al.

v.

Green Tree Servicing, LLC, et al.

218-2011-cv-1293

ORDER ON THE MERITS

Plaintiffs Irvin Joseph and Theresa Joseph¹ brought suit against Green Tree Servicing, LLC, Federal National Mortgage Association, and Litton Loan Servicing, L.P., for breach of contract, negligence, violation of RSA ch. 358-A, unjust enrichment, breach of the implied covenant of good faith and fair dealing, misrepresentation, promissory estoppel, and violation of 15 U.S.C. §1641. Plaintiffs also sought avoidance of the mortgage for non-compliance with RSA ch. 477. Plaintiffs settled their suit with Litton Loan Servicing, L.P. (Litton). The remaining defendants are therefore Green Tree Servicing, LLC ("Green Tree") and Federal National Mortgage Association. An evidentiary hearing on the merits was held on August 11, 2014 at which Ms. Joseph, Mr. Joseph, and Thomas Krehel, an employee of Green Tree testified. After hearing evidence, the Court finds and rules as follows.

Evidence

In April of 2007, the Josephs purchased a home at 2 Linda Road in Derry. They financed the home with a \$175,000 mortgage that was serviced by Litton. The Josephs were required to pay \$1,227.12 per month on the note. Ex. D. This figure did not

¹ Ms. Joseph initially brought suit as Theresa Fortin, but has apparently since changed her last name to Joseph.

include any escrow items. No evidence has been provided to the Court demonstrating what escrow items were to be paid, how much the payments were for, and to what extent they were paid. The Court was not provided with a copy of the mortgage.

The Josephs had their hours reduced at work and subsequently encountered financial difficulties. As a result, they fell behind on their payments and entered into default. Effective August 1, 2008, they entered a Home Affordable Modification Program trial period with Litton. Pls.' Summ. Evid. Issues, Ex. A. They were to pay \$944.97 per month for three months to qualify for the modification. That figure included \$476.33 in monthly escrow payments. The Josephs were accepted into the modification, but no document has been provided to the Court explaining its terms. Apparently, as a standard practice in loan modifications, unmet payments are recapitalized, or added to the principle owed. The term of the mortgage was also extended by 4 years. It is unclear if the interest rate, originally 7.5% annually, was lowered. The Josephs continued making payments, albeit irregularly. On January 1, 2011, Litton ceased being the servicer and Green Tree took over.

The parties agree that between July 30, 2009 and September 5, 2013, the Josephs paid \$50,375.70. During the pendency of this case, the Josephs continued to make some payments. Mr. Joseph testified that from July 30, 2009 to April 11, 2014 he had made a total of \$60,630.33 in payments. In support of this contention, printouts of Plaintiffs' bank records were introduced in evidence. Ex. 1. The Court credits this testimony.

What happened to the payments next is a matter of some dispute. Apparently, when Mr. Joseph sent payments to Green Tree, these payments were sometimes

returned via check. Mr. Joseph testified that he deposited some of these checks and burned other checks. Some of the payments he made were credited to his account.

Green Tree introduced several sets of exhibits. Apparently, expense and time constraints prevented Plaintiffs from obtaining their bank records, so they executed releases to Green Tree who subpoenaed their bank accounts between July of 2009 and September of 2013. In summaries of payments, Green Tree confirmed that \$23,763.27 was applied to Plaintiffs' account as of September 5, 2013. Green Tree also confirmed that \$16,629.76 was returned to Plaintiffs and deposited in their accounts via check. Neither party is able to account for \$10,319.00 that, according to Green Tree, was paid but neither credited by Green Tree or deposited by the Josephs. See Exs. A & B.

The Josephs believe that the principle on their mortgage should be \$170,090.02. This figure is based on an accounting from Green Tree before the mortgage was recapitalized. Ex. C. Green Tree disputes this, and claims the principle is \$272,866.31. This accounting includes \$8,277.21 in recapitalized principle, \$44,528 in recapitalized interest, and \$49,971.08 in recapitalized escrow payments. Ex. F. The recapitalization reflects payments allegedly missed from July 1, 2010 to February 2, 2014. Id. Neither party was able to explain what, exactly, escrow payments were made. The Court was not presented with receipts from Green Tree for payment for these items.² Nor was it presented with bills due the Josephs for these items.

Findings

This dispute does not require the Court to address any legal issues as the parties have not raised any. It is purely a question of fact. The Court first pauses to note the

² Plaintiffs sought these receipts or an accounting from Green Tree in discovery but they were never provided.

sparse state of the evidentiary record. Many crucial documents to the determination—such as bills due the Josephs or the terms of the mortgage modification—were not provided to the Court. Nor were any receipts explaining the escrow payments made by Green Tree. While the Court is aware that, as the moving party, Plaintiffs bear the burden of proof, some documents such as the escrow receipts were more likely in the possession of Green Tree and were not disclosed. The Court may draw an adverse inference from discovery violations. N.H. R. Super. Ct. (Civil) 21(d)(1)(B). The Court is being asked to decide a factual issue on a sparse record, so it has done the best it can.

The Court finds as follows. Plaintiffs owe, to begin with, \$171,215.98. This reflects the remaining principle as of June 30, 2010—the time after which Green Tree recapitalized the mortgage.

As to the principle and interest accrued after that, Green Tree has computed the total owed and unpaid to be \$52,805.21. Ex. F. This time period is based upon 43 months of payments at \$1,227.12 per month.³ The parties do not dispute, that, of this, Plaintiffs paid \$10,518.62 between June 30, 2010 and September 5, 2013.⁴ This figure was calculated from Exs. A & B. The Court also credits Mr. Josephs' testimony that he paid Green Tree \$5,128 between September 6, 2013 and February 1, 2014. It is further undisputed that Mr. Joseph deposited returned checks in the amount of \$16,629.76. Ex. B. As to the unaccounted for money, the Court credits, generally Mr. Joseph's

³ The uncontroverted testimony was that, since the modification, Plaintiffs were only required to pay \$944.97 per month. However, there was testimony that these modifications are financed by recapitalizing. As it is Plaintiff's burden and they have not introduced any evidence to the contrary, the Court accepts that the modification was financed, in part, by recapitalizing the difference between these two figures for some time.

⁴ Ex. B lists a payment for 944.97 which was accepted by Green Tree. Plaintiff's bank records note it as being made September 5, 2014 (Ex. 1) but Green Tree lists the transaction date as October 31, 2014 back dated to September 5. Ex. C. The date the payment was made is immaterial, but the Court makes this explanation to assure the parties the payment is not being counted twice.

testimony that some these checks were burned. The Court notes that Green Tree has not provided cancelled checks to either Plaintiffs or the Court. Nonetheless, Mr. Joseph was not able to explain how many checks or for what amount were immolated. He may have also had other bank accounts, into which these checks were deposited. Thus, the Court finds that half the money, \$5,159.94 was retained by Mr. Joseph and half by Green Tree. In total, therefore, the bank properly recapitalized \$31,998.65 in principle and interest.⁵

As to escrow items, the bank recapitalized \$49,971.08. This figure is reflected on columns 83 to 118 on Ex. F. No evidence was introduced to support this figure, and Green Tree's witness could not explain it. As this information was requested and presumably in Green Tree's possession, the Court may draw an adverse inference. Nor was any evidence introduced to explain what the Josephs' required escrow payment was, or how much of it was paid. The Court concludes, on the basis of the monthly escrow payment required in the modification trial period, that escrow was to be paid at \$476.33 per month. This is the only evidence before the Court on the matter. Plaintiffs introduced no evidence that this money was ever paid. The Court finds therefore \$20,482.18—43 months at \$476.33 per month—is an appropriate amount to recapitalize for escrow items.

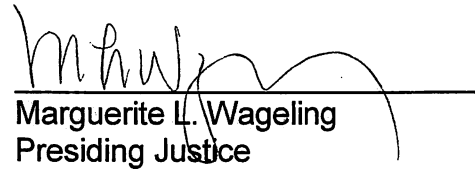
In conclusion, the Court finds that the principal owed, as of the February 1, 2014 recapitalization is \$223,696.82. This figure is the sum of \$171,215.98, the principle as of June 30, 2010, \$31,998.65, the properly recapitalized principle and interest from that date to February 1, and \$20,482.18, the properly recapitalized escrow. The money

⁵ \$52,805.21 - (\$10,518.62 + \$5,128 + \$5,159.94).

Plaintiffs have paid since February 1, 2014 is to be treated in the ordinary course of business.

So Ordered.

Sept 26, 2014
Date


Marguerite L. Wageling
Presiding Justice