

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

<b>WELLS FARGO BANK, N.A.</b>	)	
	)	<b>C.A. No. 09L-07-295 MJB</b>
<b>Plaintiff,</b>	)	
	)	<b>NON-ARBITRATION</b>
<b>v.</b>	)	<b>In Rem</b>
	)	<b>Sci. Fa. Sur Mortgage Action</b>
<b>EVAN O. WILLIFORD, and,</b>	)	<b>Mortgage Record 200771101-</b>
<b>DIONNE D. WILLIFORD,</b>	)	<b>0094999</b>
	)	
<b>Defendants.</b>	)	

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<b>WELLS FARGO BANK, N.A.</b>	)	
	)	<b>C.A. No. N11C-08-090 MJB</b>
<b>Plaintiff,</b>	)	
	)	<b>JURY TRIAL DEMANDED</b>
<b>v.</b>	)	
	)	
<b>EVAN O. WILLIFORD, and,</b>	)	
<b>DIONNE D. WILLIFORD,</b>	)	
	)	
<b>Defendants.</b>	)	

Submitted: May 24, 2012

Decided: August 21, 2012

Upon Defendants' Motion for Summary Judgment Dismissing In Personam Action, **DENIED.**

**OPINION & ORDER**

Geoffrey G. Grivner, Esquire, and Mark Pfeiffer, Esquire, Buchanan Ingersoll & Rooney PC, Wilmington, Delaware, Attorneys for Wells Fargo Bank, N.A. and Federal Home Loan Mortgage Corporation.

Sarah M. Rutigliano, Esquire, and Lisa Keil Cartwright, Esquire, Atlantic Law Group, Wilmington, Delaware, Attorneys for Wells Fargo Bank, N.A.

Evan O. Williford, Esquire, Newark, Delaware, Attorney for Evan O. Williford and Dionne D. Williford.

**BRADY, J.**

## Introduction

This action began as a *scire facias sur* mortgage action, originally brought on July 26, 2009 by Wells Fargo Bank, N.A. (“Wells Fargo”) against Evan and Dionne Williford (“the Willifords”), for foreclosure of Wells Fargo’s interest in property located in Newark, Delaware. On August 28, 2009, counsel for Wells Fargo requested that the Court place this action on the dormant docket, advising that Wells Fargo entered into a modification agreement with the Willifords, and that Wells Fargo intended to proceed to foreclose if the Willifords failed to honor the terms of their agreement.<sup>1</sup> The Court placed the action on the dormant docket on September 15, 2009. Wells Fargo filed a Direction for Entry of Default Judgment with the Court on May 7, 2010, and then moved to vacate the default judgment and provide the Willifords an opportunity to answer Wells Fargo’s Complaint on May 14, 2010. In July 2010, the Willifords filed an Answer with Counterclaims against Wells Fargo and Federal Home Mortgage Corporation, as a third party defendant, (collectively, “Defendants”), asserting breach of contract and promissory estoppel allegations and seeking declaratory judgment setting forth the parties’ rights and obligations in connection with the mortgage that is the subject of the litigation. In August 2011, the Willifords commenced an *in personam* action against Wells Fargo and Federal Home Mortgage Corporation, alleging that Wells Fargo offered, and the Willifords accepted, a hardship loan modification under the federal Home Affordable Modification Program (“HAMP”). The *in personam* Complaint contains claims for fraud, deceptive trade practices, breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel. On September 22, 2011, the Court granted a motion to consolidate the actions.

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<sup>1</sup> Letter from Kathryn E. Burritt, Paralegal to Michelle Berkley-Ayres, Esquire, Atlantic Law Group, LLC, to Judicial Case Manager to the Hon. M. Jane Brady (Aug. 28, 2009).

On November 17, 2011, the Court granted summary judgment to dismiss the Willifords' counterclaims in the foreclosure action, on two bases. First, the Willifords' counterclaims were permissive and therefore barred by law.<sup>2</sup> Second, pursuant to explicit limiting language, a HAMP trial period plan agreement ("TPP") between the Willifords and Wells Fargo was not a modification of the original mortgage agreement, either outright or pursuant to conditions precedent, and therefore did not discharge, replace, pay, or satisfy the Willifords' obligations under the original mortgage agreement.<sup>3</sup> The Court's ruling focused on the limited defenses and counterclaims permitted by Delaware law in *scire facias sur* mortgage actions.<sup>4</sup>

Defendants filed the present Motion for Summary Judgment to dismiss the *in personam* action on April 24, 2012. The Willifords filed their Response to the Motion on May 17, 2012. The Court heard the Motion on May 24, 2012. For reasons stated herein, the Court **DENIES** the Motion.

#### *Factual Background*

On August 27, 2009, the Willifords signed and returned to Wells Fargo a TPP to participate in a loan trial period for the HAMP.<sup>5</sup> The TPP provided that the Willifords' participation in the trial period could lead to a permanent loan modification.<sup>6</sup> Section 2 of the TPP provided as follows:

F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true

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<sup>2</sup> *Wells Fargo Bank, N.A. v. Williford*, No. 09L-07-295, 13 (Del. Super. Nov. 17, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 8-9.

<sup>5</sup> *See* Pls.' Resp., Ex. A.

<sup>6</sup> *See id.*

and correct, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

G. I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan. . . .<sup>7</sup>

The Willifords submitted as Exhibits to their Response to this Motion two untitled documents dated August 22, 2009, demonstrating a creditor decision to provide the Willifords a HAMP term extension.<sup>8</sup>

#### *Parties' Contentions*

Defendants contend they are entitled to summary judgment for the *in personam* action in its entirety under the “law of the case” doctrine.<sup>9</sup> Defendants argue, “The Court has already decided that the Borrowers were not offered a modification of their mortgage. Since all of Borrowers claims in the *in personam* action are premised on the Lenders offering Borrowers a modification to their mortgage, summary judgment against the Borrowers is warranted.”<sup>10</sup>

The Willifords respond that the Court’s opinion in the *in rem* action does not control the merits of any claim not asserted as a counterclaim. They argue that the Court’s conclusion that the TPP was not, in and of itself, a modification to the mortgage does not amount to a forever preclusion of other claims in this case; the Court barred their counterclaims in the *in rem* case

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<sup>7</sup> *Id.*

<sup>8</sup> Pls.’ Resp. Exs. B & D.

<sup>9</sup> Defs.’ Mot. ¶ 9.

<sup>10</sup> *Id.* ¶ 10.

because they were permissive, and permissive counterclaims are barred in *scire facias sur* mortgage actions. The Willifords posit that “numerous courts” have ruled that an action for breach of contract based upon a HAMP trial period TPP is actionable.<sup>11</sup> They argue that discovery confirms their “belief that an agreement had been reached to modify the Note and Mortgage.”<sup>12</sup>

### **Standard of Review**

A party may move for summary judgment under Superior Court Civil Rule 56. Upon a motion for summary judgment, the Court reviews the record in the light most favorable to the non-moving party and will grant summary judgment only if no genuine issues of material fact are in dispute.<sup>13</sup> Summary judgment will be denied if material issues of fact exist or if the record lacks information necessary to clarify application of the law to the circumstances.<sup>14</sup>

### **Discussion**

“The law of a case is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation.”<sup>15</sup> “The ‘law of the case’ doctrine requires that issues already decided by the same court should be adopted without relitigation, and ‘once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.’”<sup>16</sup>

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<sup>11</sup> Pls.’ Resp. ¶ 11.

<sup>12</sup> *Id.* ¶ 2.

<sup>13</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979);

<sup>14</sup> *Ebersole*, 180 A.2d at 468.

<sup>15</sup> *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000) (citing *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)).

<sup>16</sup> *May v. Bigmar, Inc.*, 838 A.2d 285, 288 (Del. Ch. 2003) *aff’d*, 854 A.2d 1158 (Del. 2004).

The “law of the case” doctrine applies to the present case, because the facts have remained constant since the Court’s decision dismissing the counterclaims in the *in rem* proceeding. That decision required the Court to analyze the parties’ TPP to infer whether they intended to modify the original mortgage agreement, in which case the Willifords could have had a proper defense to the foreclosure action.<sup>17</sup> The Court found that “because the [TPP] was not a modification of the parties’ original mortgage agreement, the Willifords’ counterclaims, which arise out of the [TPP], do not arise out of the original mortgage agreement.”<sup>18</sup>

Defendants take the position that the Court decided that Wells Fargo did not *offer* the Willifords a modification of their mortgage.<sup>19</sup> That argument is premised upon an inaccurate reading of the decision. The Court ruled in its November 17, 2011 Opinion only that the TPP did not, in and of itself, constitute a modification of the original mortgage agreement. The Court resolved that “[t]he agreement, by a reading of its ordinary language, demonstrates Wells Fargo’s intent that the payments the Willifords made pursuant to the TPP apply toward the amount the Willifords owed under the original mortgage agreement without immediately modifying the original mortgage agreement.”<sup>20</sup> “Law of the case” doctrine binds the Court only to the holding that the TPP was not a modification of the original mortgage agreement. The finding that the TPP did not constitute an immediate and effective modification does not preempt the possibility that a trier of fact could find that Wells Fargo extended an offer of modification to the Willifords, through the TPP, other communications and dealings between the parties, or a combination thereof.

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<sup>17</sup> The only permissible defenses in a *scire facias sur* mortgage action are payment, satisfaction, or a plea in avoidance, meaning an assertion the plaintiff has no right to payment. *See Wilmington Trust Co. v. The Bethany Group Ltd. P’ship*, 1999 WL 288686, at \*7 (Del. Super. June 3, 1993); *LaSalle*, 2005 WL 1284049, at \*2.

<sup>18</sup> *Wells Fargo Bank, N.A. v. Williford*, No. 09L-07-295, 14 (Del. Super. Nov. 17, 2011).

<sup>19</sup> Defs.’ Mot. at 4.

<sup>20</sup> *Wells Fargo Bank, N.A. v. Williford*, No. 09L-07-295, 11 (Del. Super. Nov. 17, 2011).

In their Motion, Defendants construe a statement in the Court’s November 17, 2011 Opinion, that the TPP did not promise the Willifords a modification of the original mortgage agreement “either outright or pursuant to conditions precedent”<sup>21</sup> to mean that the TPP could not constitute an offer by Wells Fargo to modify the mortgage, even if the parties fulfilled the conditions precedent laid out in the TPP.<sup>22</sup> The Court has reviewed recent case law on issues relating to HAMP TPP agreements, and writes now to clarify its holding.

HAMP agreements are the subject of litigation throughout the United States. A split of authority exists as to the question of whether a TPP can constitute an enforceable offer to permanently modify an original loan.<sup>23</sup> A majority of courts espouse the view that the parties must fulfill the conditions<sup>24</sup> imposed by a HAMP TPP, including that a lender provide a borrower a fully executed copy of the TPP and modification agreement, for a TPP to yield a binding contract for a permanent loan modification.<sup>25</sup> It follows that the same courts rule that, without pleading receipt of a fully executed copy of a permanent loan modification, a plaintiff cannot properly plead a breach of contract because no contract exists.<sup>26</sup>

Under an alternative reading of HAMP TPP agreements, a line of cases led by the Seventh Circuit Court of Appeals decision in *Wigod v. Wells Fargo Bank, N.A.*,<sup>27</sup> have held that

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<sup>21</sup> *Id.* at 11.

<sup>22</sup> See Pls.’ Resp., Ex. A. §§ 2.F. & 2.G.

<sup>23</sup> *Sutcliffe v. Wells Fargo Bank, N.A.*, 2012 WL 1622665, \* 17, -- F.R.D. --- (N.D. Cal. May 9, 2012).

<sup>24</sup> The Plan agreement states: “I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all conditions required for the modification, (ii) I receive a fully executed copy of a Modification Agreement . . . .” Pl.’s Resp. Ex. A, Step One of Two-Step Documentation Process, ¶ 2.G.

<sup>25</sup> See *Lucia v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 1059, 1066-69 (N.D. Cal. 2011); *Bourdelais v. J.P. Morgan Chase*, 2011 WL 1306311, \*5 (E.D. Va. Apr. 1, 2011); *Stovall v. SunTrust Mortg., Inc.*, 2011 WL 4402680, \*11-12 (D. Md. Sept. 20, 2011).

<sup>26</sup> See *Lucia v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 1059, 1066-69 (N.D. Cal. 2011); *Bourdelais v. J.P. Morgan Chase*, 2011 WL 1306311, \*5 (E.D. Va. Apr. 1, 2011); *Stovall v. SunTrust Mortg., Inc.*, 2011 WL 4402680, \*11-12 (D. Md. Sept. 20, 2011).

<sup>27</sup> See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562-63 (7th Cir. 2012); *Sutcliffe v. Wells Fargo Bank, N.A.*, 2012 WL 1622665, \*19-\*20 (N.D. Cal. May 9, 2012); *Gaudin v. Saxon Mortg. Services, Inc.*, 2011 WL 5825144, \*5 (N.D. Cal. Nov. 17, 2011).

the provision for a modification to be complete only upon a borrower's receipt of a fully executed modification agreement from the lender "turns an otherwise straightforward offer into an illusion"<sup>28</sup> by conferring "unbridled discretion" upon the lender.<sup>29</sup> In *Wigod*, the lender sent the borrowers a fully executed copy of a TPP.<sup>30</sup> The Seventh Circuit found that the lender was obliged to offer the borrowers a permanent modification upon the borrowers' fulfillment of the conditions set forth in the agreement, even though the lender did not provide the borrower a fully executed modification agreement.<sup>31</sup> The court found that the more natural interpretation of the provisions in section 2.G provided "no permanent modification existed unless and until" the borrowers met the TPP conditions, the lender executed a modification agreement, and the effective modification date passed.<sup>32</sup> Elaborating on *Wigod*, the Eastern District of Pennsylvania subsequently held, in *Cave v. Saxon Mortg. Srvs., Inc.*,<sup>33</sup> that, rather than providing lenders unfettered discretion as to their obligations, the provisions in Section 2.G "simply set forth reasons why the permanent modification *would not occur automatically* upon the expiration of the three-month trial period."<sup>34</sup> The court concluded the TPP obligated the lender to provide the borrowers a loan modification if they qualified or a written denial if they did not qualify.<sup>35</sup>

The issue of whether Wells Fargo's provision of a modification agreement to the Willifords was a condition precedent to enforceability of the TPP as an offer to modify the original mortgage is not squarely before the Court. Therefore, the Court will not adopt either of the aforementioned approaches to the TPP at this time. However, in light of the federal courts' readings of the language in Section 2.G of HAMP TPP agreements, the Court reiterates its

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<sup>28</sup> *Wigod*, 673 F.3d at 563.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 2012 WL 1957588 (E.D. Pa. May 30, 2012).

<sup>34</sup> *Cave v. Saxon Mortg. Services, Inc.*, 2012 WL 1957588, \*7 (E.D. Pa. May 30, 2012) (emphasis in original).

<sup>35</sup> *Id.* at \*7.

November 17, 2011 holding that the TPP between the parties did not constitute or promise a modification of the original mortgage agreement. However, whether the TPP amounted to an offer for a modification is an issue that has been the subject of the cases discussed in the foregoing paragraphs, and which is still at issue in the present litigation. Therefore, the Court **DENIES** Defendants' Motion for Summary Judgment.

**IT IS SO ORDERED.**

*/s/*  
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**M. Jane Brady**  
Superior Court Judge