

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

First Horizon Home Loans, a division of First Tennessee Bank )  
National Association, )

Plaintiff, )

v. )

Clarence Smithson a/k/a/Clarence M. Smithson, Abbie Smithson )  
a/k/a Abbie T. Smithson, Unknown Owners and )  
Non-Record Claimants, )

Defendants. )

No. 09 CH 4858

**MEMORANDUM ORDER AND OPINION**

A court must set aside the sale of foreclosed property if, more than seven business days before the sale, the mortgagor applied for assistance under the United States Treasury Department's Making Home Affordable Program and the sale materially violated the program's requirements. Although the defendants here submitted a HAMP application 25 days prior to the judicial sale of their property, the sale went forward in material violation of HAMP. As a result, the sale must now be set aside.

**FACTS**

The Smithsons signed a mortgage for their residence at 2815 Paris Road, Olympia Fields, Illinois, as collateral for a promissory note provided by First Horizon. The Smithsons later defaulted on the note, and First Horizon filed a complaint for foreclosure. On September 10, 2009, the circuit court entered a judgment in First Horizon's favor. On June 4, 2012, the Smithsons contacted First Horizon to postpone the scheduled June 15, 2012 judicial sale. First Horizon responded by giving the Smithsons less than 24 hours to submit a complete HAMP loan modification package. The Smithsons managed, nonetheless, to submit the package the same day, and First Horizon acknowledged receipt of the application. After public notice, First Horizon rescheduled the sale, which took place on June 29, 2012.

First Horizon later filed a motion to approve the sale to which the Smithsons responded and First Horizon replied. At a March 11, 2013 hearing, the circuit court expressly provided First Horizon with additional time to "submit affidavits or other documents as to the lender's participation in HAMP. . . ." First Horizon did not provide any supplemental submissions.

**STATUTORY AND REGULATORY AUTHORITY**

The Illinois Mortgage Foreclosure Act governs the sale of foreclosed property in this state. One of the statute's sections provides, in part, that:

The court that entered judgment shall set aside a sale held pursuant to Section 15-507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury . . . and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale.

735 ILCS 5/15-1508(d-5). The United States Department of the Treasury authorizes the HAMP program. To that end, the department issued and periodically updates a handbook to guide HAMP servicers of mortgage loans not owned or guaranteed by Fannie Mae or Freddie Mac. The handbook provides that:

When a borrower submits a request for HAMP consideration after a foreclosure sale date has been scheduled and the request is received no later than midnight of the seventh business day prior to the foreclosure sale date (Deadline), the servicer must suspend the sale as necessary to evaluate the borrower for HAMP. Servicers are not required to suspend a foreclosure sale when: (1) a request for HAMP consideration is received after the Deadline; (2) a borrower received a permanent modification and lost good standing (as described in Section 9.4); (3) a borrower received a TPP offer and failed to make one or more payments under the TPP by the last day of the month in which it was due; or (4) a borrower was evaluated based upon an Initial Package and determined to be ineligible under HAMP requirements.

U.S. Dep't of the Treasury, "Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages," version 3.4 (eff. Dec.15, 2011) ch. II, § 3.3, [https://hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_31.pdf](https://hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_31.pdf) (accessed Apr. 18, 2013).

## **ANALYSIS**

The statute's prohibition-against-sale provision requires first a showing that the borrower submitted a HAMP application at least seven business days before a scheduled sale. Here, it is undisputed that the Smithsons submitted their HAMP application to First Horizon on June 4, 2012, 11 days before the originally scheduled June 15, 2012 sale date and 25 days before the rescheduled and actual June 29, 2012 sale date. The only remaining statutory requirement is that the sale constituted a material violation of the HAMP guidelines.

First Horizon makes several related arguments that it did not materially violate HAMP's guidelines. The worst is the claim that the Smithsons offered no evidence that First Horizon was a HAMP lender or that it reviewed them for a HAMP modification versus an in-house one. That argument takes chutzpah. If it were not a HAMP lender, First Horizon violated federal and state banking regulations and exposed itself to a common-law fraud charge by inviting the Smithsons to submit a HAMP application and then reviewing them for an in-house modification. Most

telling, First Horizon chose not to take advantage of the court's invitation to supplement the record with evidence that it is not a HAMP lender.

Running a close second is the argument that First Horizon did not materially violate the HAMP guidelines because they do not authorize a court "to set aside a sale based on an alleged error in the lender's administration and assessments [sic] of a borrower's request for a HAMP loan modification." That argument excuses federal and state banking violations with incompetence. First Horizon should be far more prudent in making such an admission. Regardless, First Horizon's internal failings are irrelevant in the face of the statutory and regulatory standards.


Finally, First Horizon argues that it proceeded to the judicial sale only after it had rejected the Smithsons' HAMP application. That may be true, but First Horizon waived the argument by failing to offer any corroborating evidence. The preponderance of the evidence, therefore, plainly favors the Smithsons. (It should be noted that First Horizon does not attempt to argue in support of either of the guidelines' two remaining exceptions authorizing a sale – that the Smithsons received a permanent loan modification or failed to make a payment under a temporary payment plan.)

In sum, First Horizon's arguments fail for the obvious reason that a sale of foreclosed property is material; if a sale were immaterial, the guidelines would not prohibit it under the conditions provided. Indeed, First Horizon's ultimate goal in filing this lawsuit was to transfer ownership of the mortgage collateral from the Smithsons to a successful bidder. To suggest that a prohibition-of-sale provision contained in a state statute and federal guidelines is immaterial ultimately means that First Horizon's lawsuit and the years of court proceedings in this matter are also immaterial. This court does not share such a cynical view. For that reason:

- (1) the June 29, 2012 judicial sale of 2815 Paris Road, Olympia Fields, Illinois is vacated;
- (2) First Horizon's motion to approve the sale is denied; and
- (3) the April 24, 2013 hearing date is stricken.

So ordered.

Dated: April 19, 2013

  
John H. Ehrlich, Circuit Court Judge  
Judge John H. Ehrlich

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