

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - December 19, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-03143
2011-03146

DECISION & ORDER

Aurora Loan Services, LLC, appellant, v
Shahmela Shah Sookoo, et al., defendants.

(Index No. 1043/08)

Tompkins, McGuire, Wachenfeld & Barry, LLP, New York, N.Y. (Andrew P. Zacharda of counsel), for appellant.

In an action to foreclose a mortgage, the plaintiff appeals (1) from an order of the Supreme Court, Kings County (Schack, J.), dated March 31, 2009, which denied that branch of its motion which was pursuant to RPAPL 1321 for an order of reference appointing a referee to ascertain and compute the amount due to it, with leave to renew, inter alia, upon its presentation of “all loan origination documents” with respect to the subject mortgage, and (2) from an order of the same court dated August 14, 2009, which denied that branch of its renewed motion which was pursuant to RPAPL 1321 for an order of reference and, sua sponte, directed the dismissal of the complaint with prejudice and the cancellation of a notice of pendency filed January 10, 2008.

ORDERED that on the Court’s own motion, the plaintiff’s notice of appeal from so much of the order dated August 14, 2009, as, sua sponte, directed the dismissal of the complaint with prejudice and the cancellation of the notice of pendency, is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order dated March 31, 2009, is reversed, on the law, without costs or disbursements, and that branch of the plaintiff’s motion which was pursuant to RPAPL 1321 for an order of reference appointing a referee to ascertain and compute the amount due to it is granted; and it is further,

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ORDERED that the appeal from so much of the order dated August 14, 2009, as denied that branch of the plaintiff's renewed motion which was for an order of reference is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the order dated March 31, 2009; and it is further,

ORDERED that the order dated August 14, 2009, is reversed insofar as reviewed, on the law, without costs or disbursements; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Kings County, for further proceedings before a different Justice.

The defendant Shamela Shah Sookoo defaulted on her mortgage loan. The plaintiff, the holder of the mortgage and allegedly the holder of the note, commenced this action to foreclose the mortgage. None of the defendants appeared in the action or answered the complaint. As a result, the plaintiff moved, inter alia, pursuant to RPAPL 1321 for an order of reference appointing a referee to ascertain and compute the amount due to it. In an order dated March 31, 2009, the Supreme Court denied the aforementioned branch of the plaintiff's motion with leave to renew, among other things, upon its presentation of "all loan origination documents" with respect to the subject mortgage. Subsequently, in an order dated August 14, 2009, the Supreme Court denied that branch of the plaintiff's renewed motion which was for an order of reference and, sua sponte, directed the dismissal of the complaint with prejudice and the cancellation of a notice of pendency filed January 10, 2008, based upon the plaintiff's perceived failure to provide "all loan origination documents," as required by the order dated March 31, 2009.

The Supreme Court erred in denying that branch of the plaintiff's motion which was for an order of reference. The defendants failed to answer within the time allowed, and the plaintiff submitted, in support of its unopposed motion, the mortgage, the note, the verified complaint setting forth the facts establishing the claim, and an affidavit of its employee attesting to the default (*see Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823; RPAPL 1321). Under these circumstances, that branch of the plaintiff's motion which was for an order of reference should have been granted.

In light of the above discussion, the Supreme Court erred in, sua sponte, directing the dismissal of the complaint with prejudice and the cancellation of the notice of pendency (*see U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048; *HSBC Bank USA, N.A. v Valentin*, 72 AD3d 1027, 1029-1030). Under the circumstances of this case, we deem it appropriate to remit the matter for further proceedings before a different Justice.

SKELOS, J.P., HALL, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court