

U.S. Bank Natl. Assn. v Maffei

2007 NY Slip Op 30487(U)

March 19, 2007

Supreme Court, Suffolk County

Docket Number: 0025223/2006

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER H. MAYER
Justice of the Supreme Court

Ex Parte Application #001 - MD

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U.S. BANK NATIONAL ASSOCIATION, AS :
TRUSTEE :
c/o Homecomings Financial Network, Inc. :
9350 Waxie Way :
San Diego, CA 92123 :

Steven J. Baum, P.C.
Attorneys for Plaintiff
Post Office Box 1291
Buffalo, New York 14240-1291

Plaintiff(s),

- against -

NICHOLAS MAFFEI a/k/a NICHOLAS J.
MAFFEI, JR., HOMECOMINGS FINANCIAL
NETWORK, INC., MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporation or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendant(s).

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff dated October 30, 2006; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the plaintiff for an Order of Reference in this mortgage foreclosure action is denied, with leave to renew upon proper papers, which comply with the requirements set forth in CPLR 3215(f), including but not limited to a proper affidavit from a party, as well as all assignments of the subject mortgage sufficient to establish the plaintiff's ownership rights under such mortgage; and it is further

ORDERED that movant shall serve a copy of this Order upon all appearing parties, or their attorney(s) if represented by counsel, pursuant to CPLR 2103(b)(1), (2) or (3) and shall thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that a copy of this Order and proof of service of same shall be annexed as exhibits to any motion to renew.

With regard to the proof necessary on an application for judgment by default, CPLR 3215(f) states, in relevant part, that "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." With regard to a judgment of foreclosure, an order of reference is simply a preliminary step towards obtaining such a judgment (*Home Sav. of Am., F.A. v. Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

The moving papers establish that the original Lender of the subject January 20, 2006 mortgage is HomeComings Financial Network ("HomeComings"). On the first page of the mortgage, Mortgage Electronic Registration Systems, Inc. (MERS) is stated to be "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. . . . for purposes recording this mortgage." In support of its application, the plaintiff submits a purported assignment of the mortgage from MERS to the plaintiff; however, the mortgage does not empower MERS to assign the mortgage to any other entity. Furthermore, there is no proof that the plaintiff had previously assigned the mortgage to MERS, nor is there any other evidence to establish the plaintiff's ownership rights under the mortgage. Therefore, the plaintiff has failed to establish that it has standing in this matter. Foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Furthermore, a plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest (*Katz v East-Ville Realty Co.*, 249 AD2d 243, 672 NYS2d 308 [1st Dept 1998]).

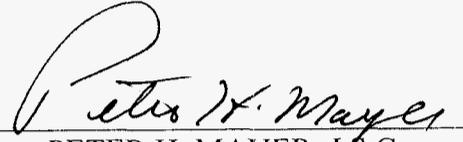
In addition to the foregoing, the plaintiff's proofs include an affidavit of merit from Bethany Hood, Vice President of HomeComings, the purported "servicer" of the plaintiff. The Court is unable to conclude whether or not such affidavit is, in fact, a proper party affidavit as required by CPLR 3215(f). In the absence of either a verified complaint or a proper affidavit by the party, not merely by an attorney with no personal knowledge, the entry of judgment by default is erroneous (*see, Peniston v Epstein*, 10 AD3d 450, 780 NYS2d 919 [2d Dept 2004]; *Grainger v Wright*, 274 AD2d 549, 713 NYS2d 182 [2d Dept 2000]; *Finnegan v. Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]);

Hazim v. Winter, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]; *Mullins v. DiLorenzo*, 199 AD2d 218; 606 NYS2d 161 [1st Dept 1993]). Therefore, the plaintiff's motion must be denied at this time.

This constitutes the Decision and Order of the Court.

Dated: _____

3/19/07



PETER H. MAYER, J.S.C.