| **Deutsche Bank Natl. Trust Co. v Auguste** |
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| 2008 NY Slip Op 31991(U) |
| July 17, 2008 |
| Supreme Court, Kings County |
| Docket Number: 0027299/2007 |
| Judge: Arthur M. Schack |
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[* 1 ]

At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of July 2008

PRESENT:

HON. ARTHUR M. SCHACK
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2
C/O COUNTRYWIDE HOME LOANS, INC.,
400 COUNTRYWIDE WAY
SIMI VALLEY, CA 93065

Plaintiff,

- against -

JEANETTE AUGUSTE, HELEN M. AUGUSTE, *et. al.*,

Defendants.

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**DECISION & ORDER**

Index No. 27299/07

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| The following papers numbered 1 read on this motion: | Papers Numbered: |
|---|---|
| Proposed Order of Reference/Exhibits | 1 |

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Plaintiff's application, upon the default of all defendants, for an order of reference and related relief for the premises located at 4301 Avenue I, Brooklyn, New York (Block 7747, Lot 10, County of Kings) is denied without prejudice. The affidavit of merit submitted in support of this application for an order of reference was not executed by an officer of the plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2 (DEUTSCHE BANK), or someone with a valid power of attorney from the plaintiff. Leave is granted to the plaintiff to renew its application for an order of reference and related relief upon the plaintiff's presentation to the Court of its compliance with the statutory requirements of CPLR § 3215 (f), with "an affidavit of facts" executed by someone who is an officer of DEUTSCHE BANK or someone who has a valid power of attorney from DEUTSCHE BANK. Further, the Court, upon renewal of the application for an order of reference requires a satisfactory explanation to questions with respect to the assignment of the instant nonperforming mortgage loan from the original lender, ACCREDITED HOME LENDERS, INC. (ACCREDITED), by MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC. (MERS), ACCREDITED's nominee for the purpose of recording the mortgage;

**Background**

Defendants JEANETTE AUGUSTE, HELEN M. AUGUSTE borrowed

$440,000.00 from ACCREDITED on November 7, 2006. The Note and Mortgage were recorded in the Office of the City Register of the City of New York on January 9, 2007, at City Register File Number (CRFN) 2007000014789 by MERS, the nominee of ACCREDITED for purposes of recording the mortgage. MERS assigned the mortgage to the plaintiff DEUTSCHE BANK on August 20, 2007, with the assignment recorded on September 11, 2007, at CRFN 2007000467262.

Plaintiff's moving papers for an order of reference and related relief fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit and amount due" by Ely Harless, "Vice President of COUNTRYWIDE HOME LOANS, Attorney in fact for DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2. Attached to his affidavit of merit is a "Limited Power of Attorney," dated June 17, 2005, from DEUTSCHE BANK appointing "Countrywide Home Loans Inc." as its attorney-in-fact to perform various enumerated services, "in connection with all mortgage loans serviced by the Servicer [Countrywide Home Loans, Inc.] pursuant to the Agreements solely for the purpose of performing such acts and executing such documents in the name of the Trustee [DEUTSCHE BANK]." Preparing foreclosure documents are listed. However, the Agreements referred to are twenty-four collateralized debt obligations (CDO's), listed on exhibit A attached to the Limited Power of Attorney. The

instant foreclosure proceeding for MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2 is not among the twenty-four listed CDO's in Exhibit A of the Limited Power of Attorney. Also, Mr. Harless claims, in ¶ 2 of his affidavit of merit and amount due, that "a true copy of the Power of Attorney is attached." The attached copy is an uncertified photocopy. If plaintiff renews its application for an order of reference, and a power of attorney is utilized authorizing the affiant to submit his or her affidavit, it must be an original, a certified copy, or certified by plaintiff's counsel, pursuant to CPLR § 2105.

Also, according to plaintiff's application, the default of the AUGUSTE defendants began with the nonpayment of principal and interest due on April 1, 2007. Yet, almost five months later, on August 20, 2007, plaintiff DEUTSCHE BANK was willing to take an assignment of the instant nonperforming loan. The Court wonders why DEUTSCHE BANK would purchase a nonperforming loan, almost five months in arrears? Leave is granted to DEUTSCHE BANK to explain why it purchased a nonperforming loan.

**Discussion**

The plaintiff has failed to meet the clear requirements of CPLR § 3215 (f) for a default judgment.

> ***On any application for judgment by default, the applicant shall file*** proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule

> 305 or subdivision (a) of rule 316 of this chapter, 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. **[*Emphasis added*].**

Plaintiff has failed to submit "proof of the facts" in "an affidavit made by the party." The "affidavit of facts" submitted by Ely Harless, Vice President of Countrywide Home Loans, Inc., fails to have a valid power of attorney for that express purpose. Additionally, upon plaintiff's renewal of the instant application for an order of reference, if a power of attorney is presented to this Court and it refers to pooling and servicing agreements, the Court needs a properly offered copy of the pooling and servicing agreements, to determine if the servicing agent may proceed on behalf of plaintiff. (*EMC Mortg. Corp. v Batista*, 15 Misc 3d 1143 (A), [Sup Ct, Kings County 2007]; *Deutsche Bank Nat. Trust Co. v Lewis*, 14 Misc 3d 1201 (A) [Sup Ct, Suffolk County 2006]).

Also, the instant application upon defendants' default must be denied because even though it contains a verified complaint, the attorney's verification is insufficient to meet the requirements of CPLR § 3215 (f). The Court, in *Mullins v Di Lorenzo*, 199 AD2d 218 [1st Dept 1993], instructed that "a complaint verified by counsel amounts to no more

than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215." Citing *Mullins v Di Lorenzo*, the Court, in *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994], held that a complaint with not more than an attorney's affidavit, for purposes of entering a default judgment "was erroneous and must be deemed a nullity." Professor David Siegel, in his Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3215: 16) explains that *Mullins v Di Lorenzo*

> is in point here. Perhaps ***the verified complaint*** can do service as an affidavit for various purposes within the litigation while the contest is on . . . but it ***will not suffice to put an end to the contest with as drastic a step as a default at the outset***. It must be kept in mind that even an outright "affidavit" by the plaintiff's attorney on the merits of the case-- except in the relatively rare circumstances in which the attorney happens to have first-hand knowledge of the facts--lacks probative force and is usually deemed inadequate by the courts to establish the merits. A fortiori, a verified pleading tendered as proof of the merits would also lack probative force when the verification is the attorney's. **[*Emphasis added*]**

In *Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005], the Court reversed a default judgment granted in Supreme Court, Nassau County, holding that:

> In support of her motion for leave to enter judgment against

> the defendant upon her default in answering, the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts (*see* CPLR 3215 (f): *Goodman v New York City Health & Hosps. Corp.* 2 AD3d 581 [2d Dept 2003]; *Drake v Drake*, 296 AD2d 566 [2d Dept 2002]; *Parratta v McAllister*, 283 AD2d 625 [2d Dept 2001]). Accordingly, the plaintiff's motion should have been denied, with leave to renew on proper papers (*see Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

(*See Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *De Vivo v Spargo*, 287 AD2d 535 [2d Dept 2001]; *Peniston v Epstein*, 10 AD3d 450 [2d Dept 2004]; *Taebong Choi v JKS Dry Cleaning Eqip. Corp.*, 15 AD3d 566 [2d Dept 2005]; *Matone v Sycamore Realty Corp.*, 31 AD3d 721 [2d Dept 2006]; *Crimmins v Sagona Landscaping, Ltd.*, 33 AD3d 580 [2d Dept 2006]).

Therefore, the instant application for an order of reference and related relief is denied without prejudice. The Court will grant plaintiff DEUTSCHE BANK an order of reference and related relief when it submits: an affidavit by either an officer of DEUTSCHE BANK, or someone with a valid power of attorney from DEUTSCHE BANK, possessing personal knowledge of the facts; and, an affidavit by an officer of DEUTSCHE BANK explaining why DEUTSCHE BANK purchased a nonperforming

loan from MERS as nominee of ACCREDITED.

## Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2, for an order of reference and related relief for the premises located at 4301 Avenue I, Brooklyn, New York (Block 7747 Lot 10, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2, to renew its application for an order of reference and related relief for the premises located at 4301 Avenue I, Brooklyn, New York (Block 7747, Lot 10, County of Kings), upon presentation to the Court, within forty-five (45) days of this decision and order, of its compliance with the statutory requirements of CPLR § 3215 (f), with an affidavit of facts by either an officer of DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2, or someone with a valid power of

attorney from DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2; and an affidavit from an officer of plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2 explaining why plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY HOME EQUITY TRUST 2007-2 MORTGAGE PASS THROUGH CERTIFICATES; SERIES 2007-2 purchased on August 20, 2007, a nonperforming loan from MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., as nominee of ACCREDITED HOME LENDERS, INC.

This constitutes the Decision and Order of the Court.

E N T E R

HON. ARTHUR M. SCHACK
J. S. C.

HON. ARTHUR M. SCHACK J.S.C.