

Saxon Mtge. Servs., Inc. v Montes

2009 NY Slip Op 31418(U)

June 23, 2009

Supreme Court, Suffolk County

Docket Number: 23379-2008

Judge: Peter H. Mayer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

MOTION DATE 3-9-09
ADJ. DATE 3-10-09
Mot. Seq. # 002 - MD

-----X		
SAXON MORTGAGE SERVICES, INC.,	:	Fein, Such & Crane, LLP
	:	Attorneys for Plaintiff
	:	747 Chestnut Ridge Road
Plaintiff(s),	:	Chestnut Ridge, New York 10977-6216
	:	
- against -	:	Audee Montes
	:	Defendant Pro Se
	:	118 West Plum Street
AUDEE MONTES; "JOHN DOE #1-5" and	:	Brentwood, New York 11717
"JANE DOE #1-5" said names being fictitious,	:	
it being the intention of Plaintiff to designate any	:	Audee Montes
and all occupants, tenants, persons or corporations,	:	Defendant Pro Se
if any, having or claiming an interest in or lien	:	275 Riddle Street
upon the premises being foreclosed herein,	:	Brentwood, New York 11717
	:	
Defendant(s).	:	
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated February 6, 2009, and supporting papers; and now

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

ORDERED that plaintiff's application (seq. #002) for an order of reference in this foreclosure action is considered under 2008 NY Laws, Chapter 472, enacted August 5, 2008, as well as the related statutes and case law, and is hereby denied without prejudice and with leave to resubmit upon proper papers, for the following reasons: (1) failure to submit proper evidentiary proof, including an affidavit from one with personal knowledge, as to whether or not the loan in foreclosure in this action is a "subprime home loan" as defined in RPAPL §1304 or a "high-cost home loan" as defined in Banking Law §6-1; (2) failure to submit evidentiary proof, including an attorney's affirmation, of compliance with the form, type size, type face, paper color and content requirements for foreclosure notices, pursuant to RPAPL §1303, which applies to actions commenced on or after February 1, 2007 (as amended August 5, 2008), as well as an affidavit of proper service of such notice; (3) failure to submit evidentiary proof, including an

attorney's affirmation, of compliance with the form, content, type size, and type face requirements of RPAPL §1320 regarding special summonses in residential foreclosure actions, and evidentiary proof of proper service of said special summons; and it is further

ORDERED that in the event the loan in foreclosure in this action meets the statutory definition of "subprime home loan," as defined in RPAPL §1304, or a "high-cost home loan," as defined in Banking Law §6-1, the plaintiff shall submit evidentiary proof, including an affidavit from one with personal knowledge, regarding whether or not the mortgagor defendant is known to be a resident of the property in foreclosure, as well as evidentiary proof of such defendant's residence address and contact information, sufficient for the Court to properly notify the defendant, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, that if he or she is a resident of such property, he or she may request a settlement conference; and it is further

ORDERED that, inasmuch this action was initiated prior to September 1, 2008 and no final order of judgment has been issued, and inasmuch as the plaintiff has failed to sufficiently show that the loan in foreclosure is not a "subprime home loan" as defined in RPAPL §1304 or a "high-cost home loan" as defined in Banking Law §6-1, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, a settlement conference, is hereby scheduled for **July 15, 2009 at 9:30 am.** before the undersigned, located at Room A-259, Part 17, One Court Street, Riverhead, NY 11901 (631-852-1760), for the purpose of holding settlement discussions pertaining to the rights and obligations of the parties under the mortgage loan documents, including but not limited to, determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the Court deems appropriate; and it is further

ORDERED that at any conference held pursuant to 2008 NY Laws, Ch. 472, Section 3-a, the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case; and it is further

ORDERED that at any such conference held pursuant to 2008 NY Laws, Ch. 472, Section 3-a, the defendant shall appear in person or by counsel and if the defendant is appearing pro se, the Court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant; and it is further

ORDERED that the plaintiff shall promptly serve a copy of this Order upon the homeowner defendant by certified mail (return receipt requested) and first class mail at his last known address, as well as at the subject property address, and upon all other defendants via certified mail (return receipt requested) and by first class mail, and shall provide proof of such service to the Court at the time of any scheduled conference, and annex a copy of this Order and the affidavit(s) of service of same as exhibits to any motion resubmitted pursuant to this Order; and it is further

ORDERED that with regard to any future applications by the plaintiff, if the Court determines that such applications have been submitted without proper regard for the applicable statutory and case law, or without regard for the required proofs delineated herein, the Court may, in its discretion, deny such applications with prejudice and/or impose sanctions pursuant to 22 NYCRR §130-1, and may deny those

*Saxon Mortgage Services v Montes**Index No. 23379-2008**Page 3*

costs and attorneys fees attendant with the filing of such future applications.

In this foreclosure action, the plaintiff filed a summons and complaint on June 23, 2008, which essentially alleges that the defendant(s) defaulted in payments with regard to a mortgage in the principal amount of \$352,000.00, dated April 27, 2007, and given by the defendant-homeowner(s), Audee Montes, for premises located at 275 Riddle Street, Brentwood, New York. The original lender, Greenlight Financial Services d/b/a GFS Wholesale, assigned the mortgage to the plaintiff by assignment dated June 24, 2008. The plaintiff now seeks a default order of reference and requests amendment of the caption to reflect the now known names of the "John Doe" defendants. For the reasons set forth herein, the plaintiff's application is denied.

On August 5, 2008, Senate Bill 8143 was approved and enacted as 2008 NY Laws, Chapter 472, which has unofficially been referred to as the Subprime Lending Reform Act. With regard to foreclosure actions commenced prior to September 1, 2008 and for which a final order of judgment has not yet been issued, Section 3-a of the Act states that the Court must "request each plaintiff to identify whether the loan in foreclosure is a subprime home loan as defined in [RPAPL §1304] or is a high-cost home loan as defined in [Banking Law §6-1]." If the loan is identified by the plaintiff as a subprime home loan or high-cost home loan, the Court must "notify the defendant that if he or she is a resident of such property, he or she may request a settlement conference."

RPAPL 1304(c), defines "subprime home loan" as "a home loan consummated between [January 1, 2003] and [September 1, 2008] in which the terms of the loan exceed the threshold as defined in [RPAPL 1304(d)]. Whether or not a loan satisfies one of the "thresholds," as defined in RPAPL §1304(d), depends upon whether the loan is a first lien mortgage loan or a subordinate mortgage lien, and upon various other factors, such as annual percentage rate, time of loan consummation, periods of maturity, percentage points over yield on treasury securities, and any applicable initial or introductory period. The definition specifically "excludes a transaction to finance the initial construction of a dwelling, a temporary or 'bridge' loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit." The meaning of the term "consummated" is not specifically defined in any of the foreclosure-related statutes. Generally, with regard to a business transaction, for example, the transaction is "consummated" when it is actually completed. Accordingly, with regard to a loan agreement, the date of consummation may be construed to mean the date on which a loan transaction is final, or when the loan is actually funded; however, in analyzing the legislation applicable to foreclosure actions, this Court finds that, as used in the statutes relevant to foreclosures, a loan is "consummated" at the time the borrower executes the note and mortgage. Since the subject mortgage was executed between January 1, 2003 and September 1, 2008, the showing required in Section 3-a applies.

Banking Law 6-1(d) defines "high-cost home loan" as "a home loan in which the terms of the loan exceed one or more of the thresholds as defined in [Banking Law 6-1(g)]." Pursuant to Banking Law §6-1(g), whether or not a loan satisfies one of the "thresholds" depends upon several factors, such as interest rates, loan types, loan amounts, loan periods, periods of maturity, annual percentage rates, percentages of total points and fees, yields on treasury securities, and bona fide loan discount points. Any combination or permutation of the "threshold" variables set forth in RPAPL §1304(d) or Banking Law 6-1(g) may cause a mortgage to meet the definition of a "high-cost home loan." Based on the variables and the complexities

of the parameters involved in defining these terms, as well as the less-than-complete nature of the plaintiff's submissions, the Court will not (nor should it be expected to) flippantly draw its own conclusions as to whether or not the loan at issue meets the definition of a "subprime home loan" or a "high-cost home loan." This is particularly true, given the legislative intent of and express protections afforded to homeowners under the statutes related to foreclosure actions. The plaintiff's statement, that "it appears that the borrower/s do not reside at the subject property," is insufficient to satisfy the showing required regarding the nature of the loan at issue.

For foreclosure actions commenced on or after February 1, 2007, RPAPL §1303(1) requires that the "foreclosing party in a mortgage foreclosure action, which involves residential real property consisting of owner-occupied one-to-four-family dwellings shall provide notice to the mortgagor in accordance with the provisions of this section with regard to information and assistance about the foreclosure process." Pursuant to RPAPL 1303(2), the "notice required by this section shall be delivered with the summons and complaint to commence a foreclosure action . . . [and] shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type [and] shall be on its own page." The specific statutorily required language of the notice is set forth in RPAPL §1303(3), which was amended on August 5, 2008 to require additional language for actions commenced on or after September 1, 2008.

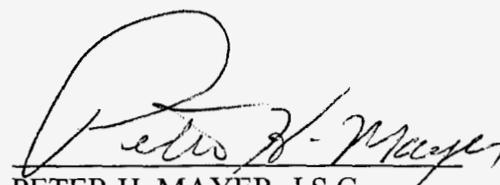
The plaintiff's summons and complaint and notice of pendency were filed with the County Clerk on June 23, 2008, thereby requiring compliance with the notice provisions set forth in RPAPL §1303. Plaintiff has failed to submit proper evidentiary proof, including an attorney's affirmation, upon which the Court may conclude that the requirements of RPAPL §1303(2) have been satisfied, specifically regarding the content, type size and paper color of the notice. Merely annexing a copy of a purportedly compliant notice does not provide a sufficient basis upon which the Court may conclude as a matter of law that the plaintiff has complied with the substantive and procedural requirements of the statute. Since the plaintiff has failed to establish compliance with the notice requirements of RPAPL §1303, its application for an order of reference must be denied.

Finally, to provide additional protection to homeowners in foreclosure, the legislature enacted RPAPL §1320 to require a mortgagee to provide additional notice to the mortgagor-homeowner that a foreclosure action has been commenced. In this regard, effective August 1, 2007 for foreclosure actions involving residential property containing not more than three units, RPAPL §1320 imposes a special summons requirement, in addition to the usual summons requirements. The additional notice requirement, which must be in boldface type, provides an explicit warning to defendant-mortgagors, that they are in danger of losing their home and having a default judgment entered against them if they fail to respond to the summons by serving an answer upon the mortgagee-plaintiff's attorney and by filing an answer with the court. The notice also informs defendant-homeowners that sending a payment to the mortgage company will not stop the foreclosure action, and advises them to speak to an attorney or go to the court for further information on how to answer the summons. The exact form and language of the required notice are specified in the statute. Plaintiff's failure to submit an attorney's affirmation of compliance with the special summons requirements of RPAPL §1320, and proof of proper service of the special summons, requires denial of the plaintiff's application for an order of reference.

Saxon Mortgage Services v Montes
Index No. 23379-2008
Page 5

This constitutes the Order of the Court.

Dated June 23, 2009



PETER H. MAYER, J.S.C.