

**Deutsche Bank Trust Co. v Barbakoff**

2009 NY Slip Op 31595(U)

July 13, 2009

Supreme Court, Suffolk County

Docket Number: 26782/2008

Judge: Peter H. Mayer

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

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 3-18-09  
ADJ. DATE 3-24-09  
Mot. Seq. # 002 - MD

-----X	
DEUTSCHE BANK TRUST COMPANY, AS	: <b>Fein, Such &amp; Crane, LLP</b>
TRUSTEE	: Attorneys for Plaintiff
	: 747 Chestnut Ridge Road
	: Chestnut Ridge, New York 10977-6216
Plaintiff(s),	:
	: <b>Kim Barbakoff</b>
- against -	: Defendant Pro Se
	: 72 Pineaire Avenue
	: Farmingville, New York 11738
KIM BARBAKOFF; MICHAEL STEPHA;	:
NATIONAL CITY BANK; "JOHN DOE #1-5" and	: <b>Michael Stephan</b>
"JANE DOE #1-5" said names being fictitious,	: Defendant Pro Se
it being the intention of Plaintiff to designate any	: 72 Pineaire Avenue
and all occupants, tenants, persons or corporations,	: Farmingville, New York 11738
if any, having or claiming an interest in or lien	:
upon the premises being foreclosed herein,	:
	:
Defendant(s).	:
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated February 17, 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 evidentiary proof of compliance with the requirements of CPLR §3215(f), including but not limited to a proper affidavit of facts by the plaintiff [or by plaintiff's agent, provided there is proper proof in evidentiary form of such agency relationship], or a complaint verified by the plaintiff and not merely by an attorney or non-party, such as a servicer, who has

no personal knowledge; (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 (4) failure to submit evidentiary proof, including an affidavit from one with personal knowledge, of compliance with the requirements of CPLR §3215(g)(3) regarding the additional notice by mail of summonses in foreclosures actions, and proof of proper service of said additional mailing; 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 identified the loan in foreclosure as a "subprime home loan" as defined in RPAPL §1304, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, the defendant homeowner is entitled to a voluntary settlement conference, which is hereby scheduled for **July 29, 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 all 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 costs and attorneys fees attendant with the filing of such future applications.

In this foreclosure action, the plaintiff filed a summons and complaint on July 16, 2008, which

essentially alleges that the defendant-homeowner(s), Kim Barbakoff and Michael Stephan, defaulted in payments with regard to a mortgage, dated March 30, 2007, in the principal amount of \$311,250.00, and given by the defendant-homeowner(s) for the premises located at 72 Pineaire Drive, Farmingville, New York 11738. The original lender, Homecomings Financial, LLC, assigned the mortgage to the plaintiffs by assignment dated March 31, 2008. The plaintiff now seeks a default order of reference and requests amendment of the caption remove the "Doe" defendants from the caption. For the reasons set forth herein, the plaintiff's application is denied.

In support of this application, the plaintiff submits an affidavit from Frank Ruhl, Vice President of Residential Funding Company, LLC purported attorney-in-fact, who is a non-party to this action; however, there is no sufficient evidentiary proof that such person or entity has authority to act on behalf of the lender-mortgage holder. Although a limited power of attorney is annexed, foreclosure actions are not one of the enumerated transactions for which the purported attorney-in-fact may act.

In relevant part, CPLR §3215(a) states: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." With regard to proof necessary on a motion for default in general, 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. . . . Proof of mailing the notice required by [CPLR 3215(g)], where applicable, shall also be filed."

With regard to a judgment of foreclosure, an order of reference is simply a preliminary step towards obtaining a default judgment (*Home Sav. of Am., F.A. v. Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). Without an affidavit by the plaintiff regarding the facts constituting the claim and amounts due or, in the alternative, an affidavit by the plaintiff that its agent has the authority to set forth such facts and amounts due, the statutory requirements are not satisfied. In the absence of either a proper affidavit by the party or a complaint verified 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]).

In support of the motion, the movant fails to submit the required affidavit made a party. Further, without a properly offered copy of a power of attorney, the Court is unable to ascertain whether or not a plaintiff's servicing agent, for example, may properly act on behalf of the plaintiff to set forth the facts constituting the claim, the default and the amounts due, as required by statute. In the absence of either a verified complaint or a proper affidavit by the party or its authorized agent, the entry of judgment by default is erroneous (*see Mullins v. DiLorenzo*, 199 AD2d 218; 606 NYS2d 161 [1<sup>st</sup> Dept 1993]; *Hazim v. Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]; *Finnegan v. Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]). Therefore, the application for an order of reference is denied.

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 or after February 1, 2007, 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.

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.

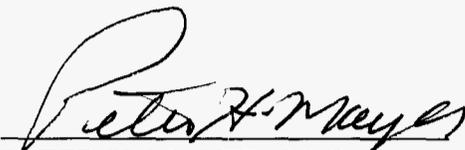
With regard to a motion for a default judgment sought against an individual in an action based upon nonpayment of a contractual obligation, CPLR §3215(g)(3)(i) requires that “an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner

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to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence." Pursuant to CPLR 3215(g)(3)(iii), these additional notice requirements are applicable to residential mortgage foreclosure that were commenced on or after August 1, 2007. Since the moving papers fail to establish compliance with the additional mailing requirements of CPLR §3215(g), the application for an order of reference must be denied.

This constitutes the Decision and Order of the Court.

Dated: July 13, 2009

  
PETER H. MAYER, J.S.C.