Novastar Mtge, Inc. v Sachse
2009 NY Slip Op 31616(U)
July 14, 2009
Supreme Court, Suffolk County
Docket Number: 18363-2007
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX NO. 18363-2007

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 3-31-09
ADJ. DATE ____
Mot. Seq. # 002 - MD

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NOVASTAR MORTGAGE, INC.,

Plaintiff(s),

- against -

EDWARD LUKE SACHSE, CHASE HOME FINANCE, LLC, COMMISSIONER OF TAXATION AND FINANCE, NEW CENTURY FINANCIAL SERVICES, INC., ASSIGNEE FOR PROVIDIAN NATIONAL and "JOHN DOE #1" through "JOHN DOE #10," the last 10 names being fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendant(s).

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Cohn & Roth
Attorneys for Plaintiff
100 East Old Country Road
Mineola, New York 11501

Edward Luke Sachse
Defendant Pro Se
84 Buckley Road
Patchogue, New York 11772

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated March 4, 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 proper evidentiary proof, including an affidavit from one with personal knowledge, of proper assignment(s) of the subject mortgage, sufficient to establish the plaintiff's ownership of the note and mortgage, in that there is no executed copy of the assignment annexed to the moving papers; (3) failure to submit evidentiary proof, including an affidavit from one with personal knowledge, of proper compliance with the time and content requirements specified in the notice of default provisions set forth in the mortgage, and evidentiary proof of proper service of said notice; (4) failure to submit evidentiary proof of compliance with the personal service provisions of CPLR §308, including proof of "due diligence" for those defendants served pursuant to CPLR §308(4), sufficient to establish jurisdiction over the defendant(s) and (5) failure to submit an affidavit in support, which is in a properly sworn form, as required by CPLR §2309(b); 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 **August 19, 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 June 19, 2007, which essentially alleges that the defendant-homeowner(s), Edward Luke Sachse, defaulted in payments with regard to a mortgage, dated April 16, 2004, in the principal amount of $188,100.00, and given by the defendant-homeowner(s) for the premises located at 84 Buckley Road, Patchogue, New York 11772. The original lender, plaintiff, Norstar Mortgage, Inc., apparently assigned the mortgage to The Bank of New York Mellon, as Successor Trustee, by assignment dated May 22, 2008; however, there is no executed copy of the assignment. The plaintiff now seeks a default order of reference and requests amendment of the caption to reflect that the current holder of the note and mortgage is the plaintiff. For the reasons set forth herein, the plaintiff's application is denied.

In support of this application, the plaintiff submits an affidavit from Valerie Clark, Vice President of Saxon Mortgage Services, Inc., a non-party to this action, as purported attorney-in-fact for the plaintiff; however, there is no sufficient evidentiary proof that such person or entity has authority to act on behalf of the lender-mortgage holder, since the movant has failed to submit an executed power of attorney.

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 [1st 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.

With regard to a mortgage assignment which is executed after the commencement of an action and which states that it is effective as of a date preceding the commencement date, such assignment is valid where the defaulting defendant appears but fails to interpose an answer or file a timely pre-answer motion that asserts the defense of standing, thereby waiving such defense pursuant to CPLR 3211[e] (see, *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 1445 [2d Dept 2009]). However, it remains settled that 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]). If an assignment is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient, unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated (*see*, *Bankers Trust Co. v Hoovis*, 263 AD2d 937, 938, 694 NYS2d 245 [1999]). Plaintiff's failure to submit proper proof, including an affidavit from one with personal knowledge, that the plaintiff is the holder of the note and mortgage, requires denial of the plaintiff's application for an order of reference.

Concerning default notices, when a mortgage agreement requires that, prior to acceleration of the mortgage, a lender must serve the borrower with a notice to cure a default, mere conclusory assertions from one without personal knowledge, including those contained in an attorney's affirmation, are insufficient to establish that the lender complied with such pre-acceleration requirements (*see*, *e.g.*, *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; *CAB Associates v State of New York*, 14 AD3d 639, 789 NYS2d 311 [2d Dept 2005]). Failure of the plaintiff to submit proper proof of such compliance requires denial of the relief requested by the plaintiff (*id*).

The "due diligence" portion of the plaintiff's affidavit of service indicates that prior to the "nail and mail" service, the process server attempted to deliver the summons and complaint to the defendant(s) on June 23, 2007 at 1:04 p.m. , on June 27, 2007 at 7:12 p.m., on June 29, 2007 at 7:06 a.m., on July 2, 2007 at 10:19 a.m. and on July 5, 2007 at 6:53 p.m. There is no indication that the process server attempted to inquire about or serve the defendant(s) at a place of employment.

The "nail and mail" method of service pursuant to CPLR §308(4) may be used only where personal service under CPLR §308(1) and (2) cannot be made with "due diligence" (*Lemberger v Khan*, 18 AD3d 447, 794 NYS2d 416 [2d Dept 2005]). The due diligence requirement of CPLR §308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (*McSorley v Spear*, 50 AD3d 652, 854 NYS2d 759 [2d Dept 2008]; *Estate of Waterman v Jones*, 46 AD3d 63, 843 NYS2d 462 [2d Dept 2007]; *O'Connell v Post*, 27 AD3d 630, 811 NYS2d 441 [2d Dept 2006]; *Scott v Knoblock*, 204 AD2d 299, 611 NYS2d 265 [2d Dept 1994]; *Kaszovitz v Weiszman*, 110 AD2d 117, 493 NYS2d 335 [2d Dept 1985]).

What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality (*McSorley v Spear, supra*; *Estate of Waterman v*

Jones, supra). Attempting to serve a defendant at his or her residence without showing that there was a genuine inquiry about the defendant's whereabouts and place of employment is fatal to a finding of due diligence as required by CPLR §308(4) (*Id.*; *see also*, *Sanders v Elie,* 29 AD3d 773, 816 NYS2d 509 [2d Dept 2006]). Further, absent any evidence that the process server attempted to determine that the address where service was attempted was, in fact, the actual dwelling or usual place of abode of the defendant(s), such as by searching telephone listings or making inquiries of neighbors, the requirement of CPLR §308(4), that service under CPLR §308(1) and (2) first be attempted with "due diligence," is not met (*Kurlander v A Big Stam, Corp.*, 267 AD2d 209, 699 NYS2d 453 [2d Dept 1999]).

Since the plaintiff has failed to meet the "due diligence" requirement for "nail and mail" service under CPLR §308(4), jurisdiction over the defendant has not been established and the plaintiff's motion must be denied (*Sanders v Elie*, *supra; Earle v Valente*, 302 AD2d 353, 754 NYS2d 364 [2d Dept 2003]; *Annis v Long*, 298 AD2d 340, 751 NYS2d 370 [2d Dept 2002]) *Earle v Valente, supra; Annis v Long, supra*).

Lastly, CPLR §2309 (b) requires that an "oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs." Accordingly, for affidavits to have sufficient validity, a notary public witnessing signatures must take the oaths of the signatories or obtain statements from them as to the truth of the statements to which they subscribed their names (see, *Matter of Helfand v Meisser*, 22 NY2d 762, 292 NYS2d 467 [1968]; *Matter of Imre v Johnson*, 54 AD3d 427, 863 NYS2d 473 [2d Dept 2008]; *Matter of Leahy v O'Rourke*, 307 AD2d 1008, 763 NYS2d 508 [2d Dept 2003]). Since the affidavit in support submitted by the plaintiff fails to have such sufficient validity, plaintiff's application is denied.

This constitutes the Decision and Order of the Court.

Dated: July 14, 2009

PETER H. MAYER, J.S.C.