

HSBC Bank USA v Boucher

2009 NY Slip Op 31617(U)

July 17, 2009

Supreme Court, Suffolk County

Docket Number: 27200-2008

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

MOTION DATE 3-20-09
ADJ. DATE 3-24-09
Mot. Seq. # 002 - RTFC

-----X	
HSBC BANK USA, N.A., as Indenture Trustee	: DeRose & Surico
for the Registered Noteholders of RENAISSANCE	: Attorneys for Plaintiff
HOME EQUITY LOAN TRUST 2006-2,	: 213-44 38th Avenue
	: Bayside, New York 11361
	: :
Plaintiff(s),	: Ralph B. Finno, Esq.
	: Attorney for Defendant
- against -	: 16 Court Street
	: Brooklyn, New York 11241
	: :
SHANE BOUCHER, JACQUELINE BOUCHER,	: :
AMERICAN GENERAL HOME EQUITY, INC.,	: :
	: :
Defendant(s).	: :
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated February 20, 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 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; (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, 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; (5) 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; (6) 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 foreclosure actions, and proof of proper service of said additional mailing; (7) failure to submit an affidavit: (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service, as required by 50 USCS §521[b)]; (8) 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 failed to show whether or not the loan in foreclosure is 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, 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 all future applications must state in one of the first paragraphs of the attorney's affirmation whether or not a Section 3-a conference has been held; and it is further

ORDERED that at any such conference held pursuant to 2008 NY Laws, Ch. 472, Section 3-a, if the defendant appears 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 18, 2008, which essentially alleges that the defendant-homeowner(s), Shane Boucher and Jacqueline Boucher, defaulted in payments with regard to a mortgage, dated May 3, 2006, in the principal amount of \$245,000.00, and given by the defendant-homeowner(s) for the premises located at 316 Frederick Avenue, Bayshore, New York 11706. The original lender, Delta Funding Corporation, had the mortgage assigned to the plaintiff by assignment dated July 11, 2008. The plaintiff now seeks a default order of reference and requests amendment of the caption to substitute tenant(s) Charles Pray and Betty Boucher in the place and stead of the "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, pursuant to Section 3-a, the Court must ascertain whether or not this action involves a "high-cost home loan" or "subprime home loan" as defined by statute.

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-

l(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 “subprime home loan” or 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. Accordingly, the plaintiff must provide proof in evidentiary form, including an affidavit from one with personal knowledge, as to whether or not this matter involves the foreclosure of a “subprime home loan” or a “high-cost home loan,” as defined by statute, thereby qualifying this matter for the Section 3-a settlement conference, or proper evidentiary proof, including an affidavit from one with personal knowledge, as to the reasons why those requirements of Section 3-a are not applicable to this action. In addition, the plaintiff shall submit evidentiary proof as to whether or not the defendant is a resident of the subject property.

The motion papers submitted in this matter establish that this foreclosure action was commenced prior to September 1, 2008. Therefore, based upon the legislative mandates imposed upon the Court by 2008 NY Laws, Ch. 472, Section 3-a, the Court hereby denies the plaintiff’s motion with leave to resubmit upon evidentiary proof, including an affidavit from one with personal knowledge, of compliance with the settlement conference requirements of Section 3-a, or as to why the requirements of Section 3-a are not applicable to this action.

In support of this application, the plaintiff submits an affidavit from Jessica Dybas, Default Servicing Liaison of Ocwen Loan Servicing, LLC, a non-party to this action who is the servicing agent and 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.

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.

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*).

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 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.

Plaintiff's moving papers fail to set forth a proper and evidentiary statement as to the military status of the defendant. Title 50 USCS §521, which applies in state courts, was enacted for the "protection of service members against default judgments." Pursuant to 50 USCS §521(a), this section "applies to *any* civil action or proceeding in which the defendant does not make an appearance" (emphasis supplied).

Under 50 USCS §521(b)(1), "the court, before entering judgment for the plaintiff, *shall* require the plaintiff to file with the court an affidavit: (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service" (emphasis supplied). Under §521(b)(4), "[t]he requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury." Here, the plaintiff's proofs fail to include a statutorily required statement, in proper evidentiary form, as to the military status of the

defendant. Therefore, pursuant to 50 USCS §521(b), a judgment of default may not be entered against the defendant.

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 17, 2009


PETER H. MAYER, J.S.C.