

**JPMorgan Chase Bank, N.A. v Guevara**

2009 NY Slip Op 31892(U)

August 17, 2009

Supreme Court, Suffolk County

Docket Number: 08-11582

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

APPLICATION FOR AN  
ORDER OF REFERENCE  
#001 -MD

-----X  
JPMORGAN CHASE BANK, N.A. :  
10790 Rancho Bernardo Road :  
San Diego, CA 92127 :  
Plaintiff, :

STEVEN J. BAUM, P.C.  
Attorneys for Plaintiff  
P.O. Box 1291  
Buffalo, N. Y. 14240

- against -

MARIA E. MENDEZ GUEVARA, CLERK :  
OF THE SUFFOLK COUNTY DISTRICT :  
COURT, EXCEL RADIOLOGY SERVICES :  
PC, GOOD SAMARITAN HOSPITAL, :  
JOSEPHINE GONZALEZ, JPMORGAN :  
CHASE BANK, N.A., NEW YORK STATE :  
DEPARTMENT OF TAXATION AND :  
FINANCE, PEOPLE OF THE STATE OF :  
NEW YORK, SOUTHSIDE HOSPITAL, :  
STATE OF NEW YORK ON BEHALF OF :  
UNIVERSITY HOSPITAL O P :  
JOHN DOE (Said name being fictitious, it being :  
the intention of Plaintiff to designate any and all :  
occupants of premises being foreclosed herein, :  
and any parties, corporations or entities, if any, :  
having or claiming an interest or lien upon the :  
mortgaged premises.) :  
Defendants. :

-----X

Upon the reading and filing of the following papers in this matter: Notice of Motion/Order to Show Cause by the plaintiff, the affirmation of regularity of Ryan P. Hanna, Esq. dated April 19, 2008, and other supporting papers (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

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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. #001) 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: 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; 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; 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; 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 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

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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 March 24, 2008, which essentially alleges that the defendant-homeowner, Maria E. Mendez Guevara, defaulted in payments with regard to a mortgage dated March 27, 2007 in the principal amount of \$320,000, and given by the defendant-homeowners for the premises located at 210 Irving Street, Central Islip, New York 11722. The original lender, JPMorgan Chase Bank, N.A. ("JPMorgan"), assigned the mortgage and note to Chase Home Finance, LLC ("Chase") by assignment dated April 8, 2008. The plaintiff now seeks a default order of reference and requests amendment of the caption to reflect the current holder of the note and mortgage, ("Chase") as plaintiff. 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

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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-l(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-l(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-l(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 plaintiffs 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, as to whether or not this action involves a "high-cost home loan" or a "subprime home loan," or why the requirements of Section 3-a are not applicable to this action. In the event this action does involve a subprime or high-cost loan, the plaintiff shall also submit

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with any motion resubmitted in accordance with this Order, evidentiary proof of the defendant's residence address and contact information, sufficient for the Court to properly notify the defendant of his or her right to a Section 3-a settlement conference.

In support of this application, the plaintiff submits an affidavit from An Dang, Vice President of JPMorgan. Plaintiff has not submitted, however, an affidavit from an authorized principal of Chase requesting that Chase be substituted as the plaintiff in this action. Also, counsel's affirmation of regularity does not include a representation that his office represents Chase, which is currently a non-party to this action.

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

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[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.

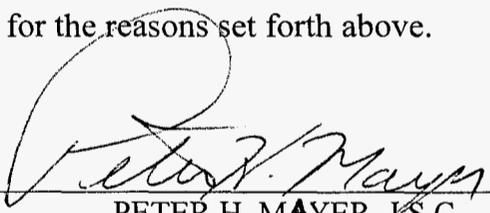
With regard to a mortgage assignment which is executed after the commencement of an action and which states that it is effective as of a date preceding the commencement date, such assignment is valid where the defaulting defendant appears but fails to interpose an answer or file a timely pre-answer motion 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 [1<sup>st</sup> 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]). Here, the affidavit of An Dang, Vice President of JPMorgan, does not state that the subject mortgage and note were assigned to Chase. 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.

Parenthetically, the court notes that there is a second cause of action in the complaint which demands that certain prior and/or adverse liens be extinguished pursuant to RPAPL Article 15, but that the plaintiff has failed to address the second cause of action in its supporting papers.

Accordingly, the motion must be denied for the reasons set forth above.

Dated: \_\_\_\_\_

8/17/09

  
\_\_\_\_\_  
PETER H. MAYER, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION