

Countrywide Home Loans, Inc. v Bouvin

2009 NY Slip Op 32670(U)

September 28, 2009

Supreme Court, Suffolk County

Docket Number: 15713/08

Judge: Peter H. Mayer

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

P R E S E N T :

Hon. PETER H. MAYER
Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
#001 -

-----X

COUNTRYWIDE HOME LOANS, INC. :

Plaintiff, :

- against - :

CHRISTER BOUVIN, :

if living and if he be dead, any and all other :

persons, who may claim as devisees, :

distributes, legal representatives and :

successors in interest of said defendants, all :

of whom and whose places of residence are :

unknown to the plaintiff and cannot after :

diligent inquiry be ascertained :

ROSEMARIE BOUVIN, :

"JOHN DOE #1" through "JOHN DOE #12," :

the last twelve names being fictitious :

and unknown to plaintiff, the persons or :

parties intended being the tenants, :

occupants, persons or corporations, if any, :

having or claiming an interest in or lien :

upon the premises, described in the :

complaint. :

Defendants. :

-----X

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Upon the reading and filing of the following papers in this matter :ex parte application for an order of reference filed on Aug. 29, 2008, supported by the affirmation of Sara Z. Boriskin,Esq. dated July 25, 2008, 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. # 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: (1). The plaintiff has failed 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). The plaintiff has failed 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. (3). The plaintiff has failed 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. (4). The plaintiff failed 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); (5). The plaintiff's 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, as required by Title 50 USCS 521, 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 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 4/21/08, which essentially alleges that the defendant-homeowner(s), Christer Bouvin and Rosemarie Bouvin, defaulted in payments with regard to a mortgage dated 12/21/05 in the principal amount of \$ 384,750, and given by the defendant-homeowner(s) for the premises located at 273 Lenox Road, Huntington Station, New York. The original lender, America's Wholesale Lender [through M.E.R.S.] assigned the mortgage to the plaintiff by assignment dated 3/31/08. The plaintiff now seeks a default order of reference and further requests amendment of the caption to delete Christer Bouvin as a defendant due to his death on 4/2/06. 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-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 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, 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 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.

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*). In addition, the court finds that the plaintiff does not address the issue of Countrywide's authority to send a default notice to the mortgagor on

11/6/07 when the assignment of the mortgage to Countrywide did not take place until 3/31/08.

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.

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 4/30/08 at 5:30 pm. , on 5/17/08 at 10:30 am. The "nailing" was then accomplished on 6/7/08, with the "mailing" being effectuated several days later. 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*).

Related to the issue of service of process is the fact that the 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, a default may not be entered.

This constitutes the order of this court.

Dated: 9/28/09


PETER H. MAYER, J.S.C.

 X NON-FINAL DISPOSITION