

HSBC Bank USA, N.A. v Fama

2009 NY Slip Op 32671(U)

October 29, 2009

Supreme Court, Suffolk County

Docket Number: 23752/09

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		
HSBC BANK USA, N.A., AS INDENTURE	:	DEROSE & SURICO
TRUSTEE FOR THE REGISTERED	:	Attorney for Plaintiff
NOTEHOLDERS OF RENAISSANCE	:	213-44 38 th Avenue
HOME EQUITY LOAN TRUST 2007-1,	:	Bayside, N. Y. 11361
	:	
Plaintiff,	:	
	:	
- against -	:	
	:	
PHILIP FAMA, ADRIAN FAMA A/K/A	:	
ADRIENNE FAMA, PEOPLE OF THE	:	
STATE OF NEW YORK, FORD MOTOR	:	
CREDIT COMPANY VOLVO CAR	:	
FINANCE NORTH AMERICA, BANK OF	:	
NEW YORK	:	
	:	
Defendants.	:	
-----X		

Upon the reading and filing of the following papers on this ex parte application for an order of reference : proposed order of reference, as supported by the affirmation of Vincent P. Surico, dated Aug. 10, 2009, with exhibits 'A'-'G' attached, and the foregoing having been submitted to the undersigned, and upon due consideration and deliberation by the court of the foregoing papers, the motion is decided as follows, and 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) 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) plaintiff has failed 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 the plaintiff's agent such as a loan service company, provided there is proper proof in evidentiary form of

such agency relationship], or a complaint actually verified by the plaintiff and not merely by an attorney or non-party, (3) 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 and it is further

ORDERED that, inasmuch this action was commenced after September 1, 2008 and inasmuch as the plaintiff has failed to properly show that the subject loan in foreclosure is not a “subprime home loan” as defined in RPAPL §1304 or a “high-cost home loan” as defined in Banking Law §6-1, the defendant homeowner is entitled to a settlement conference under CPLR 3408, which is hereby scheduled for _____ 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 this conference, 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 this conference, 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 18, 2009, which alleges that the defendant-homeowner(s), Philip and Adrian Fama defaulted in payments with regard to a mortgage, dated November 6, 2006 in the principal amount of \$ 220,000 and given by the defendant-homeowner(s) for the premises located at 485 Windmill Avenue, West Babylon, New York, 11704. The mortgage was thereafter assigned from the original mortgagee to the plaintiff on May 29,

2009. The plaintiff now seeks a default order of reference. 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 such as the one herein commenced *after* September 1, 2008, the relevant statute, RPAPL 1302[1], sets forth several pleading requirements that must be satisfied in any mortgage foreclosure action "*relating to a high-cost home loan or a subprime home loan*". Further, as a result of this legislation, CPLR 3408 was added [effective 8/5/08], mandating that a settlement conference be scheduled and conducted by the court within sixty [60] days of the filing of proof of service with the clerk, if the foreclosure action involves a subprime, non traditional or high cost loan. Finally, the Rules of Court [202.12a] were amended after the enactment of L.2008, ch.472 to require that a special RJJ form be utilized by the plaintiff seeking judicial intervention in any foreclosure action relating to a subprime or high cost loan. The utilization of the special RJJ serves to alert the court in the very first instance that a mandatory conference under CPLR 3408 may need to be scheduled.

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, 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 §6-1(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. Indeed, the determination of whether the pleadings are sufficient under RPAPL 1302 and/or whether to schedule a mandatory conference under CPLR 3408 should not hinge upon on anything but compelling and reliable evidence as to the type or character of the subject home loan. As noted below, there must be an affidavit of merit from the party on all substantive aspects of the action. Accordingly, since the plaintiff did not 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, or that the defendant is not a resident of the subject property and, therefore, does not qualify for the protections under the new laws, the court must proceed on the assumption that the defendant is entitled to the settlement conference under CPLR 3408.

In addition to the foregoing, the court observes that in support of this application, the plaintiff submits an affidavit from Kevin M. Jackson, dated July 15, 2009 of Ocwen Loan Servicing, a non-party to this action, without sufficient evidentiary proof of actual 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 itself regarding the facts constituting the claim and amounts due or, in the alternative, an affidavit by the plaintiff that its agent has the legal 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]).

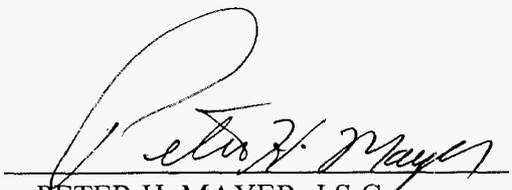
In support of this motion, the plaintiff fails to submit the required affidavit made a party. Further, without a properly offered copy of a power of attorney, the court is unable to ascertain whether or not the plaintiff's servicing agent, Ocwen, may properly act on behalf of the plaintiff to set forth 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 duly authorized agent, the entry of judgment by default is erroneous (*see Mullins v. DiLorenzo*, 199 AD2d 218; 606 NYS2d 161 [1st Dept 1993]; *Ilazim 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.

Further, there is a the paramount issue of the plaintiff's compliance with paragraph '22" of the mortgage instrument. Concerning default notices, when a mortgage agreement such as the one herein requires that, prior to acceleration of the mortgage, a lender must serve the borrower with a notice to cure a default, mere 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]). Here, the application is entirely silent with respect to the service of the default notice/demand requirement of the mortgage. Failure of the plaintiff to submit proper proof of such compliance requires denial of the relief requested by the plaintiff (*id*).

Accordingly, the motion for an order of reference must be denied on these grounds.

Dated: 10/29/09


PETER H. MAYER, J.S.C.

NON-FINAL DISPOSITION