

Bank of N.Y. v Smalls

2009 NY Slip Op 32672(U)

September 28, 2009

Supreme Court, Suffolk County

Docket Number: 27186/08

Judge: Peter H. Mayer

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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
Motion Date: Sept. 24, 2008
#001 -MD

-----X
The Bank of New York as Trustee for the
Certificateholders CWALT Inc., Alternative Loan
Trust 2006-45T1, Mortgage Pass-Through
Certificate Series 2006 45T1

Plaintiff,

McCabe , Weisberg, Conway, P.C.
Attorneys for Plaintiff
145 Huguenot Street, Suite 401
Rochester, new York 10801

- against -

Leroy Smalls, M.E.R.S., as nominee for
Countrywide Bank, N.A., and "JOHN DOE #1"
through "JOHN DOE #10", the last ten
names being fictitious and unknown to
the plaintiff, the person or parties intended
being the person or parties, if any, having
or claiming an interest in or lien upon the
mortgaged premises described in the verified
complaint,

Defendants.

-----X

Upon the reading and filing of the following papers numbered 1-3 on this ex parte application for an order of reference: Proposed ordered and supporting papers : 1-3, and the application having been submitted to the undersigned, and with due consideration and deliberation by the court of the foregoing papers, the application 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, 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 July 16, 2008 , which essentially alleges that the defendant-homeowner, Leroy Smalls, defaulted in payments with regard to an interest only note dated November 30, 2006 in the principal amount of \$480,000, and a mortgage of even date given by the defendant-homeowners for the premises located at 78 Sylvan Place, Miller Place New York . The original lender, America's Wholesale Lender, assigned the mortgage to plaintiff by assignment dated July 2, 2008. 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 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 §6-1(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. 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.

In addition to the foregoing, the court finds that the plaintiff 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.

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 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]). Here, neither the attorney's affirmation nor the affidavit of the loan service agent set forth the date and manner of the service of the required default/acceleration notice. This failure on the part of the plaintiff to submit proper proof of such compliance requires denial of the relief requested by the plaintiff (*id.*).

The foregoing constitutes the decision and order of this court.

Dated: 9/28/09


 Hon. Peter H. Mayer, J.S.C.

 X NON-FINAL DISPOSITION