

GMAC Mtge., LLC v Ingoglia

2009 NY Slip Op 32854(U)

November 25, 2009

Supreme Court, Suffolk County

Docket Number: 3463/2009

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-22-09
ADJ. DATE 5-26-09
Mot. Seq. # 001 - RTFC

-----X
GMAC MORTGAGE, LLC :
 :
 :
 Plaintiff(s), :
 :
 - against - :
 :
 FRANK J. INGOGLIA; KATHRYN INGOGLIA; :
 "JOHN DOE # 1-5" AND "JANE DOE #1-5" said :
 names being fictitious, it being the intention of :
 Plaintiff to designate any and all occupants, tenants, :
 persons or corporations, if any, having or claiming :
 an interest in or lien upon the premises being :
 foreclosed herein: :
 :
 Defendant(s). :
-----X

Fein, Such & Crane, LLP
Attorneys for Plaintiff
747 Chestnut Ridge Road
Chestnut Ridge, New York 10977-6216

Frank J. Ingoglia
Kathryn Ingoglia
Defendants Pro Se
9 Gristmill Court
Kings Park, New York 11754

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 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. # 001) for an order of reference in this foreclosure action is considered under CPLR 3408, 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 evidentiary proof, including an affidavit from one with personal knowledge, as to whether or not, pursuant to CPLR 3408, this action is a residential foreclosure involving a "high-cost home loan" consummated between January 1, 2003 and September 1, 2008 or a "subprime" or "nontraditional home loan" (as those terms are defined under RPAPL §1304), as well as evidentiary proof, including an attorney's affirmation, of compliance with requirements of CPLR 3408, if applicable, regarding mandatory settlement conferences in residential foreclosure actions; (2) 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

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provisions set forth in the mortgage, and evidentiary proof of proper service of said notice; (3) 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; (4) 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; (5) failure to submit evidentiary proof, including an affidavit from one with personal knowledge, as to whether, pursuant to RPAPL §1302, the action involves a "high-cost home loan" or a "subprime home loan" (as such terms are defined in Banking Law §6-l and §6-m, respectively) and, if so, evidentiary proof, including an attorney's affirmation, of compliance with the pleading requirements of RPAPL §1302 regarding high-cost and subprime home loans; and (6) failure to submit evidentiary proof, including an affidavit from one with personal knowledge, as to whether, pursuant to RPAPL §1304, this action involves a "high-cost home loan" (as defined in Banking Law §6-l), or a "subprime home loan" or a "non-traditional home loan" (as defined in RPAPL §1304) and, if so, evidentiary proof, including an attorney's affirmation, of compliance with the requirements of RPAPL §1304 regarding the pre-commencement notice required in foreclosure actions; and it is further

ORDERED that, inasmuch as the plaintiff has failed to properly show that the loan in foreclosure is not a "high-cost home loan" consummated between January 1, 2003 or a "subprime home loan" or "non-traditional home loan" as those terms are defined in RPAPL §1304, pursuant to CPLR 3408(a), a mandatory settlement conference is hereby scheduled for **January 20, 2010, 9:30 a.m.**, 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 relative 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, pursuant to CPLR 3408(c), at the scheduled 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 the plaintiff shall promptly serve a copy of this Order upon the homeowners defendant(s), at all known addresses, via certified mail (return receipt requested) and by first class mail, and upon all other defendants via first class mail, and shall provide the affidavit(s) 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 as exhibits to any motion resubmitted pursuant to this Order; and it is further

ORDERED that with regard to any scheduled court conferences or future applications by the plaintiff, if the Court determines that such conferences have been attended, or 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, dismiss this case or 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 January 28, 2009, which essentially alleges that the defendant-homeowners, Frank J. Ingoglia and Kathryn Ingoglia, defaulted in

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payments with regard to a mortgage, dated January 27, 2006, in the principal amount of \$292,000.00, for the premises located at 51 Bowdoin Road, Centereach, New York 11720. The plaintiff now seeks a default order of reference and requests amendment of the caption to substitute tenant(s) in the place and stead of the "Doe" defendants. For the reasons set forth herein, the plaintiff's application is denied.

As part of the legislation intended to protect homeowners in foreclosure, CPLR 3408 was enacted pursuant to 2008 NY Law, Chapter 472, Section 3, which became effective August 5, 2008. The statute does not state an effective date, nor does it specify its applicability to actions commenced on or after a date certain; however, since Section 3-a of Ch. 472 deals only with settlement conferences for those actions commenced prior to September 1, 2008, and since September 1, 2008 is the effective date for other relevant statutes enacted or amended by 2008 NY Law, Ch. 472, this Court finds that CPLR 3408 applies to actions commenced on or after September 1, 2008.

Paragraph (a) of CPLR 3408 essentially requires the court to hold a mandatory settlement conferences in foreclosure actions involving a high-cost home loans, subprime home loans or nontraditional home loans. The purpose of those mandatory settlement conferences is to conduct "settlement discussions pertaining to the relative 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." The motion papers submitted in this matter establish that this is, indeed, a foreclosure action involving a residential mortgage loan, and that the action was initiated on or after September 1, 2008. Therefore, the Court must determine whether or not the mandates of CPLR 3408 apply. 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 is a "high cost home loan," a "subprime home loan," or a "non-traditional home loan," as those terms are defined in the applicable statutes.

It is not enough for a plaintiff or plaintiff's attorney to make conclusory statements of the inapplicability of CPLR 3408 as relates to the subject loan. In support of its motion, the plaintiff submits an affidavit from its Vice-President, Sheri D. Hall, in which Ms. Hall claims that the defendants are not entitled to a mandatory court conference because, based on the affidavit of service, "it appears that the borrower/s do not reside at the subject property" and that it is, therefore, her "belief that the mortgage being foreclosed is not a 'home loan'" entitling the defendants to such a conference. The Court, however, will not rely on such conclusory statements by the plaintiff or plaintiff's process server to the detriment of the borrower-defendants. Pursuant to RPAPL § 1304(5)(b)(iv), the definition of a "home loan," which may qualify for a mandatory settlement conference, includes one in which the premises "*is or will be* occupied by the borrower as the borrower's principal dwelling" (emphasis supplied). Therefore, a mere general statement from plaintiff, plaintiff's process server or plaintiff's counsel that states, for example, that the defendant resides or was served with process at an address other than the mortgaged premises, is not dispositive on the residency issue for purposes of excluding the matter from the mandatory conference requirements of CPLR 3408. In keeping with the obvious homeowner-protective legislative intent of the relevant foreclosure statutes, the Court errs on the side of those protections and hereby directs that a settlement conference pursuant to CPLR 3408 shall be held in accordance with this Order.

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]). Since the plaintiff has failed to submit proper proof of such compliance, the relief requested by the plaintiff must be denied (*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 also 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 respect to foreclosure actions commenced on or after September 1, 2008 involving a “high-cost home loan” or “subprime home loan,” as those terms are defined in Banking Law §6-l and §6-m, respectively, RPAPL §1302(1) requires that the plaintiff’s complaint “must contain an affirmative allegation that at the time the proceeding is commenced, the plaintiff: (a) is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note; and (b) has complied with all of the provisions of [Banking Law §595-a] and any rules and

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regulations promulgated thereunder, [Banking Law §6-l or 6-m], and [RPAPL §1304].” The plaintiff has failed to submit proper evidentiary proof, including an affidavit from one with personal knowledge, as to whether or not the subject loan being foreclosed qualifies as a “high-cost home loan” or a “subprime home loan,” and an attorney’s affirmation establishing that the pleading requirements of RPAPL §1302 have been complied with. In the alternative, the plaintiff must submit an affidavit as to the specific reasons why such pleading requirements are not applicable to this action. Since plaintiff’s moving papers fail to include such proper proof, the application must be denied.

Also effective September 1, 2008 is RPAPL §1304, which requires that, with regard to a “high-cost home loan,” a “subprime home loan” or a “non-traditional home loan,” at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, including a mortgage foreclosure action, the lender or mortgage loan servicer must give the borrower a specific, statutorily prescribed notice. In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL §1304(1).

Pursuant to RPAPL §1304(2), the requisite 90-day notice must be “sent by the lender or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence which is the subject of the mortgage. Notice is considered given as of the date it is mailed.” Without a proper affidavit from one with personal knowledge as to whether or not this action involves one of those types of loans identified by the statutes, as well as an attorney’s affirmation of compliance with the requirements of RPAPL §1304, the Court may not grant an order of reference.

Based on the foregoing, the plaintiff’s application for an order of reference is denied.

This constitutes the Decision and Order of the Court.

Dated: November 25, 2009



PETER H. MAYER, J.S.C.