Deutsche Bank Trust Co. Ams. v Day
2011 NY Slip Op 33455(U)
December 15, 2011
Sup Ct, Suffolk County
Docket Number: 2728-11
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX
NO.: 2728-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

COPY

PRESENT: Hon. ARTHUR G. PITTS
Justice of the Supreme Court

DEUTSCHE BANK TRUST COMPANY AMERICAS AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF SAXON ASSET SECURITIES TRUST 2005-3 MORTGAGE LOAN ASSET BACKED NOTES, SERIES 2005-3,

Plaintiff,

-against-

DENNIS D DAY, SMI MORTGAGE, "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,

Defendant,

MOTION DATE: 9-26-11
ADJ. DATE: _____
MOT SEQ. #: 001-MD

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Upon the following papers numbered 1 to 8 read on this unopposed motion for an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers_____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED this unopposed motion (001) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor and striking the answer of the defendant, Dennis D. Day; amending the caption; and appointing a referee to ascertain and compute the amount due the plaintiff in this foreclosure action is considered and is denied, for the reasons stated herein, without prejudice to renew within One Hundred and Twenty (120) Days of the date of this Order and if the renewal motion is not submitted within that time period it shall be deemed denied and the action dismissed due to the plaintiff's failure to obey a direct Order of this Court and the dismissal shall be without a further Order of this Court; and it is further

ORDERED that the plaintiff shall promptly serve a copy of this Order upon counsel for the defendant, Dennis D. Day, and upon all other defendants who have answered or appeared, if any, via first class mail, and shall promptly file the affidavit(s) of such service along with a copy of this Order (001) as exhibits to any motion resubmitted pursuant to this Order; and it is further

ORDERED that the plaintiff shall serve a copy of this Order upon the Calendar Clerk of this IAS Part 34 and upon the Clerk of the Court and shall file the affidavits of service upon the County Clerk and the Clerk of this Court.

The plaintiff, Deutsche Bank Trust Company Americas, commenced this residential foreclosure action by the filing of a summons and complaint on January 24, 2011 alleging that Dennis D. Day ("the defendant mortgagor") defaulted in repaying a note and mortgage which was secured by certain real property located at 12 Park Lane, Medford, New York 11763. Issue was joined by the service of the defendant mortgagor's answer dated February 15, 2011. No answer has been filed by the defendant SMI Mortgage. The plaintiff now moves for an order pursuant to CPLR 3212 granting summary judgment in its favor and striking the defendant mortgagor's answer; amending the caption; fixing the defaults of the non-answering defendants and appointing a referee to compute amounts due pursuant to RPAPL § 1321. No opposition has been filed to the motion.

Parenthetically, according to the records maintained by the Court's computerized database, a foreclosure settlement conference was held on July 25, 2011. At that time, this matter was referred as an IAS case since the defendant mortgagor did not appear or otherwise participate. In any event, the papers submitted reflect that the subject property is not owner-occupied. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

Familiarity with this matter is presumed and the Court need not recite the history of this foreclosure matter and only relevant facts will be restated where necessary. The instant application is considered and is denied as deficient without prejudice to renewal upon proper papers which shall include the following:

1) An affidavit of merit from the plaintiff or, if the plaintiff's office submits an affidavit made by a servicing agent or attorney-in-fact for the plaintiff, then any renewed application must also be supported by a copy of the recorded limited power-of-attorney document and relevant excerpts of the servicing agreement (*see e.g.*, ***Wolf v Citibank, N.A.***, 34 AD3d 574 [2d Dept 2006]). Without a properly offered copy of a recorded or certified power-of-attorney document or an affidavit from an officer of the plaintiff itself, 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 (*see*, ***HSBC Bank v Betts***, 67 AD3d 735 [2d Dept 2009]). 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, [1st Dept 1993]; ***Hazim v Winter***, 234 AD2d 422 [2d Dept 1996]; ***Finnegan v Sheahan***, 269 AD2d 491 [2d Dept 2000]).

2) A copy of the default notice purportedly sent to the defendant mortgagor along with proof of mailing or service of the notice of default by someone with personal knowledge upon the defendant mortgagors pursuant to sections 15 and 22 (b) of the mortgage (*see*, ***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722 [2d Dept 2002]).

3) Evidentiary proof, including an affidavit or affirmation from one with personal knowledge, of compliance with the type-size and content requirements of RPAPL § 1304 regarding the pre-commencement notice required in foreclosure actions, as well as an affidavit of proper service of such notice by registered or certified mail and by first class mail to the last known address of the borrower, as required by RPAPL § 1304(2) or, in the alternative, an affidavit from one with personal knowledge sufficient to show why the requirements of RPAPL § 1304(1) do not apply (*see*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95 [2d Dept 2011]). Pursuant to RPAPL §1304(2), the requisite 90-day notice must be "sent by the lender, assignee 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." Additionally, RPAPL §1304(2) provides that the requisite "notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice." The notice must also contain a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides. Pursuant to RPAPL § 1304(3), the 90-day period specified in RPAPL § 1304(1) does not apply "if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling."

The plaintiff alleges in the verified complaint that there has been compliance with RPAPL § 1304; however, neither a copy of the purported 90-day notice nor an affidavit of service of the notice in compliance with RPAPL § 1304 has been annexed to the moving papers (*see*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra*). Without an affidavit of service from one with personal knowledge of compliance with the specific service requirements of RPAPL § 1304 or, in the alternative, an affidavit sufficient to show why the requirements of § 1304 do not apply, the Court may not grant an order of reference.

4) 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 (*see*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra*; ***Emigrant v Mtge. Co. v Fitzpatrick***, 29 Misc3d 746 [Sup Ct, Suffolk County, Aug. 11, 2011]). While an allegation is set forth in the complaint that RPAPL § 1304 applies herein and that the subject mortgage is a "high-cost home loan" or a "subprime home loan", the complaint is not verified by an officer of the plaintiff with first-hand knowledge (*e.g.*, ***Zuckerman v City of New York***, 49 NY2d 557, 563 [1980]; ***2 N. St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 1395 [3d Dept 2009]; ***Simpson v King***, 48 AD3d 788, 788 [2d Dept 2008]).

5) Evidentiary proof, including an attorney's affirmation of compliance with the form, type size, type face, paper color and content requirements of RPAPL §1303 regarding foreclosure notices, as well as an affidavit of proper service of such notice (*see*, ***First Nat'l Bank of Chicago v Silver***, 73 AD3d 162 [2d Dept 2010]). In the affidavit of service submitted, the plaintiff's process server does not specifically allege that defendant mortgagor has been served with the summons and verified complaint printed on white paper along with the required foreclosure notice pursuant to RPAPL §1303 printed on color paper other than the color of the summons and complaint. Also, counsel's affirmation is devoid of any allegations of compliance with the specific requirements of RPAPL §1303. The bare recitation in the affidavits of service that the defendant mortgagor was served with the summons and complaint for foreclosure of a mortgage, notice of pendency and notice pursuant to RPAPL Section 1303 on blue colored paper bearing Index No # 2728/2011, is insufficient to establish compliance with RPAPL § 1303.

6) Evidentiary proof, including an attorney's affirmation of compliance with RPAPL §1320 regarding special summonses in residential foreclosure actions, and evidentiary proof of proper service of said special summons. In his affirmation, counsel has not averred whether the summons contained the required RPAPL § 1320 warning/notice. Additionally, the affidavit of service upon defendant mortgagor does not contain any information as to compliance with RPAPL § 1320. Counsel's affirmation contains no allegations of compliance with RPAPL § 1320. The submission of the summons in this action by itself is insufficient to establish compliance with RPAPL § 1320.

7) An affirmation from counsel and an affidavit from the plaintiff or the plaintiff's representative that he/she has reviewed the file in this case and that he/she documents that all paperwork is correct in compliance with AO 431/11. While the records maintained by the Court's computerized database show that the required affirmation was filed with the Court, neither the affirmation nor the filed Request For Judicial Intervention have been annexed to the moving papers.

8) A complete, legible copy of the affidavit of service upon the defendant mortgagor. In the submitted copy, the defendant mortgagor's name is partially obscured.

9) A copy of the notice of pendency and a copy of the summons and complaint bearing the index number of this action as well as the "filed" date stamp from the Suffolk County Clerk's Office.

10) An affidavit of non-military status of the defendant-mortgagor pursuant to 50 USCS 521 et. seq. (*see*, ***Central Mtge. Co v Acevedo***, 2011 NY Slip Op 21378 [Sup Ct, Kings County, Oct. 27, 2011]).

11) A proposed order of reference which shall contain a provision directing compliance by the referee with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including sections 36.2(c) and (d); the prohibition that the referee not accept or retain any funds for him/herself (*see*, 22 NYCRR Part 36); and a provision that the statutory fee of $50.00 (or in the discretion of the Court, a fee of $250.00) be paid to the referee.

Accordingly, the instant unopposed motion for summary judgment is denied without prejudice for the reasons stated in this Order and under the conditions set forth in this Order for renewal. A copy of this Order (001) shall be submitted with any future application(s) for an order of reference.

Proposed order of reference marked "Not Signed."

Dated: December 15, 2011

HON. ARTHUR G. PITTS, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**