

Deutsche Bank Natl. Trust Co. v Henry

2008 NY Slip Op 30038(U)

January 8, 2008

Supreme Court, Kings County

Docket Number: 0015375/2007

Judge: Arthur M. Schack

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At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of January 2008

HON. ARTHUR M. SCHACK J.S.C.

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE
LOAN TRUST 2006-FF8, ASSET-BACKED
CERTIFICATES SERIES 2006-FF8
C/O HOME LOAN SERVICES, INC.
150 ALLEGHENY CENTER MALL
PITTSBURGH, PA 15212

Plaintiff,

- against -

VERNON HENRY, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 15375/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference/Exhibits _____

_____ 1 _____

Plaintiff's application, upon the default of all defendants, for an order of reference and related relief for the premises located at 10 Palmetto Street, Brooklyn, New York (Block 3348, Lot 12, County of Kings) is denied without prejudice. The "affidavit of merit and amount due" submitted in support of this application for an order of reference was not executed by an officer of the plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8, ASSET-BACKED CERTIFICATES SERIES 2006-FF8 (DEUTSCHE BANK), or someone with a power of attorney from the plaintiff. Leave is granted to the plaintiff to renew its application for an order of reference and related relief upon the plaintiff's presentation to the Court of its compliance with the statutory requirements of CPLR § 3215 (f), with "an affidavit of facts" executed by someone who is an officer of DEUTSCHE BANK or someone who has a valid power of attorney from DEUTSCHE BANK.

Background

Defendant Vernon Henry borrowed \$585,000.00 from FIRST FRANKLIN, A DIVISION OF NATIONAL CITY BANK OF INDIANA (FIRST FRANKLIN), on February 21, 2006. The Henry Note and Mortgage were recorded in the Office of the City Register of the City of New York on March 30, 2006 at City Register File Number (CRFN) 2006000176303. FIRST FRANKLIN by Mortgage Electronic Registration Systems, Inc. (MERS), its nominee for the purpose of recording the mortgage, assigned

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the mortgage to the plaintiff, DEUTSCHE BANK, on April 4, 2007, with the assignment recorded on May 7, 2007 at CRFN 2007000238288.

Plaintiff's moving papers for an order of reference and related relief fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit and amount due" by Bryan Kusich, "Vice President of HOME LOAN SERVICES, INC., Attorney in Fact for DEUTSCHE BANK FARGO." Attached to plaintiff's moving papers is a "Limited Power of Attorney," dated August 10, 2006, from DEUTSCHE BANK appointing National City Home Loan Services, Inc. (NCHLS) as its attorney-in-fact to perform various enumerated services, pursuant to a June 1, 2006 Pooling and Servicing Agreement. It is clear that the Limited Power of Attorney from DEUTSCHE BANK is to NCHLS, not Home Loan Services, Inc. The DEUTSCHE BANK Limited Power of Attorney to NCHLS presented in the plaintiff's moving papers does not grant a power of attorney to Home Loan Services, Inc., as alleged by Mr. Kusich, in his affidavit. Therefore, the proposed order of reference and related relief is denied without prejudice.

Leave is granted to the plaintiff to comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of DEUTSCHE BANK or someone with a valid power of attorney from DEUTSCHE BANK. Then, the Court will grant the proposed order of reference and related requested relief.

Discussion

The plaintiff has failed to meet the clear requirements of CPLR § 3215 (f) for a default judgment.

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, 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. [Emphasis added].

Plaintiff has failed to submit "proof of the facts" in "an affidavit made by the party." The "affidavit of merit and amount due" submitted by Bryan Kusich, Vice President of Home Loan Services, Inc. fails to have a valid power of attorney for that express purpose. Additionally, if a power of attorney is presented to this Court and it refers to pooling and servicing agreements, the Court needs a properly offered copy of the pooling and servicing agreements, to determine if the servicing agent may proceed on behalf of plaintiff. (*EMC Mortg. Corp. v Batista*, 15 Misc 3d 1143 (A), [Sup Ct, Kings County 2007]; *Deutsche Bank Nat. Trust Co. v Lewis*, 14 Misc 3d 1201 (A) [Sup Ct, Suffolk

County 2006]).

Also, the instant application upon defendants' default must be denied because even though it contains a verified complaint, the attorney's verification is insufficient to meet the requirements of CPLR § 3215 (f). The Court, in *Mullins v Di Lorenzo*, 199 AD2d 218 [1st Dept 1993], instructed that "a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215." Citing *Mullins v Di Lorenzo*, the Court, in *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994], held that a complaint with not more than an attorney's affidavit, for purposes of entering a default judgment "was erroneous and must be deemed a nullity." Professor David Siegel, in his Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3215: 16) explains that *Mullins v Di Lorenzo*

is in point here. Perhaps *the verified complaint* can do service as an affidavit for various purposes within the litigation while the contest is on . . . but it *will not suffice to put an end to the contest with as drastic a step as a default at the outset*. It must be kept in mind that even an outright "affidavit" by the plaintiff's attorney on the merits of the case-- except in the relatively rare circumstances in which the attorney happens to have first-hand knowledge of the facts--lacks probative force and is usually deemed inadequate by the courts to establish the merits. A fortiori, a verified pleading tendered as proof

of the merits would also lack probative force when the verification is the attorney's. ***[Emphasis added]***

In *Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005], the Court reversed a default judgment granted in Supreme Court, Nassau County, holding that:

In support of her motion for leave to enter judgment against the defendant upon her default in answering, the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts (*see* CPLR 3215 (f): *Goodman v New York City Health & Hosps. Corp.* 2 AD3d 581 [2d Dept 2003]; *Drake v Drake*, 296 AD2d 566 [2d Dept 2002]; *Parratta v McAllister*, 283 AD2d 625 [2d Dept 2001]). Accordingly, the plaintiff's motion should have been denied, with leave to renew on proper papers (*see* *Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

(*See* *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *De Vivo v Spargo*, 287 AD2d 535 [2d Dept 2001]; *Peniston v Epstein*, 10 AD3d 450 [2d Dept 2004]; *Taebong Choi v JKS Dry Cleaning Equip. Corp.*, 15 AD3d 566 [2d Dept 2005]; *Matone v Sycamore Realty Corp.*, 31 AD3d 721 [2d Dept 2006]; *Crimmins v Sagona Landscaping, Ltd.*, 33 AD3d 580 [2d Dept 2006]).

Therefore, the instant application for an order of reference and related relief is

denied without prejudice. The Court will grant plaintiff DEUTSCHE BANK an order of reference and related relief when it submits an affidavit by either an officer of DEUTSCHE BANK, or someone with a valid power of attorney from DEUTSCHE BANK, possessing personal knowledge of the facts.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8, ASSET-BACKED CERTIFICATES SERIES 2006-FF8, for an order of reference and related relief for the premises located at 10 Palmetto Street, Brooklyn, New York (Block 3348, Lot 12, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8, ASSET-BACKED CERTIFICATES SERIES 2006-FF8, to renew its application for an order of reference and related relief for the premises located at 10 Palmetto Street, Brooklyn, New York (Block 3348, Lot 12, County of Kings), upon presentation to the Court of its compliance with the statutory requirements of CPLR § 3215 (f), with an affidavit of facts by someone with authority to execute such an affidavit.

[* 8]
This constitutes the Decision and Order of the Court.

E N T E R



HON. ARTHUR M. SCHACK
J. S. C.

HON. ARTHUR M. SCHACK J.S.C.