

American Brokers Conduit v Zamalla

2008 NY Slip Op 30238(U)

January 28, 2008

Supreme Court, Kings County

Docket Number: 0007206/2007

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 28th day of January 2008

P R E S E N T:

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

HON. ARTHUR M. SCHACK
Justice

AMERICAN BROKERS CONDUIT c/o AMERICAN HOME MORTGAGE SERVICING, 4600 REGENT BLVD., IRVING, TX 75063,

Plaintiff,

- against -

HEIDY ZAMALLA, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 7206/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference/Exhibits _____

1 _____

Plaintiff's renewed application, upon the default of all defendants, for an order of reference and related relief for the premises located at 1816 East 32nd Street, Brooklyn, New York (Block 8475, Lot 47, County of Kings) is denied without prejudice. The

affidavit of merit submitted in support of this application for an order of reference was not executed by an officer of the plaintiff, AMERICAN BROKERS CONDUIT c/o AMERICAN HOME MORTGAGE SERVICING, 4600 REGENT BLVD., IRVING, TX 75063 (AMERICAN BROKERS CONDUIT), or someone with a power of attorney from the plaintiff. Leave is granted to 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 AMERICAN BROKERS CONDUIT or someone who has a valid power of attorney from AMERICAN BROKERS CONDUIT. Upon renewal, I will grant the application to amend the caption, pursuant to CPLR § 1021, to reflect that the plaintiff is AMERICAN BROKERS CONDUIT.

Background

In my prior September 11, 2007 decision and order in this action, I denied plaintiff's application for an order of reference without prejudice and leave to renew, since American Brokers Conduit, 538 Broadhollow Road, Melville, New York 11747, owns the instant mortgages and notes for the premises since March 5, 2007.

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 Robert Hardman, "Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

ACTING SOLELY AS A NOMINEE FOR AMERICAN BROKERS CONDUIT, C/O AMERICAN HOME MORTGAGE SERVICING, Plaintiff.” Mr. Hardman is not an officer of AMERICAN BROKERS CONDUIT, nor does he possess a power of attorney from AMERICAN BROKERS CONDUIT. Therefore, the proposed order of reference must be denied without prejudice. Leave is granted to plaintiff AMERICAN BROKERS CONDUIT to comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of AMERICAN BROKERS CONDUIT or someone with a valid power of attorney from AMERICAN BROKERS CONDUIT. Then, and only then, will the Court grant the proposed order of reference for the instant mortgage.

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 Robert Hardman, "Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ACTING SOLELY AS A NOMINEE FOR AMERICAN BROKERS CONDUIT, C/O AMERICAN HOME MORTGAGE SERVICING, Plaintiff." No power of attorney upon behalf of plaintiff AMERICAN BROKERS CONDUIT has been presented with the instant application for an order of reference. Additionally, if a power of attorney is presented upon a renewed application, 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]).

Further, 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 [2^d 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 AMERICAN BROKERS CONDUIT an order of reference and related relief when it submits an affidavit by either an officer of AMERICAN BROKERS CONDUIT, or someone with a valid power of attorney from AMERICAN BROKERS CONDUIT, possessing personal knowledge of the facts.

Conclusion

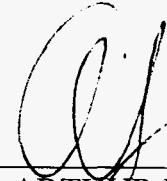
Accordingly, it is

ORDERED, that the application of plaintiff, AMERICAN BROKERS CONDUIT, for an order of reference and related relief for the premises located at 1816 East 32nd Street, Brooklyn, New York (Block 8475, Lot 47, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, AMERICAN BROKERS CONDUIT, to renew its application for an order of reference and related relief for the premises located at 1816 East 32nd Street, Brooklyn, New York (Block 8475, Lot 47, 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 either an officer of AMERICAN BROKERS CONDUIT, or someone with a valid power of attorney from AMERICAN BROKERS CONDUIT, possessing personal knowledge of the facts.

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.