SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WASHINGTON MUTUAL BANK f/k/a
WASHINGTON MUTUAL BANK, FA
c/o Wells Fargo Bank, N.A.,

Plaintiff,

-against-

MICHAEL KATZ, DEBRA SETTEDUCATO, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, SILVER BRANCH CAPITAL CO.,

Defendants.

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TP9
Present:
Hon. Anthony I. Giacobbe

Decision and Order

Index No. 100235/07
Motion No. 002, 003

The following papers numbered 1 to 3 were submitted on these motions the 25th day of January, 2008:

	Pages Numbered
Notice of Motion for Execution of Judgment of Foreclosure and Sale by Plaintiff, with Exhibits (dated November 9, 2007)	1
Order to Show Cause by Defendant Michael Katz, with Supporting Papers (dated December 3, 2007)	2
Affirmation in Opposition by Plaintiff, with Exhibits (dated December 5, 2007)	3

Upon the foregoing papers, plaintiff's motion (002) is granted; defendant's (cross) motion by Order to Show Cause (003) is denied.

This is an action for the foreclosure of a mortgage in which plaintiff, Washington Mutual Bank f/k/a Washington Mutual Bank, FA c/o Wells Fargo Bank, NA (hereinafter "Washington

Mutual"), the present holder of the mortgage, claims that the pro se defendant Michael Katz (hereinafter "defendant") is in default as a result of having failed to make the required payments since October 1, 2006.

To the extent relevant, on or about September 20, 2004, defendant obtained a mortgage from Washington Mutual in the amount of $650,000 covering the premises known as 99 Alter Avenue, Staten Island, New York 10304. The underlying foreclosure action was commenced by the filing and service of a summons, complaint and notice of pendency on or about January 30, 2007[1] (Plaintiff's Exhibit "E"). A *pro se* answer was subsequently interposed by defendant on or about February 20, 2007, wherein he does not deny the allegations of default (*id.*). As a result, Washington Mutual moved for summary judgment on or about March 19, 2007. The motion was not opposed (Plaintiff's opposition, para 15).

On or about August 30, 2007, an Order of Reference was signed appointing a referee to compute, dismissing defendant's answer and granting summary judgment in favor of Washington Mutual. The Referee's Report, dated October 24, 2007, subsequently computed $719,554.84 as the total amount due (Plaintiff's 2nd Exhibit "A"). The additional notice required by CPLR 3215(g)(3)(iii) was mailed to defendants on November 13, 2007 (Plaintiff's Exhibit "A").

In the present motion, Washington Mutual seeks (1) leave to enter a Judgment of Foreclosure and Sale; (2) confirmation of the Referee's Report; (3) counsel fees in the amount of $1,800.00; and (4) reformation of the legal description in the subject mortgage and deed to correct an obvious error.

In his Order to Show Cause, defendant, in effect, cross-moves to dismiss the foreclosure action based on improper service and an alleged conflict of interest on the part of plaintiff's counsel, Steven J. Baum, Esq., for representing both Washington Mutual and "Wells Fargo Bank."

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[1] The statutory requirement of serving a Homeowners Foreclosure Notice along with the summons and complaint, pursuant to RPAPL 1303, did not take effect until February 1, 2007.

In response to defendant's December 3, 2007 Order to Show Cause, Washington Mutual alleges that it was not served in accordance with the above order's service provision, which required overnight delivery by the time and date specified therein (Plaintiff's Affirmation in Opposition, Exhibit "A"). In addition, it is claimed that said application is not supported by the proper documentation.

It is well settled that the mode of service provided for in an order to show cause is jurisdictional in nature and must be literally followed (*see, Goldmark v. Keystone & Grading Corp*., 226 AD2d 143 [1st Dept. 1996]). In this regard, defendant's pro se status is irrelevant (*id.* at 144). However, even assuming arguendo that the Order to Show Cause was otherwise unobjectionable, for the reasons stated below the Court finds that defendant has failed to offer any justification for vacating the Judgment for Foreclosure and Sale pursuant to CPLR 5015(a)(1), or raised an issue of fact requiring a trial (*see, Ocwen Federal Bank FSB v. Miller*, 18 AD3d 527 [2nd Dept.], *lv dismissed*, 5 NY3d 824 [2005]).

CPLR 308(2) authorizes personal service upon a natural person, *inter alia*, by delivery of the summons and complaint within the state to a person of suitable age and discretion at defendant's actual place of business, and either mailing the summons to the defendant at his or her last known residence or mailing the summons by first class mail to the person to be served at his or her actual place of business (*see, Melton v. Brotman Foot Care Group*, 198 AD2d 481 [2nd Dept. 1993]). Although it is the plaintiff who bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was properly obtained, it is familiar law that a process server's sworn affidavit constitutes prima facie evidence of proper service (*see, Bankers Trust Co. of California v. Tsoukas*, 303 AD2d 343 [2nd Dept. 2003]). Nevertheless, a process server's affidavit can be rebutted by a detailed and specific contradiction of the allegations of fact contained therein (*ibid.*).

Here, on the issue of service, Washington Mutual has provided this Court with a copy of an affidavit of a licensed process server (Plaintiff's Exhibit "E", Plaintiff's Affirmation in

Opposition Exhibit "B"), dated February 1, 2007, indicating in-hand delivery of the summons and complaint to Tom Princeton, identified therein as defendant's partner, as a person of suitable age and discretion, at 4:52 p.m. on January 30, 2007 at 103 Alter Avenue, Staten Island, NY 10304, which is designated as defendant's place of business, and the mailing of a copy of same to defendant at the same address, also on January 30, 2007. The affidavit of service was filed with the County Clerk on February 2, 2007. Therefore, Washington Mutual has made a prima facie showing of proper service. In opposition, defendant simply states the he "was not properly served the summons [under] index # 101396/07." On this basis, defendant has failed to rebut the presumption of due service established by plaintiff.

In response to defendant's allegations of a conflict of interest, plaintiff avers that Wells Fargo acts on behalf of Washington Mutual as the latter's loan servicer, and that in such capacity it "collects payments on the loan, tracks payments, insurance, and taxes on the mortgaged premises, and deals with borrower defaults." On this basis, it is not evident that there is any irreconcilable conflict of interest, but even if there was, defendant has failed to demonstrate any nexus between his default and the alleged conflict. Neither has he shown that this purported conflict is inextricably intertwined with plaintiff's cause of action for foreclosure (*see, LaSalle Bank N. A. v. Kosarovich*, 31 AD3d 904 [3rd Dept. 2006]). Accordingly, defendant's claim is legally insufficient to defeat plaintiff's motion.

As for plaintiff's request for attorneys' fees in the amount of $1,800.00, in New York, an attorney's fee is merely an incident of litigation, and is not recoverable absent a specific contractual provision or statutory authority therefore (*see, Levine v. Infidelity, Inc*., 2 AD3d 691 [2nd Dept. 2003], *lv dismissed*, 3 NY3d 656 [2004]). Accordingly, since there is no statute authorizing the recovery of an attorney's fee in a mortgage foreclosure action, such a fee may only be recovered if it is contractually authorized (*id.*). Thus, an attorney's fee may be recovered in a mortgage foreclosure action if, *e.g.*, the mortgage document obligates the mortgagor to pay such a fee for the expenses incurred in that action (*id.*). The mortgage agreements in this case

contain the following provision (Plaintiff's 2nd Exhibit "D", page 17, para 22):

> In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured.

As a result, plaintiff's recovery of an attorney's fee is contractually authorized, and may be awarded subject to the Court's discretion upon the submission of an appropriate judgment as provided for herein.

Lastly, Washington Mutual seeks reformation of the mortgage and deed recorded on September 19, 2003 in Liber 15875 at page 283 to correct the compass-heading set forth in the final course description fixing the boundaries of the subject parcel from "South 55º 46' 00" West," to "South 55º 46' 00" East." The description of the mortgaged premises (Plaintiff's Exhibit "E") currently reads as follows:

> BEGINNING at a point on the Northerly side of Alter Avenue distant 375 feet Westerly from the corner formed by the intersection of the Northerly side of Alter Avenue and the Westerly side of Bear Street;
>
> RUNNING THENCE North 34 degrees 14 minutes 00 seconds East 100.50 feet to a point;
>
> THENCE North 55 degrees 46 minutes 00 seconds West, 50 feet to a point;
>
> THENCE South 34 degrees 14 minutes 00 seconds West, 100.50 feet to a point on the Northerly side of Alter Avenue;
>
> THENCE South 55 degrees 46 minutes 00 seconds West, 50 feet along the Northerly side of Alter Avenue to the point or place of BEGINNING.

As recorded, it is evident that the current description will not lead the reader back to the "point or place of Beginning," and is clearly erroneous. Where the course set forth in a deed or

mortgage misdescribes the parcel of realty to which it purports to relate as the result of an apparent scrivener's error, it may be reformed to reflect the true metes and bounds (*see, Shawangunk Conservancy, Inc. v. Fink*, 261 AD2d 692 [3rd Dept. 1999]).

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiff settle a judgment on not less than twenty (20) days notice.

ENTER

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J.S.C.

Dated: February 26, 2008