

**Indymac Bank, FSB v Hernandez**

2009 NY Slip Op 30456(U)

February 24, 2009

Supreme Court, Suffolk County

Docket Number: 27045-08

Judge: Ralph F. Costello

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SHORT FORM ORDER

INDEX NO: 27045-08

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

Motion Date: 10-14-08

Adj Date: 11-25-08

Motion Seq: 001-MD

PRESENT:

Honorable Ralph F. Costello

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Indymac Bank F.S.B.,

Plaintiff,

-against-

Manuel Hernandez, Nancy Hernandez et al.  
Defendants.

PLAINTIFF'S ATTORNEY  
RICHARD D. FEMANO, ESQ.  
Fein, Such & Crane, LLP  
747 Chestnut Ridge Road, Suite 200  
Chestnut Ridge, New York 10977-6216

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Upon the following papers: (1) Notice of Motion for Order Of Reference In Mortgage Foreclosure dated September 10, 2009; and now, it is

**ORDERED** that plaintiff's motion in this foreclosure action is considered under 2008 N.Y. Laws 472, Section 3-a, enacted August 5, 2008, and is hereby denied without prejudice and with leave to resubmit upon proper papers, including but not limited to evidentiary proof, including an affidavit from one with personal knowledge, as to whether or not the loan in foreclosure in this action is a "subprime home loan" as defined in RPAPL §1304 or a "high-cost home loan" as defined in Banking Law §6-1; and it is further

**ORDERED** that in the event the loan in foreclosure in this action meets the statutory definition of "subprime home loan" or "high-cost home loan," the plaintiff shall include in any motion resubmitted in accordance with this Order evidentiary proof, including an affidavit from one with personal knowledge, as to whether the mortgagor defendant(s) is a resident of the subject property; and it is further

**ORDERED** that in the event the loan in foreclosure in this action meets the statutory definition of "subprime home loan" or "high-cost home loan," the plaintiff shall include in any motion resubmitted in accordance with this Order evidentiary proof, including an affidavit from one with personal knowledge, information regarding the defendant's residence address and contact information, sufficient for the Court to properly notify the defendant of a settlement conference pursuant to Section 3-a; and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this Order upon the defendants via first class mail, and shall annex a copy of this Order and the affidavit of service of same as exhibit to any motion resubmitted pursuant to this Order; and it is further

**ORDERED** that with regard to any future applications resubmitted pursuant to this Order, plaintiff's papers shall comply with all other requirements set forth herein; and it is further

**ORDERED** that with regard to any future applications, if the Court determines that 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, 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; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this decision and order upon all parties.

On August 5, 2008, Senate Bill 8143 was approved and enacted as 2008 N.Y. Laws 472. In essence, the Act: requires notice to a mortgagor regarding foreclosure protection and foreclosure rescue scams; requires a mortgagee or loan servicer to give notice a specified number of days before commencing an action; requires that a settlement conference be held; requires identification of subprime home loans or high-cost home loans in foreclosure actions; prohibits prepayment fees; and makes numerous changes relating to refinancing, mortgage fraud, loan servicing, distressed property consultants, and other related matters. With regard to home mortgage loans, changes in the law include amendments to the Real Property Actions and Proceedings Law, the Civil Practice Law and Rules, the Banking Law and the General Obligations Law. The Penal Law and the Criminal Procedure Law has also been amended to create new crimes for mortgage fraud. And the Real Property Law has been amended with regard to distressed property consulting contracts.

With regard to pending foreclosure actions, Section 3-a of the 2008 N.Y. Laws 472 states:

For any foreclosure action on a residential mortgage loan, in which the action was initiated prior to September 1, 2008 but where the final order of judgment has not yet been issued, the court shall request each plaintiff to identify whether the loan in foreclosure is a subprime home loan as defined in section 1304 of the real property actions and proceedings law or is a high-cost home loan as defined in section 6-1 of the banking law.

If the loan is a subprime home loan or high-cost home loan, the court shall notify the defendant that if he or she is a resident of such property, he or she may request a settlement conference.

If the defendant requests a conference, the court shall hold such

conference as soon as practicable for the purpose of holding settlement discussions pertaining to the 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.

At any conference held pursuant to this section, 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. The defendant shall appear in person or by counsel. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff to attend the settlement conference telephonically or by video-conference.

The motion papers submitted in this matter establish that this is, indeed, a foreclosure action on a residential mortgage loan, that the action was initiated prior to September 1, 2008, and that a final order of judgment has not yet been issued. Therefore, in accordance with the mandates of 2008 N.Y. Laws, Ch. 472, Section 3-a, the Court must ascertain from the plaintiff whether or not the loan in foreclosure is a “subprime home loan” as defined in RPAPL §1304, or a “high-cost home loan” as defined in Banking Law 6-1. RPAPL §1304(5)(c) defines a “subprime home loan” as follows:

[A] home loan consummated between [January 1, 2003 and September 1, 2008] in which the terms of the loan exceed the threshold as defined in [RPAPL §1304(d)]. A subprime home loan excludes a transaction to finance the initial construction of a dwelling, a temporary or “bridge” loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit.

Under RPAPL §1304(d), the term “threshold,” as referred to in the RPAPL §1304(5)(c) definition of “subprime home loan,” means:

[F]or a first lien mortgage loan, the annual percentage rate of the home loan at consummation of the transaction exceeds three percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month in which the loan was consummated; or for a subordinate mortgage lien, the annual percentage rate of the

home loan at consummation of the transaction equals or exceeds five percentage points over the yield on treasury securities having comparable periods of maturity on the fifteenth day of the month in which the loan was consummated; as determined by the following rules: if the terms of the home loan offer any initial or introductory period, and the annual percentage rate is less than that which will apply after the end of such initial or introductory period, then the annual percentage rate that shall be taken into account for purposes of this section shall be the rate which applies after the initial or introductory period.

Since plaintiff's application alleges that the subject loan was executed within the January 1, 2003 and September 1, 2008 time period set forth in RPAPL §1304, the loan may qualify as a subprime or high-cost home loan, thereby subjecting this matter to the mandatory settlement conference requirements of Section 3-a.

Based upon the legislative mandates imposed upon the Court by 2008 N.Y. Laws, Ch. 472, Section 3-a, the Court hereby denies the plaintiff's motion with leave to resubmit upon evidentiary proof as to whether the subject foreclosure property is a high-cost loan a subprime loan. In the event this action involves a subprime or high-cost loan, the plaintiff shall also submit with any motion resubmitted in accordance with this Order evidentiary proof of the defendant's residence address and contact information, sufficient for the Court to properly notify the defendant of a Section 3-a settlement conference.

With regard to any future applications resubmitted pursuant to this Order, plaintiff's papers shall include: (1) evidentiary proof of compliance with the applicable personal service provisions such as, but not limited to, CPLR §308, including proof of "due diligence" of several attempts to find the mortgagor defendant during times that such defendant is likely not commuting to or from work or at work for those defendants served pursuant to CPLR §308(4) (which may also include attempts to ascertain the mortgagor defendant's place of employment if "nail and mail" service was made at the mortgagor defendant's home, or attempts to ascertain mortgagor defendant's place of abode or dwelling if "nail and mail" service was made at the mortgagor defendant's place of employment), sufficient to establish jurisdiction over the defendant(s); (2) evidentiary proof of compliance with the requirements of CPLR §3215(f), including but not limited to a proper affidavit of facts by the plaintiff [or by plaintiff's agent, provided there is proper proof in evidentiary form of such agency relationship], or a complaint verified by the plaintiff and not merely by an attorney or non-party, such as a servicer, with no personal knowledge; (3) evidentiary proof, including an affidavit from one with personal knowledge, of compliance with the time and content requirements specified in the notice of default provisions set forth in the mortgage, and evidentiary proof of proper service of said notice; (4) evidentiary proof, which may include an affidavit from one with personal knowledge demonstrating the plaintiff's standing to commence the action, or proper and timely assignments of the subject mortgage, if any, sufficient to establish the plaintiff's ownership of the subject note and mortgage at the time the action was commenced, which assignment does not rest upon an ineffectual retroactive date of assignment to establish standing; (5) evidentiary proof of

compliance, including an attorney's affirmation, with the form, type size, type face, paper color (that must be other than the color of the summons and complaint) and content requirements for foreclosure notices, as set forth in RPAPL §1303, for those foreclosure actions commenced between February 1, 2007 and August 31, 2008, as well as an affidavit demonstrating proper service of such compliant notice; (6) evidentiary proof, including an attorney's affirmation, of compliance with the form, type size, type face, paper color (that must be other than the color of the summons and complaint) and additional content requirements for foreclosure notices, as set forth in RPAPL §1303 [as amended August 5, 2008], for those foreclosure actions commenced on or after September 1, 2008, as well as an affidavit demonstrating proper service of such compliant notice; (7) evidentiary proof, including an attorney affirmation, of compliance with the additional form, content, type size, and type face notice requirements for summonses, as set forth in RPAPL §1320, for those foreclosure actions commenced on or after August 1, 2007, and proof of proper service of said summons; and (8) evidentiary proof, including an affidavit from one with personal knowledge, of compliance with the additional mailing requirements set forth in CPLR §3215(g)(3), for those foreclosure actions commenced on or after August 1, 2007, and proof of proper service of said additional notice.

This constitutes the Decision and Order of the Court.

DATE: Feb 24, 2009  
RIVERHEAD, NY

ENTER:

  
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Ralph F. Costello, J.S.C.