

Citimortgage, Inc. v Villatoro-Guzman

2009 NY Slip Op 30983(U)

March 16, 2009

Supreme Court, Suffolk County

Docket Number: 08-15889

Judge: Donald R. Blydenburgh

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 11 - SUFFOLK COUNTY

P R E S E N T :

Hon. DONALD R. BLYDENBURGH
Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
001 - MD

-----X		
CITIMORTGAGE, INC.,	:	DE ROSE & SURICO
	:	Attorney for Plaintiff
Plaintiff,	:	213-44 38 th Avenue
- against -	:	Bayside, New York 11361
	:	
DIONICIO VILLATORO-GUZMAN,	:	
MORTGAGE ELECTRONIC REGISTRATION	:	
SYSTEMS, INC., AS NOMINEE FOR CITIBANK,	:	
N.A. and "JOHN DOE" # 1 - 10, "MARY DOE"	:	
# 1 - 10, and "JANE DOE" # 1 - 10, the names	:	
being fictitious, their true names being unknown to	:	
the plaintiff, persons intended being persons in	:	
possession of portions of the premises herein	:	
described,	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 15 read on this application to amend and for an order of reference ; Application and supporting papers 1-15 ; Answering Affidavits and supporting papers no opposition ;Replying Affidavits and supporting papers ; Other ; it is,

ORDERED that this ex-parte application by plaintiff for an order of reference and for an order amending the caption in this foreclosure action is considered under 2008 NY Laws, Chapter 472, enacted August 5, 2008, and is hereby denied, without prejudice, with leave for renewal upon proper papers; and it is further

ORDERED that any renewed application by plaintiff shall be accompanied by copies of all the supporting proof submitted on the instant application.

This is an action to foreclose a mortgage on premises known as 219 Nolin Street, Brentwood, New York 11717, with tax map description 0500/185.00/02.00/ 002.000 ("premises"). The action was

Citimortgage, Inc. v Villatoro-Guzman
Index No. 08-15889
Page No. 2

commenced on April 22, 2008, with the filing of a summons and complaint with RPAPL §1303 notice in the Suffolk County Clerk's Office. A Notice of Pendency was also filed on April 22, 2008. The summons and complaint were served on all defendants within thirty days of the filing of the Notice of Pendency (*see* CPLR 6512 and 6514[a]).

Defendant Dionicio Villatoro-Guzman executed and delivered a note dated May 11, 2007, for a loan from Citimortgage, Inc. ("lender") in the sum of \$332,000.00, at a yearly interest rate of 6.875 % with monthly payments of principal and interest in the amount of \$2,181.00. The note was secured by a mortgage on the premises dated and signed by defendant Dionicio Villatoro-Guzman on May 11, 2007 ("mortgage"). The mortgage indicated that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee of the lender and its successors and assigns, and that for purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded in the Suffolk County Clerk's Office on June 7, 2007, in Liber 21547, at page 588. The mortgage was assigned to plaintiff, by assignment dated April 2, 2008, and plaintiff is still the holder to date. Defendant Dionicio Villatoro-Guzman defaulted on the loan payment due on December 1, 2007, and the grace period under the note of 15 days thereafter ("default date") and each successive due date. The total monthly payment of \$2,181.00 was due as of the default date. Upon the failure of defendant Dionicio Villatoro-Guzman to cure the default, under the terms and conditions of the loan, it was accelerated.

Plaintiff now seeks an order appointing a referee to determine the amount due and to ascertain whether the subject premises can be sold in parcels; amending the caption of the action to delete the fictitious names "John Doe" #1-10, "Mary Doe" #1-10, and "Jane Doe" # 2-10 as party defendants, and to add "Reyna Vasquez" as a party defendant.

The court must deny plaintiff's application for an order of reference, as the result of the following deficiencies contained herein:

1. The submitted motion papers establish that this foreclosure action was commenced after August 1, 2007 but prior to September 1, 2008. Under the mandates imposed upon the Court by 2008 NY Laws, Ch. 472, Section 3-a, a plaintiff must provide proof identifying the type of loan being secured by the mortgage. Here, plaintiff has not submitted proof in evidentiary form as to whether the subject loan being foreclosed upon is a "subprime home loan" (*see* RPAPL §1304[5][c]) or a "high-cost home loan" (*see* Banking Law § 6-1), or a "non-traditional home loan" (*see* RPAPL §1304[5][e]). Where the loan meets the statutory definition of any of these type of loans, plaintiff must submit evidentiary proof, including an affidavit from someone with personal knowledge, of defendant's residence address and contact information, sufficient for the Court to properly notify the defendant mortgagor that he or she may request a settlement conference if a resident of the premises in foreclosure (*see* CPLR 3408). If the loan meets the statutory definition of a "high-cost home loan," the complaint must include an affirmative allegation of plaintiff's compliance with all of the provisions of Banking Law §§ 595-a and 6-1 (*see* RPAPL § 1302[1]).

Citimortgage, Inc. v Villatoro-Guzman
Index No. 08-15889
Page No. 3

2. Plaintiff has not submitted the required proof that the “Help for Homeowners in Foreclosure” notice served upon the mortgagor met all of the notice requirements of RPAPL §1303. Given the explicit statutory requirements of RPAPL §1303(2), plaintiff must submit proper evidentiary proof to establish full compliance with the substantive and procedural requirements of this statute (*see Countrywide Home Loans, Inc. v Taylor*, 17 Misc3d 595, 843 NYS2d 495 [Sup Ct, Suffolk County 2007]). Upon renewal, plaintiff must submit an attorney’s affirmation with specifics showing that the notice complied with the form, type, size, type face, paper color and content requirements of RPAPL §1303. Proof of service should indicate the notice was printed on colored paper other than the color of the summons and complaint, not just that it was printed on colored paper, or that it was a RPAPL §1303 notice (*see Countrywide Home Loans, Inc. v Taylor supra*).

3. Plaintiff has not submitted valid proof in evidentiary form regarding the facts constituting the claim and amounts due ((CPLR 3215 [f]; *see Wolf v Citibank*, 34 AD3d 574, 824 NYS2d 176 [2nd Dept 2006]; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314 [2nd Dept 2005]; *Countrywide Home Loans v Taylor supra*). Here, plaintiff submits the affidavit of Tim Paul, an assistant vice president of plaintiff Citimortgage, Inc., which was signed and notarized in the State of Missouri. An out-of-state affidavit must comply with CPLR 2309 [c], which requires an out-of-state affidavit to be accompanied by a certificate of conformity (*see Real Property Law § 299-a[1]*; *see also PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2nd Dept 2008]; *Ford Motor Credit C., v Prestige Gown Cleaning Serv.*, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct, Queens Cty 2002]). In the absence of a certificate of conformity, the affidavit is, in effect, unsworn (*see Worldwide Asset Purchasing, LLC v Simpson*, 17 Misc3d 1128[A], 851 NYS2d 75 [Auburn City Ct 2007]). Thus the submission of a proof of facts through the affidavit of Tim Paul, an assistant vice president of plaintiff Citimortgage, Inc., fails as sufficient proof.

Nevertheless, where a verified complaint has been served, “it may be used as the affidavit of the facts constituting the claim and the amount due...” (CPLR 3215 [f]; *see NYCTL 2005-A TRUST v Davis*, 2009 NY Slip Op 29022, 870 NYS2d 905 [Sup Ct, Kings Cty 2009]). However, it must be accompanied by an affidavit as to the default, by the party or the party’s attorney (*see CPLR 3215 [f]*). Here, again, plaintiff has not submitted proper proof of an affidavit in admissible form as to the details of the default. The affidavit submitted by Tim Paul, an assistant vice president of plaintiff Citimortgage, Inc., was signed and notarized in the State of Missouri. In the absence of a certificate of conformity, again, the affidavit is, in effect, unsworn (*see Worldwide Asset Purchasing, LLC v Simpson supra*), and fails as sufficient proof.

Further, the complaint itself was verified by plaintiff’s attorney, not by plaintiff, based upon the statement that the client (plaintiff) did not maintain its principal place of business in the same county where plaintiff’s attorney maintained his office (*see CPLR 3020 [d][3]*). Where a verified complaint has been served, “it may be used as the affidavit of the facts constituting the claim and the amount due...” (*see CPLR 3215 [f]*; *NYCTL 2005-A TRUST supra*). However, “[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” (*see Hazim v Winter*, 234 AD2d 422, 651 NYS2d

Citimortgage, Inc. v Villatoro-Guzman
Index No. 08-15889
Page No. 4

149 [2nd Dept 1996]; *Mullins v DiLorenzo*, 199 AD2d 218, 606 NYS2d 161 [1st Dept 1993]). An attorney's verification not made on personal knowledge cannot be used for purposes of obtaining a default judgment (see *Costello v Reilly*, 36 AD3d 581, 828 NYS2d 172 [2nd Dept 2007]; *Finnegan v Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2nd Dept 2000]; *Joosten v Gale*, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]). Its use is "pure hearsay utterly devoid of evidentiary value" (see *Feffer v Malpeso*, 210 AD2d 46, 619 NYS2d 46 [1st Dept 1994]).

Accordingly, the plaintiff has failed to meet the burden of proof required by CPLR 3215 [f] to obtain an order of default (see *Blam v Netcher*, 17 AD3d 495, 793 NYS2d 464 [2nd Dept 2005]; *Peniston v Epstein*, 10 AD3d 450, 780 NYS2d 916 [2nd Dept 2004]; *Goodman v New York City Health & Hospitals Corp.*, 2AD3d 581, 768 NYS2d 365 [2nd Dept 2003]; *DeVivo v Sparago*, 287 AD2d 535, 731 NYS2d 501 [2nd Dept 2001]; *NYCTL 2005-A TRUST v Davis supra*).

4. Similarly, the assignment document from Mers to plaintiff is also deficient, as it was signed and notarized in the State of Missouri and lacks the necessary certificate of conformity (CPLR 2309 [c]; Real Property Law § 299-a[1]; see *PRA III, LLC v Gonzalez supra*).

5. Plaintiff has not submitted proof in admissible form of compliance with the notice requirements contained in Paragraphs 15 and 22[b] of the mortgage. Neither the affirmation of plaintiff's attorney, nor the affidavit of Tim Paul, an assistant vice president of plaintiff Citimortgage, Inc., nor the verified complaint, submitted by plaintiff, attests to the date when a demand letter to correct the default was sent to the mortgagor, the manner in which it was sent, or that this demand letter conformed to the specific requirements of the mortgage (see *General Elec. Co. v Kessler*, 131 AD2d 634, 516 NYS2d 945 [2nd Dept 1987]). The necessity of this was a contractual condition-precedent to the exercising of plaintiff's rights upon default (CPLR 3215 [f]; see *GE Capital Mortgage Services Inc v Mittelman*, 238 AD2d 471, 656 NYS2d 645 [2nd Dept 1997]; *Moet II Inc. v McCarthy*, 229 AD2d 876, 646 NYS2d 64 [3rd Dept 1996]). Upon renewal, plaintiff must attach a copy of the notice letter, with proof of mailing, by affirmation or affidavit.

6. Plaintiff must provide proof in admissible form as to the factual basis of the identity of "Reyna Vasquez" and his or her relevancy to this foreclosure action, upon renewal.

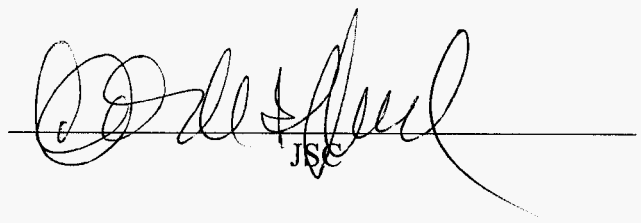
Further, plaintiff is reminded that proper proof of compliance with CPLR 3215[g][3], concerning the mailing of additional notice, is required upon application for a judgment of foreclosure against any defaulting mortgagor. An order of reference is simply a preliminary step towards obtaining a judgment of foreclosure (see *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2nd Dept 1996]). An affidavit must state that "additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of the judgment" (CPLR 3215 [g][3][i]).

Accordingly, the plaintiff's application for an order of reference is denied, without prejudice

Citimortgage, Inc. v Villatoro-Guzman
Index No. 08-15889
Page No. 5

to renewal upon proper papers, including but not limited to a copy of all the papers submitted with this application, a copy of this order, and the evidentiary proof specified above.

Dated: 3-16-09



 FINAL DISPOSITION X NON-FINAL DISPOSITION