JP Morgan Chase Bank v Anthony
2009 NY Slip Op 32129(U)
July 28, 2009
Supreme Court, Suffolk County
Docket Number: 10744-07
Judge: Ralph F. Costello
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.

[* 1]

SHORT FORM ORDER

INDEX No. 10744-07

SUPREME COURT - STATE OF NEW YORK
IAS PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

APPLICATION FOR AN ORDER OF REFERENCE
Motion Date: January 5, 2009
#003 - MD

JP MORGAN CHASE BANK AS TRUSTEE FOR EQUITY ONE ABS, INC. MORTGAGE PASS THROUGH CERTIFICATES SERIES 2004-3 C/O EQUITY ONE, INC.
121 WOODCREST RD
CHERRY HILL, NJ 08003

Plaintiff,

- against -

RAY ANTHONY, NATIONAL CITY BANK AND JOHN DOE "1" through "12" said persons or parties having or claimed to have a right, title or interest in Mortgaged premises, herein their respective names are presently unknown to the Plaintiff,

Defendants.

THE LAW OFFICES OF
ALAN WEINREB, PLLC
Attorneys for Plaintiff
6800 Jericho Tpke
Suite 207W
Syosset, NY 11791

Upon the reading and filing of the following papers in this matter: ex parte application for an order of reference filed on January 5, 2009, and supported by the affirmation of Alan H. Weinreb, Esq. dated December 22, 2008, and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that plaintiff's application (seq. #003) for an order of reference in this foreclosure action is considered under 2008 NY Laws, Chapter 472, enacted August 5, 2008, as well as the related statutes and case law, and is hereby denied without prejudice and with leave to resubmit upon proper papers, for the following reasons: **(1)** The plaintiff's failure to submit proper 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 **(2)** The plaintiff's failure to submit proper evidentiary proof, including an affidavit from one with personal knowledge, of proper assignments of the subject mortgage, sufficient to establish the plaintiff's ownership of the note and mortgage; and it is further

ORDERED that in the event the loan in foreclosure in this action meets the statutory definition of "subprime home loan," as defined in RPAPL §1304, or a "high-cost home loan," as defined in Banking Law §6-1, the plaintiff shall submit evidentiary proof, including an affidavit from one with personal knowledge, regarding whether or not the mortgagor defendant is known to be a resident of the property in foreclosure, as well as evidentiary proof of such defendant's residence address and contact information, sufficient for the Court to properly notify the defendant, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, that if he or she is a resident of such property, he or she may request a settlement conference; and it is further

ORDERED that at any conference held pursuant to 2008 NY Laws, Ch. 472, Section 3-a, 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; and it is further

ORDERED that at any such conference held pursuant to 2008 NY Laws, Ch. 472, Section 3-a, the defendant shall appear in person or by counsel and 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; and it is further

ORDERED that the plaintiff shall promptly serve a copy of this Order upon all defendants via certified mail (return receipt requested), and by first class mail, and shall provide proof of such service to the Court at the time of any scheduled conference, and annex a copy of this Order and the affidavit(s) of service of same as exhibits to any motion resubmitted pursuant to this Order; and it is further

ORDERED that with regard to any future applications by the plaintiff, 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.

In this foreclosure action, the plaintiff filed a summons and complaint on March 30, 2007, which essentially alleges that the defendant-homeowners, Ray Anthony, defaulted in payments with regard to a mortgage, dated September 3, 2003, in the principal amount of $212,000, and given by the

defendant-homeowner(s) for the premises located at 118 Chanel Drive East, Shirley, New York 11967. The note contains an allonge which indicates that it was endorsed without recourse to Popular Financial Services, LLC. ("Popular"). The original lender, American General Home Equity, Inc., ("American") assigned the mortgage and note to Mortgage Electronic Registration Systems, Inc. ("MERS") by assignment dated June 4, 2004. The mortgage and note were then assigned by MERS back to American by further assignment dated March 27, 2007. Thereafter, pursuant to a purported Asset Purchase Agreement dated August 29, 2008, between Goldman Sachs Mortgage Company Goldman Sachs & Co., ("Goldman"), Litton Loan Servicing LP, ("Litton") as purchasers, and Popular Mortgage Servicing, Inc., Equity One. Inc. Equity One Incorporated, Equity One Consumer Loan Company, Inc., E-LOAN Auto Fund Two, LLC, Popular, Popular FS, LLC, as Sellers and Popular, Inc. and Popular North America, Inc., and the BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK as successor to JPMorgan Chase Bank ("the Bank"), National Association, Litton was appointed as the Bank's Attorney-In-Fact as it relates to the subject mortgage and note. The plaintiff now seeks a default order of reference and requests amendment of the caption deleting the fictitious named defendants, "John Doe #1" through "John Doe #12." For the reasons set forth herein, the plaintiff's application is denied.

On August 5, 2008, Senate Bill 8143 was approved and enacted as 2008 NY Laws, Chapter 472, which has unofficially been referred to as the Subprime Lending Reform Act. With regard to foreclosure actions commenced prior to September 1, 2008 and for which a final order of judgment has not yet been issued, Section 3-a of the Act states that the Court must "request each plaintiff to identify whether the loan in foreclosure is a subprime home loan as defined in [RPAPL §1304] or is a high-cost home loan as defined in [Banking Law §6-1]." If the loan is identified by the plaintiff as a subprime home loan or high-cost home loan, the Court must "notify the defendant that if he or she is a resident of such property, he or she may request a settlement conference."

RPAPL 1304(c), defines "subprime home loan" as "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)]." Whether or not a loan satisfies one of the "thresholds," as defined in RPAPL §1304(d), depends upon whether the loan is a first lien mortgage loan or a subordinate mortgage lien, and upon various other factors, such as annual percentage rate, time of loan consummation, periods of maturity, percentage points over yield on treasury securities, and any applicable initial or introductory period. The definition specifically "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." The meaning of the term "consummated" is not specifically defined in any of the foreclosure-related statutes. Generally, with regard to a business transaction, for example, the transaction is "consummated" when it is actually completed. Accordingly, with regard to a loan agreement, the date of consummation may be construed to mean the date on which a loan transaction is final, or when the loan is actually funded; however, in analyzing the legislation applicable to foreclosure actions, this Court finds that, as used in the statutes relevant to foreclosures, a loan is "consummated" at the time the borrower executes the note and mortgage. Since the subject mortgage was executed between January 1, 2003 and September 1, 2008, pursuant to Section 3-a, the Court must ascertain whether or not this action involves a "high-cost home loan" or "subprime home loan" as defined by statute.

Banking Law 6-l(d) defines "high-cost home loan" as "a home loan in which the terms of the loan exceed one or more of the thresholds as defined in [Banking Law 6-l(g)]." Pursuant to Banking Law §6-l(g), whether or not a loan satisfies one of the "thresholds" depends upon several factors, such as interest rates, loan types, loan amounts, loan periods, periods of maturity, annual percentage rates, percentages of total points and fees, yields on treasury securities, and bona fide loan discount points. Any combination or permutation of the "threshold" variables set forth in RPAPL §1304(d) or Banking Law 6-l(g) may cause a mortgage to meet the definition of a "subprime home loan" or a "high-cost home loan."

Based on the variables and the complexities of the parameters involved in defining these terms, as well as the less-than-complete nature of the plaintiffs submissions, the Court will not (nor should it be expected to) flippantly draw its own conclusions as to whether or not the loan at issue meets the definition of a "subprime home loan" or a "high-cost home loan." This is particularly true, given the legislative intent of and express protections afforded to homeowners under the statutes related to foreclosure actions. Accordingly, the plaintiff must provide proof in evidentiary form, including an affidavit from one with personal knowledge, as to whether or not this matter involves the foreclosure of a "subprime home loan" or a "high-cost home loan," as defined by statute, thereby qualifying this matter for the Section 3-a settlement conference, or proper evidentiary proof, including an affidavit from one with personal knowledge, as to the reasons why those requirements of Section 3-a are not applicable to this action. In addition, the plaintiff shall submit evidentiary proof as to whether or not the defendant is a resident of the subject property.

The motion papers submitted in this matter establish that this foreclosure action was commenced prior to September 1, 2008. Therefore, based upon the legislative mandates imposed upon the Court by 2008 NY Laws, Ch. 472, Section 3-a, the Court hereby denies the plaintiff's motion with leave to resubmit upon evidentiary proof, including an affidavit from one with personal knowledge, as to whether or not this action involves a "high-cost home loan" or a "subprime home loan," or why the requirements of Section 3-a are not applicable to this action. In the event this action does involve 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 his or her right to a Section 3-a settlement conference.

With regard to a mortgage assignment which is executed after the commencement of an action and which states that it is effective as of a date preceding the commencement date, such assignment is valid where the defaulting defendant appears but fails to interpose an answer or file a timely pre-answer motion that asserts the defense of standing, thereby waiving such defense pursuant to CPLR 3211[e] (see, *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 1445 [2d Dept 2009]). However, it remains settled that foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Furthermore, a plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest (*Katz v East-Ville Realty Co.*, 249 AD2d 243, 672 NYS2d 308 [1st Dept 1998]). If an assignment is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient, unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously

effectuated (*see*, *Bankers Trust Co. v Hoovis*, 263 AD2d 937, 938, 694 NYS2d 245 [1999]). Plaintiff's failure to submit proper proof, including an affidavit from one with personal knowledge, that the plaintiff is the holder of the note and mortgage, requires denial of the plaintiff's application for an order of reference. Additionally, in his affirmation of regularity, counsel fails to mention all assignments of the note and mortgage herein. In particular, counsel's affirmation is silent as to purported endorsement of the note to Popular, the purported assignment dated June 4, 2004 from American to MERS, and the purported Asset Purchase Agreement dated August 29, 2008, between Goldman and Litton as purchasers and Popular et. al., as Sellers, as well as the details of same. Moreover, the affidavit of attempted service upon the fictitious defendants, "John Doe #1 through "John Doe #12," while merely stating that the subject premises is "vacant," is insufficient to establish the premises is unoccupied by any tenants or by mortgagor, full-time, part-time, or seasonally.

Dated: July 28, 2009

RALPH F. COSTELLO, J.S.C.

______ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**