

**Flagstar Bank, FSB v Mena**

2009 NY Slip Op 32619(U)

October 26, 2009

Supreme Court, Nassau County

Docket Number: 012291-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**FLAGSTAR BANK, FSB,**

**Plaintiff,**

**-against-**

**LUIS MENA,**

**Defendant.**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Index No: 012291-09**

**Motion Seq. No: 1  
Submission Date: 8/24/09**

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**The following papers having been read on this motion:**

**Notice of Motion, Affidavit in Support and Exhibits.....x**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Flagstar FSB on July 20, 2009 and submitted on August 24, 2009.<sup>1</sup> Defendant has not submitted any response to Plaintiff's motion. For the reasons set forth below, the Court denies Plaintiff's motion based upon improper service of the Summons and Motion on Defendant, with leave to renew.

**BACKGROUND**

**A. Relief Sought**

Plaintiff requests an Order, pursuant to CPLR § 3213, directing the entry of summary judgment against Defendant and awarding Plaintiff the principal amount of \$131,932.06, plus interest and counsel fees, in light of Plaintiff's failure to make required payments pursuant to a

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<sup>1</sup> Plaintiff filed the Summons on June 24, 2009, and the Clerk assigned this matter Index Number 012291-09. Plaintiff neglected to place the Index Number on the motion papers.

Home Equity Line of Credit.

B. The Parties' History

In support of its motion, Flagstar Bank, FSB ("Flagstar") provides an affidavit of Jessica Strong ("Strong") January 25, 2008. Strong affirms that she is an employee of Flagstar who is fully familiar with the facts and circumstances of this matter, except as to those stated upon information and belief. With respect to those facts and circumstances stated upon information and belief, Strong affirms that she believes those matters to be true based on her inspection of Flagstar's books and records, and conversations with Flagstar's counsel.

In her affidavit, Strong affirms the following:

At all relevant times, Defendant Luis Mena ("Mena") was and still is a resident of Nassau County, New York. Flagstar is a Federal Savings Bank organized under the laws of the State of Michigan and is authorized to do business in the State of New York.

On or about August 26, 2005, Mena executed a Home Equity Line of Credit ("HELOC") agreement ("Agreement") with Flagstar in the sum of \$132,000. Strong provides a copy of the Agreement, which contains Mena's name and address at the top of the first page. The Agreement lists Mena's address as 1036 Harrison Street, Uniondale, New York 11553 ("Address"). The Agreement also reflects a Loan Number of 5007821 13. The Agreement also contains 1) the contract variable rate of interest, 2) floor and ceiling rates, and 3) the conditions under which the variable rate of interest may change.

Strong also provides a copy of an Initial Rate Discount Agreement - Addendum to Home Equity Line of Credit Note, dated August 26, 2005 ("Discount Agreement"). The Discount Agreement, which refers to and contains the same Loan Number as the Agreement, modifies the Agreement as follows: 1) an Initial Interest Rate reduction of 1.000% will be in effect for a period of ninety (90) days from the date of disbursement; 2) at the end of the Initial Interest Rate period, the contract rate of interest and floor rate will revert to the rate that would have been in effect if Flagstar had not offered the Initial Interest Rate; and 3) the Initial Interest Rate will immediately cease, even if in effect for less than ninety (90) days, if the loan account becomes thirty (30) or more days delinquent. The Discount Agreement lists Mena as the Borrower, and the Address as the property to which the HELOC refers.

Pursuant to the HELOC, Mena agreed to pay Flagstar principal in the sum of \$132,000,

for a term of no more than one hundred and twenty (120 ) months, at a variable interest rate. On or about August 10, 2007, Mena defaulted with respect to those payments.

The Agreement also contains a paragraph titled "Attorney's Fees." That paragraph provides that, if Mena defaults on his obligations under the HELOC, he agrees to pay costs, including counsel fees, that Flagstar incurs in collecting or enforcing the debt.

On or about September 10, 2007, Flagstar demanded of Mena that he cure the default. Flagstar provides a copy of a letter dated January 25, 2008 from counsel for Flagstar to Arturo Torres, Esq., c/o Bridgeview Mortgage Corp., 1200 Hempstead Turnpike, Franklin Square, NY 11010 ("Default Letter"). Strong also provides a copy of a document titled "Telefax Message" dated January 25, 2008, reflecting that the Default Letter, as well as a one-page document titled "Pre Litigation Validation Notice," was faxed to Arturo Torres, Esq. ("Torres") on January 25, 2008.

The Default Letter, on stationery containing the letterhead of counsel for Flagstar, reads as follows:

Dear Mr. Torres:

**This letter is from an attorney acting as a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.**

This file has be [sic] referred to me for a lawsuit. I have already started the work to commence the action on the debt.

Before I recommend to my client that the legal action be continued, I'm writing to you to give your client, Mr. Luis Mena, who on 1-25-08 referred me to you the chance to make payment of \$140,119.98 plus the additional interest accruals through the date of full payment. Please review all the additional information on the attachment to this letter.

Very truly yours,

[Counsel for Flagstar]

(emphasis in original)

Flagstar also provides an Affidavit of Service dated July 13, 2009, regarding the service of the instant motion. That Affidavit of Service reflects that, on July 10, 2009, the Summons, Notice of Motion, Affidavit in Support and Supporting Documents ("Motion Documents") were

served on Luis Mena, pursuant to CPLR § 308(2), by delivering copies of those Motion Documents to Byron Jarren, described on the affidavit of service as a “co-worker,” at Bridgeview Mortgage Corporation, 1200 Hempstead Turnpike, 1<sup>st</sup> Floor, Franklin Square, New York 1101 (“Bridgeview”). The Affidavit of Service also reflects that copies of the Motion Documents were mailed to Bridgeview’s address on July 13, 2009.

C. The Parties’ Positions

Flagstar submits that it is entitled to judgment against Mena in light of his default with respect to his obligations under the HELOC, as well as counsel fees. With respect to Flagstar’s application for counsel fees, Strong affirms that this collection matter has been referred to counsel, who is not a salaried employee of Flagstar. Strong affirms, further, that counsel is handling this matter on a 25% contingency basis, which is a customary arrangement in this type of

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable

instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Flagstar Has Not Demonstrated Satisfactory Service of the Motion Papers

CPLR § 308(2) provides, in pertinent part, that personal service upon a natural person may be made:

by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business...

Flagstar's motion papers provide minimal information regarding the connection between Mena and Bridgeview, where the Motion Papers were served. The only evidence before the Court of any such connection is the Default Letter to Mr. Torres, who is apparently an attorney at Bridgeview. The Court infers from the Default Letter that Mr. Torres represented Mena in some capacity, but there is insufficient information from which the Court can conclude that service on Mena by delivery of the Motion Papers to an employee at Bridgeview was sufficient, particularly in light of the fact that the HELOC documentation refers to an Address in Uniondale. Under these circumstances, Flagstar has not demonstrated that it effected proper service of the Motion Papers, including the Summons, on Mena. In light of the foregoing, the Court denies Flagstar's motion, with leave to renew upon a proper showing that it has properly effected service of the Motion Papers on Mena.

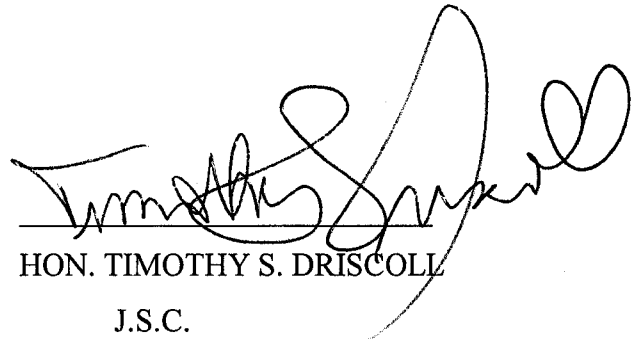
Accordingly, it is hereby:

**ORDERED**, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is denied, with leave to renew upon a proper showing that Plaintiff has properly effected service of all appropriate documents on Defendant.

All matters not decided herein are hereby denied.  
This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
October 26, 2009



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**

NOV 02 2009  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**