

**Bank of New York v Fuentes**

2009 NY Slip Op 33214(U)

March 16, 2009

Supreme Court, Suffolk County

Docket Number: 08-41134

Judge: Ralph F. Costello

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

scan

**PRESENT:**

Hon. RALPH F. COSTELLO  
Justice of the Supreme Court

APPLICATION FOR AN  
ORDER OF REFERENCE

Motion Seq. # 001

-----X	:	
BANK OF NEW YORK AS TRUSTEE FOR	:	
THE CERTIFICATE HOLDERS CWALT,	:	DRUCKMAN LAW GROUP PPLC
INC. ALTERNATIVE LOAN TRUST	:	Attorneys for Plaintiff
2005-53T2, MORTGAGE PASS-THROUGH	:	242 Drexel Avenue, Suite 2
CERTIFICATES SERIES 2005-53T2,	:	Westbury, N. Y. 11590
	:	
Plaintiff,	:	
	:	
- against -	:	
	:	
MARIE C. FUENTES, BANK OF AMERICA	:	
N.A., GOOD SAMARITAN HOSPITAL,	:	
CAPITOL ONE BANK, "JOHN DOE 1 to	:	
JOHN DOE 25", said names being fictitious,	:	
the persons or parties intended being the	:	
persons, parties, corporations or entities, if	:	
any, having or claiming an interest in or lien	:	
upon the mortgaged premises described in the	:	
complaint.	:	
	:	
Defendants.	:	
-----X	:	

Upon the reading and filing of the following papers in this matter : Ex parte application for an order of reference filed on April 21, 2009, as supported by the affirmation of Kiyam Poulson, Esq. dated April 13, 2009 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. # 001] 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 reason[s]: (1) The plaintiff has failed to submit proper evidentiary proof, including an affidavit from one with personal knowledge of the facts, 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; (2) The plaintiff has failed to submit 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 a complaint verified by the plaintiff and not merely by an attorney or non-party, such as a servicer, who has no personal knowledge of the facts alleged therein; (3). The plaintiff has failed to submit evidentiary proof, including an affidavit from one with personal knowledge, of proper 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, and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this Order upon all defendants and shall provide proof of such service to the Court at the time of any submission of a future application for the relief sought herein; 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 Nov.13, 2008 which alleges that the defendant-homeowner, Maria Fuentes, defaulted in payments with regard to a mortgage, dated September 19, 2005 in the principal amount of \$400,000 and given by the defendant for the premises located at 1824 Stein Drive, Bay Shore, New York. The original lender, Countrywide Home Loans, Inc., assigned the mortgage to the plaintiff by assignment dated Sept. 4, 2008. The plaintiff now seeks a default order of reference. For the reasons set forth herein, the plaintiff's application is denied, without prejudice.

It is ostensibly well known that 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 [such as the one herein] commenced after September 1, 2008, RPAPL 1302[1], sets forth several pleading requirements that must be satisfied in any mortgage foreclosure action "*relating to a high-cost home loan or a subprime home loan*". Further, as a result of this legislation, CPLR 3408 was added [effective 8/5/08], mandating that a settlement conference be scheduled and conducted by the court within sixty [60] days of the filing of proof of service with the clerk, if the foreclosure action involves a subprime, non traditional or high cost loan. Finally, the Rules of Court were amended after the enactment of L.2008, ch.472 to require that a special RJI form be utilized by the plaintiff seeking judicial intervention in any foreclosure action relating to a subprime or high cost loan. The utilization of the special RJI serves to alert the court in the very first instance that a mandatory conference under CPLR 3408 may need to be scheduled.

RPAPL 1304(c), defines a "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 statute appears to exempt any loan that exceeds the "conforming loan size" as established by the federal national mortgage association [ RPAPL 1304[5][b][I]. 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. Here, because of the date that this action was commenced, 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 6-1(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 6-1(g)]." Pursuant to Banking Law §6-1(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 6-1(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, the Court will not engage in surmise and/or conjecture and 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." In the case at bar, the court does not have independent knowledge as to whether this loan exceeds the "conforming loan size" established by the federal agency. Indeed, there must be competent evidence of this narrow issue. This is particularly true, given the legislative intent of and express protections afforded to homeowners under the statutes related to foreclosure actions. Indeed, the determination of whether the pleadings are sufficient under RPAPL 1302 and/or whether to schedule a mandatory conference under CPLR 3408 should not hinge upon the court reaching a conclusion on anything but compelling and reliable evidence as to the type or character of the subject home loan. As noted below, there must be an affidavit of merit from the party on all substantive aspects of the action.

Here, the affirmation of Kiyam Poulson Esq. dated April 13, 2009 is somewhat contradictory. In the Affirmation of Regularity, paragraph 15, the attorney alleges that the loan is, in fact, a subprime loan but then alleges that a conference is not required. Later, in a Supplemental Affirmation dated April 13, 2009, counsel affirms that this is a subprime loan and that the defendant occupies the subject premises. However, counsel also affirms "upon information and belief" that the loan exceeds the Fannie Mae Historical Conventional Loan limits for a single family home and, therefore, a conference is not required. There is no recitation explaining the source of counsel's information and/or belief, nor is any

documentary evidence in support of this claim annexed to the moving papers. Accordingly, since the plaintiff did not 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, or that the defendant is not a resident of the subject property and, therefore, does not qualify for the protections under the new laws, the court must deny the application, without prejudice to renewal upon proper proof.

The court further finds that the plaintiff's affidavit of merit that was ostensibly filed pursuant to CPLR 3215[f] is insufficient. In relevant part, CPLR §3215(a) states: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." With regard to proof necessary on a motion for default in general, CPLR 3215(f) states, in relevant part, that "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. . . . Proof of mailing the notice required by [CPLR 3215(g)], where applicable, shall also be filed."

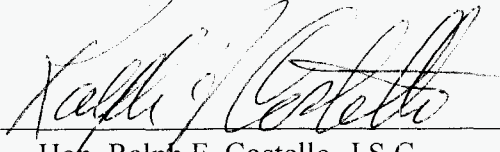
Without an affidavit by the plaintiff regarding the facts constituting the claim and amounts due or, in the alternative, an affidavit by the plaintiff that its agent has the authority to set forth such facts and amounts due, the statutory requirements are not satisfied. In the absence of either a proper affidavit by the party or a complaint verified by the party, not merely by an attorney with no personal knowledge, the entry of judgment by default is erroneous (see, *Peniston v Epstein*, 10 AD3d 450, 780 NYS2d 919 [2d Dept 2004]; *Grainger v Wright*, 274 AD2d 549, 713 NYS2d 182 [2d Dept 2000]; *Finnegan v. Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]; *Hazim v. Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]). Here, there is nothing from the plaintiff stating that the alleged agent, Countrywide Home Loans Servicing LLP, has the authority to act on the plaintiff's behalf. This is a fatal defect.

Finally, as noted previously, the court finds that there is a failure to submit evidentiary proof, including an affidavit from one with personal knowledge, of proper 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. Concerning default notices, when a mortgage agreement requires that, prior to acceleration of the mortgage, a lender must serve the borrower with a notice to cure a default. Mere conclusory assertions from one without personal knowledge, including those contained in an attorney's affirmation or in an affidavit from the plaintiff's officer, are insufficient to establish that the lender complied with such pre-acceleration requirements (see, e.g., *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; *CAB Associates v State of New York*, 14 AD3d 639, 789 NYS2d 311 [2d Dept 2005]). Here, there is no evidence that the required notice was actually mailed to the defendant. A copy of the alleged notice was not provided by the plaintiff. Failure of the plaintiff to submit proper proof of such compliance requires the denial of the

relief requested by the plaintiff in this application.

This constitutes the order of the court.

Dated: *Nov 16, 2009*

  
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Hon. Ralph F. Costello, J.S.C.

NON-FINAL DISPOSITION