

**Wells Fargo Bank, N.A. v Edeman**

2014 NY Slip Op 32013(U)

July 24, 2014

Supreme Court, Suffolk County

Docket Number: 20759-2007

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

*copy*

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 6-24-14  
ADJ. DATE 7-1-14  
Mot. Seq. # 002 - MotD

-----X  
WELLS FARGO BANK, N.A. as trustee and :  
custodian for MORGAN STANLEY ABS :  
CAPITAL, INC., MSAC 2007-HE3 :  
c/o Saxon Mortgage Services, Inc. :  
4708 Mercantile Drive North :  
Fort Worth, TX 76137-3605 :

Plaintiff(s), :

- against - :

ALISON EDEMAN, ROBERT A. GUERRO, :  
CAPITAL ONE BANK, MORTGAGE :  
ELECTRONIC REGISTRATION SYSTEMS, :  
INC., as nominee for FREMONT INVESTMENT :  
AND LOAN, PEOPLE OF THE STATE OF NEW :  
YORK, SAXON MORTGAGE SERVICES, INC., :  
JOHN DOE (Said name being fictitious, it being the :  
intention of Plaintiff to designate any and all :  
occupants of premises being foreclosed herein, and :  
any parties, corporations or entities, if any, having :  
or claiming an interest or lien upon the mortgaged :  
premises.) :

Defendant(s). :

-----X

**Leopold & Associates, PLLC**  
Attorneys for Plaintiff  
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Armonk, New York 10504

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 16, 2014, and supporting papers; and now

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

**ORDERED** that the branch of the plaintiff's motion (seq. #002), which seeks an order restoring this foreclosure case to the Court's calendar, is granted; and it is further

**ORDERED** that the branch of the plaintiff's motion (seq. #002), which seeks an order of reference in this foreclosure action, is hereby denied without prejudice and with leave to resubmit upon proper papers, for: **(1)** failure 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 by plaintiff's agent or attorney-in-fact, provided there is proper proof in evidentiary form of such agency relationship or a proper power-of-attorney), 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; **(2)** 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; and **(3)** failure to submit evidentiary proof, including an attorney's affirmation, of compliance with the form, type size, type face, paper color and content requirements for foreclosure notices to homeowners, pursuant to RPAPL §1303, (which applies to actions commenced on or after February 1, 2007, as amended by 2008 NY Laws, Ch. 472, eff. August 5, 2008, further amended by 2009 NY Laws, Ch. 507, eff. Jan. 14, 2010), including proper notice to tenants, if any, for actions commenced on or after January 14, 2010, and an affidavit of proper service of such notice(s) or, in the alternative, an affidavit from one with personal knowledge sufficient to show why the requirements of RPAPL §1303 do not apply; and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this Order upon the defendant-homeowner(s) at all known addresses and upon all other answering defendants, via first class mail, and shall promptly file the affidavit(s) of such service with the County Clerk and annex a copy of this Order and the affidavit(s) of service as exhibits to any motion resubmitted pursuant to this Order; and it is further

**ORDERED** that with regard to any scheduled court conferences or future applications by the plaintiff, if the Court determines that such conferences have been attended or 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, dismiss this case or 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 support of this motion, the plaintiff submits an affidavit from Jeremiah O'Brien, Vice President of Ocwen Loan Servicing, LLC, a non-party to this action<sup>1</sup>; however, there is no sufficient evidentiary proof that either Mr. O'Brien or Ocwen have authority to act on behalf of the plaintiff.

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

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<sup>1</sup> Mr. O'Brien's affidavit is dated December 17, 2012

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. . . .”

A party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence, and the declarations of an alleged agent may not be shown for the purpose of proving the fact of agency (see *Bank of New York v Silverberg*, 86 AD3d 274, 281, 926 NYS2d 532, 538 [2d Dept 2011]; *Lexow & Jenkins v Hertz Commercial Leasing Corp.*, 122 AD2d 25, 504 NYS2d 192 [2d Dept 1986]). Furthermore, the acts of a person assuming to be the representative of another are not competent to prove the agency without evidence tending to show the principal’s knowledge of or assent to such acts (*Lexow & Jenkins v Hertz Commercial Leasing Corp, supra*).

With regard to a judgment of foreclosure, an order of reference is simply a preliminary step towards obtaining a default judgment (see *Emigrant Mortgage Co., Inc., v Fisher*, 90 AD3d 823, 935 NYS2d 313 [2d Dept 2011]; *Home Sav. of Am., F.A. v. Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). 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, *Lamb v Moody*, 62 AD3d 839, 878 NYS2d 635 [2d Dept 2009]; *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]; *Henriquez v Purins*, 245 AD2d 337, 666 NYS2d 190 [2d Dept 1997]; *Hazim v. Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]).

The plaintiff has failed to submit the required affidavit made a party. Without a properly offered copy of a power of attorney, the Court is unable to ascertain whether or not a plaintiff’s servicing agent, for example, may properly act on behalf of the plaintiff to set forth the facts constituting the claim, the default and the amounts due, as required by statute.

Plaintiff has also 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. 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, 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]).

Lastly, for foreclosure actions commenced on or after February 1, 2007 involving residential real property consisting of owner-occupied one-to-four-family dwellings, RPAPL §1303(1) requires that the plaintiff in a mortgage foreclosure action must deliver to the mortgagor a statutorily specified notice. Pursuant to RPAPL §1303(2), the "notice to any mortgagor . . . shall be delivered with the summons and complaint. Such notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page." The specific statutorily required language of the notice to mortgagors is set forth in RPAPL §1303(3).

Effective January 14, 2010, pursuant to 2009 NY Laws Ch. 507, RPAPL §1303(1)(b) further requires that the plaintiff in any mortgage foreclosure action involving residential real property must provide notice to "any tenant of a dwelling unit in accordance with the provisions of this section." The specific content of the required notice is set forth in RPAPL §1303(5), while RPAPL 1303(4) sets forth the required form of the notice as follows:

The notice . . . shall be delivered within ten days of the service of the summons and complaint. Such notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page. For buildings with fewer than five dwelling units, the notice shall be delivered to the tenant, by certified mail, return receipt requested, and by first-class mail to the tenant's address at the property if the identity of the tenant is known to the plaintiff, and by first-class mail delivered to "occupant" if the identity of the tenant is not known to the plaintiff. For buildings with five or more dwelling units, a legible copy of the notice shall be posted on the outside of each entrance and exit of the building.

The plaintiff's summons and complaint and notice of pendency were filed with the County Clerk on July 10, 2007, thereby requiring compliance with the applicable notice provisions set forth in RPAPL §1303. Plaintiff has failed to submit proper evidentiary proof, including an attorney's affirmation, upon which the Court may conclude that the requirements of RPAPL §1303 have been satisfied, specifically regarding the form, type size, paper color and required language of any applicable notices. Merely annexing a copy of a purportedly compliant notice does not provide a sufficient basis upon which the Court may conclude as a matter of law that the plaintiff has complied with the substantive and procedural requirements of the statute.

Notice pursuant to RPAPL §1303 must be delivered with the summons and complaint in the foreclosure action (RPAPL 1303 [2]), and proper service is a condition precedent to the commencement of the action which is the plaintiff's burden to meet (see *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, the plaintiff has failed to establish compliance with the notice requirements of RPAPL §1303.

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Inasmuch as plaintiff has failed to submit evidentiary proof of compliance with the requirements of CPLR §3215(f), failed to submit evidentiary proof of proper compliance with the time and content requirements specified in the notice of default provisions set forth in the mortgage, and failed to establish compliance with the notice requirements of RPAPL §1303, that portion of the plaintiff's motion which seeks an order of reference must be denied; however, plaintiff's request to restore this case to the Court's calendar is granted.

This constitutes the Decision and Order of the Court.

Dated: July 24, 2014

  
PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION