

JPMorgan Chase Bank, N.A. v Israel
2015 NY Slip Op 31498(U)
August 10, 2015
Supreme Court, Kings County
Docket Number: 502918/2013
Judge: Larry D. Martin
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RECEIVED NYSCEF: 08/10/2015
At an I.A.S. Trial Term, Part 41 of the Supreme
Court of the State of New York, held in and for the
County of Kings, at the Courthouse, located at
Civic Center, Borough of Brooklyn, City and State
of New York, on the 20th day of
JULY 2015

P R E S E N T:

HON. LARRY D. MARTIN, J.S.C.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

MOTION SEQ. # 1

Plaintiff,

-against-

INDEX No.:

JONATHAN ISRAEL A/K/A JONATHAN B. ISRAEL A/K/A ISRAEL
JONATHAN, et al,

502918/2013

Defendants.

The following papers numbered 1 to 6 read on this motion

Papers Numbered

Notice of Motion, Affirmations, Affidavits

1-6

HON. LARRY D. MARTIN, J.S.C.:

Upon the foregoing papers, plaintiff moves this Court for an order granting it default judgment, appointing a referee, and amending the caption. By short-form order dated November 24, 2014, the motion was granted on default, subject to review by the Foreclosure Department. Upon review, the motion is denied.

Initially, the Court notes the following inconsistencies with respect to the plaintiff and alleged date of the borrower's default. The affirmation in support of the motion states that plaintiff is the original lender and has been in continuous possession of the note and mortgage "since July 23, 2013 and has not transferred any of its rights or interests thereunder to a third party" (Demko aff, ¶ 5). However, this action commenced before that date, on June 3, 2013. Additionally, the party affidavit by Kolette Modlin, a Default Service Officer of Caliber Home Loans, Inc. ("Caliber"), states that Caliber is the "assignee of plaintiff, for the purpose of servicing mortgage loans" (Modlin affidavit, ¶ 1). Thus, the attorney affirmation, dated June 24, 2014 contradicts the Modlin affidavit, sworn to on June 10, 2014, with respect to whether there has been an assignment. If plaintiff is still the note-holder

and Caliber is the servicer, no evidence is submitted “demonstrating that agent’s authority to act on behalf of the plaintiff” (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]). Rather than deny the motion (*see id.*; CPLR 3215 [f]), the Court will assume that Caliber and Ms. Modlin held the requisite authority for the limited purpose of determining the issues in this decision and order.

Another issue concerns the alleged date of default. The complaint, attorney affirmation, and party affidavit state that the borrower allegedly defaulted by failing to make a payment due January 1, 2013. Yet, the copy of the notice of default dated January 10, 2013 that was filed with the summons and complaint states that the borrower failed to pay the monthly payment due December 1, 2012.¹ There is also a purported RPAPL § 1304 notice dated September 10, 2012, which advises the borrower that his loan is forty (40) days in default — which would mean that the borrower failed to make a monthly payment due August 1, 2012. No explanation is provided on these discrepancies.

Proper service of a RPAPL § 1303 notice is a condition precedent to commencing a foreclosure action and the “foreclosing party has the burden of showing compliance” (*First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 166 [2d Dept 2010]). The notice “must be ‘delivered’ with the summons and complaint” and the affidavits of service should demonstrate such compliance (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102–03 [2d Dept 2011]). Here, there are two (2) affidavits of service filed with the County Clerk indicating that process was served on the borrower in accordance with CPLR § 308 (2). The first affidavit states that a “notice of commencement of action subject to mandatory electronic filing; summons and complaint . . . ; together with the Notice required by RPAPL Section 1303” were delivered to Linda Israel, the borrower’s wife, at the subject property address on June 26, 2013. In order to complete service by CPLR § 308 (2), the same documents were to be mailed

¹ Interestingly, the motion papers include another notice of default dated February 11, 2013, stating the alleged date of default was January 1, 2013 (see exhibit C). The first notice filed with the summons and complaint is not mentioned in the motion papers.

to the borrower. However, the second affidavit of service states that only the “notice of commencement of action subject to mandatory electronic filing; [and] summons and complaint” were mailed to the borrower on July 1, 2013. By failing to include the RPAPL § 1303 notice in the mailing, plaintiff failed to meet its burden with this requirement.

Additionally, the plaintiff failed to demonstrate proper compliance with RPAPL § 1304. First, the party affidavit simply states “On September 10, 2012 a 90 day default letter was sent in accordance with New York RPAPL 1304” (Modlin affidavit, ¶ 7). Because this affidavit is insufficient and plaintiff has not submitted a certified mailing receipt, nor any other proof of the alleged mailing(s), plaintiff has not shown strict compliance with the statute (*TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1257–58 [3d Dept 2014] [where plaintiff submitted certified mail receipts that did “not contain a postmark or date of mailing” and did not include “an affidavit from anyone with personal knowledge of the mailing”]; *see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 910 [2d Dept 2013] [plaintiff’s burden not met without an affidavit of service]; *JPMorgan Chase Bank, N.A. v Plaskett*, 45 Misc 3d 531, 534–35 [Sup Ct Kings County 2014]; *see also Weisblum*, 85 AD3d at 106).

Furthermore, a copy of the alleged notice annexed to the motion papers as Exhibit D appears to include another page/notice beginning with “IMPORTANT NOTICE TO SERVICEMEMBERS AND THEIR DEPENDENTS.” Sending this notice is in direct contravention to RPAPL § 1304 (2), which states that the § 1304 notice “shall be sent by the lender, assignee, or mortgage loan servicer in a separate envelope from any other mailing or notice” (emphasis added). Only one enclosure should be accompanying the notice, which is the required list of housing counseling agencies that “that serve the region where the borrower resides” (RPAPL 1304 [2]). The Department of Financial Services provides the list of approved agencies by region (i.e., by county). Here, plaintiff provided a seven-page list of agencies throughout the state, but only four (4) are located in Brooklyn. Clearly this fails to demonstrate

strict compliance with the statute as at least five (5) are required to be in the list (*id.*).

Finally, plaintiff did not submit any evidence to prove its allegation in the complaint that it complied with RPAPL § 1306. The allegation is insufficient, by itself, to prove such compliance and/or the timing of the required filing with the New York State Department of Financial Services (*see Leroy*, 121 AD3d at 1258–60; *Plaskett*, 45 Misc 3d at 535–36).

Because compliance with HETPA's notice requirements are conditions precedent to commencing a foreclosure action (*see Silver*, 73 AD3d at 169), plaintiff's failure to demonstrate such compliance requires dismissal of the action (*Silver*, 73 AD3d at 166 [“the foreclosure action will be dismissed” if plaintiff fails to demonstrate compliance]; *Weisblum*, 85 AD3d at 103 [“plaintiff's failure to show strict compliance requires dismissal”]).

Accordingly, the action is dismissed and the motion is denied. The foregoing constitutes the decision, order, and judgment of the Court.

ENTER,

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Motion Seq. # 1

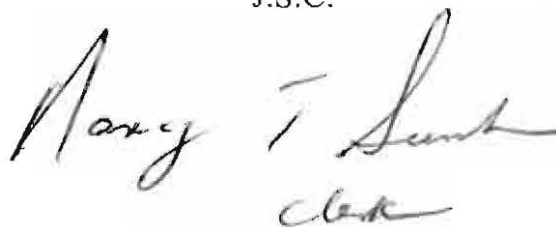
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HON. LARRY D. MARTIN

J.S.C.



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