

At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of June 2008

HON. ARTHUR M. SCHACK J.S.C.

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWALT, INC.
ALTERNATIVE LOAN TRUST 2006-OC1
MORTGAGE PASS-THROUGH CERTIFICATES,
2006-OC1,

Plaintiff,

- against -

DENISE MULLIGAN, BEVERLY BRANCHE, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 29399/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference with Affidavits/Exhibits _____

_____ 1 _____

Plaintiff's application, upon the default of all defendants, for an order of reference, for the premises located at 1591 East 48th Street, Brooklyn, New York (Block 7846, Lot

14, County of Kings) is denied without prejudice. The “affidavit of merit” submitted in support of this application for a default judgment is not by an officer of the plaintiff or someone with a power of attorney from the plaintiff. Leave is granted to plaintiff BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1 (BNY), to renew its application for an order of reference upon presentation to the Court of compliance with the statutory requirements of CPLR § 3215 (f), with “an affidavit of facts” executed by someone who is an officer of BNY or has a valid power of attorney from BNY. Further, the Court, upon renewal of the application for an order of reference requires a satisfactory explanation to questions with respect to: the assignment of the instant nonperforming mortgage loan from the original lender, DECISION ONE MORTGAGE COMPANY, LLC (DECISION ONE), by MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC. (MERS), its nominee for the purpose of recording the mortgage; and, the employment history of Ely Harless, who assigned the instant mortgage to BNY as Vice President of MERS on October 9, 2007, and then on March 20, 2008 executed the “affidavit of facts ” to this application as Vice President of nonparty COUNTRYWIDE HOME LOANS, INC. (COUNTRYWIDE).

Background

Defendant Denise Mulligan borrowed \$392,000 from DECISION ONE, on

October 28, 2005. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on February 6, 2006, at City Register File Number (CRFN) 2006000069253. DECISION ONE, by MERS, its nominee for the purpose of recording the mortgage, assigned the note and mortgage to plaintiff BNY on October 9, 2007, with the assignment recorded on October 24, 2007, at CRFN 2007000537351. The assignment by MERS to BNY was executed by Ely Harless, as Vice President of MERS.

Plaintiff's moving papers for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The application contains the March 20, 2008-affidavit by Ely Harless, now wearing the assignee's hat, but as a Vice President and "an employee of Countrywide Home Loans, Inc., attorney-in fact for Countrywide Home Loans, Inc." The plaintiff is not COUNTRYWIDE, in any one of its corporate incarnations, but BNY. As an aside, how can COUNTRYWIDE be an attorney-in-fact for itself? For reasons unknown to the Court, plaintiff BNY failed to provide any power of attorney authorizing anyone else to go forward with the instant foreclosure action. Therefore, the proposed order of reference must be denied without prejudice. Leave is granted to plaintiff BNY to comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of BNY or someone with a valid power of attorney from BNY.

Further, according to plaintiff's application, the default of defendant Mulligan

began with the nonpayment of principal and interest due on May 1, 2007. Yet, more than five months later, plaintiff BNY was willing to take an assignment of the instant nonperforming loan. The Court wonders why BNY would purchase a nonperforming loan, more than five months in arrears? Leave is granted to BNY to explain why it would purchase a nonperforming loan.

Additionally, plaintiff BNY must address a third matter if it renews its application for an order of reference. In the instant action, as noted above, Ely Harless, as Vice President of MERS, assigned the instant mortgage to BNY on October 9, 2007. Then, as Vice President of COUNTRYWIDE, on March 20, 2008, he executed the affidavit in this action. Is Mr. Harless the Vice President of MERS or the Vice President of COUNTRYWIDE? Did he change his employment between October 9, 2007 and March 20, 2008? The Court is concerned that Mr. Harless might be engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Harless describing his employment history for the past three years.

Discussion

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of the defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." In the instant action, plaintiff's application for an order of reference is a

preliminary step to obtaining a default judgment of foreclosure and sale. (*Home Sav. Of Am., F.A. v Gkanios*, 230 AD2d 770 [2d Dept 1996]).

Plaintiff has failed to meet the requirements of CPLR § 3215 (f) for a default judgment.

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, 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. [Emphasis added].

Plaintiff has failed to submit "proof of the facts" in "an affidavit made by the party." The affidavit is submitted by Ely Harless, "an employee of Countrywide Home Loans, Inc." There must be an affidavit by an officer of BNY or a servicing agent, possessing a valid power of attorney from BNY for that express purpose. Additionally, if a power of attorney is presented to this Court and it refers to pooling and servicing agreements, the Court needs a properly offered copy of the pooling and servicing agreements, to

determine if the servicing agent may proceed on behalf of plaintiff. (*EMC Mortg. Corp. v Batista*, 15 Misc 3d 1143 (A) [Sup Ct, Kings County 2007]; *Deutsche Bank Nat. Trust Co. v Lewis*, 14 Misc 3d 1201 (A) [Sup Ct, Suffolk County 2006]).

In *Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005], the Court reversed a default judgment granted in Supreme Court, Nassau County, holding that:

In support of her motion for leave to enter judgment against the defendant upon her default in answering, the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts (*see* CPLR 3215 (f): *Goodman v New York City Health & Hosps. Corp.* 2 AD3d 581 [2d Dept 2003]; *Drake v Drake*, 296 AD2d 566 [2d Dept 2002]; *Parratta v McAllister*, 283 AD2d 625 [2d Dept 2001]). Accordingly, the plaintiff's motion should have been denied, with leave to renew on proper papers (*see* *Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

(*See* *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *De Vivo v Spargo*, 287 AD2d 535 [2d Dept 2001]; *Peniston v Epstein*, 10 AD3d 450 [2d Dept 2004]; *Taebong Choi v JKS Dry Cleaning Equip. Corp.*, 15 AD3d 566 [2d Dept 2005]; *Matone v Sycamore Realty Corp.*, 31 AD3d 721 [2d Dept 2006]; *Crimmins v Sagona Landscaping, Ltd.*, 33 AD3d 580 [2d Dept 2006]).

Therefore, the instant application for an order of reference is denied without prejudice, with leave to renew. The Court will grant plaintiff BNY an order of reference when it presents: an affidavit by either an officer of BNY or someone with a valid power of attorney from BNY, possessing personal knowledge of the facts; an affidavit from Ely Harless clarifying his employment history for the past three years and what corporation he serves as an officer; and, an affidavit by an officer of BNY, explaining why BNY would purchase a nonperforming loan from MERS, as nominee for DECISION ONE.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1, for an order of reference for the premises located at 1591 East 48th Street, Brooklyn, New York (Block 7846, Lot 14, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1, to renew its application for an order of reference for the premises located at 1591 East 48th Street, Brooklyn, New York (Block 7846, Lot 14, County of Kings), upon

presentation to the Court, within forty-five (45) days of this decision and order, of: an affidavit of facts either by an officer of BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1 or someone with a valid power of attorney from BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1, possessing personal knowledge of the facts; an affidavit from Ely Harless, describing his employment history for the past three years; and, an affidavit from an officer of plaintiff BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OC1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-OC1, explaining why plaintiff would purchase a nonperforming loan from MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., as nominee of DECISION ONE MORTGAGE COMPANY, LLC.

This constitutes the Decision and Order of the Court.

E N T E R



HON. ARTHUR M. SCHACK
J. S. C

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