

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 18th day
of September 2007

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE OF ARGENT MORTGAGE
SECURITIES, INC. ASSET-BACKED PASS
THROUGH CERTIFICATES, SERIES 2005-W3
UNDER THE POOLING AND SERVICING
AGREEMENT DATED AS OF OCTOBER 1,
2005, WITHOUT RECOURSE,

Plaintiff,

- against -

JENNIFER CLOUDEN, REMI V. OGUNGBE, AND
"JOHN DOE,"

Defendants.

DECISION & ORDER

Index No. 277/07

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 9306 Farragut Road, Brooklyn, New York (Block 8162, Lot

33, County of Kings) is denied without prejudice. The assignment of the instant mortgage to plaintiff Deutsche Bank National Trust Company, as Trustee of Argent Mortgage Securities, Inc. Asset-Backed Pass Through Certificates, Series 2005-W3 under the Pooling and Servicing Agreement, dated as of October 1, 2005, Without Recourse (Deutsche Bank), is improper. Further, the "affidavit of facts" submitted in support of this application for a default judgment is not by an officer of plaintiff or someone with a power of attorney from plaintiff. Leave is granted to plaintiff to renew its application for an order of reference upon presentation to the Court of: a proper assignment of the instant mortgage to plaintiff; and, compliance with the statutory requirements of CPLR § 3215 (f), with "an affidavit of facts" executed by someone who is an officer of Deutsche Bank or has a valid power of attorney from Deutsche Bank.

Background

Defendant Jennifer Clouden borrowed \$382,500.00 from Grand Pacific Mortgage Corporation on August 3, 2005. My check of the Automated City Register Information System (ACRIS) website of the Office of the City Register, New York City Department of Finance verified that the Clouden Note and Mortgage were recorded on October 5, 2005 at City Register File Number (CRFN) 2005000556871.

The instant mortgage loan is an example of the subprime loan denominated in the mortgage industry as a "2-28" adjustable rate mortgage (ARM) loan. According to the August 3, 2005 Note, defendant Clouden was to initially pay principal and interest of

\$2,786.68 per month for the initial two years, at 7.925 %. Then, on September 1, 2007, and every six months thereafter, the interest rate could change on the "change date," based upon an "index" that is the average of interbank offered rates for the six-month U.S. dollar-denominated deposits in the London market (LIBOR) as published in the *Wall Street Journal* . The specific terms of the Clouden note provided that the new interest rate would be the LIBOR rate, 45-days prior to the "change date," plus 6.00 %, rounded to the nearest .125%. The interest-rate could increase 1.00% on each "change date" until the LIBOR index plus 6.00% would be reached. The LIBOR rate, according to today's *Wall Street Journal*, is approximately 5.42%. Therefore, the LIBOR plus 6.00% rate is now approximately 11.42%. The Note capped the adjusted interest at 13.925% and set 7.925% as the floor, if rates go down. If interest rates stay constant, the defendant, if she hadn't become delinquent in her payments, would be paying her mortgage loan at the rate of 11.42% on September 1, 2010, and thereafter.

Gretchen Morgenson, in the April 6, 2007 *New York Times*, reported in "Fair Game; Home Loans: A Nightmare Grows Darker," that "with home foreclosures and mortgage delinquencies soaring, it is becoming clear that the innovative loans that lenders championed – in what the industry called the 'democratization of credit' – are turning the American dream into a nightmare for many borrowers." Ms. Morgenson quotes Thomas A. Lawler, founder of *Lawler Economic and Housing Consulting Daily*, a newsletter, that subprime loans, similar to the one in this action, "are designed to make borrowers

refinance and keep the loan production mill churning." Further, Mr. Morgenson writes that " [w]hile subprime borrowers try to climb out of the holes they fell into, those who sold and packaged the loans are laughing all the way to the bank. 'Folks who ran these companies are going to walk away not just unscathed but extraordinarily well rewarded,' Mr. Calhoun [Michael D. Calhoun, President of the Center for Responsible Lending] said."

U.S. Senator Christopher Dodd (D-Connecticut), Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, in his opening statement at the March 22, 2007 Committee hearing on "Mortgage Market Turmoil: Causes and Consequences," noted that "[o]ur mortgage system appears to have been on steroids in recent years – giving everyone a false sense of invincibility." He observed that:

The subprime market has been dominated in recent years by hybrid

ARMs, loans with fixed rates for 2 years that adjust upwards every 6 months thereafter. These adjustments are so steep that many borrowers cannot afford to make the payments and are forced to refinance, at great cost, sell the house, or default on the loan. No loan should force a borrower into this kind of devil's dilemma. These loans are made on the basis of the value of the property, not the ability of the borrower to repay. This is the fundamental definition of predatory lending.

My ACRIS check, as well as exhibit C of the instant application, further verified

that the original lender, Grand Pacific Mortgage Corp. assigned the mortgage to Argent Mortgage Company, LLC (Argent) on October 5, 2005, with it recorded it on July 18, 2006 at CRFN 2006000407430. Subsequently, Argent, "by AMC Mortgage Services Inc. as authorized agent," assigned the mortgage to plaintiff Deutsche Bank on June 9, 2006, with the assignment also recorded on July 18, 2006 at CRFN 200600040741 [exhibit C of application]. Argent's assignment is signed by "Tamara Price, as Authorized Agent," but the assignment fails to attach any power of attorney demonstrating how Tamara Price became the authorized agent of Argent. Thus, the assignment is invalid.

The caption shows that Deutsche Bank purchased the instant mortgage as part of a package of subprime mortgages pooled together to pass the risk of default to bond buyers. Paul Krugman, in his July 2, 2007 *New York Times* column, "Just Say AAA," commented, "What do you get when you cross a Mafia don with a bond salesman? A dealer in collateralized debt obligations C.D.O's – someone who makes you an offer you don't understand." While the Court doesn't have to concern itself with the details of the C.D.O. that includes the instant mortgage, the Court understands that the assignment by "Tamara Price, as Authorized Agent," without a power of attorney from the holder of the mortgage, Argent, is clearly improper.

Further, plaintiff's moving papers for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). Exhibit H of the instant application contains an affidavit of facts by Rose C. Lara, a Vice-President of AMC

Mortgage Services, Inc., "the authorized servicing agent for the Plaintiff herein [¶ 1 of Lara affidavit]." For reasons unknown to the Court, plaintiff Deutsche Bank has failed to provide any power of attorney authorizing AMC Mortgage Services, Inc. to go forward with the instant foreclosure action. Therefore, the proposed order of reference must be denied without prejudice.

The Court notes that AMC Mortgage Services, Inc. made the alleged assignment from Argent to Deutsche Bank as Argent's "authorized agent," and also had one of its agents submit an affidavit of facts as "authorized servicing agent" for Deutsche Bank. AMC Mortgage Services, Inc. alleges to represent both the assignor Argent and the assignee Deutsche Bank.

The Court makes the following offer that plaintiff Deutsche Bank should understand. Leave is granted to plaintiff to: provide the Court with a properly recorded assignment of the instant mortgage from Argent to Deutsche Bank; and, comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of Deutsche Bank or someone with a valid power of attorney from Deutsche Bank. Then, and only then, will the Court grant the proposed order of reference for the instant mortgage.

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].

The plaintiff must have "standing" to bring this action. The Court of Appeals in Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d, 901, 812 (2003), *cert denied* 540 US 1017 (2003), declared that "[s]tanding to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." In Carper v Nussbaum, 36 AD3d 176, 181 (2d Dept 2006), the Court held that "[s]tanding to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. Stark v Goldberg, 297 AD2d 203 (1st Dept 2002).

In the instant action, Argent's defective assignment to Deutsche Bank affects the standing of Deutsche Bank to bring this action. The recorded assignment from Argent to Deutsche Bank, made by "Tamara Price, as Authorized Agent" on behalf of "AMC Mortgage Services Inc. as authorized agent," lacks any power of attorney granted by Argent to AMC Mortgage Services, Inc. and/or Tamara Price to act on its behalf. The first mortgage assignment, from Grand Pacific Mortgage to Argent, was proper. It was

executed by the President of Grand Pacific Mortgage.

Real Property Law (RPL) § 254 (9) states:

Power of attorney to assignee. The word "assign" or other words of assignment, when contained in an assignment of a mortgage and bond or mortgage and note, must be construed as having included in their meaning that the ***assignor does thereby make, constitute and appoint the assignee the true and lawful attorney, irrevocable, of the assignor, in the name of the assignor,*** or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond or mortgage and note, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made. [***Emphasis added***]

Therefore, to have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with the authority to assign the mortgage. In Tawil v Finkelstein Bruckman Wohl Most & Rothman, 223 AD2d 52, 55 (1st Dept 1996), the Court instructed that "[n]o special form or language is necessary to effect an assignment as long as the language shows the ***intention of the owner of a right to transfer it*** [***Emphasis added***]." See Suraleb, Inc. v International Trade Club, Inc., 13 AD3d 612 (2d Dept 2004). To foreclose on a mortgage, a party must have title to the

mortgage. The assignment by AMC Mortgage Services, Inc., allegedly as Argent's agent, to Deutsche Bank is a nullity. The Appellate Division, Second Department, in Kluge v Fugazy, 145 AD2d 537, 538 (2d Dept 1988), held that a "foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity." Citing Kluge v Fugazy, the Court in Katz v East-Ville Realty Co., 249 AD2d 243 (1st Dept 1998), held that "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact."

Thus, it is clear that plaintiff Deutsche Bank, with the invalid assignment of the instant mortgage from Argent, lacks standing to foreclose on the instant mortgage. The Court, in Campaign v Barba, 23 AD 3d 327 (2d Dept 2005), that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, *ownership of the mortgage*, and the defendant's default in payment [Emphasis added]." See Household Finance Realty Corp. Of New York v Wynn, 19 AD3d 545 (2d Dept 2005); Sears Mortgage Corp. v Yahhobi, 19 AD3d 402 (2d Dept 2005); Ocwen Federal Bank FSB v Miller, 18 AD3d 527 (2d Dept 2005); U.S. Bank Trust Nat. Ass'n v Butti, 16 AD3d 408 (2d Dept 2005); First Union Mortgage Corp. v Fern, 298 AD2d 490 (2d Dept 2002); Village Bank v Wild Oaks Holding, Inc., 196 AD2d 812 (2d Dept 1993).

Further, even if the assignment to Deutsche Bank had been valid, plaintiff has

failed to meet the clear 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 of facts" is submitted by Rose Lara, a Vice-President of AMC Mortgage Services, Inc. an "authorized servicing agent." Ms. Lara must have, as plaintiff's agent, a valid power of attorney 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).

Also, the instant application upon defendants' default must be denied because even though it contains a verified petition, the attorney's verification is insufficient to meet the requirements of CPLR § 3215 (f). The Court in Mullins v Di Lorenzo, 199 AD2d 218 (1st Dept 1993), instructed that "a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215." Citing Mullins v Di Lorenzo, the Court, in Feffer v Malpeso, 210 AD2d 60, 61 (1st Dept 1994), held that a complaint with not more than an attorney's affidavit, for purposes of entering a default judgment "was erroneous and must be deemed a nullity." Professor David Siegel, in his Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3215: 16) explains that Mullins v Di Lorenzo

is in point here. Perhaps *the verified complaint* can do service as an affidavit for various purposes within the litigation while the contest is on . . . but it *will not suffice to put an end to the contest with as drastic a step as a default at the outset*. It must be kept in mind that even an outright "affidavit" by the plaintiff's attorney on the merits of the case-- except in the relatively rare circumstances in which the attorney happens to have first-hand knowledge of the facts--lacks probative force and is usually deemed inadequate by the courts to establish the merits. A fortiori, a verified pleading tendered as proof of the merits would also lack probative force when the verification is

the attorney's. **[Emphasis added]**

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. The Court will grant plaintiff Deutsche Bank an order of reference when: it

submits proper papers, complying with the requirements for a valid assignment of the instant mortgage from Argent to itself; and, submits an affidavit by either an officer of Deutsche Bank, or someone with a valid power of attorney, possessing personal knowledge of the facts.

Conclusion

Accordingly, it is

ORDERED that the application of plaintiff Deutsche Bank National Trust Company, as Trustee of Argent Mortgage Securities, Inc. Asset-Backed Pass Through Certificates, Series 2005-W3 under the Pooling and Servicing Agreement, dated as of October 1, 2005, Without Recourse, for an order of reference for the premises located at 9306 Farragut Road, Brooklyn, New York (Block 8162, Lot 33, County of Kings) is denied without prejudice, and it is further

ORDERED that leave is granted to plaintiff Deutsche Bank National Trust Company, as Trustee of Argent Mortgage Securities, Inc. Asset-Backed Pass Through Certificates, Series 2005-W3 under the Pooling and Servicing Agreement, dated as of October 1, 2005, Without Recourse, to renew its application for an order of reference for the premises located at 9306 Farragut Road, Brooklyn, New York (Block 8162, Lot 33, County of Kings), upon presentation to the Court of a proper assignment of the instant mortgage to plaintiff and compliance with the statutory requirements of CPLR § 3215 (f), with an affidavit of facts by someone with authority to execute such an affidavit.

This constitutes the Decision and Order of the Court.

E N T E R



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

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