

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 25th day of April 2008

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

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY  
AS TRUSTEE FOR THE CERTIFICATE HOLDERS  
OF SOUNDVIEW HOME LOAN TRUST 2006-0PT2,  
ASSET-BACKED CERTIFICATES, SERIES  
2006-0PT2,

Plaintiff,

- against -

ELAINE GRANT, OPTION ONE MORTGAGE,  
CORPORATION, *et. al.*,

Defendants.

**DECISION & ORDER**

Index No. 39192/07

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 973 East 85<sup>th</sup> Street, Brooklyn, New York (Block 8022, Lot 107, County of Kings) is denied without prejudice with leave to renew. The "affidavit of merit" submitted in support of this application for an order of reference was not executed by an officer of plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME LOAN TRUST 2006-OPT2, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2 (DEUTSCHE BANK), or someone with a power of attorney from plaintiff. Leave is granted to plaintiff DEUTSCHE BANK to renew its motion for an order of reference upon plaintiff's presentation to the Court of its 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 someone who has a valid power of attorney from DEUTSCHE BANK. Further, the court wonders why plaintiff DEUTSCHE BANK purchased the instant nonperforming loan on October 22, 2007.

#### Background

Defendant ELAINE GRANT borrowed \$456,000.00 from OPTION ONE MORTGAGE CORPORATION (OPTION ONE), on November 10, 2005. This Note and Mortgage were recorded in the Office of the City Register of the City of New York on January 4, 2006, at City Register File Number (CRFN) 2006000003593. OPTION ONE assigned the mortgage to plaintiff DEUTSCHE BANK on October 22, 2007, effective

September 19, 2007, with the assignment recorded on November 1, 2007, at CRFN 2007000550538.

Plaintiff's application for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit," executed on November 1, 2007, by Leo. S. Ortega, Jr., Vice President of OPTION ONE. This is ten days after OPTION ONE assigned the mortgage to DEUTSCHE BANK. Leave is granted to the plaintiff to 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 application for an order of reference.

Further, according to the instant complaint, defendant GRANT defaulted in making her mortgage loan payments to OPTION ONE on May 1, 2007. Yet DEUTSCHE BANK accepted the assignment of a nonperforming loan, effective September 19, 2007, 142 days subsequent to defendant GRANT's default in making her mortgage loan payments. The instant mortgage, based upon the caption in this action, was collateralized into a package of bonds, so that the risk could be handed off to investors. Paul Krugman, in his July 2, 2007 *New York Times* column, "Just Say AAA," in writing about the subprime mortgage crisis, could have been thinking about DEUTSCHE BANK in the instant case:

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 . . .

Yet the banks making the loans weren't stupid: they passed the buck to other people. Subprime mortgages and other risky loans were securities — that is, banks issued bonds backed by home loans, in effect handing off the risk to the bond buyers.

In principle, securitization should reduce risk: even if a particular loan goes bad, the loss is spread among many investors, none of whom takes a major hit. But with the collapse of the \$800 billion market in bonds backed by subprime mortgages . . . it's now clear that many investors who bought these securities didn't realize what they were getting into . . .

Now we're looking at huge losses to investors who thought they were playing it safe . . .

But apparently not. And the housing bubble, like the stock bubble before it, is claiming a growing number of innocent victims.

#### **Discussion**

The 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" was submitted by Leo. S. Ortega, Jr., Vice President of OPTION ONE, which had assigned the instant mortgage to DEUTSCHE BANK, before Mr. Ortega executed his affidavit. DEUTSCHE BANK must submit an "affidavit of fact" executed by an officer of DEUTSCHE BANK or by an agent of DEUTSCHE BANK who possesses a valid power of attorney for that express purpose. Additionally, if DEUTSCHE BANK presents to the Court an "affidavit of facts" by an agent, and the agent's power of attorney 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 Court requires an explanation from an officer of plaintiff DEUTSCHE BANK as to why, in the middle of our national subprime mortgage financial crisis, DEUTSCHE BANK purchased a nonperforming loan OPTION ONE. The Court wonders if DEUTSCHE BANK violated a corporate fiduciary duty to its stockholders with the purchase of a loan that defaulted more than five months prior to its assignment to DEUTSCHE BANK. Any due diligence on the part of DEUTSCHE BANK would have demonstrated to DEUTSCHE BANK that defendant GRANT was in arrears on her loan payments for months.

#### **Conclusion**

Accordingly, it is

ORDERED, that the application of plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME LOAN TRUST 2006-OPT2, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, for an order of reference for the premises located at 973 East 85<sup>th</sup> Street, Brooklyn, New York (Block 8022, Lot 107 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 FOR THE CERTIFICATE HOLDERS OF

SOUNDVIEW HOME LOAN TRUST 2006-OPT2, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, to renew its application for an order of reference for the premises located at 973 East 85<sup>th</sup> Street, Brooklyn, New York (Block 8022, Lot 107 County of Kings), upon presentation to the Court, within sixty (60) days from the date of this decision and order, of: its compliance with the statutory requirements of CPLR § 3215 (f), with an affidavit of facts by someone with authority to execute such an affidavit; and, an affidavit from an officer of plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME LOAN TRUST 2006-OPT2, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, explaining why plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME LOAN TRUST 2006-OPT2, ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, purchased a nonperforming loan from OPTION ONE MORTGAGE COMPANY.

This constitutes the Decision and Order of the Court.

E N T E R



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

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