

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 5<sup>th</sup> day of June 2008

P R E S E N T:

HON. ARTHUR M. SCHACK

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

Justice

NYCTL 1998-1 TRUST AND THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiffs,

- against -

ANTONIO CRUZ, *et. al.*,

Defendants.

**DECISION & ORDER**

Index No. 35985/05

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed order of reference \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_

Plaintiffs' application, upon the default of all defendants, for an order to appoint a referee to compute and amend the caption in an action to foreclosure on a tax lien

certificate for the premises located at 121 Powell Street, Brooklyn, New York (Block 3712, Lot 17, County of Kings) is denied without prejudice. The affidavit submitted in support of this application for a default judgment of foreclosure and sale was not executed by an officer of plaintiffs, NYCTL 1991-1 TRUST AND THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN (the Trust), or someone with a power of attorney from plaintiffs. Leave is granted to plaintiffs to renew their application for an order to appoint a referee to compute and amend the caption upon plaintiffs' 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 the Trust or someone who has a valid power of attorney from the Trust.

#### **Background**

The Trust purchased certain tax liens from the City of New York on June 1, 2001. These liens, including the tax lien for the premises known as 121 Powell Street, Brooklyn, New York (Block 3712, Lot 71, County of Kings), were recorded in the Kings County Office of the City Register, New York City Department of Finance, on June 28, 2001 at September 30, 2004, at Reel 5201, Page 0613.

Plaintiffs' moving papers for an order to appoint a referee to compute and amend the caption fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an affidavit by Albert Fiorello. Mr. Fiorello states that "I am the Vice President of Plymouth Park Tax Services, LLC d/b/a Xspand, servicer for the

plaintiff NYCTL 1998-1 Trust, and the Bank of New York as Collateral Agent and Custodian Trust (the "Trust"), the owner of the tax lien which is the subject of this foreclosure action (the 'Tax Lien')." For reasons unknown to the Court, plaintiffs failed to provide any power of attorney authorizing Plymouth Park Tax Services, LLC to go forward with the instant foreclosure action. Therefore, the proposed order for the appointment of a referee to compute and amend the caption must be denied without prejudice.

Leave is granted to plaintiffs to comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of the Trust or someone with a valid power of attorney from the Trust. Then, and only then, will the Court grant the proposed order to appoint a referee to compute and amend the caption.

#### **Discussion**

The plaintiffs have 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*].

Plaintiffs have failed to submit "proof of the facts" in "an affidavit made by the party." The "affidavit of facts" was submitted by Albert Fiorello, "Vice President of Plymouth Park Tax Services, LLC, d/b/a Xspan, servicer for the plaintiff NYCTL 1998-1 Trust, and the Bank of New York as Collateral Agent and Custodian Trust (the "Trust"), the owner of the tax lien which is the subject of this foreclosure action (the "Tax Lien')." Mr. Fiorello must have, as plaintiffs' 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 servicing agreements, the Court needs a properly offered copy of the servicing agreements, to determine if the servicing agent may proceed on behalf of plaintiffs. (*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]).

The complaint in the instant action is unverified. 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 to appoint a referee to compute and amend the caption is denied without prejudice. The Court will grant the Trust an order to appoint a referee to compute and amend the caption when the Trust submits an affidavit by either an officer of the Trust, or someone with a valid power of attorney from the Trust, possessing personal knowledge of the facts.

#### **Conclusion**

Accordingly, it is

ORDERED, that the application of plaintiffs NYCTL 1998-1 TRUST AND THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN, or an order appointing a referee to compute and amend the caption in a foreclosure action for the premises located at 121 Powell Street, Brooklyn, New York (Block 3712, Lot 17, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiffs NYCTL 1998-1 TRUST AND THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN, to renew its application for an order appointing a referee to compute and amend the caption in a foreclosure action for the premises located at 121 Powell Street, Brooklyn, New York (Block 3712, Lot 17, County of Kings), upon presentation to the Court 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.

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.