

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 24<sup>th</sup> day of April 2008

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

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

PROPERTY ASSET MANAGEMENT, INC.,

Plaintiff,

- against -

JUNIOR THEODORE, *et. al.*,

Defendants.

**DECISION & ORDER**

Index No. 21597/07

The following papers numbered I 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 9712 Flatlands Avenue, Brooklyn, New York (Block 8205, Lot 40, County of Kings) is denied without prejudice. The "affidavit of merit" submitted

in support of this application for an order of reference was not executed by an officer of the plaintiff, PROPERTY ASSET MANAGEMENT, INC. (PAM), or someone with a power of attorney from the plaintiff. Leave is granted to the plaintiff to renew its application for an order of reference and related relief upon the 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 PAM or someone who has a valid power of attorney from PAM. Further, leave is granted to plaintiff to renew this application for an order of reference upon providing the Court with a satisfactory explanation to questions with respect to: why plaintiff PAM would purchase a nonperforming loan from the prior mortgagee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS) as nominee for BNC MORTGAGE, INC.; and, why assignor MERS as nominee for BNC MORTGAGE, INC., and Plaintiff assignee, PAM, both have the same address, 10790 Rancho Bernardo Road, San Diego, California 92127.

### **Background**

Defendant JUNIOR THEODORE borrowed \$382,500.00 from BNC MORTGAGE, INC., on October 10, 2006. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance, on November 16, 2006, at City Register File Number (CRFN) 2006000636637, by MERS as nominee for BNC MORTGAGE, INC. for purposes of recording. MERS as nominee for BNC

MORTGAGE INC. assigned the note and mortgage to plaintiff, PAM, on September 12, 2007, with the assignment recorded on April 6, 2007 at CRFN 2007000506069.

Plaintiff's moving papers for an order of reference and related relief fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit" by Christopher M. Zeis, "Assistant Vice President of Chase Home Finance, LLC, as servicing agent for Property Assert Management Inc." There is no power of attorney attached to the instant application for an order of reference from plaintiff PAM. Even if there was a power of attorney, Mr. Zeis executed his affidavit of merit on June 27, 2007, 77 days prior to the purchase of the instant mortgage by PAM. MERS, as nominee for BNC MORTGAGE, INC. owned the mortgage on that date, not PAM. Also, the affidavit of merit is blank as to the State and County where it was executed, and Mr. Zeis does not give his address. One might assume that the affidavit was executed in New York State because the notary public states that she is a New York State Notary Public, qualified in Erie County. Therefore, the proposed order of reference and related relief must be denied without prejudice. 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 PAM or someone with a valid power of attorney from PAM.

Also, according to plaintiff's complaint, defendant THEODORE's default began with the nonpayment of principal and interest due on January 1, 2007, with defendant

THEODORE owing \$382,282.20 in principal and interest from December 1, 2006. Yet, more than eight months after defendant THEODORE's default, plaintiff PAM was willing to take an assignment of the instant nonperforming loan from MERS as nominee for BNC MORTGAGE, INC.,

Further, both assignor MERS and assignee PAM have the same office address in San Diego, California. The Court needs a satisfactory explanation of why MERS and PAM share office space.

### **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 merit" submitted by Christopher M. Zeis, "Assistant Vice President of Chase Home Finance, LLC, as servicing agent for Property Asset Management Inc.," fails to have a valid power of attorney for that express purpose. If plaintiff submits a new "affidavit of merit," whether by a party or someone with a power of attorney, the affidavit must be properly prepared and executed by the notary public. 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]).

Further, the Court requires an explanation from an officer of plaintiff PAM as to why, in the middle of our national subprime mortgage financial crisis, PAM would purchase a nonperforming loan, from MERS as nominee for BNC MORTGAGE, INC. The Court wonders if PAM violated a corporate fiduciary duty to its stockholders with the purchase of a loan that defaulted more than eight months prior to its assignment to PAM. Any due diligence on the part of PAM would have demonstrated to PAM that defendant THEODORE was in arrears on his loan payments for months.

Lastly, if PAM renews its application for an order of reference, it must provide an affidavit by an officer of PAM explaining why both MERS as nominee for BNC

MORTGAGE, INC. and PAM share office space at 10790 Rancho Bernardo Road, San Diego, California 92127. Should PAM fail to provide an adequate explanation in its affidavit, I will conclude that this corporate togetherness is evidence of corporate collusion.

**Conclusion**

Accordingly, it is

ORDERED, that the application of plaintiff, PROPERTY ASSET MANAGEMENT INC., for an order of reference for the premises located at 9712 Flatlands Avenue, Brooklyn, New York (Block 8205, Lot 40, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, PROPERTY ASSET MANAGEMENT INC., to renew its application for an order of reference for the premises located at 9712 Flatlands Avenue, Brooklyn, New York (Block 8205, Lot 40, 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, PROPERTY ASSET MANAGEMENT INC., explaining why plaintiff PROPERTY ASSET MANAGEMENT INC. purchased a nonperforming loan from MERS as nominee for BNC MORTGAGE, INC., and why PROPERTY ASSET MANAGEMENT INC. shares an office address in San Diego,

California with MERS as nominee for BNC MORTGAGE, INC.

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.