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 9th day of November 2007

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

HON. ARTHUR M. SCHACK
Justice

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE,

Plaintiff,

- against -

JANETT GRANT, BORO FUEL OIL CO. INC., and ANNMARIE LLOYD,

Defendants.

DECISION & ORDER

Index No. 22160/06

The following papers numbered 1 read on this motion: Papers Numbered:

Proposed Judgement of Foreclosure and Sale/Exhibits_____ 1

Plaintiff's application, upon the default of all defendants, for a judgment of foreclosure and sale for the premises located at 1125 East 99th Street, Brooklyn, New York (Block 8245, Lot 31, County of Kings) is denied without prejudice. The "affidavit

of merit" submitted in support of this application for a default judgment of foreclosure and sale was not executed by an officer of plaintiff, U.S. Bank National Association, Trustee (U.S. Bank), or someone with a power of attorney from plaintiff. Leave is granted to plaintiff to renew its application for a judgment of foreclosure and sale 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 U.S. Bank or someone who has a valid power of attorney from U.S. Bank.

Background

Defendant Janett Grant borrowed $490,000.00 from BNC Mortgage, Inc. on September 11, 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 Grant Note and Mortgage were recorded on October 11, 2005 at City Register File Number (CRFN) 2005000566500.

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 September 11, 2005 Note, defendant Grant was to initially pay principal and interest of $3,767.68 per month for the initial two years, at 8.5 %. Then, on October 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 Grant note provided that the new interest rate would be the LIBOR rate, 45-days prior to the "change date," plus 5.65 %, rounded to the nearest .125%. The interest-rate could increase 1.00% on each "change date" until the LIBOR index plus 5.65% would be reached. The LIBOR rate, according to today's *Wall Street Journal,* is approximately 4.84%. Therefore, the LIBOR plus 5.65% rate is now approximately 10.49%. The Note capped the adjusted interest at 15.5% and set 8.5% 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 10.49% on April 1, 2008, 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 G of the instant application, further verified that the original lender, BNC Mortgage, Inc., by Mortgage Electronic Registration Systems, Inc. (MERS), its nominee for purpose of recording the mortgage, assigned the mortgage to plaintiff U.S. Bank on September 11, 2006, with it recorded it on October 17, 2006 at CRFN 2006000581274.

Plaintiff's moving papers for a judgment of foreclosure and sale fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit" by Joe Lanning, "a Vice-President of Chase Home Finance LLC as authorized agent of U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, the plaintiff in the above-entitled action." For reasons unknown to the Court, plaintiff U.S. Bank failed to provide any power of attorney authorizing Chase Home Finance LLC to go forward with the instant foreclosure action. Therefore, the proposed judgement for foreclosure and sale must be denied without prejudice.

Leave is granted to plaintiff to comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of U.S. Bank or someone with a valid power of attorney from U.S. Bank. Then, and only then, will the Court grant the proposed judgment of foreclosure and sale of the instant mortgage.

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 Joe Lanning, a Vice-President of Chase Home Finance LLC, "as authorized agent." Mr. Lanning 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 complaint, 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 Eqip. 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 a judgment of foreclosure and sale is denied without prejudice. The Court will grant plaintiff U.S. Bank a judgment of foreclosure and sale when it submits an affidavit by either an officer of U.S. Bank, or someone with a valid power of attorney from U.S. Bank, possessing personal knowledge of the facts.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff U.S. Bank National Association, Trustee for a judgment of foreclosure and sale for the premises located at 1125 East 99th

Street, Brooklyn, New York (Block 8245, Lot 31 County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff U.S. Bank National Association, Trustee to renew its application for a judgment of foreclosure and sale for the premises located at 1125 East 99th Street, Brooklyn, New York (Block 8245, Lot 31, 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

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

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