

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 17th day of December 2007

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

P R E S E N T:

HON. ARTHUR M. SCHACK
Justice

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1
C/O SELECT PORTFOLIO SERVICING, INC.
3815 SOUTHWEST TEMPLE
SALT LAKE CITY, UT 84115

Plaintiff,

- against -

AS
B
KENNETH LEWIS, et al.,

Defendants.

DECISION & ORDER

Index No. 21101/07

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 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21, 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 plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS- THROUGH CERTIFICATES, SERIES 2007-1 (U.S. BANK), or someone with a proper power of attorney from plaintiff. Leave is granted to plaintiff to renew its application 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 merit" executed by someone who is an officer of U.S. BANK or someone who has a valid and proper power of attorney from U.S. BANK.

Background

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Defendant Kenneth Lewis borrowed \$540,000.00 from Credit Suisse Financial Corporation on December 19, 2006. The Lewis Note and Mortgage were recorded on January 9, 2007 in the Office of the City Register of the City of New York at City Register File Number (CRFN) 200700014875 [exhibit E of application]. Credit Suisse Financial Corporation, by Mortgage Electronic Registration Systems, Inc. (MERS), its nominee for purpose of recording the mortgage, assigned the mortgage to plaintiff U.S. BANK on June 13, 2007, with the assignment recorded on July 5, 2007 at CRFN

2007000344271 [exhibit F of application]
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made by the party," pursuant to CPLR § 3215 (f). The motion is granted as requested in

exhibit B an "affidavit of merit" by John Shelley, Vice President of SELECT PORTFOLIO SERVICING, INC., Attorney in Fact for U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS- THROUGH CERTIFICATES, SERIES 2007-1."

The attached "Limited Power of Attorney" from US BANK to SELECT PORTFOLIO SERVICING, INC. [exhibit C of application] does not specifically grant to the Attorney in Fact the power to engage in a foreclosure action. Further, it does not refer to US Bank acting as Trustee for "THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS- THROUGH CERTIFICATES, SERIES 2007-1." The "Limited Power of Attorney refers to US BANK as Trustee, "relating to the ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES AEG 2006-HE1." Therefore, plaintiff's application for an order of reference 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

application for an order of reference.

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" was submitted by John Shelley, "Vice President of SELECT PORTFOLIO SERVICING, INC., Attorney in Fact for U.S. BANK NATIONAL ASSOCIATION . . ." Mr. Shelley 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, in the instant action, the complaint 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, plaintiff's application for an order of reference is denied without prejudice. The Court will grant plaintiff U.S. BANK an order of reference 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, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1, for an order of reference for the premises located at 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21 County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE RATE MORTGAGE TRUST 2007-1, ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-1, to renew its application for an order of reference for the premises located at 604 Bainbridge Street, Brooklyn, New York (Block 1511, Lot 21, 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.

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