

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 29th day
of April 2008

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

U.S. BANK, NATIONAL ASSOCIATION, AS
TRUSTEE FOR FIRST FRANKLIN FINANCIAL
MORTGAGE LOAN TRUST 2006-FF10,
MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2006-FF10,

Plaintiff,

- against -

IVARS VIDEJUS, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 7171/07

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

New York
April 2008

for the premises located at 39A Brighton 10th Court, Brooklyn, New York (Block 8701, Lot 80, County of Kings) is denied without prejudice. First, the “affidavit of merit” submitted in support of this application for a default judgment is not by an officer of the plaintiff or someone with a valid power of attorney from plaintiff. Second, the instant verified complaint is defective. It is not verified by an “agent” of the foreign corporate plaintiff, U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR FIRST FRANKLIN FINANCIAL MORTGAGE LOAN TRUST 2006-FF10, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-FF10 (U.S. BANK), or by its attorney. Leave is granted to plaintiff U.S. BANK renew its application for an order of reference upon presentation to the Court of: 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 has a valid power of attorney from U.S. BANK; and, an amended verified complaint, verified by an officer of U.S. BANK or its attorney, in compliance with CPLR § 3020 (d). Third, the Court, upon renewal of this application for an order of reference, requires a satisfactory explanation as to why the mortgagee, U.S. BANK, would have purchased the instant nonperforming mortgage loan from MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC. (MERS), as nominee of FIRST FRANKLIN, A DIVISION OF NATIONAL CITY BANK OF INDIANA (FIRST FRANKLIN).

Background

Defendant IVARS VIDEJUS borrowed \$680,000.00 from FIRST FRANKLIN, on April 26, 2006. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on May 12, 2006 at City Register File Number (CRFN) 2006000267231, by MERS, the nominee of FIRST FRANKLIN for the purpose of recording the mortgage. MERS assigned the note and mortgage to plaintiff U.S. BANK on January 26, 2007, with the assignment recorded on February 22, 2007 at CRFN 2007000101131.

Plaintiff's moving papers for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The application contains an "affidavit of merit" by Bryan Kusich, "Vice-President for Home Loans Service, Inc., servicing agent for U.S. Bank, National Association, as Trustee for First Franklin Financial Mortgage Loan Trust 2006 FF-10, Mortgage Pass Through Certificates, Series 2006-FF10, the Plaintiff in the within action." For reasons unknown to the Court, plaintiff U.S. BANK has failed to provide any power of attorney authorizing Home Loan Services, Inc. to go forward with the instant foreclosure action. Therefore, the proposed order of reference must be denied without prejudice. Leave is granted to plaintiff U.S. BANK 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.

Next, plaintiff's verified complaint contains a "verification" by Bryan Kusich, a representative of the servicing agent. This is defective. Plaintiff must file an amended

verified complaint that meets the requirements of CPLR § 3020 (d), with a verification by either an officer of U.S. BANK or U.S. BANK's attorney.

Further, according to the affidavit of Mr. Kusich and the instant verified complaint, defendant VIDEJUS defaulted in his mortgage loan payments on October 1, 2006. If this is true, why did US BANK take the assignment of this nonperforming loan 117 days after the alleged default of defendant VIDEJUS? The complaint shows that on the date of the assignment, defendant VIDEJUS owed \$679,319.21 in principal and \$23,255.40 in interest (at the annual rate of 8.50% for 147 days from September 1, 2006 to January 26, 2007, the date of the assignment) for a total of \$702,574.61. The complaint also asks for late charges, inspection fees, escrow advances and attorneys' fees. The court needs to know if US BANK performed due diligence in purchasing this nonperforming loan or was this a device for FIRST FRANKLIN to shift its loss to the bondholders of plaintiff's mortgage loan trust collateralized debt obligations (C.D.O.). Paul Krugman, in his July 2, 2007 *New York Times* column, "*Just Say AAA*," in writing about the subprime mortgage crisis, could have been alluding to FIRST FRANKLIN 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.

Seriously, it's starting to look as if C.D.O.'s were to this decade's housing bubble what Enron-style accounting was to the stock bubble of the 1990s. Both made investors think they were getting a much better deal than they really were. . . .

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 — the price of a basket of these bonds has lost almost 40 percent of its value since January [2007] — 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

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of the defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." In the instant action, plaintiff's application for an order of reference is a preliminary step to obtaining a default judgment of foreclosure and sale. (*Home Sav. Of Am., F.A. v Gkanios*, 230 AD2d 770 [2d Dept 1996]).

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" is submitted by Bryan Kusich, Vice-President for Home Loans Service, Inc., "servicing agent" for U.S. BANK. Mr. Kusich 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. (*Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *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 instant verified complaint is defective. The verification is signed by Bryan Kusich, who swears that "I am a representative of National City Home Loan Services, Inc., the servicing agent for U.S. Bank, National Association, as Trustee for Fiorst Franklin Financial Mortgage Loan Trust 2006 FF-10, Mortgage Pass Through Certificates, Series 2006-FF10, the Plaintiff in the within action." Mr. Kusich is not an

officer or an agent employed by plaintiff U.S. BANK. CPLR § 3020 (d) states that:

(d) By whom verification made. The verification of a pleading shall be made by the affidavit of the party . . . except: . . .

3. if the party is a foreign corporation . . . or if all the material allegations of the pleading are within the personal knowledge or an agent or the attorney, the verification may be made by such agent or attorney.

An officer of a foreign corporation, such as plaintiff U.S. BANK, is the “agent” for purposes of verification of the pleadings. (*Williamson Law Book Co. v Midland Nat. Holding Corp.*, 136 Misc 288 [Sup Ct, Monroe County 1930]; *Robinson v Ecuador Development Co.*, 32 Misc 106 [Sup Ct, Kings County 1900]. 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]). Plaintiff is granted leave to file and serve an amended complaint, with a proper verification

Finally, the Court requires an explanation from an officer of plaintiff U.S. BANK why, in the middle of our national subprime mortgage financial crisis, would plaintiff U.S. BANK purchase, from MERS as nominee of FIRST FRANKLIN, a nonperforming loan. Could it be that U.S. BANK and FIRST FRANKLIN desired to assign to the bondholders of plaintiff's C.D.O. a nonperforming loan in excess of \$700,000.00, rather than keep it on FIRST FRANKLIN's books?

Conclusion

Accordingly, it is

ORDERED that the application of plaintiff, U.S. BANK, NATIONAL

ASSOCIATION, AS TRUSTEE FOR FIRST FRANKLIN FINANCIAL MORTGAGE LOAN TRUST 2006-FF10, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-FF10, for an order of reference for the premises located at 39A Brighton 10th Court, Brooklyn, New York (Block 8701, Lot 80, 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 FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF10, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-FF10, to renew its application for an order of reference for the premises located at 39A Brighton 10th Court, Brooklyn, New York (Block 8701, Lot 80, County of Kings), upon presentation to the Court of: compliance with the statutory requirements of CPLR § 3215 (f), with an affidavit of facts by someone with authority to execute such an affidavit; compliance with the statutory requirements of CPLR § 3020 (d), with an amended verified complaint, verified by plaintiff's attorney or an officer of plaintiff; and, a satisfactory explanation from an officer of plaintiff U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF10, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-FF10, why plaintiff took the assignment on January 26, 2007 of the instant nonperforming loan from MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., as nominee of FIRST FRANKLIN, A DIVISION OF NATIONAL CITY BANK OF INDIANA.

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.