

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 1st day of
May 2008

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
FIRST FRANKLIN MORTGAGE LOAN TRUST
2006-FF15, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-FF15,

Plaintiff,

-against-

WRENFORD E. GUY, *et. al.*,

Defendants.

DECISION AND ORDER

Index No. 33690/07

The following papers numbered 1 read on this motion:

Proposed Order of Reference/Exhibits _____

Papers Numbered:

1

Plaintiff's application, upon the default of all defendants, for an order of reference
for the premises located at 434A Lexington Avenue, Brooklyn, New York (Block 1805,

Lot 21, County of Kings) is denied without prejudice. The "affidavit of merit and amount due" submitted in support of this application for an order of reference was not executed by an officer of plaintiff, WELLS FARGO BANK, N.A., AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF15, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF15 (WELLS FARGO), or someone with a valid 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 WELLS FARGO or someone who has a valid power of attorney from WELLS FARGO. Further, the Court, upon renewal of this application for an order of reference, requires a satisfactory explanation of why plaintiff WELLS FARGO 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 WRENFORD E. GUY borrowed \$600,000.00 from FIRST FRANKLIN on August 21, 2006, to finance the purchase of the premises at 434A Lexington Avenue. The GUY Note and Mortgage were recorded in the Office of the City Register of the City of New York on February 23, 2007, at City Register File

Number (CRFN) 2006000103745, by MERS, its nominee for the purpose of recording the mortgage. MERS assigned the mortgage to plaintiff WELLS FARGO, on August 15, 2007, with the assignment recorded on September 18, 2007, at CRFN 2007000477797.

Plaintiff's application for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant application contains an "affidavit of merit and amount due" by Bryan Kusich, who states "[t]hat deponent is the Vice President of HOME LOAN SERVICES, INC., Attorney in Fact for WELLS FARGO BANK, N.A., AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF15, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF15. That a true copy of the Power of Attorney is attached hereto."

Attached to plaintiff's moving papers is a "Limited Power of Attorney," dated January 11, 2006, from WELLS FARGO appointing National City Home Loan Services, Inc. (NCHLS) as its attorney-in-fact to perform various enumerated services, pursuant to a December 1, 2004 Pooling and Servicing Agreement "relating to the First Franklin Mortgage Loan Trust 2004-FF11, Asset-Backed Certificates, Series 2004-FF11." The instant case deals with FIRST FRANKLIN Mortgage Loan Trust Series 2006-FF15, not Series 2004-FF11, and the submitted "Limited Power of Attorney" does not authorize Mr. Kusich to act on behalf of WELLS FARGO, as Trustee for FIRST FRANKLIN Mortgage Loan Trust Series 2006-FF15. Further, even if the limited power of attorney was for WELLS FARGO to act for the correct FIRST FRANKLIN mortgage loan trust, the

limited power of attorney submitted to the Court is a photocopy, not an original document. Plaintiff's counsel failed to certify that the power of attorney had been compared with the original document and found to be a true and complete copy, pursuant to CPLR § 2105.

Mr. Kusich, the alleged servicing agent, states in his affidavit that he is a Vice President of HOME LOAN SERVICES, INC., not NCHLS. Plaintiff attached to the moving papers a photocopy of a document from the Secretary of State of the State of Delaware, dated January 3, 2007, stating that "ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF 'NATIONAL CITY HOME LOAN SERVICES, INC.', CHANGING ITS NAME FROM 'NATIONAL CITY HOME LOAN SERVICES, INC.' TO 'HOME LOAN SERVICES, INC.', FILED IN THIS OFFICE ON THE SECOND DAY OF JANUARY, A.D. 2007." Again, Plaintiff's counsel failed to certify that the photocopies of the Delaware Secretary of State's certification and the certificate of amendment had been compared with the original documents and found to be true and complete copies, pursuant to CPLR § 2105.

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 WELLS FARGO or someone with a valid power of attorney from WELLS FARGO.

Further, according to the affidavit of Mr. Kusich and the instant complaint, defendant GUY defaulted in his mortgage loan payments on May 1, 2007. If this is true,

why did WELLS FARGO take the assignment of this nonperforming loan 117 days after the alleged default of defendant GUY? The complaint alleges that defendant GUY owed, on April 1, 2007, \$599,243.52 in principal plus 9.65% interest (an additional \$23,289.21 on August 15, 2007, the date of the assignment from MERS to WELLS FARGO). The complaint also asks for late charges, inspection fees, insurance, escrow advances and attorneys' fees. The court needs to know if WELLS FARGO 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. 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 merit and amount due" submitted by Bryan Kusich, Vice President of Home

Loan Services, Inc. fails to have a valid power of attorney for that express purpose. Additionally, if a valid 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, if plaintiff's counsel submits copies of documents, such as a power of attorney, counsel must comply with CPLR § 2105, which states that "[w]here a certified copy of a paper is required by law, an attorney may certify that it has been compared by him with the original and found to be a true and complete copy." Thus, plaintiff's counsel can certify the genuineness of a copy of a document. However, in the instant case, the incorrect power of attorney and the alleged Delaware amendment of the mortgage servicer's name failed to have an attorney's certification.

Also, the Court requires an explanation from an officer of plaintiff WELLS FARGO as to why, in the middle of our national subprime mortgage financial crisis, plaintiff WELLS FARGO purchased from MERS, as nominee of FIRST FRANKLIN, a nonperforming loan. Could it be that WELLS FARGO and FIRST FRANKLIN desired to assign to the bondholders of plaintiff's C.D.O. a nonperforming loan in excess of

\$600,000.00 due, rather than keep it on FIRST FRANKLIN's books?

Therefore, the instant application for an order of reference is denied without prejudice. The Court will grant plaintiff WELLS FARGO an order of reference when it submits an affidavit by either an officer of WELLS FARGO or someone with a valid power of attorney from WELLS FARGO possessing personal knowledge of the facts, and explains why it took an assignment of a nonperforming loan.

Conclusion

Accordingly, it is

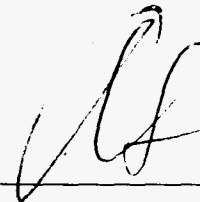
ORDERED that the application of plaintiff, WELLS FARGO BANK, N.A. AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF15, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF15, for an order of reference for the premises located at 434A Lexington Avenue, Brooklyn, New York (Block 1805, Lot 21, County of Kings) is denied without prejudice; and it is further

ORDERED that leave is granted to plaintiff, WELLS FARGO BANK, N.A. AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF15, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF15, to renew its application for an order of reference for the premises located at 434A Lexington Avenue, Brooklyn, New York (Block 1805, Lot 21, 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; and, a satisfactory explanation from an officer of plaintiff, WELLS FARGO BANK, N.A. AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF15, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF15, why plaintiff took the August 15, 2007 assignment 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.