

U.S. Bank National Association v Maynard

2007 NY Slip Op 33766(U)

November 26, 2007

Supreme Court, Kings County

Docket Number: 0018007/2006

Judge: Arthur M. Schack

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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 26th day of November 2007

P R E S E N T:

HON. ARTHUR M. SCHACK
Justice

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR SECURITIES ASSET BACKED
RECEIVABLES LLC TRUST 2006-WM1,

Plaintiff,

- against -

HASSAN MAYNARD, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 18007/06

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Judgement of Foreclosure and Sale/Exhibits _____

_____ 1 _____

Plaintiff's motion, upon the default of all defendants, for a judgment of foreclosure and sale for the premises located at 1645 Pacific Street, Brooklyn, New York (Block

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1334, Lot 38, 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, AS TRUSTEE FOR SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2006-WM1, (U.S. BANK, N.A., AS TRUSTEE), or someone with a power of attorney from plaintiff. Leave is granted to plaintiff to renew its motion 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, N.A., AS TRUSTEE, or someone who has a valid power of attorney from U.S. BANK, N.A., AS TRUSTEE.

Background

Defendant Hassan Maynard borrowed \$440,000.00 from WMC Mortgage Corp., on September 27, 2005. The Maynard note and mortgage were recorded in the Office of the City Register, New York City Department of Finance, on November 22, 2005 at City Register File Number (CRFN) 2005000649808. WMC Mortgage Corp., by Mortgage Electronic Registration Systems, Inc. (MERS), its nominee for the purpose of recording the mortgage, assigned the note and mortgage to plaintiff, US BANK N.A., AS TRUSTEE, on June 26, 2006, with the assignment recorded on July 19, 2006 at CRFN 2007000409461.

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 two "affidavits of merit" by Cathy Menchise, "Senior Vice President of WELLS FARGO BANK, N.A., Attorney in Fact for U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2006-WM1." Plaintiff's papers contain a "Limited Power of Attorney," dated May 28, 2004 which states:

U.S. Bank National Association . . . a national banking association . . . appoints Wells Fargo Bank, N.A. . . . Attorney-in-Fact . . . to execute and acknowledge in writing . . . for the tasks describe in items (1) through (4) below; provided, however, that the documents described below may only be executed and delivered by such Attorneys-In-Fact if *such documents are required or permitted under the terms of the related servicing agreements* . . .

This Power of Attorney is being issued in connection with Wells Fargo Bank, N.A.[’s] . . . responsibilities to *service certain mortgage loans . . . held by U.S. Bank in its capacity as Trustee. [Emphasis added]*

The Court does not have before it "the related servicing agreements" to determine the specific powers given to the attorney-in-fact. Further, the instant collateralized deb obligation (CDO) was issued in 2006. The "Limited Power of Attorney" was issued in

2004 to “service certain mortgage loans.” The listing of the CDO’s covered by this power of attorney was not presented to the Court. How could US BANK, N.A., AS TRUSTEE know in 2004 what CDO’s would be issued in 2006? The Court finds the “Limited Power of Attorney” presented to be defective in granting Wells Fargo the right to foreclose on the instant mortgage.

Further, plaintiff must address a second matter, if renews its motion for an order of reference, upon compliance with CPLR § 3215 (f). In the instant action, as noted above, Cathy Menchise, in her affidavits, dated August 23, 2006 and January 31, 2007, states that she is “Senior Vice President of WELLS FARGO BANK, N.A.” However, in another foreclosure action in which I issued a decision on November 21, 2006, (*MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR CREDIT SUISSE FINANCIAL CORPORATION v GLENDA HUNTE, et. al*, Index # 12705/07), there is a June 18, 2007-“affidavit of facts” by Cathy Menchise, in which she claims to be the “Senior Vice President of Mortgage Electronic Registration Systems, Inc. (MERS).” Is Ms. Menchise the Senior Vice President of WELLS FARGO BANK, N.A. or the Senior Vice President of MERS? Did she change her employment from between January 31, 2007 and June 18, 2007? The Court is concerned that Ms. Menchise might be engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Ms. Menchise describing her employment history for the past three years.

Leave is granted to plaintiff to renew its motion for a judgment of foreclosure and sale, provided it: complies with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of U.S. BANK N.A., AS TRUSTEE, or someone with a valid power of attorney from U.S. BANK N.A., AS TRUSTEE, and, presents an affidavit executed by Ms. Menchise, with respect to her employment history for the past three years. 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 Cathy Menchise, "Senior Vice President of WELLS FARGO BANK, N.A., [alleged] attorney in fact." Ms. Menchise must have, as plaintiff's agent, a valid power of attorney for that express purpose. Additionally, if the power of attorney to be presented to this Court refers to servicing agreements, the Court needs a properly offered copy of the servicing agreements, to determine if the servicing agent or attorney in fact 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]).

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, the instant application for a judgment of foreclosure and sale is denied without prejudice. The Court will grant plaintiff U.S. BANK N.A., AS TRUSTEE a judgment of foreclosure and sale when it: submits an affidavit by either an officer of U.S. BANK, N.A., AS TRUSTEE, or someone with a valid power of attorney from U.S. BANK N.A., AS TRUSTEE, possessing personal knowledge of the facts; and, presents an affidavit from Cathy Menchise clarifying her employment for the past three years and what corporation(s) she serves as an officer.

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2006-WM1, for a judgment of foreclosure and sale for the premises located at 1645 Pacific Street, Brooklyn, New York (Block 1334, Lot 38, County of Kings) is

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denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2006-WM1, to renew its motion for a judgment of foreclosure and sale for the premises located at 1645 Pacific Street, Brooklyn, New York (Block 1334, Lot 38, 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 valid authority to execute such an affidavit; and, an affidavit by Cathy Menchise describing her employment history for the past three years.

This constitutes the Decision and Order of the Court.

E N T E R



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