

Deutsche Bank Natl. Trust Co. v Alvarado

2011 NY Slip Op 33169(U)

December 8, 2011

Supreme Court, Suffolk County

Docket Number: 36015/2010

Judge: Paul J. Baisley

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

copy

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
DEUTSCHE BANK NATIONAL TRUST
COMPANY AS INDENTURE TRUSTEE FOR NEW
CENTURY HOME EQUITY LOAN TRUST 2005-3,

INDEX NO.: 36015/2010
MOTION DATE: 8/25/2011
MOTION NO.: 001 MD

Plaintiff,

PLAINTIFF'S ATTORNEY:
COHN & ROTH
100 East Old Country Road
Suite 28
Mineola, New York 11501

-against-

CECILIA ALVARADO INDIVIDUALLY AND
AS SURVIVING JOINT TENANT OF JORGE
ALVARADO, JORGE ALVARADO A/K/A JORGE
ALVARADO JR. A/K/A GEORGE ALVARADO AS
SURVIVING JOINT TENANT OF JORGE
ALVARADO, NEW CENTURY MORTGAGE
CORPORATION, UNITED STATES OF AMERICA,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, TARGET NATIONAL
BANK, CACH LLC, MIDLAND FUNDING LLC,
PORTFOLIO RECOVERY ASSOCIATES LLC,
NORTH STAR CAPITAL ACQUISITION LLC,
DISCOVER BANK, BETHPAGE FEDERAL
CREDIT UNION, and "John Doe #1" through
"John Doe #10", the last 10 names being
fictitious and unknown to the Plaintiff, the
persons or parties intended being the persons or
parties, if any, having or claiming an interest in
or lien upon the mortgaged premises described
in the verified complaint,

DEFENDANTS' ATTORNEY:
ALLISON B. CRAIN, P.C.
130 Third Avenue
Brentwood, New York 11717

Defendants.

-----X

Upon the following papers numbered 1 to 10 read on this ex-parte application for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED this unopposed motion (motion sequence no. 001) by the plaintiff for an order of reference in this foreclosure action is considered and is denied, for the reasons stated herein, without prejudice to renew within One Hundred and Twenty (120) Days of the date of this Order and if the renewal motion is not submitted within that time period it shall be deemed denied and the action dismissed due to the plaintiff's failure to obey a direct Order of this Court and the dismissal shall be without a further Order of this Court; and it is further

ORDERED that the plaintiff shall submit with any renewed application an affidavit of merit made by an officer of the plaintiff; copies of a recorded or certified power-of-attorney document from the plaintiff to Carrington Mortgage Services, LLC; the relevant portions of the trust/servicing agreement between the plaintiff, New Century and Carrington; a copy of the RPAPL § 1304 90-day notice; and an affidavit or affirmation from one with personal knowledge, of compliance with the type-size and content requirements of RPAPL § 1304; and it is further

ORDERED that the plaintiff shall submit with any renewed application copies of the purported recorded deed and the Suffolk County Recording and Endorsement page by which the subject property was allegedly transferred by Cecilia Alvarado and the decedent Jorge Alvarado to the defendant Cecilia Alvarado and Jorge Alvarado also known as Jorge Alvarado, Jr. also known as George Alvarado as well as copies of the decedent Jorge Alvarado's death certificate, and the filed petition for Letters of Administration and the Decree from the Surrogate's Court, Suffolk County granting Letters of Administration to the defendant Cecelia M. Alvarado; and it is further

ORDERED that with respect to any future application the plaintiff is directed to provide an updated affirmation from counsel and/or an affidavit from the plaintiff or the plaintiff's representative that he/she has reviewed the file in this case and that he/she documents that all paperwork is correct in compliance with newly enacted Uniform Rules of Trial Courts (22 NYCRR) § 202.12-A (f); and it is further

ORDERED that with respect to any future application and submission of the judgment, the plaintiff is directed to provide an affidavit of non-military status of the defendants, Cecilia Alvarado and Jorge Alvarado also known as Jorge Alvarado, Jr. also known as George Alvarado pursuant to 50 USCS 521 et. seq., or an explanation by way of affirmation or affidavit why said affidavit cannot be obtained; and it is further

ORDERED that any renewal shall include properly tabbed exhibits in order to facilitate the Court's review; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order on all parties, if any, who have appeared in this action.

This is an action to foreclose a mortgage on certain real property known as 58 Salem Avenue, West Babylon, New York 11704. On May 17, 2005, Jorge Alvarado borrowed the principal sum of \$317,240 from New Century Mortgage Corporation ("New Century") and executed an adjustable rate note agreeing to pay back principal and interest over a thirty-year period. As security for the loan, Jorge Alvarado, Sr. and the defendant Cecelia Alvarado gave New Century a mortgage dated May 17, 2005 with respect to certain real property known as 58 Salem Avenue, West Babylon, New York 11704. By assignment dated September 14, 2010, the subject mortgage and note were purportedly transferred by Carrington Mortgage Services, LLL ("Carrington") as attorney-in-fact for New Century to Deutsche Bank National Trust Company as Indenture Trustee for New Century Home Equity Loan Trust 2005-3 ("the plaintiff").

By deed dated January 15, 2007, fee ownership of the premises was allegedly transferred by the defendants Cecilia Alvarado and Jorge Alvarado, Sr. to the defendants Cecilia Alvarado and Jorge Alvarado, Sr. as to a 50% interest and Jorge Alvarado also known as Jorge Alvarado,

Jr. also known as George Alvarado (hereinafter “Jorge Alvarado, Jr.”) as to a 50% interest. On April 23, 2008, Jorge Alvarado, Sr. allegedly died intestate a resident of Suffolk County and, thereafter, Letters of Administration were allegedly issued to the defendant Cecelia M. Alvarado. The defendant Cecelia M. Alvarado individually and as surviving joint tenant of Jorge Alvarado, Sr. (“the decedent”) and Jorge Alvarado, Jr. (“collectively the Alvarado defendants”) allegedly failed to comply with the terms and conditions of the note and mortgage by failing to pay the installment of principal and interest which became due pursuant to the note and mortgage on June 1, 2009.

The plaintiff commenced this action by the filing of a summons and complaint on September 24, 2010. According to the records maintained by the Court’s computerized database, a pre-screening foreclosure settlement conference was held on March 8, 2011 at which time the Alvarado defendants failed to appear. As a result, this case was referred to IAS Part 36. The plaintiff now seeks a default order of reference and requests an amendment of the caption by striking the fictitious defendants named “John Doe #1” to “John Doe #10”.

With regard to a judgment of foreclosure, an order of reference is simply a preliminary step towards obtaining a default judgment (*Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). Without an affidavit by the plaintiff regarding the facts constituting the claim and amounts due or, in the alternative, an affidavit by the plaintiff that its agent has the authority to set forth such facts and amounts due, the statutory requirements are not satisfied. In the absence of either a proper affidavit by the party or a complaint verified by the party, not merely by an attorney with no personal knowledge, the entry of judgment by default is erroneous (*see, Peniston v Epstein*, 10 AD3d 450, 780 NYS2d 919 [2d Dept 2004]; *Grainger v Wright*, 274 AD2d 549, 713 NYS2d 182 [2d Dept 2000]; *Finnegan v Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]; *Hazim v Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]).

Further, for foreclosure actions commenced on or after January 15, 2010, RPAPL §1304 requires that, with regard to a “home loan,” at least 90 days before a lender, assignee or mortgage loan servicer commences legal action against the borrower, such lender, assignee or mortgage loan servicer must give the borrower a specific statutorily prescribed notice. In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific wording and type-size requirements of the notice are set forth in RPAPL §1304(1).

Pursuant to RPAPL §1304(2), the requisite 90-day notice must be “sent by the lender or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence which is the subject of the mortgage.” Notice is considered given “as of the date it is mailed.” The notice must also contain a list of at least five housing counseling agencies approved by the U.S. Department of Housing and Urban Development, or those designated by the Division of Housing and Community Renewal, that serve the region where the borrower resides, as well as the counseling agencies’ last known addresses and telephone numbers. Pursuant to RPAPL §1304(3), the 90-day period specified in RPAPL §1304(1) does not apply “if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the

borrower no longer occupies the residence as the borrower's principal dwelling.”

Additionally, necessary parties to a foreclosure action include “every person entitled to the reversion, remainder, or inheritance of the real property” (*see*, RPAPL §1311 [1]). Section 6-2.2 (a) of the Estates, Powers and Trusts Law (“EPTL”) provides for a rebuttable presumption that “[a] disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.” The co-tenants to a tenancy in common have no right of survivorship (3 Warren's Weed New York Real Property, Common Ownership of Property § 27.02 [5th ed.]).

In support of this application, the plaintiff has submitted, *inter alia*, the summons and complaint and the affidavit of fact of Greg Schleppey, the Senior Vice President of Carrington. Initially, the Court notes that the complaint has been verified by counsel, and not by an officer of the plaintiff. The Court also notes that this application is not supported by a power-of-attorney document or the relevant portions of the trust/servicing agreement between the plaintiff, New Century and Carrington. Without a properly offered copy of a recorded or certified power-of-attorney document, the Court is unable to ascertain whether or not a plaintiff's servicing agent may properly act on behalf of the plaintiff to set forth the facts constituting the claim, the default and the amounts due, as required by statute (*see*, *HSBC Bank USA v Betts*, 67 AD3d 735, 888 NYS2d 203 [2d Dept 2009]). Therefore, in the absence of either a verified complaint or a proper affidavit by the party or its authorized agent, the entry of judgment by default is erroneous (*see*, *Mullins v DiLorenzo*, 199 AD2d 218, 606 NYS2d 161 [1st Dept 1993]; *Hazim v Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491, *supra*).

The plaintiff's application is also denied for the plaintiff's failure to submit evidentiary proof, including a copy of the 90-day notice as well as an affidavit or affirmation from one with personal knowledge, of compliance with the type-size and content requirements of RPAPL §1304 regarding the pre-commencement notice required in foreclosure actions, as well as an affidavit of proper service of such notice by registered or certified mail and by first class mail to the last known address of the borrowers as required by RPAPL §1304(2) or, in the alternative, an affidavit from one with personal knowledge sufficient to show why the requirements of RPAPL §1304(1) do not apply (*see*, *Aurora Loan Servs., LLC v Weisblum*, 85AD3d 95 [2d Dept 2011]). Without submission of the actual notice, along with copies of postal mailing receipts, the mere allegation by Schleppey that a 90-day notice was sent is insufficient to meet the requirements of RPAPL §1304.

Additionally, the allegations pertaining to the fee transfer between the Alvarado defendants is not supported by a copy of the purported recorded deed and the Suffolk County Recording and Endorsement page. Furthermore, the plaintiff has not submitted any documentation from the Surrogate's Court, Suffolk County such as a copy of the decedent's death certificate, the filed petition for Letters of Administration or the Decree from that Court granting Letters of Administration to the defendant Cecelia M. Alvarado to substantiate the allegations as to these matters. Hence, the Court cannot determine whether all necessary parties have been joined (*see*, *e.g.*, *Salomon Bros. Rlty Corp. v Alvarez*, 22 AD3d 482, 802 NYS2d 705 [2d Dept 2005]; *Morgan v Morgan*, 111 AD2d 790, 490 NYS2d 539 [2d Dept 1985]; *Matter of Heller v Rogers*, 26 AD2d 640, 272 NYS2d 433 [2d Dept 1966]; *see also*, EPTL § 6-2.2[a]).

Accordingly the application for an order of reference is denied without prejudice for the reasons stated in this order and under the conditions set forth in this order for renewal. A copy of this order and all previously submitted documentation on this motion (001) shall be submitted with any future application(s) for an order of reference. Proposed order of reference marked "Not Signed."

Dated: December 8, 2011

PAUL J. BAISLEY, JR.

J.S.C.

_____ FINAL DISPOSITION NON-FINAL DISPOSITION