

SUPREME COURT - STATE OF NEW YORK
IAS PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
#001 - MD

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FREMONT INVESTMENT AND LOAN, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 MICHAEL GRAMSE, MICHELE A. LAEZZA :
 GRAMSE a/k/a MICHELE LAEZZA a/k/a :
 MICHELE GRAMSE, "JOHN DOE ONE" :
 through "JOHN DOE TEN," the last ten names :
 being fictitious and unknown to the Plaintiff, the :
 persons or parties intended being the tenants, :
 occupants, persons or corporations, if any having or :
 claiming an interest in, possession of, or lien upon :
 the premises described in the Complaint, :
 :
 Defendants. :
-----X

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Tuckahoe, New York 10707

Upon the following papers numbered 1 to 4 read on this application for an order of reference; Application and supporting papers 1 - 4; Answering Affidavits and supporting papers____;Replying Affidavits and supporting papers____; Other____; it is,

ORDERED that plaintiff's application in this foreclosure action for an order of reference, for leave to amend the caption by striking "John Doe One" through "John Doe Ten," and for leave to amend the complaint by substituting Deutsche Bank National Trust Company as, Trustee under the Pooling and Servicing Agreement dated as of December 1, 2006, GSAMP Trust 2006-FM3, as plaintiff, is denied with leave to renew upon proper papers.

The instant action seeks to foreclose a mortgage on real property located at 120 Norman Avenue, Amityville, New York. The defendants Michael Gramse and Michele A. Laezza Gramse executed an adjustable rate note, dated August 18, 2006, for a loan from the lender Fremont Investment and Loan. The note was secured by a mortgage on the subject premises, also dated August 18, 2006, which was given by the defendants Michael Gramse and Michele A. Laezza Gramse in favor of Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), as nominee for the lender. The plaintiff Fremont

Investment and Loan alleges that the defendants defaulted on their loan payments due on January 1, 2008 and thereafter. The summons and complaint and notice of pendency were filed on May 21, 2008. The defendants have not appeared or answered, and are in default. MERS purportedly assigned the mortgage to Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement dated as of December 1, 2006, GSAMP Trust 2006-FM3, by assignment dated June 16, 2008.

The application for an order of reference, denied herein, is considered under 2008 NY Laws Chapter 472, enacted August 5, 2008, and may be renewed upon submission of proper papers, including but not limited to a copy of the papers submitted with this application, a copy of this order, and evidentiary proof, specifically:

1) An affidavit of merit by the plaintiff regarding the facts constituting the claim and the amounts due (*see e.g., Wolf v Citibank, N.A.*, 34 AD3d 574, 824 NYS2d 176 [2006]), or, in the alternative, evidentiary proof that the Assistant Vice President of Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement dated as of December 1, 2006, GSAMP Trust 2006-FM3, has the authority and personal knowledge to set forth the facts constituting the claim and the amounts due. The Court notes that the plaintiff seeks to substitute Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement as of December 1, 2006, GSAMP Trust 2006-FM3, as the plaintiff in the instant matter. However, the plaintiff has failed to provide evidentiary proof of the proper assignment of the subject mortgage and note to said party. The written assignment submitted was insufficient for this purpose. Such assignment purports to document the transfer of the subject mortgage from MERS to Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement dated as of December 1, 2006, GSAMP Trust 2006-FM3, by assignment dated June 16, 2008. However, the record fails to establish that MERS had any ownership interest in the subject note. Any purported assignment of a note or mortgage made by an entity lacking an ownership interest therein passes no title to the assignee (*LaSalle Bank Natl. Assn. v Lamy*, 12 Misc 3d 1191[A], 824 NYS2d 769 [2006]). Absent an effective transfer of the note, the assignment of the mortgage to Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement dated as of December 1, 2006, GSAMP Trust 2006-FM3, would be a nullity (*see, Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [1988]). Moreover, the plaintiff failed to provide a certificate of conformity relative to the notarization of the assignment of mortgage (CPLR 2309[c]; Real Property Law § 299-a[1]; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2008]).

Moreover, and in any event, the affidavit of merit provided, was not submitted in admissible form. Such affidavit was signed and notarized in the State of Texas and was not accompanied by the required certificate of conformity with the laws of the State of Texas. For an out-of-state affidavit to be admissible, it must comply with CPLR 2309 [c] which requires that an out-of-state affidavit be accompanied by a certificate of conformity (*see, Real Property Law § 299-a[1]; PRA III, LLC v Gonzalez, supra; Boai Zhong Yi Acupuncture Services, P.C. v New York Central Mut. Fire Ins Co.*, 8 Misc3d 1011[A], 801 NYS2d 776 [2005]; *Ford Motor Credit Company v Prestige Gown Cleaning Service, Inc.*, 193 Misc2d 262, 748 NYS2d 235 [2002];

see also, NY CLS Real P § 299-a [2008]; 1 Mortgages and Mortgage Foreclosure in N.Y. § 7:17).

2) An affidavit from someone with personal knowledge, as to whether or not the loan sought to be foreclosed herein is a “non-traditional home loan” as defined in RPAPL §1304 (5)(e), a “subprime home loan” as defined in RPAPL §1304, or a “high-cost home loan” as defined in Banking Law §6-1. In the event the loan herein meets the statutory definition of “subprime home loan” or “high-cost home loan,” the plaintiff shall also submit evidentiary proof, including an affidavit from one with personal knowledge, regarding whether or not the mortgagor defendant is known to be a resident of the property in foreclosure, as well as evidentiary proof of such defendant’s residence address and contact information, sufficient for the Court to properly notify the defendant, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, that if he or she is a resident of such property, he or she may request a settlement conference (CPLR 3408). In the event that the loan meets the statutory definition of a high-cost home loan, the complaint must contain an affirmative allegation that plaintiff mortgage banker has complied with all of the provisions of Banking Law §§ 595-a and 6-1 (*see*, RPAPL §1302 [1]).

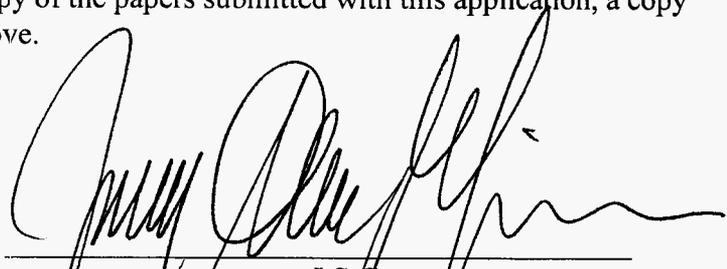
3) Evidentiary proof that the defendants received a notice of default complying with paragraphs 15 and 22 (b) of the mortgage agreement (*see*, *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2002]; *see also*, *New York Prsby. Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 814 NYS2d 687 [2006]; *Residential Holding Corp. v Schottsdale Ins. Co.*, 286 AD2d 679, 729 NYS2d 776 [2006]).

4) Evidentiary proof, including an attorney’s affirmation, of compliance with the form, type size, type face, paper color and content requirements of RPAPL § 1303 regarding the “Help for Homeowners in Foreclosure” Notice, as well as an affidavit of proper service of such notice.

The plaintiff is reminded that proper proof of compliance with CPLR 3215(g)(3), concerning the mailing of additional notice, is required upon application for a judgment of foreclosure against any defaulting mortgagor.

In summary, the instant application is denied without prejudice to resubmission of the application upon proper papers. Any renewal shall include a copy of the papers submitted with this application, a copy of this order, and the evidentiary proof specified above.

Dated: FEB 27 2009



HON. JEFFREY ARLEN SPINNER
J.S.G.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION