

COPY

SHORT FORM ORDER

INDEX No. 34485/09

2-10-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 14 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Acting Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
#001 - MD

-----X
THE BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK AS TRUSTEE
FOR THE CERTIFICATE HOLDERS CWALT,
INC., ALTERNATIVE LOAN TRUST 2005-48T1
MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2005-48T1,

Plaintiff,

DRUCKMAN LAW GROUP, PLLC
Attorney for the Plaintiff
242 Drexel Avenue
Suite 2
Westbury, New York 11590

- against -

JOSE T. DIAZ ARGUETA, MARIE P. ARGUETA,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., ACTING SOLELY AS A
NOMINEE FOR COUNTRYWIDE HOME LOANS,
INC., "JOHN DOE 1 to JOHN DOE 25," said names
being fictitious, the persons or parties intended being
the persons, parties, corporations or entities, if any,
having or claiming an interest in or lien upon the
mortgaged premises described in the complaint,

Defendants. :

-----X
Upon the following papers numbered 1 to 5 read on this ex parte motion by the plaintiff for an order of reference: Proposed order and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers Replying Affidavits and supporting papers , and the aforesaid having been submitted to the undersigned, and with due consideration and deliberation it is,

ORDERED that this motion (#001) by the plaintiff for an order appointing a referee to compute is considered under RPAPL Article 13 and is denied without prejudice to renew upon proper papers including but not limited to a copy of all the papers submitted with this application, a copy of this order, and the evidentiary proof specified herein.

In this mortgage foreclosure action, the plaintiff seeks foreclosure of a mortgage on certain real property situated in Suffolk County. The plaintiff now moves for the appointment of a referee to compute upon the defendants' default in answering the summons and complaint (*see* RPAPL §1321). On August 5,

2008 Senate Bill 8143 was approved and enacted as 2008 N.Y. Laws 472. One of the clear mandates of the law was that a Court must ascertain from the plaintiff is whether the loan in foreclosure is a “subprime home loan” as defined in RPAPL § 1304, or a “high cost loan as defined in Banking Law § 6-1.

In support of the application for an order of reference, an attorney for the plaintiff affirms upon information and belief that the loan is not a subprime loan. This is done in three (3) separate affirmations. See, affirmations of Kiyam J. Poulson, Esq., all dated December 7, 2009.

A second attorney for the plaintiff verified the complaint itself, wherein paragraph 3C states:

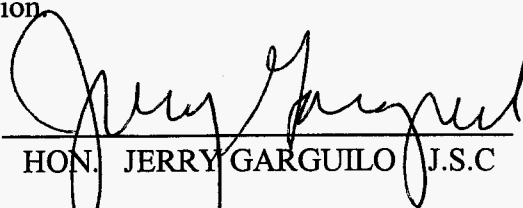
“The above entitled action is a foreclosure action on a residential mortgage loan in which the loan in foreclosure does not fall within the ambit of the Foreclosure Prevention and Responsible Lending Act of 2008. Thus, notice to the mortgagor(s) regarding the availability of a settlement Conference may not be required.”

In the affidavit of merit that was submitted by the mortgage servicer, Countrywide Home Loans, dated September 24, 2009, its Assistant Secretary, Tiaquanda Turner, states that the loan is, in fact, a subprime loan as defined in RPAPL § 1304.

The Court cannot overlook or ignore the obvious conflict between what the attorneys assert and what the officer of the plaintiff avers regarding the character or nature of the home loan that is the subject of this action. This conflict has placed the court in the untenable position of having to guess who is correct, the attorney or the client. It is not the court’s function to identify the subject loan, it is the plaintiff’s.

Under the circumstances, the ex-parte order of reference is denied without prejudice to renew upon proper papers that are not flawed by serious contradiction.

Dated: ~~January~~ ^{Feb} 10 2010



HON. JERRY GARGUILO J.S.C

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION