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Lasalle Bank N.A. v Smith
2010 NY Slip Op 50470(U)
Decided on March 22, 2010
Supreme Court, Kings County
Schack, J.
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<p>Lasalle Bank N.A. AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET- BACKED CERTIFICATES, SERIES 2007-1, Plaintiff,</p> <p>against</p> <p>Hubert Smith, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FIRST FRANKLIN FINANCIAL CORP., et. al., Defendants.</p>
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35207/07

Appearances:

Plaintiff

Heather Johnson, Esq.

Steven J. Baum, PC

Amherst NY

Arthur M. Schack, J.

The instant motion by plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1 (LASALLE), in this mortgage foreclosure action, upon the default of all defendants, for: a judgment of foreclosure and sale; granting subordinate mortgagee defendant MORTGAGE ELECTRONIC

REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FIRST FRANKLIN FINANCIAL CORP. (MERS) relief pursuant to Real Property Actions and Proceedings Law (RPAPL) §§ 1351 (3) and 1354 (3); and related relief; for the premises located at 2741 Fulton Street, Brooklyn, New York (Block 3664, Lot 52, [*2]County of Kings) is denied without prejudice, with leave to renew the instant motion, within sixty (60) days of this decision and order, with submission of:

(1) an "affidavit of facts," in compliance with the statutory requirements of CPLR § 3215 (f), for the instant first mortgage and note, executed by an officer of plaintiff LASALLE or someone who has a valid power of attorney from plaintiff LASALLE, and if necessary a properly offered copy of a pooling and servicing agreement between LASALLE and its mortgage servicer;

(2) an "affidavit of facts," in compliance with the statutory requirements of CPLR § 3215 (f), for the subordinate mortgage and note, executed by an officer of subordinate mortgage defendant MERS or someone who has a valid power of attorney from subordinate mortgage MERS; and

(3) affirmations by both Steven J. Baum, Esq., the principal of Steven J. Baum, P.C., plaintiff LASALLE's counsel, and Elpiniki M. Bechakas, attorney of record for subordinate mortgagee defendant MERS, who is also an attorney employed by Steven J. Baum, explaining whether plaintiff LASALLE and subordinate mortgagee defendant MERS consented to simultaneous representation by Steven J. Baum, P.C., with "full disclosure of the implications of the simultaneous representation and the advantages and risks involved."

Background

Defendant HUBERT SMITH (SMITH) purchased the subject premises for \$550,000.00 and closed on February 16, 2007. He received 100 percent financing from FIRST FRANKLIN FINANCIAL CORP. Defendant SMITH executed two notes and mortgages at the February 16, 2007 closing; the subject first mortgage with 80 percent

financing, borrowing \$440,000.00 from FIRST FRANKLIN FINANCIAL CORP.; and, the subordinate second mortgage and note with 20 percent financing, borrowing \$110,000.00 from FIRST FRANKLIN FINANCIAL CORP. MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., recorded the instant \$440,000.00 mortgage and note on April 25, 2007, in the Office of the City Register of the City of New York, City Register File Number (CRFN) 2007000213842. The subordinate \$110,000.00 mortgage and note were recorded immediately after the subject mortgage and note, on April 25, 2007, in the Office of the City Register of the City of New York, CRFN 2007000213843.

Defendant SMITH defaulted in his mortgage loan payments after making only one payment, on April 1, 2007. MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP. assigned the instant nonperforming mortgage and note to plaintiff LASALLE, on August 7, 2007. This assignment was recorded in the office of the City Register of the City of New York, on September 26, 2007, CRFN 2007000493535. Plaintiff LASALLE, on September 19, 2007, commenced the instant foreclosure action by filing the summons, complaint and notice of pendency with the Kings County Clerk.

This action was randomly assigned to an Acting Justice of the Supreme Court, Kings County, who granted plaintiff LASALLE an order of reference on April 3, 2008. The Referee appointed pursuant to the April 3, 2008 order prepared a report, dated April 29, 2008, in which [*3] he found that defendant SMITH owed plaintiff LASALLE \$496,128.83 for principal, interest, taxes, hazard insurance, and late fees, through July 9, 2008. Subsequently, plaintiff LASALLE moved, on December 19, 2008, for a judgment of foreclosure and sale. The Acting Justice to which this case had been assigned was assigned to another Court in late 2009. Thus, the instant matter was randomly assigned to me, after a review of the instant motion by the Kings County Supreme Court Foreclosure Department. The Foreclosure Department submitted the instant motion to me on March 16, 2010.

I reviewed the instant motion and discovered that plaintiff LASALLE's moving papers, for a judgment of foreclosure and sale, failed to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The instant motion papers contain an "affidavit of merit and amount due," dated July 8, 2008, by Bryan Kusich, "Vice President of HOME LOAN SERVICES, INC., Attorney in Fact for" plaintiff LASALLE. Attached to plaintiff's moving papers is a "Limited Power of Attorney," dated April 10, 2007, from an entity with a name different from that of the plaintiff, "LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR *MERRILL LYNCH* FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1 [*Emphasis added*]." The instant case does not deal with "*MERRILL LYNCH* FIRST FRANKLIN MORTGAGE LOAN TRUST" [*Emphasis added*].

Further, even if the limited power of attorney allowed for HOME LOAN SERVICES, INC. to act for the correct mortgage loan trust, the limited power of attorney submitted 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.

Moreover, the limited power of attorney, even if issued by the correct mortgage loan

trust, authorizes HOME LOAN SERVICES, INC. to act, pursuant to a December 1, 2006 "Pooling and Servicing Agreement for the purpose of performing all acts and executing all documents in the name of the Trustee." Plaintiff's counsel failed to submit with its moving papers the original or a certified copy of the December 1, 2006 Pooling and Servicing Agreement. All that the Court received are several pages, with many redactions, from an uncertified copy of the March 1, 2007 Pooling and Servicing Agreement with respect to the "*MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1* [*Emphasis added*]. The defective limited power of attorney submitted to the Court refers to the December 1, 2006 Pooling and Servicing Agreement, not the March 1, 2007 Pooling and Servicing Agreement. The Court requires either the entire original Pooling and Servicing agreement, or a certified copy of the entire document, to determine if HOME LOAN SERVICES, INC., as attorney in fact, is empowered to give an affidavit of facts.

Also, the moving papers contain an affirmation by Elpiniki M. Bechakas, Esq., "the attorney of record for" defendant subordinate mortgagee MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., requesting that the Court direct the Referee to pay MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., pursuant to RPAPL §§ 1351 (3) and 1354 (3), "the sums necessary to satisfy its mortgage to the extent the surplus proceeds of the sale will allow." Ms. Bechakas submitted an uncertified copy of a December 26, 2007-"affidavit of merit and amount due subordinate mortgagee," by Bryan Kusich, "Vice President of HOME LOAN [*4]SERVICES, INC., as servicer for MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a defendant herein." Thus, Mr. Kusich is the incestuous servicer for both plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP. Ms. Bechakas' failed to present to the Court a power of attorney by an officer of MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., granting HOME LOAN SERVICES, INC. a power of attorney to execute affidavits of merit on its behalf.

Finally, for reasons unknown to this court, Ms. Bechakas, the attorney of record for subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., failed to disclose to the Court that she is employed by plaintiff's counsel, Steven J. Baum, P.C. My March 17, 2010 examination of the Office of Court Administration's Attorney Registry reveals that Ms. Bechakas, admitted in the Fourth Department in 1991, lists her business address as "Steven J. Baum, P.C., 220 Northpointe Pkwy, Ste G., Amherst, NY 14228-1894." As noted above, Steven J. Baum, P.C. is the attorney for plaintiff LASALLE. The Court is concerned that the simultaneous representation by Steven J. Baum, P.C., of both plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., is a conflict of interest in violation of 22 NYCRR § 1200.24, the Disciplinary Rule of the Code of Professional Responsibility, entitled "Conflict of Interest; Simultaneous Representation," in effect when plaintiff LASALLE moved in December 2008 for a judgment of foreclosure and sale.

Discussion

Plaintiff LASALLE 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 LASALLE failed to submit "proof of the facts" in "an affidavit made by the party." The affidavit of merit submitted by Bryan Kusich, Vice President of HOME LOAN SERVICES, INC. failed to have a valid power of attorney for that express purpose. The power of attorney is from LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1 [*Emphasis added*]," not from plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1.

If plaintiff LASALLE renews its motion for a judgment of foreclosure and sale with related relief, within sixty (60) days of this decision and order, it must present a proper power of attorney to the Court, and if the renewed motion refers to a pooling and servicing agreement, the [*5] Court needs a properly offered copy of the pooling and servicing agreement, 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 or a pooling and servicing agreement, 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. (*See Security*

Pacific Nat. Trust Co. v Cuevas, 176 Misc 2d 846 [Civ Ct, Kings County 1998]).

With respect to directing the Referee to pay subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., "the sums necessary to satisfy its mortgage to the extent the surplus proceeds of the sale will allow," Ms. Bechakas is correct. My inspection of the New York City Department of Finance's Automated City Register Information System (ACRIS) shows only two open mortgage liens on the subject premises - plaintiff LASALLE's senior lien and the junior lien of MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP. Thus, the only subordinate mortgagee, MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., is entitled to any surplus money to satisfy its lien. (RPAPL §§ 1351 (3) and 1354 (3); [Washington Mut. Home Loans, Inc. v Jones](#), 27 AD3d 728 [2d Dept 2006]). RPAPL § 1351 deals with judgments of foreclosure and sale and states in (3):

If it appears to the satisfaction of the court that there exists no more than one other mortgage on the premisis [sic] which is then due and which is subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, upon motion of the holder of such mortgage made without valid objection of any other party, the final judgment may direct payment of the subordinate mortgage debt

from the proceeds in accordance with subdivision 3 of section 1354. RPAPL § 1354 deals with the distribution of the proceeds of foreclosure sales and states in (3):

The officer conducting the sale after fully complying with the provisions of subdivisions one and two of this section and if the judgment of sale has so directed shall pay to the holder of any subordinate mortgage or his attorney from the then remaining proceeds the amount then due on such subordinate mortgage, or so much as the then remaining proceeds will pay and take the receipt of the holder, or his attorney for the amount so paid, and file the same with his report of sale. [*6]

Therefore, if plaintiff LASALLE renews its motion for a judgment of foreclosure and sale with related relief, within sixty (60) days of this decision and order, and submits a

properly executed affidavit of merit from an officer of subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., or someone with a valid power of attorney from MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., the Court will direct the Referee in a judgment of foreclosure and sale with related relief to pay any surplus money to MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., to the extent that it will either satisfy fully satisfy the subordinate mortgage or be credited to the balance owed upon the instant subordinate mortgage.

Last, a conflict of interest exists in the instant action. Plaintiff's counsel represents both plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP. 22 NYCRR § 1200.24, of the Disciplinary Rules of the Code of Professional Responsibility, entitled "Conflict of Interest; Simultaneous Representation," in effect in December 2008, when the instant motion was made, states in relevant part:

(a) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section. (b) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section. (c) in the situations covered by subdivisions (a) and (b) of this section, *a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.* [Emphasis added]

For the instant action to proceed, both plaintiff LASALLE and subordinate

mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., need to explain to the Court, with affirmations by both Steven J. Baum, Esq., the principal of Steven J. Baum, P.C., and Elpiniki M. Bechakas, Esq., whether both plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., consented [*7] to simultaneous representation in the instant action, with "full disclosure of the implications of the simultaneous representation and the advantages and risks involved [22 NYCRR § 1200.24 (c)]."

The Appellate Division, Fourth Department, the Department where both Mr. Baum and Ms. Bechakas are registered, censured an attorney for, *inter alia*, violating 22 NYCRR § 1200.24, by representing both a buyer and sellers in the sale of a motel. (*In re Rogoff*, 31 AD3d 111 [2006]). The *Rogoff* Court, at 112, found that the attorney, "failed to make appropriate disclosures to either the sellers or the buyer concerning dual representation." Further, the Court, at 113, censured the attorney, after it considered the matters submitted by respondent in mitigation, including:

that respondent undertook the dual representation at the insistence of the buyer, had no financial interest in the transaction and charged the sellers and the buyer one half of his usual fee. Additionally, we note that respondent cooperated with the Grievance Committee and has expressed remorse for his misconduct.

If the Court receives upon the renewal of the instant motion for a judgment of foreclosure and sale and related relief, within sixty (60) days of this decision and order, affirmations from both Mr. Baum and Ms. Bechakas, explaining: why Steven J. Baum, P.C. simultaneously represented both plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP.; whether Mr. Baum and Ms. Bechakas violated 22 NYCRR § 1200.24, the Disciplinary Rule of the Code of Professional Responsibility, entitled "Conflict of Interest; Simultaneous Representation," in effect when the instant motion for a judgment of foreclosure and sale was made; and, whether plaintiff LASALLE and subordinate mortgage defendant MERS, as nominee for FIRST FRANKLIN FINANCIAL CORP., consented to their simultaneous representation by Steven J. Baum, P.C., with "full disclosure of the implications of the simultaneous representation and the advantages and risks involved."; the Court will grant plaintiff LASALLE's renewed motion for a judgment of foreclosure and sale, with related relief.

Conclusion

ORDERED, that the application of plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1, for an order of reference for the premises located at 2741 Fulton Street, Brooklyn, New York

(Block 3664, Lot 52, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1, to renew its application for an order of reference for the premises located at 2741 Fulton Street, Brooklyn, [*8]New York (Block 3664, Lot 52, County of Kings), within sixty (60) days of this decision and order, provided that plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1, submits to the Court:

(1) an "affidavit of facts," in compliance with the statutory requirements

of CPLR § 3215 (f), executed by an officer of plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-

BACKED CERTIFICATES, SERIES 2007-1, or someone who has a

valid power of attorney from plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE

LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED

CERTIFICATES, SERIES 2007-1, and if necessary a properly offered

copy of a pooling and servicing agreement between LASALLE and its

mortgage servicer;

(2) an "affidavit of facts," in compliance with the statutory requirements

of CPLR § 3215 (f), for the subordinate mortgage and note, executed by

an officer of subordinate mortgage defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., as nominee for FIRST FRANKLIN FINANCIAL CORP., or someone who has a valid power of attorney from subordinate mortgage defendant MORTGAGE ELECTRONIC

REGISTRATION SYSTEMS INC., as nominee for FIRST FRANKLIN FINANCIAL CORP., and

(3) affirmations by both Steven J. Baum, Esq., and Elpiniki M. Bechakas,

Esq. explaining: whether Steven J. Baum, Esq., Elpiniki M. Bechakas, and

Steven J. Baum, P.C. violated 22 NYCRR § 1200.24, the Disciplinary Rule

of the Code of Professional Responsibility, entitled "Conflict of Interest; Simultaneous Representation," in effect when the instant motion for a

judgment of foreclosure and sale was made, by acting as counsel for both

plaintiff, LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE

FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1,

MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES

2007-1, and subordinate mortgage defendant MORTGAGE

ELECTRONIC REGISTRATION SYSTEMS INC., as nominee for FIRST FRANKLIN FINANCIAL CORP.; and, whether plaintiff, LASALLE [*9]

BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST

FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN

ASSET-BACKED CERTIFICATES, SERIES 2007-1, and subordinate

mortgagee defendant, MORTGAGE ELECTRONIC REGISTRATION

SYSTEMS INC., as nominee for FIRST FRANKLIN FINANCIAL

CORP., consented to their simultaneous representation by Steven J.

Baum, P.C., with "full disclosure of the implications of the simultaneous

representation and the advantages and risks involved."

This constitutes the Decision and Order of the Court.

ENTER

HON. ARTHUR M. SCHACKJ. S. C.

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