

Bank of N.Y. v Holmes
2010 NY Slip Op 30226(U)
February 2, 2010
Supreme Court, Albany County
Docket Number: 5015-07
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

THE BANK OF NEW YORK AS SUCCESSOR TO
JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,
F/K/A JPMORGAN CHASE BANK, AS TRUSTEE UNDER
THE POOLING AND SERVICING AGREEMENT, DATED
AS OF NOVEMBER 1, 2003 AMONG CREDIT BASED
ASSET SERVICING AND SECURITIZATION, LLC,
FINANCIAL ASSET SECURITIES CORP., LITTON LOAN
SERVICING LP AND JPMORGAN CHASE BANK, C-BASS
MORTGAGE LOAN ASSET-BACKED CERTIFICATES,
SERIES 2003-CB6,

Plaintiff,

DECISION and ORDER
INDEX NO. 5015-07
RJI NO. 01-08-093522

-against-

JODYE B. HOLMES AND TSEHAYA D. SMITH,
MICHAEL HOLMES,

Defendants.

Supreme Court Albany County All Purpose Term, January 26, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

The Law Offices of Jordan S. Katz, PC
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TERESI, J.:

On January 6, 2008, this Court granted Plaintiff a Judgment of Foreclosure and Sale (hereinafter “Judgment”) on default, finding that each named defendant had been duly served and failed to answer. The Judgment provided that the foreclosed premises, known as 241 Northern Blvd., Albany, New York 12210, was to be sold at public auction by the referee appointed. Michael Holmes (hereinafter “Mr. Holmes”) now moves “to dismiss the complaint” and for “poor person status”. Because Mr. Holmes failed to demonstrate his entitlement to either poor person status or to dismissal of the complaint, his motion is denied.

CPLR § 1101(a) and (e) provide alternate methods for a party to obtain poor person relief. CPLR § 1101(e) allows a party, who is represented by a legal aid society, to proceed as a poor person without the necessity of a motion “... provided that a determination has been made by such society ... that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court...” Otherwise, a party seeking to proceed as a poor person must comply with CPLR § 1101(a), which states that: “[t]he moving party shall file an affidavit setting forth the amount and sources of his or her income and listing his or her property with its value; that he or she is unable to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of the contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses.”

On this motion, Mr. Holmes failed to demonstrate compliance with either CPLR

§1101(a) or (e). On September 1, 2009, Mr. Holmes brought this motion pro se. His motion papers failed to comply with CPLR §1101(a) because: he did not file an affidavit setting forth the amount and sources of his income, he did not list his property with its value, he did not state that he is unable to pay the costs, fees and expenses necessary to defend this action, he did not set forth whether any other person is beneficially interested in this action, nor whether such person is able to pay the costs, fees and expenses herein. As such, he failed to comply with CPLR §1101(a)'s requirements and cannot be granted poor person status thereunder. Similarly, although The Legal Aid Society of Northeastern New York, Inc. filed a notice of appearance on Mr. Holmes's behalf subsequent to Mr. Holmes' bringing this motion, no CPLR §1101(e) certification has been filed. As such, poor person status pursuant to CPLR §1101(e) cannot be granted. (Bryan v. Hammons, 173 Misc2d 894 [NY County, Sup. Ct. 1997]). Accordingly, Mr. Holmes' motion for poor person status is denied.

Mr. Holmes' motion "to dismiss the complaint" for failure to name a necessary party likewise fails. (RPAPL §1311[3]). Mr. Holmes claims that Niagara Mohawk d/b/a National Grid is a necessary party because it "was granted a judgment." He supports such contention with a copy of a "Notice of Motion for Default Judgment" from the City of Albany - City Court, but submits no Judgment or Transcript of Judgment to substantiate his claim. As such, he failed to sufficiently demonstrate that Niagara Mohawk is a subordinate lienholder. (RPAPL §1311[3]). Moreover, even if Niagara Mohawk was a subordinate lienholder, Mr. Holmes would still not be entitled to dismissal of the complaint. (Board of Managers of Parkchester North Condominium v. Alaska, 37 AD3d 332, 333 [1st Dept. 2007]).

Similarly, Mr. Holmes' claim that he is "the secured party [in a]... UCC Financing

Statement” filed against the foreclosed premises, does not require dismissal of the complaint. Mr. Holmes admits that the Notice of Pendency herein was filed on June 29, 2007, whereas the “UCC Financing Statement” was not alleged to be filed until March 5, 2008. As the “UCC Financing Statement” was not filed until after the Notice of Pendency, such lien, if it was one, “is bound by all proceedings taken in the [foreclosure] action.” (CPLR §6501, Makhoul v. 115 96th Street Holding Corp., 263 AD2d 470 [2d Dept. 1999]). As such, Mr. Holmes set forth no ground for dismissal of the complaint.

Additionally, Mr. Holmes’ allegations that the underlying mortgage in this action was predatory and fraudulent fail to demonstrate his entitlement to dismissal of the complaint because they are unsupported by any nonhearsay proof or documentary evidence. Nor does Mr. Holmes’ allegation that the mortgage should be “considered paid in full” because it was assigned, demonstrate his entitlement to dismissal of the complaint.

Accordingly, Mr. Holmes’ motion is denied in its entirety.

This Decision and Order is being returned to Plaintiff’s attorney. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 2, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated September 1, 2009, Affidavit of Michael A. Holmes, dated September 1, 2009, with attached unnumbered exhibits.
2. Affirmation of Sabita Hajaree-Ramsaran, dated January 12, 2010, with attached Exhibits A-E.
3. Letter of Craig Denning, dated September 15, 2009.