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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL TERM: PART 33

-----X
THE BANK OF NEW YORK MELLON f/k/a THE BANK
OF NEW YORK, as Trustee for the
Certificate holders of CWMBS, INC., CHL
MORTGAGE PASS-THROUGH TRUST 2005-OA5,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-OA5,

Plaintiffs,

-against-

Index No.

DECISION

Defendants.

COPY

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Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
October 27, 2017

B E F O R E:

THE HONORABLE LEONARD LIVOTE
Justice of the Supreme Court

A P P E A R A N C E S:

DRUCKMAN LAW GROUP
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BY: R. DAVID MARQUEZ, ESQ.

LAURIE DeBIASI
Senior Court Reporter

1 (Whereupon, the following is an excerpt of
2 proceedings, as requested:)

3 (Whereupon, the following took place in open
4 court:)

5 COURT CLERK: Come to order. Part 33 is now back
6 in session.

7 THE COURT: Good afternoon, gentlemen.

8 MR. MORAN: Good afternoon, your Honor.

9 MR. MARQUEZ: Good afternoon, your Honor.

10 THE COURT: Have a seat everybody. Okay, at the
11 a.m. session, we had completed our trial. Both sides had
12 rested and both delivered their motions and summations to
13 the Court, and I left it in the air as to whether or not I
14 would reserve decision finally on the case, and then have
15 the parties submit memos, or if I felt that, based upon the
16 evidence before me and the arguments that were made
17 afterwards and the case law cited, that I would have enough
18 at this juncture to render a decision on the non-jury
19 trial. And I have pondered that issue over the lunch
20 break, and I am ready to render my decision now. So my
21 decision is as follows:

22 On a foreclosure action -- this is a mortgage
23 foreclosure action, plaintiff is required to establish, in
24 order to get judgment as a matter of law, to produce the
25 mortgage, the unpaid note, evidence of default, and to

1 demonstrate that any affirmative defenses raised by the
2 defendant in their answer are without merit. I find that
3 the plaintiff has failed to do that for the following
4 reasons:

5 Real Property Actions and Proceedings Law
6 Section 1304(2) requires statutorily that the plaintiff
7 must notify the defendant at his last known address and at
8 the mortgage predecessor's address. In this case, we have
9 testimony by plaintiff's witness that the plaintiff was
10 aware of the defendant last known address;
11 that she testified that her records indicate that they only
12 sent mailings to the mortgage premises address, even though
13 one of the notices also had his Springfield, Massachusetts,
14 address.

15 I find that the plaintiff has violated 1304(2) by
16 not producing evidence before this Court that they have
17 complied with that section; and therefore, on that ground
18 alone, which is enough to grant judgment to the
19 defendant -- but I have an additional reason.

20 I want the Court -- I mean, the record to indicate
21 that the plaintiff was required under the mortgage and note
22 to provide a 30-day notice of his default pursuant to the
23 contract, and this is the addition to the statutory notice.
24 And I know of no case that says that the 90-day statutory
25 notice takes the place of a contractual requirement, that

1 the plaintiffs have obligated themselves to also give the
2 defendant a 30-day notice of the default pursuant to the
3 mortgage and contract. There was no testimony elicited by
4 the plaintiff that that section of the contract was
5 complied with, as the defendant has successfully argued.

6 So accordingly, I grant judgment in this action to
7 the defendant, and the case is dismissed accordingly. That
8 constitutes the decision and the order of this Court.
9 Settle judgment.

10 MR. MORAN: Thank you, your Honor.

11 MR. MARQUEZ: May I ask a question?

12 THE COURT: Yes, sir.

13 MR. MARQUEZ: Will we be permitted to put in for
14 costs?

15 THE COURT: I'm sorry.

16 MR. MARQUEZ: Will we be permitted to put in for
17 attorney's fees and costs, a bill of costs?

18 THE COURT: I see what you are asking --

19 MR. MARQUEZ: You asked to settle judgment.

20 THE COURT: Did you ask for attorney's fees in
21 your pleadings?

22 MR. MARQUEZ: I did, in my answer.

23 THE COURT: Tell me where.

24 MR. MARQUEZ: I am at a loss because I left my
25 computer --

1 THE COURT: Well, I have them.

2 MR. MARQUEZ: If I may?

3 THE COURT: Rather than reading them through,
4 since they are yours.

5 (Hanging.)

6 MR. MARQUEZ: Yes. Under the wherefore clause,
7 subparagraph one, paragraph one, it says: "Dismissing the
8 complaint of the plaintiff herein together with the costs
9 and disbursements of this action, in addition to reasonable
10 attorney's fees."

11 THE COURT: What I require you to do is with your
12 motion, submit with your postjudgment motion, ask for
13 attorney's fees, costs, and disbursements of the action,
14 and show me case law that indicates that a defendant in an
15 action such as this should be entitled to same when there
16 is no contractual provision in the mortgage and note, but
17 that there is only -- as a matter of law, you preserved it
18 in your pleadings, but usually it's the contractual
19 provisions that are in some kind of writing where the Court
20 considers attorney's fees. If you feel that you have legal
21 right to request same, provide me some authority, and I
22 will take a look at it.

23 MR. MARQUEZ: I will.

24 THE COURT: I will ask my clerk about a procedural
25 question.

1 (Whereupon, an off-the-record discussion was
2 held.)

3 THE COURT: It gets returnable here. We don't
4 have a -- we have motion calendars here on Tuesday, but
5 those are the commercial part, so you could make it
6 returnable any day, as long as --

7 COURT CLERK: Better off keeping it on Tuesday.
8 Make it to Part 33-M. 33-M, motions. This way it doesn't
9 get mixed up. It will come in on the regular motion
10 calendar. Just easier that way.

11 THE COURT: I would ask that you at least get the
12 portion of the transcript that has my decision on it and
13 annex that to your proposed judgments, okay.

14 MR. MARQUEZ: Yes. If I may, one last question.
15 On this motion, do you want us to make an appearance or is
16 it on submission?

17 THE COURT: Unless there is going to be anything
18 controversial in the papers, you don't have to make an
19 appearance.

20 MR. MARQUEZ: Okay.

21 MR. MORAN: Judge, if I may, could I get my
22 original note and mortgage back --

23 THE COURT: Yes.

24 MR. MORAN: -- and I could leave you copies.

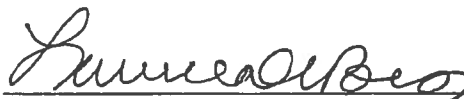
25 THE COURT: Those are important documents, I

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realize that. We will turn over all the evidence.

COURT OFFICER: All evidence gets returned.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL
STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.



LAURIE DeBIASI
Senior Court Reporter