

Comrie v HSBC Bank USA, Inc.
2016 NY Slip Op 32511(U)
September 28, 2016
Supreme Court, Suffolk County
Docket Number: 1069-16
Judge: Denise F. Molia
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Index No.: 1069-16

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

BEVERLY COMRIE,

Plaintiff,

- against -

HSBC BANK USA, INC., AS INDENTURE
TRUSTEE FOR THE REGISTERED
NOTEHOLDERS OF RENAISSANCE HOME
EQUITY LOAN TRUST 2005-4, RENAISSANCE
HOME EQUITY LOAN ASSET-BACKED NOTES,
SERIES 2005-4, VINCENT PELLIGRINO SURICO,
BRUCE H. ASHBAHIAN, DEROSE & SURICO,
OCWEN LOCAN SERVICING LLC ITS, CARLENE
REID, CHRISTINE LEE MCVICKER, MARYBETH
MALLOY, O/C RAS BORISKIN, LLC, DELTA
FUNDING CORPORATION, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
CARLOS CRUZ, FORECLOSURE HOMES
AVAILABLE, INC., DOES 1-100,

Defendant.

CASE DISPOSED: NO
MOTION R/D: 4/6/16
SUBMISSION DATE: 6/10/16
MOTION SEQUENCE NO.: 001 MG
002 MG
003 MG
004 MG
005 MD

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See annexed list

Upon the following papers filed and considered relative to this matter:

Amended Notice of Motion dated March 11, 2016 (001); Affirmation in Support dated March 11, 2016; Exhibits A through F annexed thereto; Defendant's Memorandum of Law; Defendant's Amended Memorandum of Law; Notice of Motion dated March 7, 2016 (002); Affidavit dated March 7, 2016; Affirmation dated March 7, 2016; Exhibits A through E annexed thereto; Notice of Motion dated April 5, 2016 (003); Affirmation in Support dated April 5, 2016;

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Affirmation in Support dated April 18, 2016; Affidavit in Support dated April 12, 2016; Exhibits A through H annexed thereto; Notice of Motion dated May 9, 2016 (004); Affirmation in Support dated May 9, 2016; Exhibits A and B annexed thereto; Notice of Motion in Opposition to Motion to Dismiss Complaint dated May 19, 2016 (005); Affidavit in Support dated May 19, 2016; Exhibit A annexed thereto; Reply Affirmation dated June 1, 2016; Defendants' Memorandum of Law; and upon due deliberation; it is

ORDERED, that the portion of the motion by defendant Foreclosure Homes Available, Inc. (001), pursuant to CPLR 3211(a)(5) and CPLR 6514(a), for an Order dismissing the Complaint as against said moving defendant, based on the ground that the claims set forth in the Complaint are barred by the doctrine of *res judicata* and cancelling the Notice of Pendency filed by plaintiff on or about January 28, 2016, is granted; and it is further

ORDERED, that the portion of the motion by defendant Foreclosure Homes Available, Inc., pursuant to CPLR 6514(c), for an Order awarding the costs and expenses incurred by movant as a consequence of the filing of the Notice of Pendency and its cancellation, is denied; and it is further

ORDERED, that the portion of the motion by defendant Carlos Cruz (002), pursuant to CPLR 3211(a)(7) and 3211(a)(8), for an Order dismissing the Complaint as against said moving defendant and cancelling the Notice of Pendency filed by plaintiff, is granted; and it is further

ORDERED, that the portion of the motion by defendant Carlos Cruz, for the imposition of sanctions as against the plaintiff, is denied; and it is further

ORDERED, that the portion of the motion by defendants Marybeth Malloy and Ras Boriskin, LLC (003), pursuant to CPLR 3211(a)(1), (5), (7), or (8), for an Order dismissing the Complaint with prejudice as against said moving defendants, is granted; and it is further

ORDERED, that the portion of the motion by defendants Marybeth Malloy and Ras Boriskin, LLC, for the imposition of costs and fees as against the plaintiff, is denied; and it is further

ORDERED, that the motion by defendants HSBC Bank USA, Inc. As Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2005-4, Renaissance Home Equity Loan Asset-Backed Notes, Series 2005-4, Ocwen Loan Servicing LLC ITS, and Mortgage Electronic Registration Systems, Inc. (004), pursuant to 3211(a)(5) and (8), for an Order dismissing the Complaint as against said moving defendants, is granted; and it is further

ORDERED, that the cross motion by plaintiff, for an Order denying the defendants' motions to dismiss the Complaint, is denied; and it is further

ORDERED, that the Suffolk County Clerk is directed to cancel the Notice of Pendency filed in this action on January 28, 2016, and designated by Suffolk County Tax Map number:

District 0500, Section 227.00, Block 04.00, Lot 029.00.

The instant action was commenced by plaintiff as a collateral attack against a foreclosure action appearing under Index number 10653-08, in which a Judgment of Foreclosure and Sale was rendered against the plaintiff and in favor of defendant herein, HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2005-4, and Renaissance Home Equity Loan Asset-Backed Notes, Series 2005-4, on October 9, 2008 ("HSBC"). A foreclosure auction was held on December 11, 2009. On December 16, 2009, the referee executed a deed to HSBC as the prevailing bidder. The mortgaged property at issue in said foreclosure action was 6 Virgil Drive, Brentwood, New York. Thereafter, a post-foreclosure Notice to Quit, Referee's Deed, Petition for Holdover Proceeding, and Judgment of Possession/Warrant of Eviction were served on the occupants of the subject premises.

By Order dated June 11, 2015, this Court denied the plaintiff's motion to vacate the judgment of foreclosure and sale, finding that the plaintiff/foreclosure defendant's allegations were "without evidentiary value and are therefore insufficient to establish a reasonable excuse." The Court also found that "the granting of a judgment of foreclosure and sale bars the raising of any issues which could have been litigated in the foreclosure action.

In the instant action, plaintiff once again seeks to regain title to the subject foreclosure property. The defendants have opposed the motion citing, *inter alia*, the doctrine of *res judicata*. In Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118 151 N.Y.S.2d 1, 3-4 the Court of Appeals held:

"The common-law doctrine of *res judicata*, designed to bar relitigation of adjudicated issues, is the law's recognition of the fact that it is to the interest of the State that there should be an end to litigation. The doctrine, as generally stated, is that an existing final judgment rendered upon the merits by a court of competent jurisdiction, is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein, *Good Health Dairy Products Corp. of Rochester v. Emery*, 275 N.Y.14, 17, 9 N.E.2d 758, 759, 112 A.L.R. 401; *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y.304, 165 N.E.456."

In the matter at bar, final judgment in the form of the Judgment of Foreclosure and Sale was granted to HSBC, the plaintiff in the underlying foreclosure action on September 5, 2009 and entered on October 26, 2009. The judgment of foreclosure and sale entered against Comrie is final as to all questions at issue between the parties, and all matters of defense which were, or might have been, litigated in the foreclosure action are concluded (83-17 Broadway Corp. v. Debcon Financial Services, Inc., 39 A.D.3d 583, 835 N.Y.S.2d 602; NAB Asset Venture IV, LLP v. Orangeburg Equities, 19 A.D.3d 565, 796 N.Y.S.2d 536. The fact that the judgment of foreclosure and sale was granted on default is not relevant to that action's *res judicata* effect on

the instant action. The plaintiff did not seek to reargue any of the court's prior Orders, and there is no indication that the plaintiff filed an appeal concerning any of the prior Orders within the time permitted by law.

The plaintiff was given a full and fair opportunity to litigate the propriety of the foreclosure action in her prior motion. The instant action therefore constitutes a collateral attack on the final judgment rendered in the foreclosure action and is barred by the doctrine of *res judicata*. Accordingly, the Complaint is dismissed as against all moving defendants and the Notice of Pendency is cancelled.

The defendants Marybeth Malloy and Ras Boriskin, LLC, are entitled to dismissal based upon CPLR 3211(a)(7), inasmuch as the plaintiff's claims against said defendants fail to fit within a cognizable legal theory. The defendants were not involved in the underlying foreclosure action. They were retained to represent the interests of HSBC post-foreclosure and after the transfer of the referee's deed, and to commence eviction proceedings against the occupants of the subject premises. However, after serving Ninety Days Notice and Notices to Quit the Premises, Malloy and Ras Boriskin, LLC were directed to close their file and not proceed with eviction proceedings against any of the occupants. The plaintiff did not allege, and was not in fact, the legal owner of the subject premises, but merely an occupant of the premises at the time the Notices were sent. Even giving plaintiff every possible favorable inference, the allegations of the Complaint against Malloy and Ras Boriskin, LLC, do not specify or demonstrate fraud on behalf of moving defendants, and fail to fit within any cognizable legal theory. On that basis, Malloy and Ras Boriskin, LLC, are entitled to dismissal of the Complaint as against them.

The foregoing constitutes the Order of this Court.

Dated: September 28, 2016



HON. DENISE F. MOLIA A.J.S.C.

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