

**HSBC Bank USA, N.A. v Hoffman**

2015 NY Slip Op 30151(U)

January 28, 2015

Supreme Court, Suffolk County

Docket Number: 8963-12

Judge: Jr., Andrew G. Tarantino

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL  
WHEN BLUE**

SUPREME COURT - STATE OF NEW YORK  
IAS PART 50 - SUFFOLK COUNTY

PRESENT: Hon. ANDREW G. TARANTINO JR.  
Acting Supreme Court Justice

Motion Date: 12-3-13 (001, 002)

Adj. Date: \_\_\_\_\_

Mot. Seq. #001 - MG  
#002 - XMD

\_\_\_\_\_  
HSBC BANK USA, N.A., AS INDENTURE  
TRUSTEE FOR THE REGISTERED NOTEHOLDERS  
OF RENAISSANCE HOME EQUITY LOAN  
ASSET-BACKED NOTES, SERIES 2005-2,

LEOPOLD & ASSOCIATES, PLLC  
Attorneys for Plaintiff  
By: Sarah Greenberg, Esq.  
80 Business Park Drive, Suite 110  
Armonk, New York 10504

Plaintiff,

-against-

LAWRENCE H. HOFFMAN, CAROL A. HOFFMAN,  
NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, WEST ASSET  
PURCHASING, LLC, GE CAPITAL, LVNV  
FUNDING, LLC,

PRYOR & MANDELUP, LLP  
Attorneys for Defendant  
By: Michael A. Farina, Esq.  
675 Old Country Road  
Westbury, New York 11590

"JOHN DOE #1" through "JOHN DOE #12", the  
last twelve names being fictitious and unknown to  
plaintiff, the persons or parties intended being the  
tenants, occupants, persons or corporations, if any,  
having or claiming an interest in or lien upon the  
premises, described in the complaint,

Defendants.

\_\_\_\_\_  
x

Upon the following papers numbered 1 to 20 read on this motion for summary judgment and an order of reference and cross motion for a stay; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 20; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (001) by plaintiff, HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Asset-Backed Notes, Series 2005-2 (HSBC), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Lawrence H. Hoffman and Carol A. Hoffman (collectively referred to as defendants), for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference pursuant to RPAPL 1321 is granted; and it is further

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**ORDERED** that the cross motion (002) by defendants for an order, *inter alia*, pursuant to CPLR 3408 (f) staying the action until plaintiff commences and completes in good faith the negotiation of a potential loan modification with defendants is denied; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants “John Doe #1” through “John Doe #12”; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

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HSBC BANK USA, N.A., AS INDENTURE  
 TRUSTEE FOR THE REGISTERED NOTEHOLDERS  
 OF RENAISSANCE HOME EQUITY LOAN  
 ASSET-BACKED NOTES, SERIES 2005-2,

Plaintiff,

-against-

LAWRENCE H. HOFFMAN, CAROL A. HOFFMAN,  
 NEW YORK STATE DEPARTMENT OF  
 TAXATION AND FINANCE, WEST ASSET  
 PURCHASING, LLC, GE CAPITAL, LVNV  
 FUNDING, LLC,

Defendants.

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This is an action to foreclose a mortgage on property known as 30 Newton Boulevard, Ronkonkoma, New York. On May 24, 2005, defendants executed a fixed rate note in favor of Delta Funding Corporation (Delta) agreeing to pay the sum of \$247,275.00 at the yearly interest rate of 6.450 percent. On said date, defendants also executed a mortgage in the principal sum of \$247,275.00 on the subject property. The mortgage indicated Delta to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Delta as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on July 1, 2005 in the Suffolk County Clerk’s Office. Thereafter, on June 21, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Delta, to plaintiff HSBC. The assignment of mortgage was recorded on March 22, 2012 in the Suffolk County Clerk’s Office.

Leopold & Associates, PLLC sent a notice of default dated December 19, 2011 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$49,833.54. As a result of their continuing default, plaintiff commenced this foreclosure action on March 23, 2012. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by defaulting on the installment due on February 1, 2011 and subsequent payments thereafter. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on February 19, 2013 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Sarah J. Greenberg, Esq. in support of the motion; the affirmation of Michelle Miele, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Nicholas Collins, contract management coordinator of Ocwen Loan Servicing, LLC; the pleadings; the note, mortgage and an assignment of mortgage; a notice of default; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the answering defendants' counsel in this action; and, a proposed order appointing a referee to compute. Defendants have submitted a cross motion opposing plaintiff's motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then shifts to the defendant to demonstrate ‘the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff’” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]).

In their cross motion, defendants assert that the action should be stayed pending good faith negotiation of a potential loan modification. As to the merits of defendants' argument, although CPLR 3408(f) provides that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (*see U.S. Bank N.A. v Sarmiento*, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]), the record before this Court does not support the defendants' contention that the plaintiff failed to make a good faith determination on defendants' loan modification applications. Initially, it should be noted that there is no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (*see Wells Fargo Bank, NA v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Key Intern. Mfg. Inc. v Stillman*, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). The court's computerized records establish that the instant matter appeared in the foreclosure settlement conference part on at least three occasions, to wit: October 4, 2012; December 18, 2012; and, February 19, 2013. Thereafter, the matter was marked not settled and referred to this Court. On July 30, 2013 and October 22, 2013, conferences were scheduled in an attempt to negotiate an agreeable resolution. However, on October 22, 2013, in excess of one year after defendants' initial conference, the matter was marked not settled. Furthermore, the credible evidence before the Court reveals that defendants were offered a loan modification on January 31, 2013 however, same was rejected by defendants. Here, the totality of the circumstances does not support a stay of the action until a loan modification is negotiated in good faith as suggested by defendants. As a result thereof, defendants' application is denied.

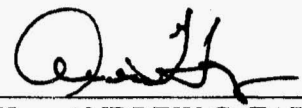
Here, defendants have failed to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by their remaining affirmative defenses (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]). Notably, defendants, who have not submitted any affidavits in support of their counsel's contentions, do not deny that they have defaulted on their mortgage payments.

Accordingly, the motion for summary judgment is granted against defendants Hoffman. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]). The defendants' cross-motion seeking a stay of the action is denied in its entirety.

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The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed as modified by the court.

Dated: JAN 28 2015



Hon. ANDREW G. TARANTINO, A.J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION