

HSBC Bank USA, N.A. v Valentin
2008 NY Slip Op 52167(U) [21 Misc 3d 1124(A)]
Decided on November 3, 2008
Supreme Court, Kings County
Schack, J.
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Supreme Court, Kings County

**HSBC Bank USA, N.A., AS INDENTURE TRUSTEE
FOR THE REGISTERED NOTEHOLDERS OF
RENAISSANCE HOME EQUITY LOAN TRUST 2005-3,
RENAISSANCE HOME EQUITY LOAN ASSET-
BACKED NOTES, SERIES 2005-3, , Plaintiff,**

against

Candida Valentin, Candide Ruiz, et al., Defendants.

15968/07

Appearances:

Plaintiff:

Bruce Ashbahian, Esq.

De Rose & Surico

Bayside NY

Defendant

Defendant did not answer or interpose any response in this foreclosure action.

Arthur M. Schack, J.

Plaintiff's renewed application, upon the default of all defendants, for an order of reference, for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings) is denied. The complaint is dismissed with prejudice for plaintiff's failure to comply with my January 30, 2008 decision and order in this matter. (18 Misc 3d 1123 [*2][A]). The May 7, 2007 notice of pendency filed against the above-named real property is cancelled.

I ordered on January 30, 2008 that:

leave is granted to plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3 [HSBC], to renew its application for an order of reference for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings), upon presentation to the Court, within forty-five (45) days of this decision and order, of: an affidavit of facts either by an officer of HSBC or someone with a valid power of attorney from HSBC, possessing personal knowledge of the facts; an affidavit from Scott Anderson, describing his employment history for the past three years; an affidavit from an officer of plaintiff HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED

NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation and why plaintiff HSBC BANK N.A., shares office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs.

Plaintiff renewed its application for an order of reference on March 19, 2008, 49 days subsequent to my January 30, 2008 order. Plaintiff's four day lateness is not the reason for my denial of the renewed application for an order of reference, dismissal of the instant action, and cancellation of the notice of pendency. In fact, I accept the excuses proffered in the March 18, 2008-affidavit of lateness of Bruce H. Ashbahian, Esq. However, plaintiff's renewed application for an order of reference fails to present an affidavit of merits by "someone with a valid power of attorney," and, an affidavit from an officer of HSBC "explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation and why plaintiff HSBC BANK N.A., shares office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs."

Discussion

Plaintiff submitted an affidavit, dated March 14, 2008, by Scott Anderson, who purports to be "Senior Vice President of Residential Assets at Ocwen Loan Servicing, LLC (Ocwen)" [¶ 2]. Mr. Anderson, in ¶ 8, claims that HSBC furnished Ocwen with a power of attorney and "[a] true and correct copy of the Power of Attorney is attached as Exhibit B' and incorporated therein." Exhibit B is a photocopy of a limited power of

attorney from HSBC to Ocwen, giving [*3]Ocwen, in § 2, the power to execute affidavits of merit on behalf of HSBC in connection with foreclosures for the mortgages in Renaissance Home Equity Loan Trust 2005-03. However, this photocopy of the limited power of attorney is unacceptable because plaintiff's counsel failed to comply with CPLR § 2105, that "an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy." Plaintiff's counsel failed to certify that the limited power of attorney in exhibit B is a true and complete copy.

Further, Mr. Anderson claims, in ¶ 7, claims that the Valentin loan was transferred "to the Trust on September 30, 2005," and, in ¶ 10, "the loan was transferred to the Trust in September 2005 when it was a performing loan. The loan remained in the name of MERS as nominee in title, but the holder changed from Delta to HSBC Bank, USA, N.A. as Trustee." If these statements are true, then Mr. Anderson lied in executing the May 1, 2007 assignment of the Valentin loan from MERS to HSBC, which was recorded on June 13, 2007 at New York City's Office of the City Register, City Register File Number 2007000306260. The May 1, 2007 recorded assignment was executed by the same Mr. Anderson, wearing his hat as Vice President of MERS, at Ocwen's office, located at 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409, and sworn to before Doris Chapman, a Florida Notary Public. The Court is troubled that Mr. Anderson acted as both assignor of the instant mortgage loan, and then as the Vice President of Ocwen, assignee HSBC's servicing agent. He admits to this conflict, in ¶ 13, stating that "[w]hen the loan went into default and then foreclosure in 2007, Ocwen, in it capacity as servicer, elected to remove the loan from the MERS system and title the loan to HSBC and the HSBC holders of the Trust probably are not aware that Mr. Anderson, on behalf of the servicer, Ocwen,

claims to have the right to assign "toxic" nonperforming mortgage loans to them. It could well be that Ocwen's transfer of the instant nonperforming loan, as well as others, is part of what former Federal Reserve Board Chairman Alan Greenspan referred to in his October 23, 2008 testimony, before the House Oversight Committee, as "a once in a century credit tsunami."

In addition, no officer of HSBC, in violation of my January 30, 2008 order, executed an affidavit explaining why plaintiff purchased a nonperforming loan and why HSBC shares office space "at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs."

CPLR § 6501 provides that the filing of a notice of pendency against a property is to give constructive notice to any purchaser of real property or encumbrancer against real property of an action that "would affect the title to, or the possession, use or enjoyment of real property, except in a summary proceeding brought to recover the possession of real property." The Court of Appeals, in *5303 Realty Corp. v O & Y Equity Corp.* (64 NY2d 313, [1984]) commented, at 319, that "[t]he purpose of the doctrine was to assure that a court retained its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit," and, at 320, that "the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review."

Article 65 of the CPLR outlines notice of pendency procedures. The Court, in *Da Silva v [*4]Musso* (76 NY2d 436, 442 [1990]), held that "the specific statutorily prescribed mechanisms for implementing this provisional remedy . . . were designed with a view toward balancing the interests of the claimant in the preservation of the status quo against the

equally legitimate interests of the property owner in the marketability of his title."

CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:

[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or *if the action has been settled, discontinued or abated*; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519. [*Emphasis added*]

The plain meaning of the word "abated," as used in CPLR § 6514 (a) is the ending of an action. Abatement is defined (Black's Law Dictionary 3 [7th ed 1999]) as "the act of eliminating or nullifying." " An action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains' (2A Carmody-Wait 2d § 11.1)." ([Nastasi v Nastasi, 26 AD3d 32](#), 40 [2d Dept 2005]). Further, *Nastasi* at 36, held that "[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR 6501 (*see 5303 Realty Corp. v O & Y Equity Corp.* at 320-321; *Rose v Montt Assets*, 250 AD2d 451, 451-452 [1st Dept 1998]; Siegel, NY Prac § 336 [4th ed])." Thus, the dismissal of the instant complaint must result in the mandatory cancellation of HSBC's notice of pendency against the property "in the exercise of the inherent power of the Court."

Therefore, since plaintiff failed to comply with my January 30, 2008 order, the instant renewed application for an order of reference is

denied, the complaint is dismissed with prejudice, and the notice of pendency against the subject property is cancelled.

Conclusion

Accordingly, it is ORDERED, that the renewed application of plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, for an order of reference for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 29, County of Kings), is denied; and it is further

ORDERED, that the instant complaint, Index Number 15368/07, is dismissed with prejudice because of the failure of plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, to comply with my January 30, 2008 decision and order in this action; and it is further[*5]

ORDERED, that the Notice of Pendency in the instant action, filed with the Kings County Clerk on May 7, 2008, by plaintiff HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, in an action to foreclose a mortgage for real property located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 29, County of Kings), is cancelled.

This constitutes the Decision and Order of the Court.

ENTER

HON. ARTHUR M. SCHACK

J. S. C.