

HSBC Bank USA v Hagerman

2012 NY Slip Op 32550(U)

October 1, 2012

Sup Ct, Richmond County

Docket Number: 130010/10

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:130010/10
Motion No.:004**

**HSBC BANK USA, NATIONAL ASSOCIATION, as trustee
for Wells Fargo Asset Securities Corporation, Mortgage Pass
Through Certificates, Series 2007-8
3476 Stateview Blvd.
F. Mill, SC 29715**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ROBERT HAGERMAN,
ANMARIE HAGERMAN, a/k/a ANMARIE HAGERMAN,
AMERICAN EXPRESS CENTURION BANK,
AMERICAN GENERAL HOME EQUITY,
BANK OF AMERICA, N.A.,
BOARD OF MANAGERS OF WOODVALE ESTATES
HOMEOWNERS ASSOCIATION,
HSBC BANK USA, N.A.,
JOLEEN ARCHUL,
LEAF FUNDING INC. a/a/o FIVE POINT CAPITAL,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
RBS CITIZENS, N.A.,
VICTORY STATE BANK,
JOHN DOE (Said name being fictitious, it being the intention
of plaintiff to designate any and all occupants of premises being
foreclosed herein, and any parties, Corporations or entities, if any,
having or claiming an interest or lien upon the mortgaged premises),**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Memorandum of Law in Opposition	3
Affirmation in Reply	4
Supplemental Reply Affirmation	5
Affidavit of Jeffrey Bergida	6
Sur-Reply Affirmation	7

**Notice of Rejection of Affidavit of Jeffrey Bergida
Exhibits**

**8
Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Annmarie Hagerman, (“defendant”) moves for summary judgment dismissing the plaintiff’s complaint and granting her summary judgement on the ground that the plaintiff and its agents forged the note at issue in this foreclosure action. This motion is denied.

Facts

By motion dated April 17, 2012 the defendant sought to dismiss the plaintiff’s complaint and have summary judgment entered in her favor. According to the defendant’s affidavit, she and her late husband executed one note on January 29, 2007 which was witnessed by Wayne Prucha. On or about July, 2011 the plaintiff moved for a protective order and the defendant cross moved for summary judgment. In opposition to the defendant’s cross-motion for summary judgment the plaintiff annexed the affidavit of Kyle N. Campbell, a Vice President of Loan Documentation for Wells Fargo Bank, N.A. Annexed to Campbell’s affidavit was a copy of a New York balloon note dated “January 29th, 2007 Huntington, NY.” In addition, the exhibit submitted in opposition to defendant’s cross-motion for summary judgment included a Richmond County Clerk cover page indicating that the mortgage and note recorded on February 28, 2007 was assigned “land doc#181083.” The balloon note recorded as part of land doc # 181083 was between the moving defendant and her husband, and Superior Mortgage Corp. and bore the typed designation of “exhibit c” on its face. The balloon note listed the property location as 47 Carol Court, Staten Island, New York 10309, a rate of interest of 6.5% and a monthly payment in the amount of \$4,911.99. The note Robert Hagerman executed the note on the first line, followed by “Anmarie Hagerman aka Annmarie Hagerman” on the second line with no witness designated. In addition, there is a stamp which says: “Pay to the order of Wells Fargo Bank” and it is signed by Evelyn Ortiz for Superior Mortgage Corp.

In order to support this new motion for summary judgment the defendant's attorney reviewed the land records maintained by the Richmond County Clerk. The Richmond County Clerk's office has a different New York Balloon Note on file. This note is also dated "January 29th, 2007 Huntington, NY" and it listed the property location as "47 Carol Court, Staten Island, New York 10309." But, unlike the note originally submitted in opposition to the defendant's cross-motion for summary judgment this note does not bear an "ORIGINAL" stamp on its face. Furthermore, the designation of "exhibit c" is not typed on the document, but instead it is stamped on the face of the document. Like the note previously submitted to this court the interest rate is set at 6.5%, but the monthly payment is now listed as \$5,303.06. On the signature lines, the balloon note is first executed by "Anmarie Hagerman a/k/a Annmarie Hagerman" and then the second line is executed by Robert Hagerman. But there is another difference with the note on file with the Richmond County Clerk. This note is purportedly witnessed by an illegible signature, without being notarized.

In an affidavit, the moving defendant avers that she and her husband executed only one note at the closing. And that the note, as well as the other documents executed at that time, were witnessed by Wayne Prucha.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".¹ Summary judgment should not be granted where there is any

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

The facts set forth in the defendant's motion are indeed troubling to this court. It is evident that the plaintiff submitted a different balloon note to oppose a cross-motion for summary judgment than what is currently on file with the Richmond County Clerk. Neither of the notes are titled "amended," yet each are purportedly executed on January 29, 2007. In its opposition, the plaintiff failed to address the statements made by Ms. Hagerman concerning the execution of the closing documents on January 29, 2007. Instead, for the first time, the plaintiff seeks to explain this irregularity in an affidavit in sur-reply from Jeffrey Bergida, General Counsel for Superior Mortgage Corp. This court will not consider these statements. However, in this case the movant failed to meet to demonstrate a prima facie entitlement to judgment as a matter of law.

While this court concedes that there are two separate notes purportedly executed by AnnMarie Hagerman, the defendant has not come forward with any evidence that proves that either of the signatures are forgeries as a matter of law.⁶ In addition, it is clear that discovery is

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *See, Banco Popular North America v. Victory Taxi Management*, 1 NY3d 381 [2004].

not complete. Consequently, summary judgment on the issue of the purported forgery of the AnnMarie Hagerman's signature is premature and the motion is denied.

Accordingly, it is hereby:

ORDERED, that AnnMarie Hagerman's motion for summary judgment is denied as premature; and it is further

ORDERED, that the parties shall respond to all outstanding demands for document discovery by October 31, 2012; and it is further

ORDERED, that all party depositions shall be held by November 30, 2012; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, on **Thursday, November 1, 2012 at 9:30 a.m.** for a compliance conference.

ENTER,

DATED: October 1, 2012

Joseph J. Maltese
Justice of the Supreme Court