

HSBC Bank USA v Holohan

2012 NY Slip Op 32553(U)

October 3, 2012

Sup Ct, Suffolk County

Docket Number: 09-24445

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-18-11 (#002)
MOTION DATE 9-8-11 (#003)
ADJ. DATE 3-29-12
Mot. Seq. # 002 - MD
003 - XMG

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HSBC BANK USA, N.A. F/K/A HSBC BANK
USA,

Plaintiff,

- against -

RAYMOND HOLOHAN, JR. A/K/A
RAYMOND T. HOLOHAN, JR., CAROL
HOLOHAN, BOARD OF DIRECTORS OF THE
HAMLET AT WIND WATCH SECTION 1,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR
FREMONT INVESTMENT & LOAN, PEOPLE
OF THE STATE OF NEW YORK, 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 mortgage
premises.),

Defendant.
-----X

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Upon the following papers numbered 1 to 29 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of cross-motion and supporting papers 8 - 14; Answering Affidavits and supporting papers 15 - 18; Replying Affidavits and supporting papers 19 - 29; Other ; it is,

ORDERED that this motion for summary judgment by defendant Mortgage Electronic Registration Systems, Inc., as nominee for Fremont Investment & Loan: (i) to dismiss the plaintiff's complaint; (ii) on

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its first counterclaim for a declaratory judgment declaring that its mortgage is superior to plaintiff's mortgage; (iii) on its second counterclaim for a declaratory judgment declaring that the plaintiff's mortgage is discharged; and (iv) on its eleventh affirmative defense that there is no money owed on the plaintiff's mortgage, is denied in its entirety; and it is further

ORDERED that this cross-motion for summary judgment by plaintiff for a declaratory judgment, pursuant to Article 15 of the Real Property Actions and Proceedings Law, cancelling and expunging the mortgage satisfaction recorded in error, and declaring that its mortgage is superior to the Fremont Investment & Loan mortgage is granted; and it is further

ORDERED AND ADJUDGED, that the satisfaction of mortgage recorded in the Suffolk County Clerk's Office on October 5, 2010, and the correction thereto recorded on December 7, 2010, are cancelled from the record; and it is further

ORDERED AND ADJUDGED, that the plaintiff's home equity mortgage lien on the premises described in the complaint and as hereafter described, recorded in the Suffolk County Clerk's Office on June 18, 2001, and the correction thereto recorded on January 9, 2002, has priority over and is senior to the defendant's, Mortgage Electronic Registration Systems, Inc. as nominee for the Fremont Investment & Loan, mortgage lien on the premises described in the complaint and as hereafter described, recorded in the Suffolk County Clerk's Office on February 28, 2005, against the defendants Raymond Holohan, Jr. a/k/a Raymond T. Holohan, Jr. and Carol Holohan.

Plaintiff HSBC Bank USA, N.A., f/k/a HSBC Bank USA ("HSBC") commenced this action to foreclose on a mortgage securing a home equity line of credit ("HELOC"). HSBC claims to have a first lien position on the premises owned by the defendants Carol and Raymond Holohan (the "Holohans") by virtue of a home equity line mortgage securing the HELOC (the "HSBC HELOC Mortgage"). Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Fremont Investment & Loan ("Fremont") counterclaimed for, *inter alia*, a judgment declaring that Fremont's subsequent mortgage has priority as the HELOC was paid off and a satisfaction recorded discharging the HSBC HELOC Mortgage.

In June 2001, plaintiff HSBC provided the HELOC to the Holohans for advances to a maximum amount of \$100,000 secured by the HSBC HELOC Mortgage on the premises known as 26 Hamlet Drive in Hauppauge, New York (the "Premises"). On June 18, 2001, the HSBC HELOC Mortgage was recorded with the Suffolk County Clerk's office, and on January 9, 2002, a correction was recorded.

In January 2005, Fremont loaned the Holohans \$600,000 in connection with a refinance, which was secured by a mortgage on the Premises and recorded with the Suffolk County Clerk's Office on February 28, 2005 (the "Fremont Mortgage"). According to the HUD-1 Settlement Statement dated January 6, 2005, a portion of the refinance proceeds was used to pay off the HELOC balance, which at the time of the closing was \$96,092.58. However, the HELOC was not closed by HSBC; instead the outstanding balance was reduced to zero and the line of credit left open and available for future advances.

On February 24, 2005, within a few weeks of closing title to the Premises, and four days before the Fremont Mortgage was recorded, the Holohans obtained an advance from the HELOC in the amount of

\$60,000. Additional advances were obtained by the Holohans in March and April 2005 for \$1,000 and \$39,000, respectively, bringing the HELOC balance to the \$100,000 maximum available. Thereafter, the Holohans made payments on the HELOC account from June 21, 2005 to September 15, 2008, obtaining additional advances of \$7,000 in November 2006 and \$4,500 in August 2007.

On October 24, 2008, the Holohans defaulted on payments under the HELOC. In June 2009, plaintiff commenced the instant foreclosure action seeking to recover the sums due and owing under the HELOC in the principal amount of \$93,047.94. In its answer, as amended, MERS asserts several affirmative defenses and counterclaims. As is pertinent here, MERS alleges in its eleventh affirmative defense, that there is no money owed under the HSBC HELOC Mortgage, and in its first counterclaim seeks a declaratory judgment declaring that the HSBC HELOC Mortgage has been paid in full, and that the Fremont Mortgage is a first lien on the Premises. In its second counterclaim MERS seeks a declaratory judgment declaring that the HSBC HELOC Mortgage is discharged as of record.

The Holohans have interposed an answer denying every allegation in the complaint, including that on June 7, 2001 they executed and delivered a note promising to pay the sum of \$100,000, and that the note was secured by a mortgage on the Premises. The Holohans also assert several affirmative defenses, including, *inter alia*, that they were not properly served, challenging HSBC's standing and disputing the amount due and owing.

MERS now moves for summary judgment on its eleventh affirmative defense, and on its first and second counterclaims. HSBC opposes the motion and cross-moves for summary judgment declaring cancelled and expunged the satisfaction of mortgage discharging the HSBC HELOC Mortgage, and declaring that the HSBC Mortgage is superior to the Fremont Mortgage. In opposition, the Holohans also maintain that no money is due under the HELOC, but also argue that HSBC merely possesses an unsecured claim against the Holohans as it lost all rights in the HSBC HELOC Mortgage upon recording the satisfaction. The Holohans also argue that MERS lacks the capacity to prosecute any defense to the instant foreclosure action because it was never the owner and holder of the Fremont Mortgage and thus not the real party in interest.

First, the Holohans' argument, which is in essence, that MERS does not have the capacity to offer a defense in which it is a named defendant is specious. Moreover, unavailing is the Holohans' argument that MERS, as nominee, and thus not the real party in interest, does not have the capacity to defend Fremont. The language of the recorded Fremont Mortgage, which forms an agency relationship between MERS and Fremont authorizes MERS to take any action required of Fremont (*see Deutsche Bank Natl. Trust Co. v Pietranico*, 33 Misc 3d 528, 928 NYS2d 818 [Sup Ct Suffolk County 2011]). The case relied upon by the Holohans in support of their argument that MERS lacks standing, *Bank of New York v Silverberg* (86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]), is not dispositive as the instant action was not commenced by MERS to foreclose on the Fremont Mortgage (*see Shui Fong Loo v HSBC Morg. Corp. (USA)*, 36 Misc 3d 1223[A], 2012 WL 3139879, 2012 NY Slip Op 51455[U] [Sup Ct Suffolk County]). Therefore, these arguments are insufficient to raise an issue of fact as to the motion by MERS.

Turning to the motion, in support thereof, MERS has provided the payoff letter from HSBC to the Holohans dated January 10, 2005 (the "Payoff Letter"). The Payoff Letter indicates that the amount due

and owing was \$95,881.44, which by the time of closing, had increased to \$96,092.58. Additionally MERS has provided the HUD-1 Settlement Statement from the Fremont refinance which indicates that \$96,092.58 had been paid to HSBC, and a certified copy of the corresponding cancelled check indicating that HSBC deposited the check. MERS has also provided certified copies of the satisfaction of mortgage and the correction, as executed by HSBC and recorded with the Suffolk County Clerk's Office. MERS argues this evidence demonstrates that the HELOC was paid in full and the HSBC HELOC Mortgage satisfied and discharged as of record. Thus, MERS' continues, the underlying debt no longer exists, the HSBC HELOC Mortgage is a nullity and cannot be a first lien against the Premises with priority over the Fremont Mortgage. Therefore, MERS maintains, its motion for summary judgment should be granted in its entirety.

HSBC argues that the motion should be denied as the 2005 tender of the payoff balance then owed on the HELOC (the "2005 Payment") was not in satisfaction of the HSBC HELOC Mortgage as there was no request to close the HELOC or discharge the HSBC HELOC Mortgage. Additionally, HSBC argues that its cross-motion should be granted as the Holohans continued to take advances from the HELOC and defaulted in making payments. HSBC maintains that the satisfaction of mortgage discharging the HSBC HELOC Mortgage was filed in error, as there was and is still an outstanding balancing due and owing. It is also argued that the HSBC HELOC Mortgage holds a first priority lien position as it was recorded in 2001, before the Fremont Mortgage recorded in 2005. HSBC further argues that it is uncontroverted that the 2005 Fremont Mortgage was not made in reliance on the HELOC being closed, and not in reliance of the erroneous filings of the mortgage satisfaction in 2010. HSBC also asserts that the branch of the motion by MERS for the discharge of the HSBC HELOC Mortgage should be denied as it is procedurally improper and must be brought in a proceeding under section 1921 of the Real Property and Proceedings Law ("RPAPL").

RPAPL 1921, with respect to a credit line mortgage, provides that "[a]fter payment of authorized principal, interest and any other amounts due thereunder or otherwise owed by law has actually been made, and ... on written request, a mortgagee of real property situate in this state ... must execute ... a satisfaction of mortgage" (RPAPL 1921 [1]). However, it has been held that " 'the mere reduction to zero of the outstanding balance of a credit line mortgage during the term of the mortgage does not constitute payment of the mortgage for the purposes of determining whether the mortgagee must execute a satisfaction upon request' *Matter of Reitman v Wachovia Natl. Bank, N.A.*, 49 AD3d 759, 760, 854 NYS2d 179" (*HSBC Bank, USA v Pugkhem*, 88 AD3d 649, 650, 931 NYS2d 635 [2d Dept 2011]; *Barclay's Bank of N.Y. v Market St. Mtge. Corp.*, 187 AD2d 141, 144, 592 NYS2d 874 [3d Dept 1993]). Moreover, the mere transmission of a check paying off the entire outstanding balance of a line of credit, "does not require the mortgagee to close the line of credit or issue a satisfaction of mortgage pursuant to RPAPL 1921 (1)" (*HSBC Bank, USA v Pugkhem*, *supra* at 651; *see Matter of Reitman v Wachovia Natl Bank, NA*, *supra*). Rather, written notice is required (*see Matter of Reitman*, *supra*). However, under the common law, a mortgagee may also become obligated to provide a satisfaction of mortgage where a mortgagor or party tendering the balance owed on a credit line mortgage, makes it clear that a satisfaction is a condition of accepting the payoff balance (*see Merrill Lynch Equity Mgmt., Inc. v Kleinman*, 246 AD2d 884, 668 NYS2d 726 [3d Dept 1998]).

The Payoff Letter, in addition to setting forth the amount due, the per diem rate, and where to make or mail the payment, provides, in pertinent part as follows:

This payoff amount could change if any recent charges or payments have not yet been applied to this account. Therefore, we request that you contact our Customer Service Department to verify the original closeout balance on the date of the payoff.

* * *

To close your account and obtain a satisfaction of mortgage, please include with your payoff check a letter requesting this be closed. This must be signed by all parties who established this account. In order to release the property mortgage, a discharge of mortgage must be filed with the County Clerk where your property is located.

To ensure proper handling of the discharge, you must inform us whether or not you would like HSBC to record the discharge. Please complete the tear-off portion of this letter and return it with your payoff to the address mentioned above. If we do not hear from you within ten days from the date of this letter, it is your responsibility to record the discharge which we will send to your mailing address.

Based upon the plain language of the Payoff Letter, it is apparent that the intent thereof is to inform the customer that the account will not be closed and the mortgage will not be discharged once the payoff is received, but that the customer has the right to close the account once HSBC receives a letter signed by the customer instructing it to do so. The facts show that there was no compliance with the Payoff Letter, since the Holohans, after its receipt, continued to obtain funds from the HELOC until August 24, 2007, and made payments thereon, albeit sporadically and late, until September 15, 2008. Significantly, MERS has not submitted any documentation to establish that Fremont instructed HSBC to close the account and execute a satisfaction discharging the mortgage (*see Matter of Reitman v Wachoiva Nat. Bank, N.A., supra*; *cf Merrill Lynch Equity Mgt. v Kleinman, supra* [check sent to payoff line of credit balance accompanied by cover letter requesting mortgagee send mortgage satisfaction, and the next day a second request sent to mortgagee to forward a discharge of mortgage]; *Barclay's Bank of N.Y. v Market St. Mtge Corp., supra* [enclosed with check tendered to payoff line of credit was a satisfaction of mortgage requesting mortgagee execute and return to the title company for recording]; *E*Trade Bank v Perez*, 22 Misc 3d 1127[A], 2009 WL 50081, 2009 N.Y. Slip Op. 50314[U] [Sup Ct Queens County] [check for balance of line of credit sent with a cover letter indicating funds were to payoff the mortgage and requesting mortgagee to close account and forward mortgage satisfaction]). MERS consequently has failed to set forth a meritorious defense to the foreclosure action, or to establish entitlement to its motion for summary judgment.

In support of its cross-motion, HSBC has demonstrated that it did not receive a request to close the line of credit or send a mortgage satisfaction discharging the HSBC HELOC Mortgage. HSBC has also established that the satisfactions discharging the HSBC HELOC Mortgage were recorded in error. "A mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording" (*Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 983, 984, 935 NYS2d 651 [2d Dept 2011]; *New York Community Bank v Vermonty*, 68 AD3d 1074, 1076, 892 NYS2d 137 [2d Dept 2009]). Additionally, "a lien affecting real estate, satisfied through mistake, may be restored to its original status and priority as a lien, provided that no one innocently relied upon the discharge and

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either purchased the property or made a loan thereon in reliance upon the validity of the satisfaction” (*DLJ Mtge. Cap., Inc. v Windsor*, 78 AD3d 645, 647, 910 NYS2d 160 [2d Dept 2010]). The Court agrees with HSBC that since the mortgage satisfactions were not recorded until 2010, Fremont could not have relied on same in providing the Holohans with a refinance in 2005.

HSBC has also demonstrated that there was still a balance on the HELOC at the time the satisfactions were recorded. HSBC has submitted the affidavit of Dana St. Clair-Hougham, Vice President and Assistant Secretary, Administrative Services Division for HSBC Mortgage Services, Inc. St. Clair-Hougham asserts that she has personal knowledge of litigation matters concerning mortgage loans involving the various HSBC companies, including the plaintiff herein. According to her review of HSBC’s records, St. Clair-Hougham explained that the error was caused by the transfer of the balance for the HELOC from an old computer system to a new computer system on April 15, 2009. Upon transfer, in the old computer system the HELOC would appear as a zero balance, while in the new computer system the correct balance would be displayed. St. Clair-Hougham, thus, attributes the erroneous filing to human error in failing to check the HELOC account balance in the new computer system.

HSBC has also submitted the HELOC Monthly Statements addressed to the Holohans. The Monthly Statement with a payment due date of March 25, 2005, reflects that the 2005 Payment was credited on February 4th, and that the Holohans obtained an advance of \$60,000 on February 24th. HSBC has also submitted the subsequent HELOC Monthly Statements with payment due dates from April 2005 through May 2009, which reflect payments made and the additional advances obtained by the Holohans. Neither MERS nor the Holohans have submitted any evidence to controvert this evidence or raise an issue of fact. To the extent it is contended the summary judgment should be denied because additional discovery is needed, such contention is unavailing. “A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Wyllie v District Attorney of Count of Kings*, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]). The mere hope based on speculation and surmise that discovery will reveal the existence of triable issues of fact is insufficient to forestall the grant of summary judgment in HSBC’s favor (*see id.*)

The contention that HSBC’s cross-motion should be denied based on the doctrine of laches is without merit (*see Deutsche Bank Trust Co. v Stathakis, supra*).

Accordingly, this motion by MERS is denied in its entirety, and this cross-motion by HSBC is granted in its entirety.

Dated: October 3, 2012


 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION