

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

2014 NY Slip Op 30746(U)

March 10, 2014

Supreme Court, Kings County

Docket Number: 501864/2012

Judge: Arthur M. Schack

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At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of December 2013

P R E S E N T:

HON. ARTHUR M. SCHACK

HON. ARTHUR M. SCHACK J.S.C

Justice

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.

**DECISION & ORDER**

Index No. 501864/12

The following papers numbered 1 - 1 read on this motion:

Papers Numbered:

Notice of Motion/Affidavits (Affirmations) Exhibits \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_

In this mortgage foreclosure action, for the premises located at 572 Riverdale

Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings), plaintiff 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 (HSBC), moves, upon the default of defendants, for an order of reference and related relief. The subject mortgage and note were executed by defendants CANDIDA VALENTIN and CANDIDE RUIZ on June 23, 2005 and recorded on July 14, 2005 in the Office of the City Register at City Register File Number (CRFM) 2005000395517. The Mortgage states that the "Lender" is "DELTA FUNDING CORP. (DELTA)," but MORTGAGE ELECTRONIC REGISTRATIONS SYSTEM, INC. (MERS) "is acting solely as nominee for Lender" and "**FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IN THE MORTGAGEE OF RECORD.**"

Subsequently, MERS, as nominee for DELTA assigned the subject mortgage and note on May 1, 2007 to plaintiff HSBC. This was recorded on June 13, 2007, at CRFM 2007000306260. However, there is no evidence that MERS, as nominee of DELTA was authorized by DELTA, its principal, to assign the subject mortgage and note. Furthermore, the assignor, as Vice President of MERS, was the conflicted robo-signer Scott Anderson, who is also a Vice President of OCWEN LOAN SERVICING, LLC, HSBC's Servicer. (See *HSBC Bank USA v Taher*, 32 Misc 3d 1208 [A] [Sup Ct Kings County 2011]; *HSBC Bank USA v Valentin*, 21 Misc 3d 1124 [A] [Sup Ct Kings County

2008]; *HSBC Bank USA v Antrobus*, 20 Misc 3d 1127 [A] [Sup Ct Kings County 2008]).

Plaintiff HSBC commenced the instant foreclosure action on July 11, 2012 by filing with the Kings County Clerk's Office the summons, complaint and notice of pendency. On December 9, 2013 plaintiff HSBC filed the instant motion for an order of reference.

### Discussion

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." Plaintiff HSBC's motion application for an order of reference is a preliminary step to obtaining a default judgment of foreclosure and sale. (*Home Sav. Of Am., F.A. v Gkanios*, 230 AD2d 770 [2d Dept 1996]).

However, the instant motion for an order of reference and related relief is denied. Plaintiff HSBC lacks standing because MERS lacked authority to assign the subject mortgage and note. No evidence has been presented that MERS physically possessed the subject note. Under the terms of the subject note, DELTA, not MERS, is the "Note Holder." The subject note defines the "Note Holder" as the "[t]he Lender or anyone who takes this Note by transfer."

Moreover, there is no power of attorney recorded or presented to the Court authorizing MERS, as nominee of DELTA to transfer the subject mortgage and note.

Real Property Law (RPL) § 254 (9) states:

*Power of attorney to assignee.* The word “assign” or other words of assignment, when contained in an assignment of a mortgage and bond or mortgage and note, must be construed as having included in their meaning that the *assignor does thereby make, constitute and appoint the assignee the true and lawful attorney*, irrevocable, of the assignor, in the name of the assignor, or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond or mortgage and note, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made. [*Emphasis added*]

To have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with the authority to assign the mortgage. “No special form or language is necessary to effect an assignment as long as the language shows the *intention of the owner of a right to transfer it* [*Emphasis added*].” (*Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1d Dept 1996]). (See *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612 [2d Dept 2004]).



“Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress.” (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 812 [2003], *cert denied* 540 US 1017 [2003]). Professor David Siegel (NY Prac, § 136, at 232 [4d ed]), instructs that:

[i]t is the law’s policy to allow only an aggrieved person to bring a lawsuit . . . A want of “standing to sue,” in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a “jurisdictional” dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack “standing” is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

“Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant’s request.” (*Caprer v Nussbaum* (36 AD3d 176, 181 [2d Dept 2006]). If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1st Dept 2002]).

The Appellate Division, Second Department instructed, in *Aurora Loan Services*,

*LLC v Weisblum* (85 AD3d 95, 108 [2d Dept 2011]):

In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage (*see Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d, 204, 207 [2d Dept 2009]). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (*see Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d at 207-209; *U.S. Bank v Collymore*, 68 AD3d 752, 754 [2d Dept 2009].)

Assignments of mortgages and notes are made by either written instrument or the assignor physically delivering the mortgage and note to the assignee. "Our courts have repeatedly held that a bond and mortgage may be transferred by delivery without a written instrument of assignment." (*Flyer v Sullivan*, 284 AD 697, 699 [1d Dept 1954]). In the instant action, even if MERS had authority to transfer the subject mortgage, DELTA is the note holder. Therefore, MERS cannot transfer something it never possessed. A "foreclosure of a mortgage may not be brought by one who has no title to it and *absent transfer of the debt*, the assignment of the mortgage is a nullity [*Emphasis added*]." (*Kluge v Fugazy* (145 AD2d 537, 538 [2d Dept 1988]). Moreover, "a mortgage

is but an incident to the debt which it is intended to secure . . . the logical conclusion is that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. The security cannot be separated from the debt, and exist independently of it. This is the necessary legal conclusion.” (*Merritt v Bartholick*, 36 NY 44, 45 [1867]). The Appellate Division, First Department, citing *Kluge v Fugazy* in *Katz v East-Ville Realty Co.* ( 249 AD2d 243 [1d Dept 1998]), instructed that “[p]laintiff’s attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact.” Therefore, plaintiff “failed to demonstrate its prima facie entitlement to judgment as a matter of law because it did not submit sufficient evidence to demonstrate its standing as the lawful holder or assignee of the subject note on the date it commenced this action.” (*U.S. Bank v Collymore*, 68 AD3d at 754).

In the instant action, MERS lacked authority to assign the subject mortgage and note. Under the terms of the subject mortgage, “MERS is a separate corporation that is acting solely as a nominee for Lender.” The term “nominee” is defined as “[a] person designated to act in place of another, usu. in a very limited way” or “[a] party who holds bare legal title for the benefit of others.” (Black’s Law Dictionary 1076 [8th ed 2004]). “This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves.” (*Landmark National Bank v Kesler*, 289 Kan 528, 538 [2009]). The Kansas Supreme Court, in *Landmark National*



*Bank*, at 539, observed:

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, 2009 WL631355, at \*4 (Bankr. D. Idaho, March 12, 2009) (MERS “acts not on its own account. Its capacity is representative.”); *Mortgage Elec. Registrations Systems, Inc. v Southwest*, 2009 Ark. 152 \_\_\_, \_\_\_ SW3d \_\_\_, 2009 WL 723182 (March 19, 2009) (“MERS, by the terms of the deed of trust, and its own stated purposes, was the lender’s agent”); *La Salle Nat. Bank v Lamy*, 12 Misc 3d 1191 [A], at \*2 [Sup Ct, Suffolk County 2006]) . . . (“A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.”)

The New York Court of Appeals in *MERSCORP, Inc. v Romaine* (8 NY3d 90 [2006]), explained how MERS acts as the agent of mortgagees, holding at 96:

In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay

annual fees for the electronic processing and tracking of ownership and transfers of mortgages. ***Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. [Emphasis added]***

Thus, it is clear that MERS's relationship with its member lenders is that of agent with the lender-principal. This is a fiduciary relationship, resulting from the manifestation of consent by one person to another, allowing the other to act on his behalf, subject to his control and consent. The principal is the one for whom action is to be taken, and the agent is the one who acts. It has been held that the agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]). "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." (*Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103 [1932]). (See *Sokoloff v Harriman Estates Development Corp.*, 96 NY 409 [2001]); *Wechsler v Bowman*, 285 NY 284 [1941]; *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133 [1936]). An agent "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." (*Lamdin*, at 136).

Thus, in the instant action, MERS, as nominee for DELTA is the agent of DELTA

for limited purposes. It only has those powers given to it and authorized by DELTA, its principal. Plaintiff HSBC failed to submit documents demonstrating how MERS is authorized, as nominee for DELTA, to assign the subject mortgage and note to plaintiff.

The Appellate Division, Second Department in *Bank of New York v Silverberg*, (86 AD3d 274, 275 [2d Dept 2011]), confronted the issue of “whether a party has standing to commence a foreclosure action when that party's assignor—in this case, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS)—was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes.” The Court held, “[w]e answer this question in the negative.” MERS, in the *Silverberg* case and the instant action, never had title or possession of the Note. The *Silverberg* Court instructed, at 281-282:

the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender (see *Aurora Loan Servs., LLC v Weisblum*, AD3d, 2011 NY Slip Op 04184, \*6-7 [2d Dept 2011]; *HSBC Bank USA v Squitteri*, 29 Misc 3d 1225 [A] [Sup Ct, Kings County, F. Rivera, J.]; ; *LNV Corp. v Madison Real Estate, LLC*, 2010 NY Slip Op 33376 [U] [Sup Ct, New York County 2010, York, J.]; *LPP Mtge. Ltd. v Sabine Props., LLC*, 2010 NY Slip Op 32367 [U] [Sup Ct, New York County 2010, Madden, J.]; *Bank of*

*NY v Mulligan*, 28 Misc 3d 1226 [A] [Sup Ct, Kings County 2010, Schack, J.]; *One West Bank, F.S.B., v Drayton*, 29 Misc 3d 1021 [Sup Ct, Kings County 2010, Schack, J.]; *Bank of NY v Alderazi*, 28 Misc 3d 376, 379-380 [Sup Ct, Kings County 2010, Saitta, J.] [the “party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence”]; *HSBC Bank USA v Yeasmin*, 24 Misc 3d 1239 [A] [Sup Ct, Kings County 2010, Schack, J.]; *HSBC Bank USA, N.A. v Vasquez*, 24 Misc 3d 1239 [A], [Sup Ct. Kings County 2009, Schack, J.]; *Bank of NY v Trezza*, 14 Misc 3d 1201 [A] [Sup Ct, Suffolk County 2006, Mayer, J.]; *La Salle Bank Natl. Assn. v Lamy*, 12 Misc 3d 1191 [A] [Sup Ct, Suffolk County, 2006, Burke, J.]; *Matter of Agard*, 444 BR 231 [Bankruptcy Court, ED NY 2011, Grossman, J.]; *but see U.S. Bank N.A. v Flynn*, 27 Misc 3d 802 [Sup Ct, Suffolk County 2011, Whelan, J.]).

Moreover, the *Silverberg* Court concluded, at 283, that “because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the . . . assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose.” Further, the *Silverberg* Court observed, at 283, that



*“the law must not yield to expediency and the convenience of lending institutions.*

*Proper procedures must be followed* to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property [*Emphasis added*].”

Therefore, with plaintiff never having standing to foreclose on the subject mortgage and note, the instant action is dismissed without prejudice and the notice of pendency is cancelled.

#### Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff, 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, 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; and it is further

ORDERED, the instant action, Index No. 501864 is dismissed without prejudice; and it is further

ORDERED, that the notice of pendency in the instant action, filed with the Kings County Clerk on July 11, 2012 to foreclose on a mortgage for real property located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings), is



cancelled and discharged.

This constitutes the Decision and Order of the Court.

E N T E R



HON. ARTHUR M. SCHACK  
J. S. C.

*HON. ARTHUR M. SCHACK U.S.C.*

**DOCKETED**

MAR 10 2014



**KINGS COUNTY CLERK**