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| HSBC Bank USA, N.A. v Farmer |
| 2012 NY Slip Op 31675(U) |
| June 20, 2012 |
| Supreme Court, Queens County |
| Docket Number: 6373/11 |
| Judge: Bernice Daun Siegal |
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19

Justice

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HSBC BANK USA, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF ACE SECURITIES CORP., HOME EQUITY LOAN TRUST, SERIES 2005-HE2 ASSET BACKED PASS-THROUGH CERTIFICATES,

Index No.: 6373/11
Motion Date: 4/25/12
Motion Cal. No: 14
Motion Seq. No: 2

Plaintiff,

-against-

RENEE FARMER, VICKEY L. PLUMMER, MICHAEL PLUMMER, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST FRANKLIN FINANCIAL CORP., AN OB. SDB. OF MLB&T CO., FSB, LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-2, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and

“JOHN DOE” NO. 1 -10 “MARY DOE” NO. 1-10 and “JANE DOE” NO. 1-10, the name being fictitious, their true names being unknown to plaintiff, persons intended being persons in possession of portions of the premises described in the complaint in this action,

Defendants.

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The following papers numbered 1 to 14 read on this motion for an order pursuant to Section 1321 of the RPAPL and Section 3212 and 3215 of the CPLR, granting judgment in favor of Plaintiff for the relief demanded in the Complaint; granting default judgment against non appearing defendants Renee Farmer and New York City Environmental Control Board and appointing a Referee to ascertain and compute the amount due to Plaintiff herein for principal and interest and otherwise upon the Note and Mortgage set forth in the complaint, and to examine and report whether the mortgaged property can be sold in one parcel.

PAPERS
NUMBERED

Notice of Motion - Affidavits-Exhibits.....

1 - 4

| | |
|--------------------------------|---------|
| Affirmation in Opposition..... | 5 - 9 |
| Reply Affirmation..... | 10 - 12 |
| Sur-Reply..... | 13 - 14 |

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, HSBC Bank USA, NA as trustee for the registered Holders of Act Securities Corp, Home Equity Loan Trust, Series 2005-HE2, Asset Backed Pass-Through Certificates (“HSBC” or “Plaintiff”) moves for an order granting summary judgment in its favor under CPLR §§3212 and 3215 pursuant to Real Property Actions and Proceedings Law (“RPAPL”) §1321. Plaintiff also seeks an order granting default judgment against Renee Farmer (“Farmer”) and the New York City Environmental Control Board (NYCECB). Finally, plaintiff seeks an order appointing a referee to ascertain and compute the amount due to plaintiff for principal and interest upon the Note and Mortgage as set forth in the complaint and to examine and report whether the mortgaged premises can be sold in one parcel.

For the reasons set forth below, plaintiff’s motion is denied in all respects.

Facts

The subject premises is located at 184-09 140th Avenue, Springfield Gardens, New York (“the premises”). On or about October 8, 2004, Farmer obtained a loan from Fremont Investment and Loan (“Fremont”) in the amount of 216,000 for the purchase of the premises. In February of 2007, Michael Plummer and Vickey Plummer (“the Plummers”) purchased the premises with two mortgage loans in the amounts of \$414,889 and \$103,722.

At the time of the Plummers’ purchase, the Premises was subject to a \$216,000 mortgage given by Farmer to MERS Mortgage, as nominee of Fremont, dated October 8, 2004 and recorded on February 18, 2005. This is the mortgage that plaintiff seeks to foreclose herein.

On or about May 1, 2010, Farmer allegedly defaulted on her loan. Thereafter, plaintiff

commenced the within foreclosure proceedings by filing a summons and complaint on March 15, 2011.

Plummers contend that prior to the closing they sought a payoff letter for the HSBC Mortgage but instead received a pay-off letter in the amount of \$211,379.10 from Saxon Mortgage Services (“Saxon”) for a second property owned by Farmer. This second property was located at 155-25 116th Avenue, Jamaica, New York, 11434 (“Property 2”). The mortgage attached to Property 2 was owned by MERS. The proceeds from the sale of the premises which are the subject of this foreclosure action, satisfied Farmer’s MERS mortgage on Property 2 based on the payoff letter the received from Saxon .

Plummers contend that the satisfaction of the MERS mortgage on Property 2 should be deemed a satisfaction of the HSBC mortgage on the subject premises.

Discussion

A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default. (*Swedbank, AB v. Hale Ave. Borrower, LLC*, 89 A.D.3d 922 [2nd Dept 2011]; *Zanfina v. Chandler*, 79 A.D.3d 1031 [2nd Dept 2010].) 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.” (*Mahopac Natl. Bank v. Baisley*, 244 A.D.2d 466, 467, [2nd Dept 1997].)

As noted above, plaintiff asserts that Farmer failed to comply with the terms and conditions of the Note and Mortgage by failing to pay the installment of principal and interest, due and payable on June 1, 2010. Plaintiff also asserts that under the terms of the HSBC mortgage, a notice of default was issued to Farmer in accordance with RPAPL 1304 on June 1, 2010 and that the balance of the

principal due upon the Note and secured by the mortgage as of the date of default was \$242,710.50.

“CPLR 3212(b) provides that a summary judgment motion shall be supported by an affidavit of a person having knowledge of the facts as well as other admissible evidence. (*JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373 [2005].) In the within action, HSBC has failed to submit an affidavit attesting to the fact that the Defendant Farmer is in default. The court notes that the affidavit of Paul Myers, a Loan Analyst employed by Ocwen Loan Servicing, submitted on behalf of movant, fails to establish that the mortgagor is in default¹. Accordingly, HSBC has failed to submit admissible evidence of the mortgagor’s default. (*See Emigrant Mortg. Co., Inc. v. Wiggins*, 29 Misc.3d 1204(A) [Sup.Ct. Queens 2010]; see also *Swedbank, AB v. Hale Ave. Borrower, LLC*, 89 A.D.3d 922 [2nd Dept 2011]; *Wells Fargo Bank v. Karla*, 71 A.D.3d 1006 [2nd Dept 2010].)

As Plaintiff failed to submit evidence of the default, plaintiff has failed to meet its prima facie burden. (*Levitin v. Boardwalk Capital, LLC*, 78 A.D.3d 1019 [2nd Dept 2010][holding that plaintiff failed to meet its prima facie burden when it failed to submit evidence of the defendant’s default under the note].) Therefore, it is not necessary to consider the sufficiency of the defendants’ opposition paper. (Id.; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985].)

The court also notes that the attached assignment is signed by Christina Carter who has been deemed a “robosigner.” (*See HSBC Bank USA, N.A. v Taher*, 32 Misc.3d 1208(A) [Sup.Ct. Kings 2011][holding that Christina Carter is not an employee of HSBC, but a robosigner employed by Ocwen Loan Servicing, whose signature on legal documents has at least three variations].)

The portion of plaintiff’s motion for a default judgment against Renee Farmer and NYCECB is denied, without prejudice and with leave to renew upon proper papers. Plaintiff failed to submit

¹The only statement made in the Myers affidavit is that the HSBC mortgage herein was never paid off by the proceeds of the sale of the premises. (affidavit of Myers § 11.)

proof of service of the summons and complaint upon Farmer or NYCECB. In addition, plaintiff failed to include an affidavit in support of the facts underlying the claim, including evidence of Farmer's default. (CPLR §3215(f).) Furthermore, plaintiff's motion for the entry of a default judgment against Farmer pursuant to CPLR 3215 is denied as plaintiff failed to attach a non-military affidavit. (50 U.S.C.A.App. § 524[a]; N.Y. Military Law § 306.)

Conclusion

For the reasons set forth above, plaintiff's motion is denied in its entirety.

Dated: June 20 , 2012

Bernice D. Siegal, J. S. C.