

HSBC Bank USA v Rizzi
2013 NY Slip Op 32691(U)
October 22, 2013
Sup Ct, Richmond County
Docket Number: 130629/10
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR WELLS FARGO ASSET
SECURITIES CORPORATION, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-14
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

MICHAEL RIZZI, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
PNC BANK, NATIONAL ASSOCIATION
SUCCESSOR BY MERGER TO NATIONAL CITY
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.

-----X

TP-12

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 130629/10

Motion No. 2190-001

The following papers numbered 1 to 3 were fully submitted on
the 14th day of August, 2013:

	Papers Numbered
Notice of Motion for an Order of Reference and Related Relief (Affirmation of Regularity, Affidavit of Merit and Amounts Due and Owing, Affirmation pursuant to Administrative Order 431/11, further Affirmation and Proposed Order in Support) (Dated: June 20, 2013).....	1
Affirmation in Opposition (Affidavit of Michael Rizzi) (Dated: July 12, 2013).....	2
Reply Affirmation (Dated: August 12, 2013).....	3

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Upon the foregoing papers, plaintiff's motion for, *inter alia*, an order of reference (Motion No. 4111-001) is granted.

This is an action by HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-14 (hereinafter "plaintiff") to foreclose a mortgage on residential property located at 79 Lafayette Avenue, Staten Island, New York.

It appears undisputed that on July 19, 2007, defendant Michael Rizzi (hereinafter "defendant") borrowed \$368,000.00 from Wall Street Mortgage Bankers, Ltd. d/b/a Power Express, A Corporation, and executed a note and mortgage in its favor calling for monthly payments over the next thirty years (see Plaintiff's Exhibits B and C). The mortgage was recorded in the Office of the Richmond County Clerk on September 11, 2007 by Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), acting solely as the lender's "nominee", and was subsequently assigned by MERS to plaintiff in a document dated April 12, 2010 and recorded on April 26, 2010¹ (see Plaintiff's Exhibit D). On April 14, 2010 plaintiff, through its predecessor counsel, Steven J. Baum, P.C., commenced this foreclosure action by the filing of a summons and complaint based on defendant's failure to make the required payments due on December 1, 2009 and subsequently (see May 24, 2013 Affidavit of Merit and

¹MERS' authority to assign the mortgage was apparently exercised pursuant to that paragraph of the mortgage entitled "Borrower's Transfer to Lender of Rights in the Property" (Plaintiff's Exhibit C, p 4).

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Amounts Due and Owing of Christina Horton, Vice President [of] Loan Documentation of Wells Fargo Bank, N.A."; Plaintiff's Exhibits A, K). Upon defendant's failure to answer the complaint, plaintiff moved and then withdrew its application for an Order of Reference on November 18, 2010 (see Plaintiff's Exhibit P). Approximately one year later, *i.e.*, on December 27, 2011, plaintiff's present counsel entered the case and was substituted for the law firm of Steven J. Baum, P.C.(see Plaintiff's Exhibit Q). Insofar as it appears, plaintiff's *lis pendens* was re-filed on April 9, 2013 (see Plaintiff's Exhibit I). By this motion, plaintiff again moves for an order appointing a Referee to compute, as well as to amend the caption to add Giselle Hernandez and Yulin Gill as defendants in the place and stead of "John Doe", and to delete plaintiff's address from the caption of the action.

In support of its application, plaintiff submits, *inter alia*, a copy of the note with two undated endorsements: the first, without recourse, from Wall Street Mortgage Bankers LTD. D/B/A Power Express, A Corp., to the order of Wells Fargo Bank, N.A.; the second, without recourse, from Wells Fargo Bank, N.A. to the order of plaintiff(see Plaintiff's Exhibit B); an affidavit of merit (Plaintiff's Exhibit A); copies of the affidavits of service upon each defendant (see Plaintiff's Exhibit L), and a June 20, 2013 affirmation wherein counsel avers that "this is not a home loan as defined in RPAPL §1304, because the property is not occupied as the borrower's principal dwelling" and further, that "pursuant to CPLR

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§3408, a settlement conference is not required” even though one was held by the court and the “case was released from the conference part on May 12, 2011.”² As “clarified” in her affirmation pursuant to Administrative Order 431/11, counsel further avers that even though paragraph “FIRST” of the complaint states that plaintiff is the “owner and holder of a note and mortgage being foreclosed”, HSBC is not, in fact, the present owner of the note, but rather “the mortgagee of record in possession of the original note,” and that no prejudice has come to any party as a result of this error (see para 3; see also Affidavit of Christina Horton, Plaintiff’s Exhibit A, para 3).

Defendant Rizzi concedes that he failed to timely appear or answer, and that he did not appear at any of the scheduled settlement conference mandated by CPLR 3408. He asks the Court to deny plaintiff’s motion so that he may “attempt to have [his] loan modified” and to make “regular payments for the long term or work out another payment/settlement option” (see Defendant’s Exhibit A). In addition, defendant argues that an order of reference is

²In paragraphs 4 and 5 of defendant Rizzi’s Affidavit, he avers that “I moved into the property, which has become my primary residence, and my home” soon after renovations were completed in 2009 (see Defendant’s Exhibit A). Assuming *arguendo* that these facts have been properly placed before the Court notwithstanding this defendant’s failure to obtain vacatur of his default, the unimpeached affidavit of substituted service upon him on April 21, 2010 at 2045 81st Street in Brooklyn, his averred “dwelling place in the State of New York” (see Plaintiff’s Exhibit L), constitutes *prima facie* evidence that the note underlying this foreclosure action was not a “Home loan” for purposes of RPAPL 1304 (see RPAPL 1304[5][a][iii]) or CPLR 3408 (see CPLR 3408[a]) at the time this action was commenced.

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premature now that his financial situation has improved "significantly" since December of 2009.³

Plaintiff counters that defendant's attempt to obtain loss mitigation is immaterial for purposes of opposing the instant motion, where defendant has yet to move to vacate his default or tender an adequate excuse and a meritorious defense to the foreclosure action.

This court is mindful of its obligation to ensure that a plaintiff has demonstrated its entitlement to the relief requested (see Zecca v. Ricciardelli, 293 AD2d 31, 34), notwithstanding the lack of a formal appearance on the part of defendant Michael Rizzi. However, it is also the case that an order of reference is simply a preliminary step towards obtaining a default judgment in a foreclosure action (see Home Sav. of Am., F.A. v. Gkanios, 230 AD2d 770).

Here, plaintiff has submitted, in support of the motion, a copy of the mortgage, the unpaid note, a verified complaint setting forth the facts establishing the claim and proof by affidavit of defendant's default (see Emigrant Mtge. Co., Inc. v. Fisher, 90 AD3d

³Mr. Rizzi avers that he defaulted in his mortgage payments because his tenants failed to pay rent and, additionally, damaged the property so significantly that he could not re-rent the units. After evicting the tenants, repairing the premises, and moving into the property himself, defendant claims that he applied and qualified for a loan modification with his lender, but because he had used-up his savings to repair the property, he was unable to provide the up-front lump sum payment required in order to obtain a permanent modification. He now claims to earn a salary which complements his NYPD disability pension.

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823; RPAPL 1321). Moreover, defendant's default is conceded. Under these circumstances, the Court is constrained by RPAPL 1321, which provides, in pertinent part, that if defendant "fails to answer within the time allowed...upon motion of the plaintiff, the court shall...direct a referee to compute the amount due to the plaintiff...and to examine and report whether the mortgaged premises can be sold in parcels" (emphasis added). Further, since defendant failed to answer or make a pre-answer motion to dismiss the complaint, he has waived his opportunity to challenge plaintiff's standing (see Countrywide Home Loans Servicing, LP v. Albert, 78 AD3d 983, 985; see also CitiMortgage, Inc. v. Rosenthal, 88 AD3d 759, 761).

Accordingly, it is

ORDERED, that plaintiff's motion is granted; and it is further

ORDERED, that the parties appear before this court for a settlement conference on _____ at _____.

Order signed herewith.

E N T E R,

Dated: October 22, 2013
gl

/s/
HON. THOMAS P. ALIOTTA
J. S. C.