

**HSBC Bank USA v Kennelly**

2014 NY Slip Op 33133(U)

November 25, 2014

Sup Ct, New York County

Docket Number: 850009/2013

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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HSBC BANK USA, NATIONAL,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.: 850009/2013

JAMES KENNELLY, 304 EAST 52ND STREET  
HOUSING CORP., ARBOR REALTY FUNDING,  
LLC, CITY OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, PROCIDA FUNDING  
LIMITED LIABILITY COMPANY, RCG GROUP,  
INC., TURTLE BAY TURKS, LLC, UNITED  
STATES OF AMERICA- INTERNAL REVENUE  
SERVICE,

JOHN DOES (said name being fictitious, it being the  
intention of Plaintiff to designate any and all occupants  
of premises being foreclosed herein, and any parties,  
corporation or entities, if any, having or claiming an  
interest or lien upon the mortgaged premises.)

Defendants.

-----X

HON. ANIL C. SINGH, J.:

In this mortgage foreclosure action, plaintiff HSBC Bank USA, National Association as Trustee for NAAC 2007-2 (hereinafter "HSBC") moves for summary judgment pursuant to CPLR 3212 against defendants James Kennelly, 304 East 52nd Street Housing Corp., Arbor Realty Funding, LLC, City of New York Environmental Control Board, Procida Funding LLC, RCG Group, Inc., Turtle Bay Turks, LLC, United States of America-Internal Revenue Service, and John Does (Motion sequence no. 002). Defendant Kennelly seeks an order

pursuant to CPLR 3012(d) to compel plaintiff to accept defendant's allegedly late Answer (Motion Sequence no. 004).

This decision and order consolidates Motion Sequence Numbers 002 and 004 for disposition.

### *Background*

On or about March 13, 2007, Defendant Kennelly, owner and borrower of a cooperative apartment addressed 304 East 52nd Street #4, executed a note in the principal amount of \$441,900.00 secured by a security agreement. The Note was transferred to plaintiff HSBC. Plaintiff alleges that defendant Kennelly defaulted on the loan payments in August 2010, and failed to cure the default.

As the assignee and holder of the Note and Security, plaintiff brings this action to foreclose on the mortgage. Defendant 304 East 52nd Street Housing Corp. (304 East 52nd Street Housing), the cooperative corporation, submitted an answer on March 18, 2013 and an amended answer on April 8, 2013. Defendant Arbor Funding, a junior and subordinate lien holder, submitted an answer on March 26, 2013. However, defendant Kennelly submitted his answer on May 13, 2013, which plaintiff rejected and returned as late. According to the plaintiff, the deadline to reply was April 24, 2013.

On March 17, 2014, plaintiff moved for summary judgment in order to strike defendants' answers and to dismiss the affirmative defenses of defendants Kennelly and 304 East 52nd Street Housing. On April 27, 2014, the same two defendants moved for an order to show cause requesting a stay and/or an extension of time to oppose to plaintiff's motion for summary judgment. On May 8, 2014, this court denied defendant's motion as moot but gave the defendants an opportunity to oppose the plaintiff's motion for summary judgment. On May 22, 2014, defendant 304 East 52nd Street Housing submitted the opposition but defendant Kennelly filed a motion to compel on June 20, 2014.

#### *Motion to Compel*

To overcome plaintiff's entitlement to default judgment, defendant Kennelly must demonstrate a reasonable excuse for failure to timely answer the complaint (see Jones v 414 Equities LLC, 57 AD3d 65, 81 [1st Dept 2008]). In determining the reasonableness of the delay, the courts consider whether the delay in both serving the answer and seeking leave to compel plaintiff to accept the answer was brief and caused no prejudice (see Cirillo v Macy's, 61 AD3d 538, 540) [1st Dept 2009]).

Here, however, the reasonableness of defendant Kennelly's excuse does not need to be reached because plaintiff HSBC moved for summary judgment

against both defendant Kennelly and 304 East 52nd Street Housing. By seeking a judgment on Kennelly, plaintiff has waived the opportunity to reject the late answer.

*Summary Judgment Motion*

Plaintiff HSBC established a prima facie entitlement to summary judgment by producing the note, security agreement, a UCC Financing Statement, and notices of non-payment (see 2010-1 SFG Venture LLC v 34-10 Dev., LLC, 106 AD3d 455,455 [1st Dept 2013] citing Chemical Bank v Broadway 55-56th St. Assoc., 220 AD2d 308 [1st Dept 1995]). Once the plaintiff makes a sufficient showing, the burden shifts to defendant to raise an existence of triable issue of fact. . (see Quest Commercial, LLC v Rovner, 35 AD3d 576, 576 [2nd Dept 2006]). Conclusory allegations are insufficient to defeat plaintiff's motion. (See id. at 576-577).

Defendant 304 East 52nd Street Housing states that there is a triable issue of fact as to the amount borrowed because the documents shows different numbers. However, defendant fails to rebut the plaintiff's motion with evidentiary support. On the other hand, plaintiff corrects the discrepancy with support from affidavits and a loan amortization schedule. Furthermore, defendants' challenge to the affidavit submitted by Mahilet Ayalew, the servicer of HSBC, fails to raise a material issue. Irrespective of Ayalew's corporate

status, here statements are made on personal knowledge. Plaintiff therefore demonstrated entitlement to judgment as a matter of law.

Defendants Kennelly and 304 East 52nd Street Housing have not raised a meritorious defense to the action. The first and sixth affirmative defenses alleging plaintiff's failure to state cause of action and failure to plead are meritless. Defendants' opportunity to assert that plaintiff failed to obtain proper jurisdiction (second affirmative defense), and to properly serve (seventh affirmative defense) have been waived because the defendants formally appeared in this action when serving answers. Furthermore, defendants fail to provide support for the vague allegations of plaintiff's bad faith (fourth affirmative defense), unclean hands (third affirmative defense), usurious loans (ninth affirmative defense) and predatory lending (tenth affirmative defense) (see e.g., Tribeca Lending Corp. v Bartlett, 84 AD3d 496, 497 [1st Dept 2011])(holding that vague assertions of predatory lending fails to demonstrate a meritorious defense)). The eighth affirmative defense alleging that plaintiff failed to comply with the requirements under RPAL 1303 is also conclusory. Similarly, the remaining affirmative defenses including plaintiff's standing and alleged culpable conduct are insufficient to raise a triable issue of fact.

Accordingly,

Defendant KENNELLY's motion to compel plaintiff to accept late Answer motion (Motion Sequence no. 004) is granted, and

Plaintiff HSBC's motion for summary judgment (Motion sequence no. 002) against all named defendants in the caption above is granted.

Settle judgment on notice.

Date: November 25, 2014  
New York, New York

  
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Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**