

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 2nd day
of May 2008

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

HSBC BANK USA, N.A. AS TRUSTEE FOR
NOMURA ASSET-BACKED CERTIFICATE
SERIES 2006-AF1,

Plaintiff,

- against -

LOVELY YEASMIN, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 34142/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference with Affidavits/Exhibits _____

1

Plaintiff's application, for an order of reference for the premises located at 22
Jefferson Street, Brooklyn, New York (Block 3179, Lot 20, County of Kings) is denied

without prejudice, with leave to renew upon providing the Court with: a copy of a valid assignment of the instant mortgage and note to plaintiff HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1 (HSBC); a satisfactory explanation of the conflict of interest by plaintiff's counsel, Steven J. Baum, P.C., with respect to the September 10, 2007 assignment of the instant mortgage and note from MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), as nominee for CAMBRIDGE HOME CAPITAL, LLC (CAMBRIDGE), by Nicole Gazzo, Esq., the assignor, an attorney employed by Steven J. Baum, P.C., plaintiff's counsel, and the simultaneous representation by Steven J. Baum, P.C., of assignee plaintiff HSBC; a valid power of attorney for the "affidavit of merit" in support of the instant application or an "affidavit of merit" executed by an officer of plaintiff HSBC; and, an affidavit by an officer of plaintiff HSBC explaining why plaintiff purchased a nonperforming loan.

Background

Defendant LOVELY YEASMIN borrowed \$624,800.00 from CAMBRIDGE on May 10, 2006. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on May 23, 2006, at City Register File Number (CRFN) 2006000286179. MERS, the nominee of CAMBRIDGE for the purpose of recording the mortgage, assigned the mortgage to plaintiff HSBC on September 10, 2007, effective August 21, 2007, with the assignment recorded on September 20, 2007, at

CRFN 2007000483945. The assignment was executed by “Nicole Gazzo, Esq., On behalf of MERS, by Corporate Resolution dated 7/19/07.” Neither a corporate resolution nor a power of attorney to Ms. Gazzo was recorded with the assignment. Thus, the assignment is invalid and plaintiff HSBC lacks standing to bring the instant foreclosure action.

Further, the assignor, Ms. Gazzo, according to the Office of Court Administration’s Attorney Registration, has as her business address, “Steven Baum, P.C., 220 Northpointe Parkway, Suite G, Buffalo, NY 14228-1894.” On the same Ms. Gazzo executed the invalid MERS assignment, September 10, 2007, plaintiff’s counsel, Steven J. Baum, P.C., commenced the instant action on behalf of purported assignee HSBC, with the filing of a notice of pendency, and the summons and complaint in the Kings County Clerk’s Office. The Court is concerned that the simultaneous representation by Steven J. Baum, P.C. of both MERS and HSBC is a conflict of interest in violation of 22 NYCRR § 1200.24, the Disciplinary Rule of the Code of Professional Responsibility, entitled “Conflict of Interest; Simultaneous Representation.”

Also, plaintiff’s moving papers for an order of reference and related relief fails to present an “affidavit made by the party,” pursuant to CPLR § 3215 (f). The instant application contains an “affidavit of merit and amount due,” dated November 16, 2007, by Cathy Menchise, “Senior Vice President of WELLS FARGO BANK, N.A. D/B/A AMERICA’S SERVICING COMPANY, Attorney in Fact for HSBC BANK USA, N.A.

AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1.”

Further, Ms. Menchise states “[t]hat a true copy of the Power of Attorney is attached hereto.” Actually attached is a photocopy of a “Limited Power of Attorney,” dated July 19, 2004, from HSBC, appointing WELLS FARGO BANK, N.A. as its attorney-in-fact to perform various enumerated services, by executing documents “if such documents are required or permitted under the terms of the related servicing agreements . . . in connection with Wells Fargo Bank, N.A.[’s] . . . responsibilities to service certain mortgage loans . . . held by HSBC . . . as Trustee of various trusts.” There is no listing in the “Limited Power of Attorney” of any of these “certain mortgage loans.” The Court is at a loss to determine if HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1, is covered by the “Limited Power of Attorney.” Additionally, the “Limited Power of Attorney” is defective. It is a photocopy, not an original. Plaintiff’s counsel failed to comply with the requirements of CPLR § 2105, by affixing to the document an attorney’s certification that the document has been compared with the original “and found to be a true and complete copy.”

The instant foreclosure application states that defendant YEASMIN defaulted on her mortgage payments by failing to make her May 1, 2007 and subsequent monthly loan payments. Yet, on September 10, 2007, 133 days subsequent to defendant YEASMIN’S alleged May 1, 2007 payment default, plaintiff HSBC was willing to take an assignment of the instant nonperforming loan from MERS, as nominee for CAMBRIDGE. Thus, the

Court requires, upon renewal of this application for an order of reference, a satisfactory explanation of why HSBC purchased a nonperforming loan from MERS, as nominee for CAMBRIDGE.

Discussion

Plaintiff HSBC must have "standing" to bring this action. The Court of Appeals (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d, 901, 812 [2003]), *cert denied* 540 US 1017 [2003]) held that "[s]tanding 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." In *Carper v Nussbaum*, 36 AD3d 176, 181 (2d Dept 2006), the Court held that "[s]tanding 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." If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1d Dept 2002]). "Sine standing is jurisdictional and goes to a court's authority to resolve litigation [the court] can raise this matter *sua sponte*." (*Axelrod v New York State Teachers' Retirement System*, 154 AD2D 827, 828 [3d Dept 1989]).

In the instant action, the September 10, 2007 assignment from MERS to HSBC is defective. Therefore, HSBC has no standing to bring this action. The recorded assignment by "Nicole Gazzo, Esq. On behalf of MERS, by Corporate Resolution dated

7/19/07,” has neither the corporate resolution nor a power of attorney attached and recorded. 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]).

To foreclose on a mortgage, a party must have title to the mortgage. The instant assignment is a nullity. The Appellate Division, Second Department (*Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1988]), held that 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." Citing *Kluge v Fugazy*, the Court (*Katz v East-Ville Realty Co.*, 249 AD2d 243 [1st Dept 1998]), held 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."

It is clear that plaintiff HSBC, with the invalid assignment of the instant mortgage and note from MERS, lacks standing to foreclose on the instant mortgage. The Court, in *Campaign v Barba* (23 AD3d 327 [2d Dept 2005]), held that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, **ownership of the mortgage**, and the defendant's default in payment [**Emphasis added**]." (See *Household Finance Realty Corp. of New York v Wynn*, 19 AD3d 545 [2d Dept 2005]; *Sears Mortgage Corp. v Yahhobi*, 19 AD3d 402 [2d Dept 2005]; *Ocwen Federal Bank FSB v Miller*, 18 AD3d 527 [2d Dept 2005]; *U.S. Bank Trust Nat. Ass'n v Butti*, 16 AD3d 408 [2d Dept 2005]; *First Union Mortgage Corp. v Fern*, 298 AD2d 490 [2d Dept 2002]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 [2d Dept 1993]).

Even if plaintiff can cure the assignment defect, plaintiff's counsel then has to

address the conflict of interest in the representation of both the assignor of the instant mortgage, MERS, and the assignee of the instant mortgage, HSBC. 22 NYCRR § 1200.24, of the Disciplinary Rules of the Code of Professional Responsibility, entitled “Conflict of Interest; Simultaneous Representation,” states in relevant part:

(a) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision © of this section.

(b) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.

(c) in the situations covered by subdivisions (a) and (b) of this section, a ***lawyer may represent multiple clients if*** a disinterested lawyer

would believe that *the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.* [Emphasis added]

The Court needs to know if both MERS and HSBC were aware of the simultaneous representation by plaintiff's counsel, Steven J. Baum, P.C., and whether both consented. If plaintiff moves to renew its application for an order of reference, the Court needs an affirmation by Steven J. Baum, Esq., the principal of Steven J. Baum, P.C., explaining if both MERS and HSBC consented to simultaneous representation in the instant action with "full disclosure of the implications of the simultaneous representation and the advantages and risks involved." The Appellate Division, Fourth Department, the Department in which both Ms. Gazzo and Mr. Baum are registered, (*In re Rogoff*, 31 AD3d 111 [2006]) censured an attorney, for *inter alia*, violating 22 NYCRR § 1200.24, by representing both a buyer and sellers in the sale of a motel. The Court, at 112, found that the attorney, "failed to make appropriate disclosures to either the sellers or the buyer concerning dual representation." Further, the Court, at 113, censured the attorney, after it considered the matters submitted by respondent in mitigation, including

that respondent undertook the dual representation at the insistence of the buyer, had no financial interest in the transaction and charged the

sellers and the buyer one half of his usual fee. Additionally, we note that respondent cooperated with the Grievance Committee and has expressed remorse for his misconduct.

Next, if plaintiff's counsel can cure the assignment defect and explain his simultaneous representation, the matter of the "affidavit of merit" must be addressed. Plaintiff must comply with CPLR § 3215 (f) by providing an "affidavit made by the party," whether by an officer of HSBC, or someone with a valid power of attorney from HSBC, to execute foreclosure documents for HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1. If plaintiff presents a power of attorney and it refers to a servicing agreement, the Court needs to inspect the servicing agreement. (*Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *EMC Mortg. Corp. v Batista*, 15 Misc 3d 1143 (A) [Sup Ct, Kings County 2007]; *Deutsche Bank Nat. Trust Co. v Lewis*, 4 Misc 3d 1201 (A) [Sup Ct, Suffolk County 2006]).

If a power of attorney is presented it must be an original or a copy certified by an attorney, pursuant to CPLR § 2105. The "Limited Power of Attorney" presented in the instant application is a photocopy without the certification. Plaintiff's counsel must comply with the statutory requirement that if a copy of a power of attorney is submitted, "an attorney admitted to practice in the court of the state may certify that it has been compared by him with the original and found to be a true and complete copy. (See

Security Pacific Nat. Trust Co. v Cuevas, 176 Misc 2d 846 [Civ Ct, Kings County 1998]).

Lastly, the Court requires a satisfactory explanation from an officer of HSBC why, in the middle of our national subprime mortgage financial crisis, plaintiff HSBC purchased from MERS, as nominee of CAMBRIDGE, a nonperforming loan. The Court wonders if HSBC violated a corporate fiduciary duty to its stockholders with the purchase of a loan that defaulted 133 days prior to its assignment from MERS to HSBC, rather than keep the mortgage loan on CAMBRIDGE's books.

Conclusion

Accordingly, it is

ORDERED that the application of plaintiff HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1, for an order of reference for the premises located at 22 Jefferson Street, Brooklyn, New York (Block 3179, Lot 20, County of Kings) is denied without prejudice, and it is further

ORDERED that leave is granted to plaintiff HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1, to renew its application for an order of reference for the premises located at 22 Jefferson Street, Brooklyn, New York (Block 3170, Lot 20, County of Kings), upon presentation to the Court, within forty-five (45) days of this decision and order of: (1) a valid assignment of the instant mortgage and note to plaintiff, HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1; (2) an affirmation from Steven J. Baum, Esq., the principal of Steven J. Baum, P.C., explaining

if both MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., the assignor of the instant mortgage and note, and HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1, the assignee of the instant mortgage and note, pursuant to 22 NYCRR § 1200.24, consented to simultaneous representation in the instant action, with “full disclosure of the implications of the simultaneous representation and the advantages and risks involved” explained to them; (3) compliance with the statutory requirements of CPLR § 3215 (f), by an affidavit of facts executed by someone with authority to execute such an affidavit, and if the affidavit of facts is executed by a loan servicer, a copy of a valid power of attorney to the loan servicer, and the servicing agreement authorizing the affiant to act in the instant foreclosure action; and (4) an affidavit from an officer of plaintiff HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1, explaining why plaintiff HSBC BANK USA, N.A. AS TRUSTEE FOR NOMURA ASSET-BACKED CERTIFICATE SERIES 2006-AF1 purchased a nonperforming loan from MERS, as nominee for CAMBRIDGE HOME CAPITAL, LLC.

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 J.S.C.