

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 31th day
of July 2008

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

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

HSBC BANK USA, NATIONAL ASSOCIATION, AS
INDENTURE TRUSTEE FOR THE REGISTERED
NOTEHOLDERS OF RENAISSANCE HOME EQUITY
LOAN TRUST 2006-4,

Plaintiff,

- against -

PATRICIA ANTROBUS, JONATHAN ANTROBUS,
et. al.,

Defendants.

DECISION & ORDER

Index No. 43299/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference with Affidavits/Exhibits _____

1

The instant mortgage foreclosure action exemplifies various aspects of the
present national foreclosure crisis, recently commented upon by Gretchen Morgenson in

her July 13, 2008 lead story in the Sunday Business section of the *New York Times*, “*The Fannie and Freddie Fallout*”:

It’s dispiriting indeed to watch the United States financial system, supposedly the envy of the world, being taken to its knees. But that’s the show we’re watching, brought to you by somnambulant regulators, greedy bank executives and incompetent corporate directors.

This wasn’t the way the “ownership society” was supposed to work. Investors weren’t supposed to watch their financial stocks plummet more than 70 percent in less than a year. And taxpayers weren’t supposed to be left holding defaulted mortgages and abandoned homes while executives who presided over balance sheet implosions walked away with millions.

“The show we’re watching” in the instant action features a possible incestuous relationship between plaintiff, HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4 (HSBC), Ocwen Loan Servicing (OCWEN), Delta Funding Corporation (DELTA), and Mortgage Electronic Registration Systems, Inc. (MERS), that might also include Goldman Sachs and Deutsche Bank. Add to this mix the alleged \$463,817.64 “balance sheet implosion” on April 1, 2007, the date defendants are alleged to have defaulted on their mortgage loan payments.

The application of plaintiff HSBC, upon the default of all defendants, for an order of reference for the premises located at 660 Decatur Street, Brooklyn, New York (Block 1506, Lot 22, County of Kings) is denied without prejudice for three reasons.

First, the “affidavit of merit” submitted in support of this application for a default judgment is not by an officer of the plaintiff or someone with any power of attorney from HSBC. Leave is granted to plaintiff HSBC to renew its application for an order of reference upon presentation to the Court of its compliance with the statutory requirements of CPLR § 3215 (f), with “an affidavit of facts” executed by someone who is an officer of HSBC or has a valid power of attorney from HSBC.

Second, the November 30, 2007 assignment of the instant mortgage and note from MERS, as nominee for DELTA, according to its recording at the ACRIS (Automated City Register Information System) website, of the Office of the City Register, New York City Department of Finance, on January 16, 2008, at City Register File Number (CRFN) 2008000021186, states that the address of assignee HSBC is c/o OCWEN, 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409 (Suite 100). The assignment was executed by Scott Anderson, Vice President of MERS, whose address, according to notary public Doris Chapman’s jurat, is also 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409. In prior decisions (*HSBC Bank v Valentin*, 18 Misc 3d 1123 (A) [January 30, 2008]; *HSBC Bank, N.A. v Cherry*, 18 Misc 3d 1102 (A) [December 17, 2007]), I found that HSBC, MERS and OCWEN all shared office space at

Suite 100. In *Deutsche Bank Nat. Trust Co. v Castellanos*, 15 Misc 3d 1143 (A) (May 11, 2007), I found that Deutsche Bank and MTGLQ, Investors, L.P., a Goldman Sachs subsidiary, also claimed to have Suite 100 as their office. I noted in *Cherry*, at 3:

In the instant action, with HSBC, OCWEN and MERS, joining with Deutsche Bank and Goldman Sachs at Suite 100, the Court is now concerned as to why so many financial goliaths are in the same space.

The Court ponders if Suite 100 is the size of Madison Square Garden to house all of these financial behemoths or if there is a more nefarious reason for this corporate togetherness. If HSBC seeks to renew its application for an order to reference, the Court needs to know, . . . why Suite 100 is such a popular venue for these corporations.

Ocwen Financial Corporation, OCWEN's parent corporation, in its March 31, 2008 Schedule 14A Proxy Statement, filed with the United States Securities and Exchange Commission (SEC), states that its corporate headquarters is Suite 100. Further, Ocwen Financial Corporation, in its 2007 10-K filing with the SEC, dated March 31, 2008, at page 10, states that Suite 100 is 41,860 square feet. The Court takes judicial notice that this is smaller than Madison Square Garden. However, the Court is still perplexed as to how HSBC, OCWEN, MERS, Deutsche Bank and Goldman Sachs can all coexist within the same 41,860 square feet.

Third, the Court, upon renewal of the application for an order of reference, requires

a satisfactory explanation as to why plaintiff HSBC took the assignment of the instant nonperforming mortgage loan from the original lender, DELTA, and for whom Scott Anderson is actually employed. Mr. Anderson, in *Cherry*, swore in an affidavit that he was HSBC's servicing agent, while in *Valentin*, he swore in the assignment, as in the instant case, to be Vice President of MERS.

Background

Defendants PATRICIA ANTROBUS and JONATHAN ANTROBUS borrowed various sums from DELTA in two separate 2004 and 2005 mortgages and notes with DELTA. Ultimately, defendant PATRICIA ANTROBUS simultaneously executed with DELTA a note and mortgage for new money and a \$465,000.00 mortgage consolidation, extension and modification agreement on October 9, 2006. The consolidation, extension and modification agreement was recorded in the Office of the City Register, New York City Department of Finance, on November 17, 2006, at CRFN 2006000640301, by MERS, as nominee of DELTA, for the purpose of recording the mortgage.

MERS assigned the \$465,000.00 mortgage consolidation, modification and extension agreement to HSBC, on November 30, 2007, and recorded it in the Office of the City Register, New York City Department of Finance, on January 16, 2008, at CRFN 2008000021186. As noted above, the assignment was executed by Scott Anderson, as Vice President of MERS, whose address is the same Suite 100, the address of assignee HSBC.

Further, plaintiff's moving papers for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215 (f). The application contains a December 12, 2007-"affidavit of merit and amounts due" by Margery Rotundo, who states that she is "the Senior Vice President of Plaintiff/Plaintiff's servicing agent." She never states the name or address of the mysterious servicing agent. Since HSBC's address in the assignment is Suite 100, the Court might logically conclude that Ms. Rotundo is a Senior Vice President of OCWEN. However, in *Nomura Credit & Capital, Inc. v Washington*, 19 Misc 3d 1126 (A) (April 30, 2008), I observed, at 2, that "Margery Rotundo, **Senior Vice President of Loss Mitigation for NOMURA** executed an affidavit executed an affidavit of merit and amounts due on October 5, 2007 . . . Anne E. Miller-Hulbert, Esq., of Shapiro & Di Caro, LLP, executed an affirmation in support of plaintiff's motion for an order of reference, on November 19, 2007 [**Emphasis added**]." Subsequent to October 5, 2007, did Ms. Rotundo change employment and cease to work for Nomura Credit & Capital, Inc., and move to OCWEN? Also, the same attorney, Ms. Miller-Hulbert, and her firm, Shapiro & Di Caro, LLP, represent the plaintiffs in both *Nomura* and the instant case. Whatever the circumstances of Ms. Rotundo's employment may be, or the identity of Shapiro & Di Caro, LLP clients, Ms. Rotundo is not an officer of HSBC. Thus, Ms. Rotundo has no authority to execute "an affidavit made by the party," because she is not a party, a predicate for the Court to grant a default judgment, pursuant to CPLR § 3215 (f). Therefore, the proposed order of reference must be denied

without prejudice. Leave is granted to plaintiff HSBC to 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.

Also, according to plaintiff's application for an order of reference, the default of defendant ANTROBUS began with the nonpayment of principal and interest due on May 1, 2007. Yet, almost seven months later, 214 days subsequent to the ANTROBUS default, on November 30, 2008, plaintiff HSBC was willing to take an assignment of the instant nonperforming loan. The Court wonders why HSBC would purchase a nonperforming loan, seven months in arrears? Did HSBC intend to get the nonperforming loan off DELTA's books and assigned to the noteholders of plaintiff's collateralized debt obligation? In fact, the instant foreclosure summons, complaint and notice of pendency were all filed with the Kings County Clerk on November 28, 2007, two days prior to the assignment of the instant nonperforming loan.

The instant complaint alleges that \$464,817.64 was owed to plaintiff on April 1, 2007. Ms. Morgenson, in her previously cited July 13, 2008 article in the *New York Times*, "*The Fannie and Freddie Fallout*," discussed "greedy bank executives and incompetent corporate directors," as well as "taxpayers [who] weren't supposed to be left holding defaulted mortgages and abandoned homes while executives who presided over balance sheet implosions walked away with millions." While HSBC purchased the nonperforming ANTROBUS "balance sheet implosion" of \$464,817.64 on November 30,

2007, its parent corporation, HSBC USA, Inc., awarded handsome compensation packages to its executives and directors. According to HSBC, USA, Inc.'s 2007 10-K filing with the SEC, dated March 3, 2008, at page 190, HSBC USA, Inc. gave Paul J. Lawrence, its President and Chief Executive Officer, total compensation in 2007 of \$4,057,321.00 (\$642,986.00 in salary; \$1,555,243.00 "discretionary cash bonus relating to 2007 performance"; \$508,634.00 in stock awards; \$502,728.00 in pension value change and nonqualified deferred compensation earnings; and, \$847,730.00 in "all other compensation," which included \$9,868.00 for physical exams, \$288,681.00 for housing allowance, \$156,779.00 for children's education allowance, and \$63,371.00 for executive travel allowance). HSBC USA, Inc.'s 2007 10-K filing also reveals that the compensation for the part-time service of the eight outside Directors on the HSBC, USA Inc.'s Board of Directors ranged from \$85,000.00 for James H. Cleave, Peter Kimmelman and James L. Morice, to \$370,000.00 for Richard A. Jalkut.

Discussion

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of the defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." In the instant action, plaintiff's 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]).

Plaintiff has failed to meet the requirements of CPLR § 3215 (f) for a default judgment.

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. ***[Emphasis added].***

Plaintiff has failed to submit "proof of the facts" in "an affidavit made by the party." The affidavit is submitted by Margery Rotundo, "Senior Vice President of Plaintiff/Plaintiff's servicing agent." There must be an affidavit by an officer of HSBC or a disclosed servicing agent, not an inscrutable one, possessing a valid power of attorney from HSBC for that express purpose. Additionally, if a power of attorney is presented to this Court and it refers to pooling and servicing agreements, the Court needs a properly offered copy of the pooling and servicing agreements, to determine if the servicing agent may proceed on behalf of plaintiff. (*EMC Mortg. Corp. v Batista*, 15 Misc 3d 1143 (A) [Sup Ct, Kings

County 2007]; *Deutsche Bank Nat. Trust Co. v Lewis*, 14 Misc 3d 1201 (A) [Sup Ct, Suffolk County 2006]).

With respect to Scott Anderson, who executed the November 20, 2007 MERS assignment to HSBC, he has worn various corporate hats in prior foreclosure actions decided by myself. In *Valentin*, at 2, I observed that Scott Anderson assigned the instant mortgage from MERS to HSBC, on May 1, 2007. Then, in *Cherry*, at 3, I observed that:

Scott Anderson, in his affidavit, executed on June 15, 2007, states he is Vice President of OCWEN. Yet, the June 13, 2007 assignment from MERS to HSBC is signed by the same Scott Anderson as Vice President of MERS. Did Mr. Anderson change his employer between June 13, 2007 and June 15, 2007. The Court is concerned that there may be fraud on the part of HSBC, or at least malfeasance. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Anderson describing his employment history for the past three years.

Lastly, the court notes that Scott Anderson, in the MERS to HSBC assignment gave his address as Suite 100. This is also the address listed for HSBC in the assignment.

The Court still doesn't know if Mr. Anderson is Vice President of MERS, Vice President of OCWEN, or both. The same concerns about possible fraud by HSBC, or at

least malfeasance, just as in my *Valentin* and *Cherry* decisions still exist. The Court needs to know Mr. Anderson's employment history and why all these banking entities are located within the 41,860 square feet of the ever popular Suite 100.

Therefore, the instant application for an order of reference is denied without prejudice, with leave to renew. The Court will grant an order of reference to plaintiff HSBC upon presentation to this court of: an affidavit by either an officer of HSBC or someone with a valid power of attorney from HSBC, possessing personal knowledge of the facts; an affidavit from Scott Anderson clarifying his employment history for the past three years and what corporation he serves as an officer; and, an affidavit by an officer of HSBC explaining why HSBC purchased a nonperforming loan from Delta Funding Corporation, and why HSBC, OCWEN, MERS, Deutsche Bank and Goldman Sachs all share office space in Suite 100.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4, for an order of reference for the premises located at 680 Decatur Street, Brooklyn, New York (Block 1506, Lot 22, County of Kings), is denied without prejudice; and it is further ORDERED, that leave is granted to plaintiff, HSBC BANK USA, NATIONAL

ASSOCIATION, AS INDENTURE TRUSTEE FOR THE REGISTERED
NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4, to
renew its application for an order of reference for the premises located at 680 Decatur
Street, Brooklyn, New York (Block 1506, Lot 22, County of Kings), upon presentation to
the Court, within sixty (60) days of this decision and order, of: an affidavit of facts either
by an officer of HSBC or someone with a valid power of attorney from HSBC, possessing
personal knowledge of the facts; an affidavit from Scott Anderson, describing his
employment history for the past three years; and, an affidavit from an officer of plaintiff
HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR
THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN
TRUST 2006-04, explaining why plaintiff purchased the instant nonperforming loan
from Delta Funding Corporation on November 30, 2007, and why plaintiff HSBC shares
office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with
Ocwen Loan Servicing, LLC, Mortgage Electronic Registration Systems, Inc., Deutsche
Bank and Goldman Sachs.

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.