

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 11<sup>th</sup> 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 PEOPLE'S CHOICE  
HOME LOAN SECURITIES TRUST SERIES  
2006-1,

Plaintiff,

- against -

MARCIE PERBOO *et. al.*,

Defendants.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**DECISION & ORDER**

Index No. 38167/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference with Affidavits/Exhibits \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_

Plaintiff's application, upon the default of all defendants, for an order of reference,  
for the premises located at 689 Eldert Lane, Brooklyn, New York (Block 4274, Lot 14,

County of Kings) is denied without prejudice. 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 a power of attorney from the plaintiff. Leave is granted to plaintiff HSBC BANK USA, NATIONAL ASSOCIATION AS INDENTURE TRUSTEE FOR PEOPLE’S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1 [HSBC], to renew its application for an order of reference upon presentation to the Court of 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. Further, HSBC must satisfactorily explain to the Court why: Victor F. Parisi assigned the instant mortgage to HSBC, and subsequently executed the affidavit and amount due for assignee HSBC; HSBC purchased a nonperforming loan; and, why HSBC shares office space with other corporate entities in Cherry Hill, New Jersey.

#### **Background**

Defendant MARCIE PERBOO borrowed \$312,000.00 from PEOPLE’S CHOICE HOME LOAN, INC. (PEOPLE’S CHOICE), on June 1, 2006. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on July 26, 2006 at City Register File Number (CRFN) 2006000424184. PEOPLE’S CHOICE, by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), its nominee for the purpose of recording the mortgage, assigned the note and mortgage to plaintiff HSBC, on September 28, 2007, with the assignment recorded on

January 31, 2008 at CRFN 2008000042701.

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 an "affidavit of merit and amount due," by Victor F. Parisi, who states that he is "the Vice-President of, EQUITY ONE, INC. [EQUITY ONE] AS AUTHORIZED SERVICER FOR HSBC BANK USA, NATIONAL ASSOCIATION AS INDENTURE TRUSTEE FOR PEOPLE'S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1, Plaintiff." For reasons unknown to the Court, plaintiff HSBC has failed to provide any power of attorney authorizing EQUITY ONE to proceed on HSBC's behalf with the instant foreclosure action. 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.

Further, plaintiff must address a second matter if it renews its application for an order of reference upon compliance with CPLR § 3215 (f). In the instant action, as noted above, Victor F. Parisi, in his affidavit, dated December 14, 2007, states he is Vice President of EQUITY ONE. Yet, the September 28, 2007 assignment from MERS as nominee for PEOPLE'S CHOICE to HSBC is signed by the same Victor F. Parisi, as Vice President of MERS. In my November 20, 2007 decision and order in *HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA HOME EQUITY LOAN*,

*INC. ASSET-BACKED CERTIFICATES SERIES 2006-FM2 v SANDOVAL*, Index Number 8758/07, the same Victor F. Parisi assigned the underlying mortgage and note as Vice President of MERS to HSBC on March 13, 2007, and then signed the affidavit of merit as Vice President of EQUITY ONE, authorized servicer for HSBC, the next day, March 14, 2007. Did Mr. Parisi change his employment from March 13, 2007 to March 14, 2007, and again from September 28, 2007 to December 14, 2007? The Court is concerned that Mr. Parisi might be engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Parisi describing his employment history for the past three years.

Also, while MERS served as nominee for PEOPLE'S CHOICE, the mortgage servicer for the PERBOO mortgage was POPULAR MORTGAGE SERVICING, INC. [POPULAR], [exhibit B of application - July 24 default letter to PERBOO], whose address is 121 Woodcrest Road, Cherry Hill, New Jersey 08003. The MERS as nominee for PEOPLE'S CHOICE to HSBC assignment lists HSBC's address as 121 Woodcrest Road, Cherry Hill, New Jersey 08003. The instant verified complaint [part of exhibit B of application] states that EQUITY ONE'S address is 121 Woodcrest Road, Cherry Hill, New Jersey 08003. How convenient to have the assignor's servicer, the assignee's servicer and the assignee all at the same address. This makes for one-stop shopping! The Court needs to know what corporate chicanery is being played at 121 Woodcrest Road, Cherry Hill, New Jersey 08003. Is the building large enough to house POPULAR,

EQUITY ONE, MERS and HSBC under the same roof? Is there enough closet space to store Mr. Parisi's various corporate hats?

Last, the verified complaint notes, in ¶ 6, that defendant PERBOO defaulted with her February 1, 2007 principal and interest payment. The first sentence in the July 24, 2007-POPULAR default letter to defendant PERBOO states "[p]lease be advised that your account is presently in default." On September 28, 2007, 240 days after the instant mortgage loan ceased to perform, and 72 days subsequent to the POPULAR default letter to PERBOO, plaintiff HSBC accepted the assignment of the instant nonperforming loan from MERS as nominee for PEOPLE'S CHOICE. The Court needs a satisfactory explanation of why HSBC, whose directors have a fiduciary responsibility to HSBC's shareholders, purchased a nonperforming loan from MERS as nominee for PEOPLE'S CHOICE, in an affidavit by an officer of HSBC.

### **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 clear 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 of facts" is submitted by Victor F. Parisi, "Vice-President of, EQUITY ONE, INC. AS AUTHORIZED SERVICER FOR HSBC." Mr. Parisi, must have, as plaintiff's agent, a valid power of attorney from HSBC to EQUITY ONE 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]).

Also, the instant application upon defendants' default must be denied because even though it contains a verified complaint, the attorney's verification is insufficient to meet the requirements of CPLR § 3215 (f). The Court, in *Mullins v Di Lorenzo*, 199 AD2d 218 [1<sup>st</sup> Dept 1993], instructed that "a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215." Citing *Mullins v Di Lorenzo*, the Court, in *Feffer v Malpeso*, 210 AD2d 60, 61 [1<sup>st</sup> Dept 1994], held that a complaint with not more than an attorney's affidavit, for purposes of entering a default judgment "was erroneous and must be deemed a nullity." Professor David Siegel, in his Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3215: 16) explains that *Mullins v Di Lorenzo*

is in point here. Perhaps ***the verified complaint*** can do service as an affidavit for various purposes within the litigation while the contest is on . . . but it ***will not suffice to put an end to the contest with as drastic a step as a default at the outset.*** It must be kept in mind that even an outright "affidavit" by the plaintiff's attorney on the merits of the case-- except in the relatively rare circumstances in which the attorney happens to have first-hand knowledge of the facts--lacks probative force and is usually deemed inadequate by the courts to establish the merits. A fortiori, a verified pleading tendered as proof

of the merits would also lack probative force when the verification is the attorney's. [*Emphasis added*]

In *Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005], the Court reversed a default judgment granted in Supreme Court, Nassau County, holding that:

In support of her motion for leave to enter judgment against the defendant upon her default in answering, the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts (*see* CPLR 3215 (f): *Goodman v New York City Health & Hosps. Corp.* 2 AD3d 581 [2d Dept 2003]; *Drake v Drake*, 296 AD2d 566 [2d Dept 2002]; *Parratta v McAllister*, 283 AD2d 625 [2d Dept 2001]). Accordingly, the plaintiff's motion should have been denied, with leave to renew on proper papers (*see* *Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

(*See* *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]; *De Vivo v Spargo*, 287 AD2d 535 [2d Dept 2001]; *Peniston v Epstein*, 10 AD3d 450 [2d Dept 2004]; *Taebong Choi v JKS Dry Cleaning Equip. Corp.*, 15 AD3d 566 [2d Dept 2005]; *Matone v Sycamore Realty Corp.*, 31 AD3d 721 [2d Dept 2006]; *Crimmins v Sagona Landscaping, Ltd.*, 33 AD3d 580 [2d Dept 2006]).

Therefore, the instant application for an order of reference is denied without



prejudice, with leave to renew. The Court will grant plaintiff HSBC an order of reference when it submits: 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 Victor F. Parisi clarifying his employment and what corporation he serves as an officer; and an affidavit from an officer of HSBC explaining why HSBC purchased a nonperforming loan from MERS as nominee for PEOPLE'S CHOICE, and why HSBC, MERS, POPULAR and EQUITY ONE all share office space at 121 Woodcrest Road, Cherry Hill, New Jersey 08003.

### **Conclusion**

Accordingly, it is

ORDERED, that the application of plaintiff, HSBC BANK USA, NATIONAL ASSOCIATION AS INDENTURE TRUSTEE FOR PEOPLE'S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1, for an order of reference for the premises located at 689 Eldert Lane, Brooklyn, New York (Block 4274, Lot 14, 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 PEOPLE'S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1, to renew its application for an order of reference for the premises located at 689 Eldert Lane, Brooklyn, New York (Block 4724, Lot 14, County of Kings), upon presentation to the Court, within forty-five (45) days from the

date of this decision and order, of: an affidavit of facts executed by an officer of HSBC or someone who has a valid power of attorney from HSBC; an affidavit by Victor F. Parisi, 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 PEOPLE'S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1, explaining why Victor F. Parisi, who assigned the instant mortgage and loan to plaintiff, submitted an affidavit of facts on behalf of plaintiff, why plaintiff HSBC BANK USA, NATIONAL ASSOCIATION AS INDENTURE TRUSTEE FOR PEOPLE'S CHOICE HOME LOAN SECURITIES TRUST SERIES 2006-1, purchased a nonperforming loan from MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as nominee for PEOPLE'S CHOICE HOME LOAN, INC., and why HSBC BANK USA, NATIONAL ASSOCIATION shares office space at 121 Woodcrest Road, Cherry Hill, New Jersey 08003 with MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., POPULAR MORTGAGE SERVICING, INC., and EQUITY ONE, INC.

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.**