

**HSBC Bank USA, N.A. v Betts**

2008 NY Slip Op 31170(U)

April 23, 2008

Supreme Court, Kings County

Docket Number: 0021336/2007

Judge: Arthur M. Schack

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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 23rd day of April 2008

P R E S E N T:

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

HON. ARTHUR M. SCHACK

Justice

\_\_\_\_\_  
HSBC BANK USA, N.A., AS INDENTURE TRUSTEE  
FOR THE REGISTERED NOTEHOLDERS OF  
RENAISSANCE HOME EQUITY LOAN TRUST  
2005-3, RENAISSANCE HOME EQUITY LOAN  
ASSET-BACKED NOTES, SERIES 2005-3,

Plaintiff,

- against -

JUSTINE BETTS, *et. al.*,

Defendants.

**DECISION & ORDER**

Index No. 21336/07

\_\_\_\_\_  
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 668 Decatur Street, Brooklyn, New York (Block 1506, Lot 16,

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 a power of attorney from the plaintiff. Leave is granted to plaintiff, HSBC BANK USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3 (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.

Second, the instant action deals with two mortgages that were consolidated by the lender, DELTA FUNDING CORPORATION (DELTA), into one mortgage, with MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), as nominee for DELTA. However, while MERS allegedly assigned the consolidated mortgage to plaintiff HSBC, MERS actually assigned one of the underlying mortgages, not the consolidated mortgage. This must be corrected and recorded to receive an order of reference.

Third, the Court, upon renewal of the application for an order of reference requires a satisfactory explanation to questions with respect to: the assignment of the instant nonperforming mortgage loan from the original lender, Delta Funding Corporation to

HSBC Bank; the employment history of one Scott Anderson, who assigned the underlying mortgages from MERS to HSBC, as Vice President of MERS; and, the relationship between HSBC, Ocwen Federal Bank, FSB (OCWEN), Deutsche Bank and Goldman Sachs, who all seem to share office space at 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409 (Suite 100). Mr. Anderson, in a decision I decided on December 17, 2007, *HSBC Bank, N.A. v Cherry*, 18 Misc3d 1102(A), swore in an affidavit to be HSBC's servicing agent, while in another decision, which I issued on January 30, 2008, *HSBC Bank, N.A. v Valentin*, 18 Misc3d 1123 (A), he swore in the assignment, as in the instant case, to be Vice President of MERS.

#### **Background**

Defendant JUSTINE BETTS borrowed \$212,000.00 from DELTA on July 26, 2004. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on October 4, 2004, at City Register File Number (CRFN) 2004000619029, by MERS, as nominee of DELTA for the purpose of recording the mortgage. Subsequently, on August 15, 2005, defendant BETTS borrowed another \$61,210.73 from DELTA, with this mortgage and note recorded in the Office of the City Register, New York City Department of Finance on October 4, 2004, at City Register File Number (CRFN) 2004000619030, by MERS, as nominee of DELTA for the purpose of recording the mortgage. Also, on August 15, 2005, defendant BETTS executed a consolidation, extension and modification agreement with DELTA, consolidating the two

mortgages and notes into one mortgage and note for \$272,000.00, with this recorded in the Office of the City Register, New York City Department of Finance on October 4, 2004, at City Register File Number (CRFN) 2004000619031, by MERS, as nominee of DELTA for the purpose of recording the mortgage.

MERS attempted to assign the \$272,000.00 consolidation, modification and extension agreement to HSBC, in an assignment dated November 7, 2007, and recorded in the Office of the City Register, New York City Department of Finance on November 29, 2007, at City Register File Number (CRFN) 2007000591286, by plaintiff HSBC. However, the assignment is defective, because while it refers to a debt of \$272,000.00, it lists the assignment as that of the mortgage recorded at CRFN 2005000535930, the \$61,210.73 underlying mortgage. Therefore, the August 15, 2005 consolidation, extension and modification agreement was not assigned from MERS to HSBC.

Additionally, 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 June 12, 2007-affidavit by Jessica Dybas, who states that she is "a Foreclosure Facilitator for Ocwen Federal Bank, FSB [OCWEN], servicing agent of HSBC BANK USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, the plaintiff herein." On that date, the note and mortgage were still held by MERS, as nominee of DELTA. For

reasons unknown to the Court, MERS, as nominee of DELTA, or plaintiff HSBC failed to provide any power of attorney authorizing OCWEN to go forward with the instant foreclosure action. Further, even if HSBC authorized OCWEN to be its attorney in fact, Ms. Dybas is not an officer of OCWEN. She is a "Foreclosure Facilitator," whatever that is. 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 BETTS began with the nonpayment of principal and interest due on May 1, 2006. Yet, more than eighteen months later, plaintiff HSBC was willing to take an assignment of the instant nonperforming loan. The Court wonders why HSBC would purchase a nonperforming loan, eighteen months in arrears? Is the intent of HSBC to get the nonperforming loan off DELTA's books and assigned to the noteholders of plaintiff's collateralized debt obligation?

Lastly, plaintiff HSBC must address a third matter if it renews its application for an order of reference. In the instant action, as noted above, Scott Anderson, as Vice President of MERS, assigned the instant mortgage to HSBC on November 7, 2007. Doris Chapman, the Notary Public, stated that on November 7, 2007, "personally appeared Scott Anderson, of 1661 Worthington Road, Suite 100, West Palm Beach, Florida

33409.” In *HSBC Bank, N.A. v Valentin*, at 2, I observed that Scott Anderson assigned the instant mortgage from MERS to HSBC, on May 1, 2007. Then, in *HSBC Bank, N.A. v 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. In a foreclosure action that I decided on May 11, 2007 (*Deutsche Bank Nat. Trust Company v Castellanos*, 15 Misc3d 1134[A]), Deutsche Bank assigned the mortgage to MTGLQ Investors, L.P. I noted, at 4-5, that MTGLQ Investors, L.P.:

According to Exhibit 21.1 of the November 25, 2006 Goldman

Sachs 10-K filing with the Securities and Exchange Commission . . . is a "significant subsidiary" of Goldman Sachs. . . . [T]he January 19, 2007 assignment has the same address for both the assignor Deutsche Bank and the assignee MTGLQ Investors, L.P., at 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409. The Court will not speculate about why two major financial behemoths, Deutsche Bank and Goldman Sachs share space in a West Palm Beach, Florida office suite

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, in the form of an affidavit, why Suite 100 is such a popular venue for these corporations.

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 decisions noted above, *HSBC Bank, N.A. v Valentin*, and *HSBC Bank, N.A. v Cherry* still exist. The Court needs to know Mr. Anderson's employment history and why all these banking entities are located at the ever popular Suite 100. The defective November 7, 2007 assignment gives the address of HSBC as c/o OCWEN at Suite 100.

### 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 Jessica Dybas, "a Foreclosure Facilitator for Ocwen Federal Bank, FSB, servicing agent of HSBC BANK USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, the plaintiff herein." There must be an affidavit by an officer of HSBC or a servicing agent, 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]).

Also, the instant application upon defendants' default must be denied because

plaintiff is proceeding in the instant action for an ultimate judgment of foreclosure and sale on the consolidated \$272,000.00 MERS mortgage, alleging its assignment to HSBC. However, the November 7, 2007 assignment, as detailed above, assigned the underlying \$61210.73 mortgage to HSBC, not the \$272,000.00 consolidated mortgage. Plaintiff may renew its application for an order of reference after MERS assigns to HSBC the \$272,000.00 mortgage, recorded at CRFN 2005000535931, and this future assignment is recorded in the Office of the City Register of the City of New York.

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 presents: an affidavit by either an officer of HSBC or someone with a valid power of attorney from HSBC, possessing personal knowledge of the facts; a proper assignment of the \$272,000.00 consolidated mortgage from MERS to HSBC; 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 would purchase 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 N.A., AS  
INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF

RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, for an order of reference for the premises located at 668 Decatur Street, Brooklyn, New York (Block 1506, Lot 16, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, to renew its application for an order of reference for the premises located at 668 Decatur Street, Brooklyn, New York (Block 1506, Lot 16, 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; a recorded assignment from MERS to HSBC of the \$272,000.00 mortgage recorded at CRFN 2005000535931; an affidavit from an officer of plaintiff HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation; and why plaintiff HSBC shares office space at Suite 100, 1661 Worthington

Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage  
Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs.

This constitutes the Decision and Order of the Court.

E N T E R



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

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