

<b>HSBC Bank USA v Rodriguez</b>
2016 NY Slip Op 32123(U)
July 27, 2016
Supreme Court, Queens County
Docket Number: 705660/2014
Judge: David Elliot
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**MEMORANDUM**

SUPREME COURT - QUEENS COUNTY  
I.A.S. PART 14

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HSBC BANK USA, etc.,  
Plaintiff(s),

-against-

ALEJANDRO RODRIGUEZ, etc., et al.,  
Defendant(s).

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Index No. 705660/2014

By: **ELLIOT, J.**

Date: July 27, 2016

Motion Cal. No. 72

Motion Seq. No. 1

Motion Date: July 19, 2016

Plaintiff commenced this action to foreclose a mortgage by electronically filing a copy of the summons and complaint, notice of pendency, and Certificate of Merit (CPLR 3012-b) on August 12, 2014. It appears from a review of the affidavits of service annexed to the instant motion that all defendants, including those sought to be substituted in the place of “John Doe,” were properly served with process, with the exception of defendants United States of America Acting Through the Department of Justice and United States of America Acting Through the IRS. Service upon the United States “shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by

registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia” (28 USC § 2410). Plaintiff only presents affidavits of service demonstrating that only delivery was effectuated, but not mailing. Though an affidavit of service is provided purportedly demonstrating that a mailing was made with respect to defendant United States of America Acting Through the Department of Justice (annexed as part of Exhibit 2), the affidavit is not signed by the process server.

Defendant Ana Figueroa (Figueroa), co-mortgagor, served an answer together with counterclaims by her counsel. A review of e-filing records indicates that, though defendant Alejandro Rodriguez a/k/a Alejandro Rodrigues (Rodriguez), the obligor and co-mortgagor herein did not serve an answer to the complaint, he appeared by counsel by virtue of a Consent to Change Attorney e-filed on March 17, 2016. No other defendants answered or appeared herein.

Plaintiff now moves for an order, inter alia, granting it summary judgment against Figueroa, dismissing her answer, including counterclaims and affirmative defenses, and appointing a referee to compute. Though served with the instant motion, no defendant has opposed it.<sup>1</sup>

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering

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1. At the time of service of the instant motion, defendants Rodriguez and Figueroa were represented by Cabanillas & Associates, P.C. A Consent to Change Attorney was e-filed on July 7, 2016, whereby said defendants consented to proceed as self-represented litigants.

sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114AD3d 627 [2014], *affd* 25 NY3d 355 [2015]; *see Homecomings Fin., LLC v Guldi*, 108AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85AD3d 95 [2011]). In addition, the plaintiff must make a prima facie showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC*, 85 AD3d at 107).

Here, plaintiff has met its prima facie burden of establishing its entitlement to foreclose the mortgage by submitting, inter alia, the note, mortgage, written assignment, and affidavit of Jessica Suzanne Phillips, Vice President Loan Documentation for Wells Fargo Bank, N.A., the servicer and custodian of the subject mortgage loan, wherein which Rodriguez’s default was detailed. Moreover, plaintiff established its standing to commence this action with more than adequate evidence: (1) the endorsed note was annexed to the

complaint; (2) the written assignment, also annexed to the complaint, dated November 19, 2010 (prior to commencement of the action), assigns both the mortgage and the note to plaintiff herein; (3) plaintiff's counsel affirms that the firm received the original collateral file for the subject mortgage loan – which contained the original note – on June 21, 2013, that the firm remained in physical possession of the original note upon commencement of the action, and that it returned the file to Wells Fargo as servicer on August 13, 2014; (4) production of the Pooling and Servicing Agreement (PSA), demonstrating that the note and mortgage were assigned to plaintiff on February 27, 2007, pursuant to the terms of said PSA, and statements by Ms. Phillips that the trust has not further assigned or sold the mortgage loan.

With respect to Figueroa's affirmative defense regarding RPAPL § 1304, such a defense is not available to her since she is not a borrower. In any event, the affidavit of Ms. Phillips is sufficient to demonstrate compliance with the statute.

With respect to that branch of the motion by plaintiff to strike Figueroa's remaining affirmative defenses raised in her answer, plaintiff bears the burden of demonstrating that the affirmative defenses are “without merit as a matter of law” (*Greco v Christoffersen*, 70AD3d 769 [2010], quoting *Vita v New York Waste Servs., LLC*, 34AD3d 559 [2006]).

As to the first and second affirmative defenses regarding standing, plaintiff has established its entitlement to dismissal of these defenses, as discussed *supra*.

As to the third affirmative defense and second counterclaim alleging fraud with respect to obtaining the loan, same is without merit inasmuch as Figueroa took no loan.

As to the first defense and first counterclaim alleging a violation of General Business Law § 349, same is without merit as Figueroa has not adequately pleaded the elements of same. In any event, the claim is time-barred (CPLR 214 [2]).

As to the second defense and seventh counterclaim alleging a violation of the Fair Housing Act, the claim is time-barred (42 USC § 3613 [a] [1] [A]); in any event, Figueroa has not alleged that she was discriminated against.

As to the third defense of unconscionability, Figueroa was not a party to the note.

As to the fourth defense regarding a violation of RPAPL § 1304, plaintiff has established its entitlement to dismissal of this defense, as discussed *supra*.

As to the fifth and sixth defenses and eighth, ninth, and tenth counterclaims seeking damages for breach of contract for, inter alia, failing to enter into a loan modification, Figueroa is not the borrower herein.

As to the seventh defense and fourth and eleventh counterclaims which allege, inter alia, a violation of TILA, Figueroa does not reference any of the provisions of the statute alleged to have been violated; in any event, plaintiff established that she received and signed the TILA disclosure statement. Further, the claim is time-barred (15 USC § 1635 [f]).

As to the eighth defense alleging a violation of Administrative Order 431/11,

plaintiff was not required to comply with said order inasmuch as it already demonstrated compliance with CPLR 3012-b. To that end, the ninth defense alleging a violation of CPLR 3012-b is also without merit.

As to the tenth defense and twelfth counterclaim alleging a violation of RESPA, a disclosure violation of RESPA does not constitute a valid defense to a mortgage foreclosure action (*see Fremont Inv. and Loan v Haley*, 23 Misc 3d 1138[A] [Sup Ct, Queens County 2009]). In any event, the claim is time-barred (12 USC § 2614).

As to the eleventh defense alleging failure to mitigate damages, same is not a defense to a foreclosure action (*see HSBC Bank USA v Picarelli*, 23 Misc 3d 1135[A] [Sup Ct, Queens County 2009]).

As to the twelfth defense alleging unclean hands, Figueroa has failed to show proof of any inequitable conduct committed by plaintiff towards her which would warrant application of this doctrine.

As to the third counterclaim alleging a violation of the ECOA, Figueroa has not demonstrated that plaintiff engaged in prohibited discrimination.

As to the fifth counterclaim alleging a violation of Banking Law § 598, Figueroa has not established that plaintiff is a mortgage broker.

As to the sixth counterclaim alleging a violation of the FDCPA, same is without merit as plaintiff is not a debt collector.

Though served with the motion, none of the defendants, including the

answering defendant, have opposed it. Thus, no triable issue of fact has been raised (*see Nationstar Mtge., LLC v Silveri*, 126 AD3d 864 [2015]).

That branch of the motion deeming non-appearing and non-answering defendants in default is granted, with the exception of the United States of America defendants for reasons set forth, *supra*. That branch of the motion for an amendment of the caption is granted, as set forth *infra*.

Accordingly, the motion is granted without opposition to the extent that: plaintiff is awarded summary judgment against Figueroa. Her answer, affirmative defenses, and counterclaims are stricken and deemed a Notice of Appearance. Plaintiff is granted leave to submit an order of reference. Plaintiff is granted judgment by default against the non-appearing/non-answering defendants with the exception of the United States of America defendants. Plaintiff, if it be so advised, may submit, on the order to be submitted hereon, proof of proper service upon said defendants in order to obtain default judgment against them. The caption is amended by substituting “Anabel Figueroa” and “Ms. Rodriguez” as “John Doe” herein.

Submit Order on notice to defendants Alejandro Rodriguez and Ana Figueroa as now self-represented litigants.

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J.S.C.