

HSBC Bank Usa v Hershko

2008 NY Slip Op 31024(U)

April 2, 2008

Supreme Court, Nassau County

Docket Number: 0882-06/

Judge: Edward G. McCabe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present: **HON. EDWARD G. McCABE**

Justice

TRIAL/IAS PART 1
NASSAU COUNTY

HSBC BANK USA, as Trustee for Nomura Asset
Acceptance Corporation Mortgage Pass-Through
Certificates, Series 2005-AR4

INDEX NO.: 020882/06

MOTION SEQ. NO.: 1

Plaintiff,

-against-

ESTHER HERSHKO, NADAV PROPERTIES, LLC,
APPROVED FUNDING CORP., SLOMINS, INC.,
NEW YORK STATE and "JOHN DOE"

Defendants.

X

The following papers were read on this application:

Order to Show Cause.....1
Affirmation in Opposition.....2

Motion by the attorneys for the defendants for an order vacating the
Judgment of Foreclosure and Order of Reference directing a sale of the premises
known as 204 Mott Avenue, Lawrence, N.Y. 11449 on the grounds that the
subject mortgage was the subject of a forbearance agreement that was not
appropriately filed with the Court, is denied.

The parties entered into a Forbearance Agreement dated September 27, 2007. A Referee's Report of Sale dated January 8, 2008, pursuant to a Judgment of Foreclosure and Sale entered in the above-captioned action on July 16, 2007, has been submitted.

The sole basis for the relief requested herein is defendants' reliance on *Deutsche Bank National Trust Company v Addington Williams, et al*, 17 Misc. 3d 320 (Sup. Court Kings County, J. Kramer, August 8, 2007).

In the context of the sub-prime mortgage crisis and predatory lending practices, the Court in *Deutsche Bank National Trust Company, supra*, stated that "every forbearance agreement must be filed with the Clerk of the Court and if a violation of the forbearance agreement occurs and the foreclosure proceeding is therefore resumed, where the mortgagor has made payments under the agreement, then plaintiff must petition the Court to appoint a referee to recalculate the amount due under the mortgage, taking those payments into account." In *Deutsche Bank National Trust Company, supra*, the Court found fault with the plaintiff bank for not filing the forbearance agreement with the Clerk of the Court, citing CPLR 2104.

CPLR §2104 regarding Stipulations states that:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing, subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk. (emphasis added).

The forbearance agreement in the within action was never filed with the Clerk of the Court. This court does not agree that a forbearance agreement in a mortgage foreclosure proceeding is in the nature of a settlement that must be recorded pursuant to CPLR 2104. A forbearance agreement does not terminate a foreclosure action without the execution of an express stipulation of discontinuance or the actual entry of judgment setting forth the terms of the settlement. See, 2 Bergman on New York Mortgage Foreclosures § 24.09 (Bruce J. Bergman, ed. Mathew Bender Co., Inc., 2005 (1990) citing *Teitelbaum Holdings v Gold*, 48 NY2d 51. Nevertheless, assuming *arguendo* that the forbearance agreement is in the nature of a settlement, CPLR 2104 provides that the “stipulation shall be filed by the defendant with the county clerk.” The Court will not declare the within mortgage foreclosure proceedings to be a “nullity” as

advocated by the attorneys for the defendants, when it was the defendants who failed to meet the technical filing requirements regarding a stipulation as set forth in CPLR 2104. In interpreting statutes we are guided by the well-settled principle of statutory construction that courts normally accord statutes their plain meaning.

Williams v Williams, 23 NY2d 592, 599; and *Matter of Rouss*, 221 NY 81, 91.

A forbearance agreement gives the borrower defendants the opportunity to reinstate a mortgage over a period of time. Rather than use the forbearance agreement as a shield to protect their house, the defendants are using the forbearance agreement as a sword and a dilatory tactic to delay the payment of a lawful obligation. The defendants do not deny the default. There is no allegation that the forbearance agreement was unconscionable, subject to defenses of fraud, duress or lack of consideration. There is no claim that the underlying security document is a sub-prime mortgage or that the defendants are the victims of predatory lending practices. There are no allegations that the plaintiff failed to credit the defendants' payments under the forbearance agreement. In the event of a default of the forbearance agreement, the plaintiff was authorized to proceed with the foreclosure. For the reasons set forth herein, this Court respectfully disagrees with the determination in *Deutsche Bank National Trust Company v Addington Williams, et al., supra*.

HSBC v HERSKO, et al. (INDEX NO. 020882/06)

5.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Defendants motion to vacate the Judgment of Foreclosure and Order of Reference, is denied; and it is further

ORDERED, the stay in the order to show cause dated January 3, 2008, is vacated.

This constitutes the decision and order of the Court.

ENTER:

Dated: April 2, 2008
Mineola, NY



HON. EDWARD G. McCABE
J.S.C.

ENTERED
APR 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

FAX/MAIL TO:

Robert S. Leni, Esq.
Shapiro & Dicaro, LLP
c/o Nationwide Court Services, Inc.
4250 Veterans Memorial Hwy.
Suite 4000, West Wing
Holbrook, NY 111741
Tele: (631) 981-4400
Fax: (631) 981-7087

Zisholtz & Zisholtz, LLP
170 Old Country Road
Suite 300
Mineola, NY 11501
Tele: (516) 741-2200
Tax: (516) 746-1024
