

**U.S. Bank Natl. Assn. v Mar**

2008 NY Slip Op 32174(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0603474/2004

Judge: Jacqueline W. Silbermann

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JACQUELINE W. SILBERMANN

PRESENT: \_\_\_\_\_

PART 506

Index Number : 603474/2004

US BANK NATIONAL ASSOCIATION

VS.

MAR, RAYMOND

SEQUENCE NUMBER : 008

VACATE STAY/ORDER/JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1, 2  
3, 4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided  
in accordance with the  
accompanying decision*

**FILED**

AUG 04 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/29/08

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 50

-----x  
U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE IN SUCCESSOR IN INTEREST TO  
BANK ONE AS TRUSTEE FOR CREDIT SUISSE  
FIRST BOSTON MBS 2002-19,

Plaintiff,

Index No.: 603474/04

-against-

DECISION AND ORDER

RAYMOND MAR, MARILYN HARRIS A/K/A  
MARILYN SELLERS, NEW YORK CITY  
DEPARTMENT OF HOUSING DEVELOPMENT  
AND PRESERVATION, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY PARKING VIOLATIONS BUREAU,  
NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU, BENNIE CHILDS, ISSA DIBATE,  
ROBERTA RODICK,

Defendants,

and

WASHINGTON MUTUAL BANK,

Intervenor/Defendant.

-----x  
SILBERMANN, J.

**FILED**  
AUG 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

On October 31, 2006, plaintiff obtained a Judgment of Foreclosure and Sale from this court in an action to foreclose a mortgage encumbering the real property and house located at 487 Manhattan Avenue, New York, New York 10027. That judgement was stayed pending an investigation of fraud with respect to the refinancing of the subject property by defendant Harris, who has

lived in the house for more than 20 years. It is noted that one of the principals involved in the alleged fraud against Harris has been indicted for his felonious conduct in connection with this transaction, and is presently incarcerated.

The underlying facts, which have been extensively discussed elsewhere, involve Harris attempting to avoid foreclosure by entering into an arrangement with an employee of Washington Mutual Bank (WaMu). Pursuant to this arrangement, Harris was to transfer her house to a third person who would later reconvey the property back to her. Harris had been told that this was the only way in which the financial institution would be willing to refinance her loan. At the time of these transactions, WaMu held a mortgage of approximately \$485,000 on the property, which had a fair market value of \$1,200,000. The result of this scheme had Harris transfer her property and the funds presumably misappropriated by the other parties. It is noted that Harris was the alleged victim of this scheme and is in no way implicated as a wrongdoer.

WaMu has commenced a separate action in Supreme Court, New York County, seeking a judgment directing the Office of the City Registrar to accept a copy of the deed to the property for recording. This action is still on-going.

WaMu also instituted an action in Supreme Court, Westchester County, to recover a check allegedly improperly issued with

respect to the refinancing of the mortgage on the subject property. This action is also currently pending.

In early July, 2008, Harris filed a Third-Party Complaint in this action against the persons who allegedly defrauded her with respect to the refinancing and reconveying of the subject property. This matter is also still pending.

The stays issued with respect to the instant case terminated on July 18, 2007, and no one sought to have them extended. Pursuant to an order of this court, the foreclosure sale was to take place on November 7, 2007, but for various reasons that sale did not occur.

On January 29, 2008, plaintiff received a notice that the Judgment of Foreclosure and Sale could not be filed or entered because there was no current Affidavit of Non-military Status on file for the residents of the property, defendants Harris and Raymond Mar. Plaintiff filed updated Affidavits of Non-military Status for Marilyn Harris and Raymond Mar, and now seeks to vacate the stay of entry of the Judgment of Foreclosure and Sale.

Defendant Harris opposes this motion, contending that her rights would be irreparably damaged if the foreclosure sale were to go through before there was a resolution on the other pending court matters indicated above, which could provide her with the funds to forestall foreclosure.

Intervenor/Defendant WaMu opposes this motion on the grounds

that plaintiff waited too long to seek to enter the Judgment of Foreclosure and Sale, that WaMu has been precluded from obtaining necessary discovery from plaintiff because the Judgment of Foreclosure and Sale was issued prior to WaMu's intervention, and that the Affidavit of Non-military Status for Marilyn Harris is ineffective because, as indicated in the caption, she has an alias as Marilyn Sellers, and no Affidavit of Non-military Status for Marilyn Sellers has been filed.

#### **DISCUSSION**

CPLR § 2201 allows a New York court to stay the proceedings "in a proper case, upon such terms as may be just." Unless a stay would violate the law, New York courts have discretion to grant a stay in cases where there is an pending action elsewhere. See *Britt v. Int'l Bus Services, Inc.*, 255 AD2d 143, 144 (1<sup>st</sup> Dept 1998). Typically, such stays are granted when they will avoid multiplicity of litigation and the waste of judicial resources. *Trieber v Hopson*, 27 AD2d 151, 152 (3d Dept 1967).

In the instant matter, there are three pending actions, the outcomes of which would have a direct and immediate impact on the foreclosure, and for this reason alone the court would be inclined to deny plaintiff's motion. However, there are other factors that the court must weigh in reaching its ultimate determination.

If plaintiff's motion were to be granted, defendant Harris,

the victim of an alleged fraud, would lose her home and equity, a result that would go "against enormous public interests ... [internal quotation and citation omitted]." *Seitzman v Hudson River Associates*, 126 AD2d 211, 214 (1<sup>st</sup> Dept 1987). These "public interests" have recently been codified in the Home Equity Theft Prevention Act.

The Home Equity Theft Prevention Act (the Act), New York Real Property Law (RPL) § 265-a, became effective on February 1, 2007, with the intention of preventing abusive and fraudulent practices by purchasers of distressed properties who falsely promise to save properties and to reconvey them to the homeowners at a future date. The Act, which is intended to save homeowners from losing their homes, applies to one-to-four family dwellings which are "in foreclosure," also provides for a right of rescission extending up to two years after a sale. Annotations, RPL § 265-a.

If the court were to grant plaintiff's motion at this juncture, Harris would lose her home as a result of an allegedly fraudulent scheme. Further, from the facts presented in the underlying actions, it appears that Harris and WaMu may be successful in their litigations, which would allow Harris to avoid foreclosure entirely. Under these circumstances, it would be improvident of the court to allow entry of the Judgment of Foreclosure and Sale at this time.

Additionally, pursuant to the Federal Soldiers' and Sailors' Civil Relief Act of 1940, 50 USCA § 520, all court proceedings must evidence that a party who may be dispossessed is not engaged in active military duty, or is a dependent of a person engaged in active military duty. In the instant case, plaintiff has failed to provide an Affidavit of Non-military Status for Marilyn Sellers, the alias of Marilyn Harris.

The court does not find much merit in WaMu's argument that plaintiff waited too long to enter judgment, since various stays and court proceedings have intervened. CPLR 2001.

Based on the foregoing, in order to avoid the multiplicity of litigation, the waste of precious judicial resources, and the appearance of going against current public policy, the court stays these proceedings pending the outcomes of the three related actions.

**CONCLUSION**

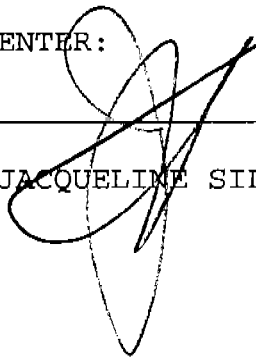
It is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that plaintiff is stayed from entering the judgment of foreclosure until the final determination of the third-party complaint in the instant action, the final determination of the actions filed by Intervenor/Defendant Washington Mutual Bank in Supreme Court, New York County, Index Number 100075/08, and in Supreme Court, Westchester County, against Citibank.

Dated: 7/29/08

ENTER:

  
\_\_\_\_\_  
JACQUELINE SILBERMANN, J.S.C.

**FILED**  
AUG 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK