

HSBC Bank USA, N.A. v Anderson

2009 NY Slip Op 32526(U)

September 25, 2009

Supreme Court, New York County

Docket Number: 110214/08

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 110214/2008
HSBC BANK USA, N.A.
VS.
ANDERSON, LYDIA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 110214/08
MOTION DATE 5/20/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 63

The following papers, numbered 1 to 13 were read on this motion for summary judgment, and cross motion to file amended answer

Notice of Motion— Affirmation — Exhibits A-E
Notice of Cross Motion—Certificate of Merit—Affidavits — Exhibits A-E; Affirmation in Opposition—Exhibits A-E
Replying Affirmation
Replying Affirmation—Exhibits F-G

PAPERS NUMBERED	
_____	<u>1-4</u>
_____	<u>5-8, 9-11</u>
_____	<u>12</u>
_____	<u>13</u>

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN
J.S.C.

Dated: 9/25/09
New York, New York

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 7

-----x

HSBC BANK USA, N.A., as Indenture
Trustee for the registered Noteholders
of Renaissance Home Equity Loan Trust
2006-2,

Plaintiff,

Index No.: 110214/08

-against-

DECISION and ORDER

LYDIA ANDERSON, Individually and as
Executrix of the Estate of Cecelia V.
McDowell; Any unknown heirs, devisees,
distributees or successors in interest
of the late Cecelia V. McDowell, if they
be living and/or if they be dead, their
spouses, heirs, devisees, distributees
and successors in interest, all of whom
and whose names and places of residence
are unknown to Plaintiff; New York State,
and JOHN DOE # 1 through JOHN DOE # 10,
the last ten names being fictitious and
unknown to the Plaintiff, the persons
or parties intended being the person or
parties, if any, having or claiming an
interest in or lien upon the mortgaged
premises described in the complaint,

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Defendants.

-----x

HON. MICHAEL D. STALLMAN, J.:

In this foreclosure action, plaintiff HSBC Bank USA, N.A.
(HSBC) moves, pursuant to CPLR 3212, for summary judgment as to
liability; moves to amend the caption; and moves for appointment of
a referee to compute. By stipulation dated March 5, 2009, Nicola
Nicolas (Nicolas) was substituted as defendant in the lawsuit in

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place of Lydia Anderson (Anderson).

Nicolas, daughter of the deceased mortgagor Cecilia V. McDowell (hereinafter, the deceased), was appointed as administrator of the deceased's estate, and the Letters Testamentary initially granted to defendant Anderson were revoked on February 10, 2009. Anderson originally answered the instant complaint on September 11, 2008, with what was basically a general denial, and asserted a defense of lack of personal jurisdiction. Nicolas now cross-moves to file an amended answer, pursuant to CPLR 3025 (b).

BACKGROUND

HSBC is the indenture trustee for the registered noteholders of Renaissance Home Equity Loan Trust 2006-2, having been assigned the underlying note and mortgage on March 21, 2008. On or about April 28, 2006, the deceased, an elderly woman, executed the underlying consolidated note and mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Delta Funding Corporation (Delta), in the principal sum of \$650,000. This was the seventh time in five years that the deceased had executed a note and mortgage with Delta for the same premises at 530 West 142 Street in Manhattan, in ever-increasing principal sums. At the time of the execution of the note and mortgage in question, the deceased's monthly income consisted of a pension of \$2,188.59, and social security payments of \$1,054.00, for a monthly total of

\$3,242.59. The monthly payments due on the subject note and mortgage were \$4,125.56. The last payment on the note and mortgage was made by the deceased on November 1, 2007.

The subject note and mortgage increased the principal owed on the premises by \$116,364.23. Of this sum, the deceased received \$62,406.62, and the remaining \$47,395.68 went to pay fees and charges. Allegedly, the deceased needed the capital to pay for medical treatment.

Nicolas seeks to amend the answer to include two affirmative defenses and counterclaims: the first, for alleged violations of the federal Truth in Lending Act (TILA), as amended by the Home Ownership and Equity Protection Act (HOEPA), seeking declaratory and injunctive relief, as well as actual damages; and the second, for alleged fraud and misrepresentation.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49

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NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

As the court recently said in *HSBC Bank USA, National Association v Antrobus* (20 Misc 3d 1127[A]*2, 2008 NY Slip Op 51639[U] [Sup Ct, Kings County 2008]):

“‘The show we’re watching’ in the instant action features a possible incestuous relationship between plaintiff, HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURED TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4 (HSBC), Ocwen Loan Servicing (OCWEN), Delta Funding Corporation (DELTA), and Mortgage Electronic Registration Systems, Inc (MERS), Add to this mix the alleged \$[650,000.00] ‘balance sheet implosion’ on April 1, 2007, the date defendants are alleged to have defaulted on their mortgage loan payments.”

The court notes that these same plaintiffs, and entities acting in concert with them, have appeared in numerous foreclosure proceedings in this city,¹ and while the court does not believe that the earlier proceedings are determinative of a litigant’s candor, one cannot escape the fact that some of the same problems the other courts have found with HSBC’s moving papers appear in the instant action as well.

The affidavit in support of HSBC’s motion is provided by

¹See *In re Crawford*, 388 BR 506 (SD NY 2008) (instant plaintiffs found to have foreclosed on a property in violation of a bankruptcy court order); *HSBC Bank USA, N.A. v Valentin*, 18 Misc 3d 1123(A), 2008 NY Slip Op 50164(U) (Sup Ct, Kings County 2008), and later proceedings at 21 Misc 3d 1124(A), 2008 NY Slip Op 52167(U) (summary judgment denied because HSBC failed to follow court’s order).

Jessica Dybas, the Default Servicing Liaison of Ocwen Loan Servicing, LLC (Ocwen), allegedly the servicing agent for HSBC. However, the papers do not provide an affidavit by an officer of HSBC, or someone with a demonstrable and valid power of attorney from HSBC. This was one of the same problems noted by the *Antrobus* court cited above, said problem mandating a denial of that motion for summary judgment.

In the instant case, the papers supporting the motion include a Uniform Residential Loan Application, dated November 31, 2006, from someone not a party to this action at all. Further, the Rider to the mortgage note, while apparantly signed by the deceased, is undated, and questions have been presented regarding the authenticity of some of the deceased's purported signatures, which do not appear to match on all of the documents.

In addition to the foregoing, the zip code for the subject premises varies on several of the documents, either listed as 10036 or 10042, and the alleged signature of Scott Anderson, also named in the previously mentioned *Antrobus* proceeding, is illegible on the Assignment of Mortgage.

At this stage in the proceedings, before any discovery has been held, it would be improvident of the court to grant summary judgment in light of the questions presented by the motion papers. This is especially true in the current economic climate, in which the courts must be ever vigilant to protect the rights of both

consumers and corporate lenders alike.

Therefore, based on the foregoing, the court denies HSBC's motion for summary judgment.

HSBC opposes Nicolas' cross motion for leave to amend the verified answer on four grounds: (1) the motion papers failed to include a signed and verified proposed answer; (2) the counterclaim for violations of TILA are time-barred; (3) the relief requested for the alleged violations of TILA are not permitted by the statute; and (4) the counterclaim alleging fraud and misrepresentation is based on statements of the deceased, which constitute hearsay.

"Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay [quotation marks and citations omitted]." *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-366 (1st Dept 2007). When "considering the proposed amendment, the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment [internal quotation marks and citation omitted]."

Id. at 366.

In the instant matter, HSBC argues that the initial cross motion failed to include a signed or verified amended answer, and, therefore, the cross motion should be denied. However, in the reply, Nicolas points out that the initial cross motion contained

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a conformed copy, and the original was attached to this reply. The court has the authority and discretion to accept corrections of technical errors in reply papers (see *Baron v Pfizer, Inc.*, 42 AD3d 627 [3d Dept 2007]), especially since unverified pleadings are capable of being corrected, absent any prejudice to the opposing party; no such prejudice has been argued or demonstrated in the case at bar. See generally *Rose v Smith*, 220 AD2d 922 (3d Dept 1997); *City of New York v Brown*, 119 Misc 2d 1054 (Civ Ct, Kings County 1982); CPLR 3021, 3022, 3026. Therefore, the court finds that the proposed answer submitted by Nicolas with her cross motion is acceptable.

HSBC next argues that the cause of action asserting that it violated TILA is time-barred under that statute, which imposes a one-year statute of limitations from the date of the occurrence of the alleged violation. There is no question that the date of the occurrence in question was more than one year prior to the institution of the present action. However, even though a party may be barred by the passage of time from making a claim as an affirmative assertion, an allegedly injured consumer may, under certain circumstances, assert that claim as a defense by way of recoupment. Pursuant to 15 USC § 1640 (e), "counterclaims to recover damages under TILA are timely to the extent that such damages might offset any damages award or deficiency judgment that might be made in favor of the plaintiff" *Delta Funding Corp.*

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v *Murdaugh*, 6 AD3d 571, 571 (2d Dept 2004). Consequently, such counterclaim may be maintained by Nicolas.

Also, pursuant to New York law,

"[u]nder CPLR 203 (d), claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced. The provisions of CPLR 203 (d) allow a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief [internal quotation marks and citations omitted]."

Carlson v Zimmerman, 2009 WL 1636562*2, NY Slip Op 4849, 2009 NY App Div LEXIS 4701*3-4 (2d Dept 2009).

Additionally, with respect to the statute of limitations argument, Nicolas maintains that the pleadings also indicate a cause of action based on violations of the New York General Business Law (GBL) § 349, which has a three-year statute of limitations. *Gaidon v Guardian Life Ins. of America*, 96 NY2d 201 (2001). However, the amended answer, as it stands, does not specify such a violation, and this argument is unavailing at this time.

The thrust of HSBC's substantive argument with respect to the first proposed counterclaim goes to the relief requested, both in terms of damages and rescission of the loan itself, not to the basis of the cause of action. However, at this point, the court does not need to, and should not, determine what, if any, relief a

party may receive at the close of the litigation. As long as a litigant asserts a viable cause of action, the cause of action cannot be dismissed by the court.

HSBC also states that Nicolas fails to specify any acts that would constitute a violation of TILA. In this, HSBC is incorrect.

The proposed amended answer alleges that the amount of fees charged to the deceased amounted to 41% of her realized proceeds, and that TILA and HOEPA mandate that such fees not exceed 8% (Proposed Amended Answer, ¶ 25). Further, the proposed amended answer seeks discovery to determine the extent to which the deceased's note and mortgage has been bifurcated, information which is exclusively in the hands of HSBC. Therefore, the court finds HSBC's argument on this point to be without merit.

HSBC's opposition to Nicolas's second proposed counterclaim, alleging fraud and misrepresentation, asserts that those claims are based on hearsay statements of the deceased, and, if allowed to be interposed, HSBC would be unable to cross-examine the deceased at trial. However, matter which might be excludable at a trial pursuant to the Dead Man's Statute may nevertheless be considered in determining whether a triable issue of fact exists to defeat a motion for summary judgment (*Bourgeois v Celentano*, 10 AD2d 824 [1st Dept 1960]; see also *Phillips v Kantor & Co.*, 31 NY2d 307 [1972]), so long as it is not the only evidence proffered. *Miller v Lu-Whitney*, 61 AD3d 1043, 1045 (3d Dept 2009); CPLR 4519. The

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documents presented with HSBC's motion, along with the statements appearing in the proposed amended answer and the opposition, give rise to questions as to HSBC's actions, and those of its predecessors-in-interest, which are sufficient, at this pre-discovery stage in the proceedings, to withstand such objections. Also, as stated above, at this time, the court only needs to determine whether the causes of action appearing in the proposed amended answer are patently insufficient to state a cause of action, not whether they would ultimately be successful. *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, *supra*.

Based on the documents appearing in the papers, along with the proposed amended answer, the court concludes that Nicolas has sufficiently stated viable counterclaims so as to permit her to serve and file the proposed amended answer.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that Nicola Nicolas, as administrator of the estate of Cecelia V. McDowell, deceased, be substituted as defendant in the above-entitled action in the place and stead of the defendant Lydia Anderson, individually and as executrix, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of Nicola

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Nicolas, as administrator of the estate of Cecelia V. McDowell, deceased, as defendant in the place and stead of Lydia Anderson, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that plaintiff's motion is in all other respects denied; and it is further.

ORDERED that the defendant's cross motion for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof.

Dated: September 29, 2009
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.

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