

**Wells Fargo Bank, N.A. v Burchetta**

2010 NY Slip Op 31462(U)

May 27, 2010

Sup Ct, NY County

Docket Number: 10731/2009

Judge: Lucy Billings

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671/10

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

PRESENT: BILLINGS  
Justice

PART 46

WELLS FARGO BANK, N.A.

INDEX NO. 107317/09

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

- v -

JAMES BURCHETTA

MOTION SEQ. NO. 02

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

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits	<u>2-3</u>
Replying Affidavits	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, ~~it is ordered that this motion~~ the court grants defendant's motion to consolidate this action with an action in Suffolk County Supreme Court and transfers this action there for that purpose, pursuant to the accompanying decision. C.P.L.R. §§ 511(d), 602(a).

**FILED**  
JUN 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/27/10

Lucy Billings  
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 STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

WELLS FARGO BANK, N.A.,

Index No. 10731/2009

Plaintiff

- against -

DECISION AND ORDER

JAMES BURCHETTA,

Defendant

-----x

LUCY BILLINGS, J.S.C.:

The court grants defendant's motion to consolidate this action with a mortgage foreclosure action in the Suffolk County Supreme Court, HSBC Bank, USA, National Association v. Burchetta, Index No. 43796/2008. In this action, plaintiff Wells Fargo Bank, N.A., seeks a monetary judgment, because defendant has not repaid a home equity line of credit, secured by a second mortgage on defendant's premises at 65 Montauk Highway, Amagansett, in Suffolk County. In the previously commenced Suffolk County action, the plaintiff HSBC Bank, USA, National Association, seeks to foreclose a first mortgage on the same premises and seeks a monetary judgment for any balance owed on the underlying promissory note, because the same defendant Burchetta has not repaid the note secured by the mortgage. See Teitelbaum v. PTR Co., 6 A.D.3d 254, 255 (1st Dep't 2004). Although HSBC Bank sues as the trustee for Wells Fargo Asset Securities Corporation, Wells Fargo Bank is also a defendant because it holds the other mortgage on the premises that secures the loan involved in this

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action. See Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 338-39 (1st Dep't 2006); Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332, 335 (1st Dep't 2005); Firequench, Inc. v. Kaplan, 256 A.D.2d 213 (1st Dep't 1998).

Burchetta interposes the same defense of accord and satisfaction to both actions, which relies on the following same evidence. See Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d at 339-40; Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d at 335; Teitelbaum v. PTR Co., 6 A.D.3d at 255; Firequench, Inc. v. Kaplan, 256 A.D.2d 213. Wells Fargo Bank, from March 2009 through February 2010, has offered to modify both loans and both mortgages on the same property securing the loans, by extinguishing the home equity line of credit and hence its security, extending the promissory note, and modifying the first mortgage, which he has accepted. In this action, he also contests Wells Fargo Bank's ownership of the mortgage and underlying loan, which if shown would affect the Suffolk County action in which Wells Fargo Bank is a party based on such ownership.

On the other hand, if plaintiff recovers in this action and must resort to the security for plaintiff's recovery, the relief here will conflict with the relief sought in the action for foreclosure on the first mortgage. Likewise, if the plaintiff recovers there, the relief there will conflict with the relief sought here. See Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d at 340; Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d

\* 4]  
at 335; Matter of Progressive Ins. Co., 10 A.D.3d 518, 519 (1st Dep't 2004); Morell v. Basa, 300 A.D.2d 134, 135 (1st Dep't 2002).

Plaintiff has not met its burden to show that consolidation in Suffolk County of the two actions will delay the foreclosure action there or otherwise prejudice plaintiff's rights. Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d at 339; Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d at 334; Matter of Progressive Ins. Co., 10 A.D.3d at 519; Firequench, Inc. v. Kaplan, 256 A.D.2d 213. See Bernstein v. Silverman, 228 A.D.2d 325 (1st Dep't 1996). Consolidation thus will promote judicial economy and avoid conflicting decisions. C.P.L.R. § 602(a); Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d at 339-40; Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d at 334-35; Matter of Progressive Ins. Co., 10 A.D.3d at 519; Teitelbaum v. PTR Co., 6 A.D.3d at 255. The court grants that relief, however, subject to the Suffolk County Supreme Court's subsequent determination that, upon proceeding to a jury trial, the original two actions be tried jointly, rather than consolidated, to avoid jury confusion by Wells Fargo Bank's status as both plaintiff and defendant. Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d at 335.

Upon defendant's delivery of this order with notice of entry to the Clerk of New York County, the Clerk shall deliver the file and certified copies of any minutes and entries in this action to the Clerk of Suffolk County. C.P.L.R. § 511(d). The court will

mail this decision and order to the parties or their attorneys in each action who appeared for this motion.

DATED: May 27, 2010

*Lucy Billings*  
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LUCY BILLINGS, J.S.C.  
**LUCY BILLINGS**  
J.S.C.

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