

HSBC Bank USA, N.A. v Culvert

2010 NY Slip Op 31544(U)

June 14, 2010

Supreme Court, New York County

Docket Number: 117640/2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 117640/2009
 HSBC BANK USA, N.A.
 VS.
 CULVERT, THERRESA
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for

(as before)

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
 JUN 21 2010
 COUNTY CLERK'S OFFICE
 NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
 THE ACCOMPANYING MEMORANDUM DECISION**

*and sep order appointing
 referee to compute*

JUN 14 2010

Dated: _____

JJG
HON. JUDITH J. GISCHE 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):

6-21-10

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
HSBC Bank USA, National Assn as Trustee for
SG Mortgage Securities Trust 2006-OPT2
Asset Backed Certificates, Series 2006-OPT2

Plaintiff (s),

-against-

Theresa Culvert; "John Doe # 1-5" and
"Jane Does # 1-5," et al.,
Defendant (s).

DECISION/ ORDER
Index No.: 117640-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (3212) w/RAG affirm, TAH affid, exhs, AOS 1

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action to foreclosure on a mortgage secured by residential real property owned by the defendant, Theresa Culvert ("Culvert"). Culvert, who is self represented, has answered the complaint. Presently before the court is plaintiff's ("the bank") motion for summary judgment and order of reference. The bank also seeks to have the caption amended so as to reflect the names of those individuals who are, apparentlySince issue has been joined, summary judgment relief is available (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]).

Although due proof of service of this motion has been filed and the motion has

been submitted to the court without opposition, the bank must still 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 (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). However, since the defendants have not come forward with any affidavits in opposition, the court accepts the facts, as alleged by the plaintiff in its complaint and supporting sworn affidavit. The following is alleged:

The bank is the owner and holder of the note and mortgage which are the subject of this foreclosure action. Culvert is the obligor on the note and the owner of the real property located at 33 Bradhurst Avenue, New York, New York ("property"), securing the mortgage. The mortgage is a first mortgage, originally in the amount of \$843,750 recorded December 9, 2005 [2005000682354]. Culvert took out a second mortgage for \$88,039.06 recorded July 27, 2006 [2006000426802]. The two mortgages were consolidated and recorded as a single instrument [2006000467942] to form a combined single lien of \$925,000 effective January 1, 2009.

The bank has provided copies of the note and mortgage which were executed by Culvert and filed. The bank has also provided proof that Culvert defaulted in making payments when due under the note and that the bank, as it had a right to do, declared the unpaid principal and interest immediately due and payable. The court has considered Culvert's answer. Culvert does not deny being in default of her mortgage payments. She states that she has experienced problems with her health and certain financial reversals, including the loss of income from employment and two of her tenants. Culvert states that the mortgage was modified in October 2009, at her request, and she remains eager to work with the bank to rescue the property from

foreclosure.

CPLR 3408 requires that in any residential foreclosure action of a high-cost home loan consummated between January 1, 2003 and September 1, 2008, or a subprime or nontraditional home loan, as defined under RPAPL 1304, in which the defendant is a resident of the property the court shall hold a mandatory conference within sixty days after proof of service is filed with the court.

It appears that this loan does not qualify under CPLR 3408 for a Home Affordable Modification Program or "HAMP" conference, although defendant lives at the premises and the first and second mortgages originated during the applicable time. This is apparently legal single family dwelling but the unpaid principal balance on the loan is \$925,000 which exceeds the statutory threshold for a compulsory conference (CPLR 3408). Furthermore, plaintiff has provided the sworn affidavit of its vice president (Michael Hunt) and the affirmation by counsel (Attorney Gerbino) who each aver that this loan does not otherwise fall within CPLR 3408 or RPAPL 1304. Thus, defendant does not qualify for, nor has defendant requested, a settlement conference. The bank and defendants previously modified the terms of the mortgage, before this action was commenced.

Plaintiff has established its prima facie entitlement to judgment as a matter of law by submitting the relevant mortgage, the underlying note, and evidence of a default (see Cochran Inv. Co., Inc. v Jackson, 38 AD3d 704, 704-705 [2nd Dept 2007]). In opposition, defendant has failed to raise a triable issue of fact. Accordingly, the bank's motion for summary judgment on the complaint is granted on default.

The bank's motion to amend the caption to substitute the real names of the


persons presently occupying the property for the "John and Jane Does" in the caption is also granted and the court has signed a separate order granting summary judgment, appointing a referee to compute, and amending the caption.

Any relief that has not been expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
JUN 21 2010
COUNTY CLERK'S OFFICE
NEW YORK