

HSBC Mtge. Corp. (USA) v Enobakhare

2010 NY Slip Op 31925(U)

July 16, 2010

Supreme Court, Richmond County

Docket Number: 130053/09

Judge: Joseph J. Maltese

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 130053/09
Motion No.: 001
002**

HSBC MORTGAGE CORPORATION (USA)

Plaintiff

against

**HELEN A. ENOBAXHARE,
BOARD OF DIRECTORS OF NEW LANE
HOMEOWNERS ASSOCIATION, INC.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motions: (1) for summary judgment; and (2) to submit an amended answer.

<u>Papers</u>	<u>Numbered</u>
HSBC Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Defendant Notice of Motion and Affidavits Annexed	4
Answering Affidavits	5
Replying Affidavits	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff HSBC Mortgage Corporation's ("HSBC") motion for summary judgment dismissing Defendant Helen A. Enobakhare's Answer pursuant to CPLR 3212 is denied with leave to renew upon the completion of a mandatory settlement conference under CPLR 3408.

Defendant's motion for leave to serve an amended answer to Plaintiff's complaint pursuant to CPLR 3025(b) is granted.

FACTS

This is a foreclosure action in which Plaintiff HSBC seeks summary judgment dismissing Defendant Helen A. Enobakhare's answer and the granting of an application for an Order of Reference. Defendant seeks leave to serve an amended answer.

On March 2, 2007, the defendant took out a mortgage loan from HSBC on her property located at 91 New Lane, Staten Island, NY 10305 in the amount of \$349,200. Defendant has defaulted on the loan by failing to make payments since September 1, 2008.

HSBC commenced this foreclosure action by filing a summons and complaint on January 15, 2009. Defendant entered an answer pro se on February 6, 2009. On October 30, 2009, the defendant retained counsel to represent her in the present action. After reviewing the defendant's file, the new counsel filed a motion for leave to amend the original answer on December 29, 2009.

DISCUSSION

HSBC's Motion for Summary Judgment

HSBC argues that it is entitled to summary judgment dismissing the defendant's answer because it has produced the mortgage, the note, proof of assignment of the note and mortgage, and evidence of the defendant's default.

Since a mandatory settlement conference has not been held as required by CPLR 3408, HSBC's motion for summary judgment is not ripe for decision and must be denied with leave to renew upon completion of said settlement conference.

Defendant's Motion for Leave to Serve an Amended Answer

Defendant seeks leave to serve an amended answer to HSBC's complaint that includes

several affirmative defenses and counterclaims that were previously unasserted.

Leave to amend pleadings is a discretionary matter that is generally favorably exercised in the absence of prejudice or surprise or unless it appears that the proposed amendment plainly lacks merit.¹ "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine."² The need for additional discovery or additional time to prepare a defense does not constitute prejudice sufficient to justify the denial of a motion to amend pleadings.³ Moreover, leave to amend in a foreclosure action should be granted, even after waiting an inordinate period of time to seek leave to amend, where there is no actual prejudice.⁴

Here, the defendant's proposed affirmative defenses may have merit, are certainly not palpably insufficient, and the plaintiff failed to show surprise or prejudice resulting from their delay in asserting the affirmative defenses.⁵

The kind of prejudice that would warrant denial of leave to amend arises when the adverse party has been hindered in the preparation of the case or has been prevented from taking some measure in support of his or her position.⁶ In the context of a motion to amend, prejudice means the "loss of a special right, a change in position, or significant trouble or expense that could have been

¹ *Pike v. New York Life Ins. Co.*, 2010 NY Slip Op 3423 [2d Dept 2010]

² *Edenwald Contracting Co. v. New York*, 60 N.Y.2d 957 [1983]

³ *Harding v. Filancia*, 144 A.D.2d 538 [2d Dept 1988]

⁴ *Haven Associates v. Donro Realty Corp.*, 96 A.D.2d 526 [2d Dept 1983]

⁵ *McCaskey, Davies & Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755 [1983]

⁶ *Loomis v. Civetta Corinno Const. Corp.*, 54 N.Y.2d 18 [1981]

avoided had the original pleading contained the proposed amendment.⁷ The need for additional discovery or additional time to prepare a defense does not constitute prejudice sufficient to justify the denial of a motion to amend pleadings.⁸

HSBC has not established that it will be prejudiced by allowing the defendant to serve an amended answer. Little discovery has taken place and no trial date has been selected. In addition, the marginal legal expenses that would be incurred by HSBC in allowing the defendant to amend her answer does not constitute the loss of a right or prejudice significant enough to justify the denial of a motion to amend the pleading.⁹ As such, the defendant is permitted to submit an amended answer pursuant to CPLR 3025(b).

Plaintiff also takes issue with the defendant's attempt to include certain affirmative defenses that it claims has been waived under CPLR 3211 for failure to allege in the original answer. Although the defendant failed to raise several of the affirmative defenses in her original answer that ought to have been raised under CPLR 3211, defenses waived under CPLR 3211 "can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay".¹⁰ Therefore, in her amended answer, the defendant is permitted to include the affirmative defenses that were allegedly waived for failure to raise them in her original answer.

Accordingly, it is hereby:

ORDERED, that Plaintiff HSBC Mortgage Corporation's motion for summary judgment

⁷ *Wyso v. New York*, 91 A.D.2d 661 [2d Dept 1982]

⁸ *Harding v. Filancia*, 144 A.D.2d 538 [2d Dept 1988]

⁹ *Seaman Corp. v. Binghamton Sav. Bank*, 243 A.D.2d 1027 [3d Dept 1997]

¹⁰ *Nunez v Mousouras*, 21 AD3d 355 [2d Dept 2005]; *Endicott Johnson Corp. v Konik Indus.*, 249 AD2d 744 [3d Dept 1998]

dismissing Defendant Helen A. Enobakhare's Answer is denied with leave to amend upon completion of a mandatory settlement conference pursuant to CPLR 3408; and it is further

ORDERED, that Defendant's motion for leave to serve an amended answer to Plaintiff's complaint is granted; and it is further

ORDERED, that Defendant shall submit and serve an amended answer forthwith; and it is further

ORDERED, that all parties appear for a mandatory settlement conference pursuant to CPLR § 3408 on Friday, August 27, 2010.

ENTER,

DATED: July 16, 2010

Joseph J. Maltese
Justice of the Supreme Court

