

**HSBC Mtge. Corp. (USA) v Gigante**

2011 NY Slip Op 33327(U)

October 31, 2011

Supreme Court, Richmond County

Docket Number: 100886/08

Judge: Joseph J. Maltese

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

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**Index No.: 100886/08  
Motions No.: 2 & 3**

**HSBC MORTGAGE CORPORATION (USA)**

*Plaintiff*

*against*

**MICHAEL GIGANTE, A/K/A MICHAEL J. GIGANTE;  
AMBER HOMEOWNERS ASSOCIATION, INC.;  
AMERICAN EXPRESS TRAVEL RELATED SERVICES,  
CO., INC;  
COMMISSIONER OF JURORS;  
HOLIDAY VILLAS AT OAKWOOD, HOA, INC.;  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;  
NEW YORK CITY TRANSIT ADJUDICATION;  
BUREAU PALISADES COLLECTION, LLC;  
PRIVATE LENDER SERVICES CORP.; and  
STATEWIDE FINANCE, LLC**

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*Defendants*

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**The following items were considered in the review of the following Order to Show Cause and Motion:**

<u>Papers</u>	<u>Numbered</u>
<b>Order to Show Cause and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>3</b>
<b>Answering Affidavits</b>	<b>4</b>
<b>Replying Affidavits</b>	<b>5</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

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

By an Order to Show Cause, the defendant, Michael Gigante, also known as Michael J. Gigante, moves to vacate a judgment of foreclosure and sale granted to HSBC Mortgage Corporation (USA), and to stay the foreclosure sale. The foreclosure sale is stayed.

Mr. Gigante, moves to declare the plaintiff in breach of a mortgage contract; or alternatively moves to compel the plaintiff to extend the terms of an alleged agreement to be a permanent modification of a mortgage; and further moves to award attorney fees for enforcement of the agreement. The motion is denied in its entirety.

### **Facts**

On July 31, 2007, at the age of nineteen years, Mr. Gigante co-signed a mortgage when his parents refinanced their home at 207 Eylandt Street, Staten Island, NY 10312. Mr. Michael DeAngelis, acted as a mortgage broker, and allegedly promised Mr. Gigante that the loan amount would be \$330,000.00. Mr. Gigante states that when he saw the total loan amount was \$371,000.00, he was “confused and did not understand”.

Mr. Gigante asserts that he was not required to present financial information for the mortgage application even though, at the time the mortgage was signed, he had only a part-time job paying \$15.00 per hour working for his father’s construction company. Mr. Gigante was not represented by counsel at the closing of the mortgage He alleges that the documents were not explained to him even though he requested an explanation and he further alleges that he did not receive any copies of the documents. He specifically asserts that he never received a HUD-1 or a Truth-in-Lending Statement. Mr. Gigante states that it his “recollection that the closing costs were extremely high [*sic*].”

His father’s construction business failed and Mr. Gigante and his father lost their incomes. Mr. Gigante defaulted on the loan after making four payments. Mr. Gigante states he never received copies of the Summons and Complaint, or of any foreclosure documents. HSBC exhibits show that notice of the foreclosure action was served upon Mr. Gigante on March 5, 2008 at his residence. Mr. Gigante states he and his mother contacted the plaintiff. He alleges that they were told that they were not in foreclosure, and that no foreclosure would be undertaken while they were negotiating a work-out agreement. Despite these assurances to the contrary, Mr. Gigante states that he then received notice of a motion for a default foreclosure and sale.

Despite having counsel, Mr. Gigante affirms that HSBC did not, directly and in a timely fashion, forward any forms or requests for documentation to his counsel to help him negotiate a loan modification. A Judgment of Foreclosure and Sale was entered on November 3, 2008. Mr. Gigante moved to vacate a Judgment of Foreclosure and Sale with an Order to Show Cause that was entered December 30, 2008.

After service of Mr. Gigante's Order to show Cause on the plaintiff, the parties began negotiating for a Home Affordable Modification Trial Period Plan ("HAMP trial period"), and a Federal Homeowners Affordability and Stability Plan was provided through HSBC to Mr. Gigante. The HAMP trial period agreement was submitted to Mr. Gigante in a letter dated May 21, 2009. That plan required a first month's payment of \$1,207.61, due by return of an included postage-paid return envelope. Two further payments of the same amount were due on or before the first day of August, and the first of September 2009. Total payments were to have been \$3,622.83 to be paid in three payments. The first Order to Show Cause moving to vacate the earlier foreclosure and sale was withdrawn by Mr. Gigante on November 5, 2009. The withdrawal followed HSBC's offer of the first loan modification.

Mr. Gigante annexed copies of checks paid to HSBC to this Order to Show Cause. The first was dated October 9, 2009 and was written for \$1,207.00, the second check was dated November 1, 2009 for \$1,300.00; and the third check was dated December 3, 2009 for \$1,200.00. Mr. Gigante states that he was told to pay the higher amount by the plaintiff. The plaintiff credited each of the three checks to Mr. Gigante's account. The total of the three checks paid was \$3,707.00, paid over a span of a little less than two months. This amount was greater than the amount required by the HAMP agreement. However, only the first check was dated for the first day of the month and no check was written for the exact amount required in the HAMP trial period.

HSBC exhibits a letter allegedly sent to Mr. Gigante on August 12, 2009. In that letter HSBC requested a federal tax return for 2008, a signed boarder agreement from his grandmother

or proof of \$1,500 monthly income. HSBC also required proof of income from another source that Mr. Gigante must specify. Another letter-exhibit purportedly sent to Mr. Gigante on August 19, 2009 stated that HSBC had attempted to contact him, but had no response. Yet another letter allegedly sent by HSBC to Mr. Gigante on September 9, 2009 advised Mr. Gigante that his request for assistance could not be approved. This latter letter specifies fifteen reasons for not approving the request for assistance:

- request withdrawn by customer,
- modification request incomplete,
- temporary or irregular employment,
- failure to fulfill trial period requirements,
- excessive obligations in relation to income,
- unable to verify income,
- unable to verify residence,
- delinquent past or present credit obligations with others,
- collection action for judgment,
- income in relation to obligations does not meet modification program,
- value or type of collateral not sufficient,
- request does not fit available loan modification program, [and]
- offer expired.

The record offers no evidence that the plaintiff provided any of this correspondence to the Mr. Gigante's counsel, and it appears to be incredible that the "request (was) withdrawn by customer."

Mr. Gigante states his December 2009 payment was refused and HSBC withdrew the agreement asserting that information was not provided as required under the trial plan. Following the letter of September 9, 2009, a second Foreclosure Sale was scheduled for February 18, 2010. On February 16, 2010, by an Order to Show Cause, Mr. Gigante moved to vacate the judgment of foreclosure and sale entered November 3, 2008, and to stay the second foreclosure sale.

Mr. Gigante exhibits a signed acknowledgment and agreement to the Home Affordable Modification Program ("HAMP") dated August 26, 2010. This agreement provided to Mr. Gigante by HSBC explicitly stated that if the HAMP trial period amounts were to be made in amounts different from the amount required by the agreement to the HAMP trial period, the loan

may not be modified. The agreement further stated that successful completion of the three-month-long trial period was a first step and that confirmation of income and eligibility would be required, and only upon successful compliance, could a modification agreement follow.

According to Mr. Gigante, during a settlement conference held on June 3, 2011, the court suggested reinstatement of the HAMP. Meanwhile, on May 11, 2011, Mr. Gigante's file had been reviewed for a second HAMP. HSBC stated that because Mr. Gigante's submission did not show sufficient income and because Mr. Gigante had failed a previous HAMP trial period, he was refused consideration for a second HAMP. It is not stated which, if any, of the deficiencies noted in the letter of September 9, 2009 still applied in May of 2011. Subsequently, on July 22, 2011, Mr. Gigante moved to declare HSBC in breach of contract, or in the alternative to extend the terms of the alleged agreement to a permanent modification. Mr. Gigante further moves for reasonable attorney fees.

### Discussion

Certain commercial contracts are merely "not enforceable by way of action or defense" without a writing.<sup>1</sup> More stringently, a contract to devise an interest in real property or a right with reference to real property is specifically void without a writing, note or memorandum subscribed by the party intended to be charged.<sup>2</sup> The writing should identify the parties, describe the subject matter, and state the essential terms of the agreement.<sup>3</sup> A contract that is void cannot be enforced by either party.<sup>4</sup> It has been held that an individual agreeing to participate in the

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<sup>1</sup>Uniform Commercial Code § 2-201 (1).

<sup>2</sup>General Obligations Law § 5-703 (1) and (3); and *Atai v. Dogwood Realty of N.Y., Inc.*, 24 AD 3d 695, 697 [2d Dept 2005].

<sup>3</sup>*Atai v. Dogwood Realty of N.Y., Inc.*, 24 AD 3d at 697.

<sup>4</sup>*Riverside Syndicate, Inc. v Munroe*, 10 NY 3d 18, 21 [2008].

HAMP has a contract with the United States Treasury.<sup>5</sup> Therefore, when Mr. Gigante alleges verbal modifications regarding the mortgage contract and the HAMP, all verbal modifications are void and unenforceable in so far as the to the conditions of both the mortgage itself, and of the HAMP.

In his affidavit, Mr. Gigante asserted that he was not served with the initial notice of foreclosure and sale; that he never received HUD-1 or Truth-in-Lending Statements; that he thought closing fees were high; and that he was misled in the mortgage process. None the less, Mr. Gigante offers no additional proofs in regard to these bare allegations. He does not argue the allegations are affirmative defenses and does not base any counterclaims upon them in an answer.

In May of 2009, the plaintiff offered a HAMP to Mr. Gigante, containing terms proffered by HSBC, but also soliciting discourse. Mr. Gigante's states his counsel was not a recipient of the initial mailing of the HAMP agreement, nor of subsequent communications. The letters that pertain to Mr. Gigante's deficiencies in complying with the first HAMP were addressed only to Mr. Gigante. HSBC's exhibits make no showing that Mr. Gigante's counsel saw them. The plaintiff contends that there is no obligation to provide a HAMP, and that a refusal to work out a payment plan with the defendant or to otherwise mitigate plaintiff's damages is not unconscionable. The plaintiff cites the Appellate Division, Third Department in which following default, and over two months after a demand letter from a seller's attorney, payment was proffered but refused.<sup>6</sup> The plaintiff also cites the Appellate Division, Second Department where, following an extension of time to comply with the terms of the mortgage, continuing failure to pay the amount due resulted in an enforcement of an acceleration clause, and

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<sup>5</sup>*Bank of America, N.A. v Gowrie*, \_\_\_ Misc. 3d \_\_\_, 2011 NY Slip Op 30658U 1\*, 2\* [Sup Ct Queens Cty 2011].

<sup>6</sup>*Logue v Young*, 94 AD 2d 827 [3d Dept 1983].

enforcement of the clause was not unconscionable.<sup>7</sup> Here, however, HSBC was required by law to hold a mandatory settlement conference.<sup>8</sup> “Both the plaintiff and the defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.”<sup>9</sup> Despite the plaintiff’s disavowals, there is an obligation to attempt a loan modification, and the modification must be arrived at in good faith. It has been suggested that a settlement conference is mandatory after August 5, 2008, at which time CPLR § 3408 was effected, and therefore, a foreclosure and sale may be vacated if the judgment of foreclosure and sale was entered in the absence of the required good faith negotiation.<sup>10</sup>

Cohn v Middle Road Riverhead Development Corp., 162 AD 2d 578, 579 [2d Dept 1990]

The HAMP agreement is manifestly a contract between a borrower and the Department of the Treasury, and the form has the seal of the Department of the Treasury printed on it. However, the terms are provided by HSBC. “A contract of adhesion contains terms that are unfair and non-negotiable and arises from a disparity of bargaining power or oppressive tactics.”<sup>11</sup> The HAMP agreement is not a contract of adhesion. The HAMP agreement clearly solicits further discourse regarding its terms. However, there is an apparent disparity of power that the borrower may feel when dealing with the government or with a financial institution such as HSBC. Moreover there is a disparity between the experience and familiarity with the process that HSBC has on the one hand, and the commonly inexperienced, unsophisticated and naive borrower on the other hand, especially when the borrower is a novice to the process and is a youth of nineteen years of age. Equity requires that the borrower’s counsel must be integrated into the process to facilitate the negotiations that the HAMP permits. Mr. Gigante affirms that his counsel did not receive communications from HSBC during the first HAMP trial period, and

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<sup>7</sup>Cohn v Middle Road Riverhead Development Corp., 162 AD 2d 578, 579 [2d Dept 1990]

<sup>8</sup>CPLR § 3408.

<sup>9</sup>CPLR § 3408 (f).

<sup>10</sup>HSBC Bank USA, N.A. v Abass, 32 Misc. 3d 1207A [Sup Ct, Queens Cty 2011].

<sup>11</sup>Matter of Love’M Sheltering, Inc. v County of Suffolk, 33 AD 3d 923, 924 [2d Dept 2006].

the plaintiff has not shown in its exhibits that its dealings with Mr. Gigante included advising his counsel of the plaintiff's course of action. Therefore, Mr. Gigante did not have full advantage of the advice of counsel.

A party other than an infant, incompetent person or conservatee may prosecute or defend a civil action by an attorney, and that person may not act except through the attorney unless the court gives permission.<sup>12</sup> Despite being governed by distinct laws, foreclosures are a form of civil action.<sup>13</sup> A HAMP agreement under CPLR § 3408, should properly be addressed to the borrower's attorney if a fully authorized counsel is retained by the borrower.<sup>14</sup> Similarly, letters detailing deficiencies should be addressed to the borrower's counsel in order to facilitate compliance with the requirements of the HAMP trial period. The HAMP agreement and subsequent communications were sent to Mr. Gigante, who affirms his counsel did not receive these from HSBC. In answer to Mr. Gigante's affirmation, the plaintiff does not show it kept Mr. Gigante's counsel advised of the on-going process. The failure of HSBC to act through the Mr. Gigante's counsel was incorrect and gives rise to inequities. However, the foreclosure action is not mandatorily stayed. In the absence of a statute stating the contrary, a judgment of foreclosure may exist even though an agreement is being negotiated.

Parties are required "to negotiate in good faith towards creation of a mutually satisfactory modification agreement."<sup>15</sup> The second request for a HAMP was rejected because the earlier HAMP agreement was not fulfilled, and because Mr. Gigante did not show adequate income. It was disingenuous of the decision to reject the second request for HAMP based upon non-compliance with the first HAMP, when Mr. Gigante's counsel was not provided with the terms of that first HAMP by HSBC. HSBC, when evaluating the second HAMP, gave no opportunity

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<sup>12</sup>CPLR § 321 (a).

<sup>13</sup>*Dime Sav. Bank, FSB v Johneas*, 172 AD 2d 1082 [4 th Dept 1991].

<sup>14</sup>CPLR § 3408 ©.

<sup>15</sup>*Deutsche Bank Trust Co. of America v. Davis*, 32 Misc. 3d 1210, \*1 [Sup Ct Kings Cty 2011].

for Mr. Gigante's counsel to rectify any potential misapprehensions of Mr. Gigante's income and ability to pay, nor to negotiate alternative payment structures. HSBC did not provide Mr. Gigante's counsel an opportunity to correct any failings in the first HAMP trial period. Therefore, in effect, there was no first HAMP trial period.

Good faith negotiation must include Mr. Gigante's counsel and only if negotiated in good faith toward a mutually satisfactory agreement can the HAMP process be as it was intended. Here, the exclusion of Mr. Gigante's counsel from the flow of communications shows a lack of good faith on the part of the plaintiff. Equity requires a thorough and even handed review of Mr. Gigante's HAMP trial period. Consequently, HSBC must re-initiate the first HAMP trial period, as though it was never previously undertaken. HSBC must communicate directly with Mr. Gigante's counsel throughout this process.

Mr. Gigante moves to declare HSBC in breach of contract. Effectively, by this motion, Mr. Gigante moves to have alleged verbal agreements enforced as a written contract pertaining to real property. Any contract to devise an interest in real property is void without a writing subscribed by the party intended to be charged.<sup>16</sup> Even if verbal agreements to the contract were unequivocally made, they would be void without a proper writing subscribed to by the party against whom they are to be held. Therefore, the motion to declare HSBC in breach of contract is denied. Mr. Gigante alternatively moves to extend the terms of the "agreement to a permanent modification." Even if the HAMP trial period was an agreement, it is not subscribed by the party against which it is intended to be enforced. Therefore, the HAMP trial period is not a proper agreement regarding real property and cannot be enforced by Mr. Gigante as an agreement.<sup>17</sup> Consequently, the HAMP trial period is not an agreement that may be extended. Therefore, that part of the motion seeking to extend an alleged agreement to a permanent modification is moot. In the absence of an actual HAMP agreement enforceable against HSBC, there was no Workout

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<sup>16</sup>General Obligations Law § 5-703 (1) and (3); *and Atai v. Dogwood Realty of N.Y., Inc.*, 24 AD 3d 695, 697 [2d Dept 2005].

<sup>17</sup>*Riverside Syndicate, Inc. v Munroe*, 10 NY 3d 18, 21 [2008].

Agreement. Despite later concerns about an inequitable failure to explicitly and specifically integrate Mr. Gigante's counsel into the HAMP process, HSBC did not breach a duly executed Workout Agreement. Therefore, the motion to award attorney fees is denied.

Accordingly, it is hereby:

ORDERED, that the foreclosure sale scheduled on the property of Michael Gigante, a/k/a Michael J. Gigante on November 3, 2008 located at 207 Eylandt Street, Staten Island, NY 10312, is stayed; and it is further

ORDERED, that the plaintiff HSBC Mortgage Corporation (USA) shall re-engage in the Home Affordable Modification Program by initiating a valid Home Affordable Modification Trial Period Plan with Michael Gigante, a/k/a Michael J. Gigante, containing such terms as may be negotiated in good faith; and it is further

ORDERED, that the parties engaged in said negotiations shall specifically include counsel for Michael Gigante a/k/a Michael J. Gigante, if he so desires; and it is further

ORDERED, that the motion made by the defendant Michael Gigante, a/k/a Michael J. Gigante, to declare the plaintiff, HSBC Mortgage Corporation (USA), to be in breach of contract; to create a permanent modification of the mortgage on the subject property at 207 Eylandt Street, Staten Island, NY 10312; and to award attorney fees and costs to the defendant Michael Gigante, a/k/a Michael J. Gigante to be paid by the plaintiff, HSBC Mortgage Corporation (USA), is denied in its entirety; and it is further

ORDERED, that the parties shall return for **a conference to DCM Part 3, 130 Stuyvesant Place, Third Floor, Staten Island, New York, at 9:30 A.M. on Tuesday, November 29, 2011.**

ENTER,

DATED: October 31, 2011

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Joseph J. Maltese  
Justice of the Supreme Court