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| <b>HSBC Bank USA v Demir</b>                                                                                                                                                                                                     |
| 2013 NY Slip Op 31078(U)                                                                                                                                                                                                         |
| May 10, 2013                                                                                                                                                                                                                     |
| Supreme Court, Suffolk County                                                                                                                                                                                                    |
| Docket Number: 21503-11                                                                                                                                                                                                          |
| Judge: Jerry Garguilo                                                                                                                                                                                                            |
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SHORT FORM ORDER

INDEX  
NO.: 21503-11

SUPREME COURT - STATE OF NEW YORK  
IAS PART 21 - SUFFOLK COUNTY

PRESENT: HON. JERRY GARGUILO  
Supreme Court

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x  
HSBC Bank USA, National Association as trustee on  
behalf of the holders of the OPTEMAC Asset-Backed  
Pass-Through Certificates, Series 2006-1,

Plaintiff,

-against-

Arslan Demir, Mortgage Electronic Registration  
Systems, Inc. acting solely as nominee for Opteum  
Financial Services, LLC its successors and assigns  
and "JOHN DOE #1" through "JOHN DOE #10", the  
last ten names being fictitious and unknown to  
the plaintiff, the person 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,

Defendants.

MOTION DATE: 8-27-12  
ADJ. DATE:  
MOT. SEQ. # 001 MotD  
#003 XMD

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Garden City, N. Y. 11530

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x

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and order of reference; Notice of  
Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 25;  
~~Answering Affidavits and supporting papers~~; Replying Affidavits and supporting papers 26 27; ~~Other~~ \_\_\_\_\_  
\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the  
motion is decided as follows: it is

**ORDERED** that the court, *sua sponte*, recalls and vacates its prior decision rendered in this matter  
dated March 11, 2013.

**ORDERED** that this motion (001) by plaintiff HSBC Bank USA, National Association as trustee on  
behalf of the holders of the OPTEMAC Asset-Backed Pass-Through Certificates, Series 2006-1 (HSBC),  
pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Arslan Demir  
(Demir), to strike the answer of the defendant Demir, for leave to amend the caption of this action pursuant to  
CPLR 3025 (b) by substituting the names of ALI DEMIR for "JOHN DOE #1", GIZEN DEMIR for "JOHN

JH

DOE #2" and SAFINAZ DEMIR for "JOHN DOE #3" and by striking the names of defendants "JOHN DOE #4" through "JOHN DOE #10", granting a default judgment against those non-appearing defendants, to reform the legal description in the underlying mortgage and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is hereby determined as follows; and it is hereby

**ORDERED** that the branch of the motion (001) by plaintiff HSBC pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Demir, to strike his answer and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is denied without prejudice to resubmit upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application, a copy of this order and evidence of physical delivery of the note or written assignment of the note to plaintiff HSBC. Should plaintiff rest on the assignment of the mortgage and note dated June 15, 2010 as evidence of Mortgage Electronic Registration Systems, Inc's. (MERS) transfer to HSBC, plaintiff is granted leave, as set forth above, to submit to the Court written proof granting such authority from the original mortgagee IndyMac to its nominee, MERS to assign the subject mortgage and note along with proof that MERS physically possessed the note prior to its transfer; and it is further

**ORDERED** that the branch of the motion (001) by plaintiff seeking leave to reform the legal description in the underlying mortgage to conform to the legal description contained in the bargain and sale deed dated November 22, 2005 which conveyed title of the subject premises to the defendant is granted; and it is further

**ORDERED** that the branch of the motion (001) by plaintiff seeking a default judgment as to the remaining non-appearing defendants is granted; and it is further

**ORDERED** that the branch of plaintiff's motion (001) seeking leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

**ORDERED** that the caption is hereby amended by substituting the names of ALI DEMIR for "JOHN DOE #1", GIZEN DEMIR for "JOHN DOE #2" and SAFINAZ DEMIR for "JOHN DOE #3" and by striking from the caption the names of "JOHN DOE #4" through "JOHN DOE #10"; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK**

\_\_\_\_\_  
HSBC Bank USA, National Association as trustee on behalf of the holders  
of the OPTEMAC Asset-Backed Pass-Through Certificates, Series 2006-1,

Plaintiff,

-against-

Arslan Demir, Mortgage Electronic Registration Systems, Inc. acting solely  
as nominee for Opteum Financial Services, LLC its successors and assigns,  
Ali Demir, Gizen Demir and Safinaz Demir,

Defendants.

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X

**ORDERED** that the branch of this cross motion (003) by defendant Demir for an order pursuant to CPLR 3211(a) dismissing the complaint on the grounds that plaintiff does not have the standing to bring the action is denied.

This is an action to foreclose a mortgage on premises known as 122 Arbour Street, West Islip, New York. On November 22, 2005, defendant Demir executed an adjustable rate note in favor of Opteum Financial Services, LLC (Opteum) agreeing to pay the sum of \$358,440.00 at the starting yearly rate of 5.759 percent. On November 22, 2005, defendant Demir also executed a mortgage in the principal sum of \$358,440.00 on his home. The mortgage indicated Opteum to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Opteum as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on December 6, 2005 in the Suffolk County Clerk's Office. Thereafter, on June 15, 2010, the note and mortgage were purportedly transferred by assignment of mortgage from MERS to HSBC and recorded on July 15, 2010 with the Suffolk County Clerks Office. HSBC asserts that it is the holder of the note, which was indorsed in blank by Michelle Waldron, assistant vice president to Opteum.

Midland Mortgage Co. Delinquency Assistance Center, sent a notice of default dated May 3, 2011 to defendant Demir stating that he had defaulted on his mortgage loan and that the amount past due was \$51,790.75. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on July 11, 2011. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the January 1, 2010 payment. Defendant interposed an answer with twelve affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 19, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that it is the holder of the note and mortgage; that defendant Demir failed to comply with the terms of the loan agreement and mortgage by failing to make monthly payments commencing with the January 1, 2010 payment; that notice of default was sent on May 3, 2011; that the defendant has not cured the default; and, that defendant Demir's answer neither raises issues of fact for trial nor a meritorious defense. In support of its motion, plaintiff submits among other things: the sworn affidavit of Josh Mills, senior foreclosure litigation specialist for MidFirst Bank, the servicer and attorney in fact for plaintiff HSBC; the affirmation in support for summary judgment of Margaret Burke Tarab, Esq.; the summons and complaint; the defendant's answer; the note, mortgage and assignment; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (see *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d at 844).

In the matter at hand, plaintiff failed to establish, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered or assigned to it prior to the commencement of the action. The affidavit from plaintiff’s assistant secretary, Josh Mills, did not provide any factual details of a physical delivery or assignment of the note and thus, failed to establish possession of the note prior to commencing this action (*HSBC Bank USA v Hernandez*, 92 AD3d 843; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). Conclusory boiler plate statements such as “[p]laintiff is the holder of the note” will not suffice when standing is raised as a defense (see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

While plaintiff does provide an assignment of mortgage dated June 15, 2010 from MERS to HSBC purportedly transferring the mortgage and note to the plaintiff, there is no evidence that MERS, as the nominee for Opteum, had authority to assign the mortgage and note. In addition, assuming arguendo, that MERS had authority to transfer the note and mortgage, there is no evidence to suggest that MERS ever physically possessed the note. Accordingly, plaintiff’s application for summary judgment and an order of reference is denied.

Defendant Demir cross-moves to dismiss the complaint based on improper service and lack of standing. By his affidavit, defendant Demir contends that service was made on his son and did not contain the RPAPL §1303 notice, that the mortgage contains an incorrect legal description of the property, and that plaintiff lacks standing.

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In opposition, plaintiff submits a copy of the affidavit of service upon defendant Demir indicating service pursuant to CPLR 308 (2) which, included a copy of the Homeowners Foreclosure Notice as required by RPAPL §1303. Plaintiff also argues that a discrepancy in a mortgage's property description does not invalidate a mortgage and reasserts that it has standing to commence this action.

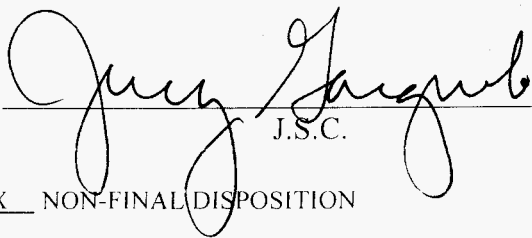
Defendant's assertion that he did not receive notice as required under RPAPL §1303 is rejected by the court. Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendant Demir pursuant to CPLR 308 (2) and defendant's unsubstantiated denial of receipt of same is insufficient to rebut the presumption of proper service created by said affidavits (*see, Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). Likewise, defendant's assertion that a discrepancy in the mortgage's property description invalidates the mortgage and accordingly requires dismissal of the action is unsupported in law and accordingly rejected. A review of the legal description of the subject property attached to the mortgage reveals that the lower portion of the metes and bounds description contained in "Schedule A" is missing. However, defendant admits that he purchased the home located at 122 Arbour Street, West Islip, New York on November 22, 2005 and executed a note and mortgage in favor of Opteum. Here, the mortgage became a lien upon the property on the date it was made, November 22, 2005 (*see Sullivan v Corn Exchange Bank*, 154 AD 292, 139 NYS 97 [2d Dept 1912]; *Dime Sav. Bank, FSB v Roberts*, 563 NYS2d 253, 167 AD2d 674 [3d Dept 1990]). As such, the discrepancy in the property description contained in the mortgage did not invalidate the mortgage (*see Savings & Loan Assoc. Of Kingston v Berberich*, 24 AD 187, 264 NYS2d 989 [3d Dept 1965]). As to defendant's assertion that plaintiff lacks standing to commence this action, at this juncture, it is unclear from the submissions before the court whether or not plaintiff has standing. As such, the court denies such application.

Accordingly, the motion for summary judgment, and order of reference, and related relief as reflected herein, and the cross motion seeking dismissal of the complaint are denied.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: \_\_\_\_\_

5/10/13

  
 J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION