

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

2013 NY Slip Op 32477(U)

October 10, 2013

Supreme Court, Richmond County

Docket Number: 130053/2009

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NE YORK  
COUNTY OF RICHMOND DCM PART 3  
HSBC MORTGAGE CORPORATION (USA)**

**Calendar Nos.: 1455-003  
2505-004  
Index No. : 130053/2009**

**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,  
JOHN DOE (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all occupants  
of premises being foreclosed herein, and any parties,  
corporations or entities, if any, having or claiming an  
interest or lien upon the mortgaged premises.)**

**DECISION  
HON. JOSEPH J. MALTESE**

**Defendants.**

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The following papers numbered 1 to 5 were fully submitted on the 9<sup>th</sup> day of August, 2013.

**Papers Numbered**

Plaintiff’s Notice of Motion for Summary Judgment, Striking the Amended Answer and for the Appointment of a Referee, with Supporting Papers (dated April 29, 2013).....	1
Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment (dated April 29, 2013).....	2
Notice of Motion by Defendant Helen A. Enobakhare for a Bad Faith Hearing, with Supporting Papers (dated July 26, 2013).....	3
Affirmation by Defendant Helen A. Enobakhare and Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Motion for Bad Faith Hearing (dated July 26, 2013).....	4

Upon the foregoing papers, plaintiff's motion (Seq. No. 003) for, *inter alia*, summary judgment, striking the amended answer of defendant Helen A. Enobakhare and appointing a referee to compute is granted; the motion (Seq. No. 004) of the above-named defendant for a bad faith hearing is denied.

This action was commenced on January 15, 2009 to foreclose a certain mortgage on real property located at 91 New Lane, Staten Island, New York. It is undisputed that said mortgage was given by defendant Helen A. Enobakhare on March 2, 2007 to MERS, acting as nominee for her lender, plaintiff HSBC Mortgage Corporation (USA) (hereinafter, "HSBC Mortgage"), to secure a 30-year note she executed in the principal sum of \$349,200.00 at a fixed rate of interest of 5.75%.

Motion Seq. No. 003

By this motion, plaintiff HSBC Mortgage moves (1) to strike the amended answer, affirmative defenses and counterclaims of defendant Helen A. Enobakhare dated August 5, 2010,<sup>1</sup> (2) for summary judgment, (3) the appointment of a referee to compute, and (4) to substitute HSBC Bank USA, N.A., the current holder of the subject note and mortgage, as plaintiff in this action.

In support of this motion, plaintiff submits the affidavit of Dana St. Clair-Hougham, Vice President and Assistant Secretary in the Administrative Services Divisions of HSBC Mortgage and HSBC Bank USA, N.A. (hereinafter "HSBC Bank"),

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<sup>1</sup> In a Decision and Order dated July 16, 2010, this Court granted the motion of defendant Helen A. Enobakhare for leave to amend her *pro se* answer dated February 6, 2009, and denied plaintiff's prior motion for summary judgment with leave to renew upon the completion of a mandatory settlement conference under CPLR 3408.

who attests, based on her personal knowledge of her employers' customary practices and activities as they relate specifically to its (1) loan accounting systems, (2) methods of processing payments and credits, and (3) maintenance of payment records and various loan documents that are prepared and kept in the ordinary course of its business, that upon her review of these books and records, defendant Enobakhare failed to make her required monthly installment payment due on September 1, 2008 and thereafter.

In a separate and detailed "Affidavit of Physical Possession," Ms. St. Clair-Hougham further attests based on her personal knowledge of the lenders' customary practices concerning both the retention of "collateral documents" relating to mortgage loans, and the record-keeping practices of plaintiff HSBC Mortgage with regard to its physical receipt and possession of original notes and mortgages, that the "original note" duly executed by defendant Enobakhare on March 2, 2007 was received and reviewed by HSBC Mortgage on March 5, 2007 and, thereafter, maintained at plaintiff's Stradtman facility located at 100 Stradtman Street, Cheektowaga, New York until July of 2009, when said original note was transferred to a vault in plaintiff's Atrium Facility located at 95 Washington Street, Buffalo, New York. On the same basis, the affiant further avers that the original mortgage was maintained in a vault at the Walden facility of HSBC Mortgage, located at 2929 Walden Avenue, Depew, New York, until September 13, 2011, when it was assigned to HSBC Bank. Finally, Ms. St. Clair-Hougham attests that simultaneously therewith, *i.e.*, on September 13, 2011, HSBC Mortgage transferred its interest in the Enobakhare note, endorsed in blank, and that the original note and mortgage have remained in the vaults maintained by HSBC Mortgage from 2007 onward.

It is well settled that on a motion for summary judgment in an action to foreclose a mortgage, a plaintiff/mortgagee establishes its prima facie right to judgment as a matter of law through the production of the relevant mortgage, the unpaid note and an

affidavit attesting to the mortgagor's default (*see* Flagstar Bank v Bellafiore, 94 AD3d 1044, 1045 [2<sup>nd</sup> Dept 2012]; HSBC Bank USA, NA v Schwartz, 88 AD3d 961, 961 [2<sup>nd</sup> Dept 2011]; Coppa v Fabozzi, 5 AD3d 718 [2<sup>nd</sup> Dept 2004]). It is also well established that in such an action, "a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 753 [2<sup>nd</sup> Dept 2009]). In this regard, "[e]ither 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, and the mortgage passes with the debt as an inseparable incident [of the note]" (*id.* at 754; *see* Bank of N.Y. v Silverberg, 86 AD3d 274, 279 [2<sup>nd</sup> Dept 2011]; US Bank N. A. v Madero, 80 AD3d 751, 752 [2<sup>nd</sup> Dept 2011]; *see also* Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674 [2<sup>nd</sup> Dept 2007]).

Consonant with the foregoing principles, it is the determination of this Court that plaintiff HSBC Mortgage, *i.e.*, Enobakhare's lender, has established its entitlement to judgment as a matter of law by tendering copies of the subject mortgage and note executed by the mortgagor, along with proof of the default in the form of the affidavit from plaintiff's vice president and assistant secretary of administrative services, an individual with personal knowledge of the bank's loan payment records and business practices relating to its physical possession of the subject note (*see* JP Morgan Chase Bank, N.A. v Agnello, 62 AD3d 662, 663 [2<sup>nd</sup> Dept 2009]; Chiarelli v Kotsifos, 5 AD3d 345, 345-346 [2<sup>nd</sup> Dept 2004]; Charter One Bank v Houston, 300 AD2d 429, 430 [2<sup>nd</sup> Dept 2002], *lv dismissed* 99 NY2d 651 [2003]). Stated otherwise, the affidavit of Dana St. Clair-Hougham is legally sufficient to accomplish its intended purpose, since the affiant has adequately established the basis for her knowledge of the detailed facts asserted therein demonstrating plaintiff's uninterrupted possession of Enobakhare's note and mortgage from the time of origination until the commencement

of this action in January of 2009 (*cf.* HSBC Bank USA v Hernandez, 92 AD3d 843, 844 [2<sup>nd</sup> Dept 2012], wherein the court held that the plaintiff/mortgagee failed to sufficiently demonstrate standing because the affidavit of its servicing agent “did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing [the] action”; *see also* Deutsche Bank Natl. Trust Co. v Barnett, 88 AD3d 636, 637-638 [2<sup>nd</sup> Dept 2011]).

In opposition to the motion, Enobakhare attempts to challenge plaintiff’s standing by erroneously arguing that the “chain of [mortgage] assignments is defective”, pointing to an allegedly invalid written assignment of the mortgage dated January 14, 2009 from MERS, as nominee of the lender, to HSBC Mortgage. While defendant Enobakhare concedes that plaintiff HSBC Mortgage is “the only holder of the *note* since [its] inception (emphasis added)”, she maintains that the assignment of the related mortgage by MERS on January 14, 2009 was invalid since said nominee never acquired ownership of the underlying debt.<sup>2</sup> This proposition is misguided. Although the assignment of the mortgage without the underlying note is a nullity for the purpose of proving standing (*see* US Bank NA v Collymore, 68 AD3d at 754), where a plaintiff, as here, is conceded to possess the note prior to commencement of the action, “the mortgage passes with the debt [instrument] as an inseparable incident” (*id.*). Thus, the standing of HSBC Mortgage, admittedly “the only holder of the note since [its] inception,” is unaffected by any purported gap in the chain of recorded assignments of the mortgage.

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<sup>2</sup> Although not strictly relevant, it should be noted that a corrective MERS assignment of the mortgage dated January 22, 2013 was recorded to correct a scrivener’s error concerning the signor of the MERS assignment of mortgage dated January 14, 2009.

Moreover, it is the Court's opinion that the ten affirmative defenses<sup>3</sup> and eleven counterclaims interposed by Enobakhare in her forty-six page amended answer represent, at best, a litany of bare legal conclusions, lacking in allegations of evidentiary facts or documentary proof. As such, this defendant has failed to meet her burden to defeat summary judgment by coming forward with admissible evidence demonstrating the existence of a material issue of fact requiring a trial (*see* Aames Funding Corp. v Houston, 44 AD3d 692, 693 [2<sup>nd</sup> Dept 2007], *lv denied* 10 NY3d 704; Charter One Bank v Houston, 300 AD2d at 430).

#### Motion Seq. No. 004

Turning to the motion of defendant Enobakhare (hereinafter, defendant) for a "bad faith" hearing, she claims that plaintiff has not complied with the requirements of the Home Affordable Modification Program (hereinafter, "HAMP"). In support, Enobakhare maintains that she has submitted no less than eight loan modification applications (dated, respectively, September 27, 2008, January 31, 2009, June 3, 2009, July 2009, September 29, 2009, November 17, 2009, October 18, 2010 and May 18, 2011), which resulted in a "protracted cycle" of requests by HSBC Mortgage for more and more documentation, ultimately followed by generic and boilerplate denials. Finally, according to Enobakhare, plaintiff belatedly offered her a trial payment plan to commence on August 1, 2012 which was "unrealistic and unaffordable" since it required monthly payments of \$2,655.03, an equivalent of 68% of her purported gross monthly

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<sup>3</sup> Defendant's affirmative defense of improper service is deemed waived since she failed to move to dismiss the complaint based on this ground within 60 days of the service of her first amended answer raising the objection (*see* CPLR 3211[e]). Also worthy of note, the affirmative defenses predicated upon alleged violations of RPAPL 1302, 1304 and Banking Law §§6-1 and 6-m are devoid of merit inasmuch as defendant has failed to plead facts sufficient to establish that her loan was either a subprime, high cost or non-traditional home loan, *i.e.*, that at the time this action was commenced, the notice provisions of RPAPL 1302(b) and 1304 were applicable to this action.

income. In order to be affordable, defendant sought a reduction in principal, interest and fees of “at least” \$75,000, with monthly installment payments not to exceed \$1,500.00. Notably, the subject note provides for monthly installment payments of \$2,037.84.

Although CPLR 3408(f) provides that “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible”, it does not set forth any specific remedy for a party’s alleged failure to negotiate in good faith. Moreover, although the procedures and rules governing CPLR 3408 settlement conferences as promulgated by the Chief Administrator of the Courts in 22 NYCRR 202.12-a(c)(4) further provide that “[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and ... that conferences not be unduly delayed...so that the rights of both parties may be adjudicated in a timely manner”, it, too, fails to provide a specific remedy or sanction for any perceived violation. In any event, it has recently been observed that “it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties” (Wells Fargo Bank, N.A. v Meyers, 108 AD3d 9, 20 [2<sup>nd</sup> Dept 2013]). In short, it has been recognized that systematic failures to achieve, *e.g.*, a loan modification, may occur in the absence of fault.

In the matter at bar, defendant has failed to demonstrate that plaintiff violated its duty to proceed in good faith pursuant to CPLR 3408(f) during the mandatory settlement conferences (*see* CPLR 3408). More particularly, this Court can state that during the numerous settlement conferences held under its direct supervision from August 27, 2010 onward, the claim that plaintiff negotiated in bad faith is baseless. Therefore, there is no justification or need for either the imposition of sanctions against plaintiff (*e.g.*, the waiving accrued interest or a principal reduction), or a “bad faith” hearing. It bears repeating that since the Court lacks the authority to rewrite the mortgage and loan

agreement, it simply cannot force a plaintiff to offer the loan modification to which a defendant can or will agree (*id.*).

Accordingly, it is hereby:

ORDERED, that plaintiff's motion is granted in its entirety; and it is further

ORDERED, that the motion of defendant Helen A. Enobakhare for a bad faith hearing is denied.

Submit Order

Dated: October 10, 2013

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Joseph J. Maltese  
Justice of the Supreme Court