

**HSBC Bank USA v Hamid**

2014 NY Slip Op 31731(U)

June 27, 2014

Sup Ct, Suffolk County

Docket Number: 20023-09

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 4/10/14  
ADJ. DATES 6/6/14  
Mot. Seq. # 002 - MG  
Mot. Seq. # 003 - XMD  
CDISP Y X N     

-----X  
HSBC BANK USA, NATIONAL ASSOCIATION :  
as Trustee for Wells Fargo Asset Securities :  
Corporation, Mortgage Pass-Through Certificates :  
Series 2006-12, :  
Plaintiff, :  
-against- :  
AISHA HAMID, WELLS FARGO BANK, NA, :  
KANTA KHALIL and ZESHAN HAMID, :  
Defendants. :  
-----X

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Upon the following papers numbered 1 to 15 read on this motion for leave to file a new affidavit of merits and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 6-7; Answering Affidavits and supporting papers 8-9; 10-11; Replying Affidavits and supporting papers 12-13; 14-15; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#002) by the plaintiff for an order granting it leave to file a new affidavit of merits, confirming the report of the referee of sale and entry of a judgment of foreclosure and sale is considered under RPAPL Article 13 and is granted; and it is further

**ORDERED** that the cross motion (#003) by the mortgagor defendant Hamid dismissing this action pursuant to CPLR 3215(c) and on other grounds or for an order vacating the defendant's default with leave to serve a late answer is considered under CPLR 3215 and 3012 and is denied.

The plaintiff commenced this action in May of 2009 to foreclose the lien of a June 5, 2006 mortgage given to the plaintiff's predecessor-in-interest by defendant Hamid. Said defendant was served with process on June 4, 2009 and thereafter defaulted in appearing by answer or otherwise. On October 5, 2009, a conference of the type contemplated by CPLR 3408, which was scheduled on notice to defendant Hamid, was held by personnel assigned to the specialized mortgage foreclosure part of this court at which defendant Hamid did not appear. In May of 2010, the plaintiff moved for an order of reference upon default. By order of this court dated June 24, 2010, the defaults in answering of all defendants served with process were fixed and determined and a referee to compute amounts due was appointed. On April 21, 2011, defendant Hamid appeared herein by the filing of a notice of appearance by his current counsel.

By the instant motion, the plaintiff seeks an order permitting it to file a new affidavit of merits to enable it to file the vouching affirmation of its counsel that is the subject of certain Administrative Orders issued by court administrators (*see* A.O. 548/10, as amended by A.O. 431/11). In addition, the plaintiff seeks an order confirming the report of the referee to compute and entry of a judgment of foreclosure and sale.

Defendant Hamid vigorously opposes the plaintiff's motion and separately cross moves for an order dismissing this action on grounds that the plaintiff lacks standing, that its failure to submit the vouching affidavit of its attorney warrants such relief, and that its failure to move for default judgment within the one year time limitations period prescribed by CPLR 3215(c) likewise warrants such relief. The defendant alternatively seeks an order vacating his default on excusable default grounds of the type contemplated by CPLR 5015(a)(1) and 3012(d) and leave to appear herein by answer and defend on the merits.

First considered is the defendant's cross motion since the granting thereof may render all or a part of the plaintiff's motion-in-chief, academic. As indicated above, the cross motion is predicated upon several grounds. For the reasons stated below, the cross motion is denied.

Rejected as unmeritorious are the defendant's claims that a purported lack of standing on the part of the plaintiff warrants dismissal of the plaintiff's complaint. Recent appellate case authorities have repeatedly held that a lack of standing is merely an affirmative defense which must be timely raised by a defendant possessed of such defense or it is waived (*see* CPLR 3018[b]; CPLR 3211[e]; ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; ***U.S. Bank Natl. Ass'n v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The defense of standing is thus not jurisdictional in nature (*see* ***Wells Fargo Bank, N.A. v Gioia***, 114 AD3d 766, 980 NYS2d 535 [2s Dept 2014]; ***Citimortgage, Inc. v Friedman***, 109 AD3d 573, 970 NYS2d 706 [2d Dept. 2013]; ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***US Bank Natl. Ass'n v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept. 2013]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; ***Bank of New York v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***U.S. Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; ***U.S. Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242-244, *supra*).

Once waived, a standing defense may not be resurrected by its assertion in opposition to a motion for summary judgment (*see Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *Capital One, N.A. v Knollwood Prop. II, LLC*, 98 AD3d 707, *supra*; *JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; *US Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *HSBC Bank, USA v Schwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *U.S. Bank Natl. Ass'n v Eaddy*, 79 AD3d 1022, 914 NYS2d 901 [2010]). Nor may it be used in support of an untimely motion to dismiss pursuant to CPLR 3211 (*see EMC Mtge. Corp. v Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *U.S. Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). In addition, a waived standing defense may not be asserted in support of an application to vacate a default under CPLR 5015(a)(1) (*see JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, *supra*; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

Here, defendant Hamid's default in answering occurred some five years ago and it was fixed in the order of reference dated June 24, 2010. The defense of standing was thus waived by such defendant. Those portions of the cross motion wherein defendant Hamid seeks dismissal of the plaintiff's complaint due to a purported lack of standing constitute an untimely motion for such relief pursuant to CPLR 3211(a)(3) and an impermissible attempt to resurrect this waived defense without establishing grounds for a vacatur of his default, all of which, is wholly unavailing under the controlling case authorities cited above (*see EMC Mtge. Corp. v Gass*, 114 AD3d 1074, *supra*; *U.S. Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694–695, *supra*; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, *supra*).

The defendant's claim that dismissal of this action is warranted by reason of the plaintiff's failure to submit the vouching affirmation required by Administrative Order 548/10, as amended by A.O. 431/11, is also lacking in merit as any such failure is not jurisdictional in nature and does not otherwise constitute a defect warranting dismissal (*see CPLR 3211*; *Bank of New York Mellon v Izmirligil*, 43 Misc3d 409, 980 NYS2d 733 [Sup. Ct. Suffolk County 2014]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011] *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept. 2012]). In any event, the plaintiff has now submitted an affirmation that is compliant with these Administrative Orders thereby rendering the defendant's claims with respect thereto, academic (*see id*).

The next demand for dismissal of the complaint is predicated upon a claim that the plaintiff abandoned its claim for foreclosure and sale by reason of its failure to move for a default judgment within the one year time limitation imposed by CPLR 3215(c). This claim is equally lacking in merit.

CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (*see U.S. Bank Nat. Ass'n v Poku*, \_\_\_ AD3d \_\_\_, 2014 WL 2871393 [2d Dept 2014]; *Jones v Fuentes*, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; *see also Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept

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2013]; *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; *Home Sav. of America, F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

In mortgage foreclosure actions, is well settled law that foreclosing plaintiffs may not be deemed to have abandoned their foreclosure action under CPLR 3215(c) when they take “the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference” under RPAPL § 1321(1) within one year of the defendant’s default (*Klein v St. Cyprian Prop., Inc.*, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; see *U.S. Bank Nat. Ass’n v Poku*, \_\_\_ AD3d \_\_\_, 2014 WL 2871393 [2d Dept 2014], *supra*; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). “Where application is made to the court for the entry of a default judgment within one year of the defendant’s default, the court may not refuse to enter judgment or dismiss the complaint as abandoned pursuant to CPLR 3215(c)” (*Nowicki v Sports World Promotions*, 48 AD3d 435, 851 NYS2d 270 [2d Dept 2008]). The outcome of such application is irrelevant because it is the mere interposition of an application for a default judgment within one year of the default that suffices for purposes of CPLR 3215(c) (see *U.S. Bank Nat. Ass’n v Poku*, \_\_\_ AD3d \_\_\_, 2014 WL 2871393 [2d Dept 2014], *supra*; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, *supra*; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, *supra*).

Here, defendant Hamid’s default in answering occurred at the earliest in June of 2009. In May of 2010, the plaintiff moved for an order of reference upon the default of all defendants in answering and was granted such relief in the court’s order dated June 24, 2010. Interposition of that motion for the order of reference upon his and the other defendants’ defaults, alone, constituted compliance with the requirements of CPLR 3215(c). There was thus no abandonment of the plaintiff’s complaint within the contemplation of that statute. The defendant’s demand for dismissal of the complaint pursuant to CPLR 3215(c) is thus rejected as unmeritorious.

Defendant Hamid’s remaining demands for affirmative relief include a vacatur of his default in answering and leave to serve a late answer. Such demands are governed by CPLR 5015(1)(a) and 3102(d), both of which require a demonstration of reasonable excuse for the default in answering and of a meritorious defense to the plaintiff’s claims (see *Mannino Dev., Inc. v Linares*, 117 AD3d 995, 2014 WL 2198432 [2d Dept 2014]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; *JP Morgan Chase Bank v Palma*, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]). The only ground advanced by the defendant is the purported delay in prosecuting this action by the plaintiff. However, such delay does not excuse the default in answering that occurred some five years ago nor his unexplained failure to move to vacate such default sooner (see *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 725, 957 NYS2d 868 [2d Dept 2013]).

Finally, defendant Hamid’s attempt to invoke the court’s inherent powers as means of vacating his default is rejected as unmeritorious. The defendant failed to demonstrate that the circumstances of this action warrant invocation of the court’s inherent power to vacate the prior order fixing the defaults in answering in the interest of substantial justice (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68, 760 NYS2d 727 [2002]; *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; *Citimortgage, Inc. v Brown*, 111 AD3d 593, 974 NYS2d 272 [2d Dept 2013]; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 1168, 912 NYS2d 285 [2d Dept 2010]).

The court thus finds that defendant Hamid failed to demonstrate any entitlement to a dismissal of this action or to a vacatur of his default in answering and for leave to appear herein by answer. The cross motion for such relief and any other incidental thereto is thus denied.

Left for consideration is the plaintiff's motion-in-chief for, among other things, entry of a judgment of foreclosure and sale which is opposed by the defendant Hamid. Therein, Hamid re-asserts the plaintiff's purported lack of standing and couples it with nuanced claims of fraudulent acts and misdeeds by the plaintiff's former counsel and/or its other agents in other cases. The defendant further asserts that the plaintiff's motion must be denied due to the plaintiff's failure to submit a vouching affirmation of its current counsel which claim was rejected for reasons set forth above. In addition, defendant Hamid asserts that the plaintiff's failure to move to vacate its prior order of reference which was premised upon its original affidavit of merits, the proper execution of which cannot be confirmed by plaintiff's current counsel, warrants denial of the plaintiff's motion. For the reasons stated below, the court grants the plaintiff's motion.

Those portions of the plaintiff's motion wherein it seeks leave to file a new affidavit of merits is considered under CPLR 5019 and is granted as such application, together with the granting thereof, is consistent with the holdings set forth in recent controlling case authorities (*see U.S. Bank Natl. Assoc. v Eaddy*, 109 AD3d 908, *supra*; *Citimortgage, Inc. v Guarino*, 42 Misc3d 962, 978 NYS2d 646 [Sup Ct. Suffolk County 2014]). The affidavit of merits is deemed filed as is the vouching affirmation of plaintiff's counsel which was supplied in the plaintiff's reply papers (*see LaSalle Bank, NA v Pace*, 100 AD3d 970, 955 NYS2d 161 [2d Dept. 2012], *supra*).

The court further grants the remaining portions of the plaintiff's motion wherein it seeks an order confirming the report of the referee to compute and entry of a judgment of foreclosure and sale. The moving papers sufficiently demonstrated the plaintiff's entitlement to such relief and the other relief incidental thereto, including an award of counsel fees (*see RPAPL § 1351, et. seq.*). The defendant waived all claims of a lack of standing on the part of the plaintiff and the defense premised thereon may not serve to defeat the plaintiff's entitlement to the relief demanded on its motion-in-chief (*see Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, *supra*; *Capital One, N.A. v Knollwood Prop. II, LLC*, 98 AD3d 707, *supra*; *JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, *supra*).

Nor is denial of the plaintiff's motion warranted by the defendant's nuanced claims that the plaintiff's pleaded allegations of fact and other assertions thereof in previous filings herein are false and that documents were falsified or improperly assembled without regard to truth thereof by the plaintiff's former counsel and other agents. It is well established that perceived misconduct on the part of a plaintiff or its agents in other matters does not establish fraud or deceptive practices in a pending case and accordingly claims premised thereon are insufficient to establish fraud or deceptive practices on the part of the plaintiff in the pending case (*see Wells Fargo, N. A. v Levin*, 101 AD3d 1519, 958 NYS2d 227 [3d Dept 2012]; *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]; *Onewest Bank, FSB v Martinez*, 101 AD3d 969, 970, 955 NYS2d 532 [2d Dept 2013]). In addition, the bald, conclusory and unsubstantiated nature of these claims further warrant their rejection (*see HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *Indymac Bank, F.S.B. v Yano-Horoski*, 107 AD3d 672, 965 NYS2d 888 [2d Dept. 2013]; *U.S. Bank Natl. Ass'n v Allen*, 102 AD3d 955, 958 NYS2d 737 [2d Dept 2013]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 1307, 956 NYS2d 271 [2012]; *Bank of N.Y. v Stradford*, 55 AD3d at 766, 869 NYS2d 554 [2d Dept 2008]; *Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475, 808 NYS2d 229 [2d Dept 2005]).

Moreover, because such claims sound in intrinsic fraud, the defendant was required to advance both a reasonable excuse for the default in answering and a meritorious defense to the plaintiff's pleaded claims for relief (*see New Century Mtge. Corp. v Corriette*, \_\_\_ AD3d \_\_\_, 2014 WL 2198579 [2d Dept 2014]; *Bank of N.Y. v Stradford*, 55 AD3d 765, *supra*; *Bank of N.Y. v Lagakos*, 27 AD3d 678, 679, 810 NYS2d 923[2d Dept 2006]). Since defendant Hamid advanced neither, the claims of fraud advanced by his counsel are rejected on this third and independent ground.

In view of the foregoing, the plaintiff's motion-in-chief (#002) for, among other things, leave to file a new affidavit of merits, confirmation of the report of the referee to compute and a judgment of foreclosure and sale is granted, while the cross motion (#003) by the Hamid defendant to dismiss or to vacate his default in answering and other relief is denied.

Proposed order and judgment of foreclosure and sale, as modified by the court, marked signed.

DATED: 6/27/14

  
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THOMAS F. WHELAN, J.S.C.