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| <b>HSBC Bank USA v Newton</b>                                                                                                                                                                                                                                    |
| 2014 NY Slip Op 32316(U)                                                                                                                                                                                                                                         |
| August 26, 2014                                                                                                                                                                                                                                                  |
| Sup Ct, Suffolk County                                                                                                                                                                                                                                           |
| Docket Number: 07-36007                                                                                                                                                                                                                                          |
| Judge: Daniel Martin                                                                                                                                                                                                                                             |
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COPY

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN

MOTION DATE 2-13-13 (#003)  
MOTION DATE 11-12-13 (#004)  
ADJ. DATE 12-10-13  
Mot. Seq. # 003 - MG  
# 004 - XMD

-----X  
HSBC BANK USA, NATIONAL  
ASSOCIATION, AS TRUSTEE FOR NOMURA  
HOME EQUITY LOAN, INC., ASSET-  
BACKED CERTIFICATES, SERIES 2006-FM2,

Plaintiff,

- against -

WENDY NEWTON, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., FREMONT INVESTMENT & LOAN,  
TEACHERS FEDERAL CREDIT UNION,

“JOHN DOE #1” through “JOHN DOE #10,”  
inclusive, the names of then ten last named  
defendants being fictitious, real names unknown  
to plaintiff, the parties intended being persons or  
corporations having an interest in, or corporations  
having an interest in, or tenants or persons in  
possession of, portions of the mortgaged premises  
described in the Complaint,

Defendants.  
-----X

LEOPOLD & ASSOCIATES, PLLC  
Attorney for Plaintiff  
80 Business Park Drive, #110  
Armonk, New York 10504

WENDY NEWTON, Pro Se  
377 Beachview Street  
Copiague, New York 11726

Upon the following papers numbered 1 to 40 read on this motion for foreclosure and this cross motion to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers 28 - 36; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers 37 - 38; 39 - 40; Other order of reference - 27; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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**ORDERED** that the motion by plaintiff HSBC Bank USA, National Association, as Trustee for Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-FM2 for leave to substitute as plaintiff HSBC Bank, USA, National Association, as Trustee for the Benefit of the Certificateholders of Nomura Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM2, for leave to amend the caption of this action pursuant to CPLR 3025 (b), for dismissal of defendant Wendy Newton's affirmative defenses, for summary judgment in its favor on the complaint, and for the appointment of a referee to compute the amount due under the mortgage is granted; and it is further

**ORDERED** that the cross motion by defendant Wendy Newton for leave to amend her answer is denied; and it is further

**ORDERED** that the caption is hereby amended by substituting Justin Newton, Shayne Wellington, Gianna Wellington, Deadri Carrion and Cheryl Carrion in place of "John Doe 1" through "John Doe 5" and by striking therefrom the names of the remaining "John Does"; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

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HSBC BANK USA, NATIONAL ASSOCIATION, AS  
 TRUSTEE FOR THE BENEFIT OF THE  
 CERTIFICATEHOLDERS OF NOMURA HOME  
 EQUITY LOAN, INC., ASSET-BACKED  
 CERTIFICATES, SERIES 2006-FM2,

x

Plaintiff,

-against-

WENDY NEWTON, MORTGAGE ELECTRONIC  
 REGISTRATION SYSTEMS, INC, FREMONT  
 INVESTMENT & LOAN, TEACHERS FEDERAL  
 CREDIT UNION, CHERYL CARRION,  
 DEADRI CARRION, JUSTIN NEWTON,  
 GIANNA WELLINGTON, SHAYNE WELLINGTON,

Defendants.

x

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This is an action to foreclose on the premises known as 12 Mortell Court, Copiague, New York. On April 4, 2006, defendant Wendy Newton, as owner of the premises, executed an adjustable rate note

in favor of Fremont Investment & Loan ("Fremont") in the principal amount of \$336,000.00, which was secured by a mortgage on the property. On the same date, defendant Newton executed a second note in favor of Fremont in the amount of \$84,000, which was secured by a second mortgage on the same premises. The mortgages indicated Fremont was the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") was the nominee of Fremont, as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded with the Suffolk County Clerk's office on April 21, 2006. On November 15, 2007, the first mortgage and note were assigned by MERS to plaintiff HSBC Bank USA, National Association, as Trustee for Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-FM2 ("HSBC"). The assignment to HSBC was recorded with the Suffolk County Clerk's office on June 10, 2008. Thereafter, on December 29, 2008, the mortgage and note were assigned by HSBC to the proposed plaintiff HSBC Bank, USA, as Trustee for the Benefit of the Certificateholders of Nomura Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM2 ("HSBC Bank"), and the assignment was recorded with the Suffolk County Clerk's office on August 6, 2009.

Meanwhile, on June 1, 2007, defendant Newton allegedly defaulted on the obligation to make monthly loan payments. By virtue of defendant Newton's alleged default, the acceleration clause in the subject mortgage was exercised and the entire principal amount of \$334,835.38 plus interest became due. As a result of defendant Newton's continuing default, HSBC commenced this action on November 19, 2007. The gravamen of HSBC's complaint is that defendant Newton breached her obligations under the terms of the note and mortgage by failing to make monthly payments commencing with the June 1, 2007 payment. Defendant Newton interposed an answer, pro se, asserting two affirmative defenses. The Court's computerized records indicate that a foreclosure settlement conference was held on October 9, 2013, at which time this matter was referred to an IAS justice, since a resolution or settlement had not been achieved. Thus, the matter is in compliance with CPLR 3408 and no further settlement conference is required.

HSBC now moves for summary judgment on its complaint, arguing that defendant Newton breached her obligation to pay under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with the June 1, 2007 payment and subsequent payments thereafter. In support of its motion, HSBC submits, among other things, the sworn affidavit of Denise V. Lundquist, contract management coordinator for Ocwen Loan Servicing, LLC ("Ocwen"), the affirmation of its attorney, Sarah J. Greenberg, Esq., pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignments; notices pursuant to RPAPL 1320 and 1304; affidavits of service for the summons and complaint. HSBC Bank also submits a proposed order appointing a referee to compute.

Defendant Newton cross-moves for leave to serve an amended answer to assert twelve affirmative defenses, including lack of standing, predatory lending and fraud. Initially, in addressing defendant Newton's application for leave to serve and amend her answer, the Court notes that as a general rule, motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see* CPLR 3025(b); *Glaser v County of Orange*, 20 AD3d 506, 799 NYS2d 120 [2d Dept 2005]). However, the defendant must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Ctr.*, 280 AD2d

636, 721 NYS2d 662 [2d Dept 2001]). In the instant matter, defendant Newton's original answer, in which she appeared pro se, is dated December 10, 2007 and asserts predatory lending and "trying to resolve this issue by doing a short sale" as the two affirmative defenses against plaintiff's allegations. Defendant Newton, after a six-year delay, now seeks leave to file an amended answer without offering a reasonable explanation for the inordinate delay in filing such application, which was not made until after HSBC filed its third motion for summary judgment and numerous foreclosure settlement conferences were held (*see e.g. Velez v South Nine Realty Corp.*, 57 AD3d 889, 871 NYS2d 614 [2d Dept 2008]). Although it is unclear as to the exact date that defendant Newton obtained counsel, she was represented by counsel more than a year before HSBC filed its third motion for summary judgment, and, since 2010, she has received legal advice and representation on the instant matter from numerous legal entities. Moreover, the information upon which the affirmative defenses are based has been known to defendant Newton for more than six years (*see e.g. Brooks v Robinson*, 56 AD3d 406, 867 NYS2d 406 [2d Dept 2008]). Thus, defendant Newton's claims that the loan servicer Ocwen failed to negotiate with her in good faith to reach a settlement in this matter, that HSBC has delayed the matter in order to charge her additional interest, fees and penalties, that she was unaware of pro bono legal services for foreclosure actions, and that she now understands that her answer was deficient when she filed it, are factually insufficient to sustain her burden for the requested relief given the prolonged delay (*see Keating v Nanuet Bd of Educ.*, 44 AD3d 623, 843 NYS2d 157 [2d Dept 2007]). Likewise, defendant Newton has failed to demonstrate by any credible evidence a lack of prejudice to HSBC, which has already moved for summary judgment (*see Congel v Malfitano*, 84 AD3d 1145, 924 NYS2d 129 [2d Dept 2011]). In light of the foregoing, defendant Newton's cross motion for leave to amend her answer is denied.

The branch of HSBC's motion to substitute HSBC Bank as plaintiff and to amend the caption to include the names Justin Newton, Shayne Wellington, Gianna Wellington, Deadri Carrion, Cheryl Carrion in the place and stead of John Doe #1 through John Doe #5 is granted. CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." HSBC has submitted the note and mortgage executed by Wendy Newton in favor of Fremont on April 4, 2006, as well as the subsequent assignment of mortgage dated November 15, 2007 by MERS, as nominee for Fremont, to HSBC. In addition, HSBC has submitted the assignment of mortgage dated December 24, 2008 executed by its assistant vice president Diane Dixon, which assigns to HSBC Bank the mortgage dated April 6, 2006 from defendant Newton and the note in the principal sum of \$336,000.00. Therefore, based upon the proffered evidence that the subject loan documents were assigned to HSBC Bank, the Court exercises its discretion in granting HSBC's motion to substitute HSBC Bank as the real plaintiff in interest (*see CPLR 1018; Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *see also Citibank, N.A. v Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). Moreover, the caption shall be amended as set forth above to reflect the substitution and the striking of "John Doe 6" through "John Doe 10" (*see CPLR 3025 [b]*).

As to the branch of the motion for summary judgment on the complaint, to commence a foreclosure action, a plaintiff must have a legal and equitable interest in the subject mortgage (*see Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). A plaintiff in a mortgage foreclosure action will establish a prima facie case through the production of the mortgage, the unpaid note, and

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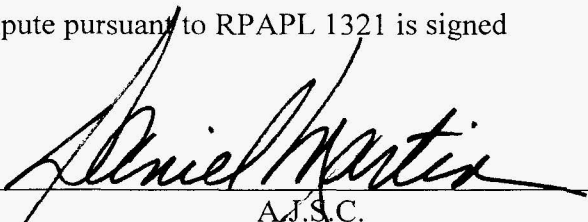
evidence of default” (see *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on 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]).

Here, HSBC demonstrated its prima facie case of its entitlement to summary judgment on its complaint by producing the mortgage, note, a copy of the assignment of the note to it, and evidence of defendant Newton’s default on the obligation to pay under the terms of the mortgage (see CPLR 3212; RPAPL 1321; *2010-1 SFG Venture LLC v 34-10 Dev., LLC*, 106 AD3d 455, 965 NYS2d 863 [1st Dept 2013]; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). As a result of HSBC’s prima facie showing, it was incumbent upon defendant Newton to submit proof sufficient to raise a triable issue of fact to rebut plaintiff’s prima facie showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (see *Flagstar Bank v Bellafigiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Contrary to defendant Newton’s contentions, she failed to raise any triable issue of fact as to whether she was subjected to predatory lending or any of the other affirmative defenses raised in her answer (see *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; *Mendel Group, Inc. v Prince*, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]). Even when viewed in the light most favorable to defendant Newton, her submissions were insufficient to raise a genuine question of fact (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]).

Accordingly, the motion for summary judgment is granted against defendant Newton. In addition, HSBC’s request for an order fixing the default of the non-appearing, non-answering defendants and an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Defendant Newton’s cross motion for leave to amend her answer is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: August 26, 2014

  
 A.J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION