

<b>HSBC Bank USA, N.A. v Elias</b>
2014 NY Slip Op 32726(U)
September 22, 2014
Supreme Court, Suffolk County
Docket Number: 12-27839
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 7-29-13  
ADJ. DATE 9-18-14  
Mot. Seq. # 001 - MG

-----X  
HSBC BANK USA, N.A., AS INDENTURE  
TRUSTEE FOR THE REGISTERED  
NOTEHOLDERS OF RENAISSANCE HOME  
EQUITY LOAN TRUST 2006-3,

Plaintiff,

- against -

MOUNIR ELIAS, NEW YORK STATE  
AFFORDABLE HOUSING CORPORATION,  
MIDLAND FUNDING OF DELAWARE LLC  
MIDLAND FUNDING LLC,

“JOHN DOE #1” through “JOHN DOE #12,” the  
last twelve names being fictitious and unknown  
to plaintiff, the persons or parties intended being  
the tenants, occupants, persons or corporations, if  
any, having or claiming an interest in or lien upon  
the premises, described in the complaint,

Defendants.  
-----X

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

DARRIN BERGER, ESQ.  
Attorney for Defendant  
Mounir Elias  
80 Prospect Street  
Huntington, New York 11743

Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers~~       ; Answering Affidavits and supporting papers 15 - 21; Replying Affidavits and supporting papers 22 - 26; ~~Other~~       ; it is,

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

**ORDERED** that this motion by plaintiff HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2006-3 (“HSBC”), pursuant to CPLR 3212, for summary judgment on its complaint, for an order of reference appointing a referee to compute

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pursuant to Real Property Actions and Proceedings Law 1321, and for 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 defendant Janet Elias in place of defendant “John Doe #1” and by striking therefrom defendants “John Doe #2” through “John Doe #12”; 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 hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_  
 HSBC BANK USA, N.A., AS INDENTURE TRUSTEE  
 FOR THE REGISTERED NOTEHOLDERS OF  
 RENAISSANCE HOME EQUITY LOAN TRUST 2006-3,

Plaintiff,

- against -

MOUNIR ELIAS, NEW YORK STATE AFFORDABLE  
 HOUSING CORPORATION, MIDLAND FUNDING OF  
 DELAWARE LLC MIDLAND FUNDING LLC, JANET  
 ELIAS,

Defendants.

\_\_\_\_\_  
 This is an action to foreclose a mortgage on premises known as 1153 Cassel Avenue, Bayshore, New York. On June 29, 2006, defendant Mounir Elias (“Elias”) executed a fixed rate note in favor of Premium Capital Funding LLC d/b/a Topdot Mortgage, a New York Limited Liability Company (“Premium”) agreeing to pay \$331,500.00 at the yearly rate of 7.240 percent. On the same date, defendant Elias executed a first mortgage in the principal sum of \$331,500.00 on their home, the subject property. The mortgage indicated Premium to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of Premium as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on March 23, 2007 in the Suffolk County Clerk’s Office. Thereafter, the note and mortgage were transferred by an assignment of mortgage dated May 19, 2010 from MERS, as nominee for Premium to plaintiff HSBC. The assignment of mortgage was recorded on July 8, 2010 with the Suffolk County Clerk’s Office. On December 28,

2010, defendant Elias executed a Home Affordable Modification Agreement that, *inter alia*, modified the original note and mortgage by providing a new principal balance of \$384,247.61.

Ocwen Loan Servicing, LLC (“Ocwen”), sent a notice of default dated December 29, 2011 to defendant Elias stating that his loan was in default and that the amount past due was \$7,654.26. As a result of defendant’s continuing default, plaintiff commenced this foreclosure action on September 10, 2012. In its complaint, plaintiff alleges in pertinent part that the mortgagor breached his obligations under the terms of the note and mortgage by failing to make monthly payments commencing with his October 1, 2011 payment and thereafter. Defendant Elias interposed an answer with eleven affirmative defenses.

The Court’s computerized records indicate that a foreclosure settlement conference was held on April 22, 2013 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 defendant Elias defaulted under the terms of the loan agreement and mortgage for failure to pay the October 1, 2011 payment and that defendant’s answer and defenses are without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Stephen Lee, contract management coordinator of Ocwen, servicer for the mortgage loan and attorney in fact; the affirmation of Danielle L. Tabankin, Esq. in support of the application; the summons and complaint; the pleadings; the note, mortgage and assignments of mortgage; a notice of default; proof of notices pursuant to RPAPL 1320, 1303 and 1304; the affirmation of Ivy Capelli, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon counsel for defendant Elias; and a proposed order appointing a referee to compute.

Defendant Elias opposes the motion, *inter alia*, on the ground that plaintiff lacks 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 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]). 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]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, copies of the assignments of mortgage, the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL 1321; *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]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC 3-202; 3-204; 9-203 [g]). Here, the plaintiff established that it took possession of the note containing an allonge with an indorsement in blank prior to the commencement of the action (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). HSBC also submitted documentation, in the form of written assignments, which established that it was the owner and holder of the subject note and mortgage prior to the commencement of the action. These assignments were duly recorded in the Suffolk County Clerk's Office. Thus plaintiff thus established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafiore*, 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]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

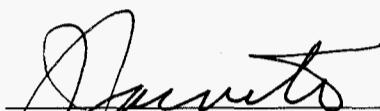
In his opposing papers, defendant Elias re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing by reason of an allonge containing the indorsement made from Premium Capital to Delta Funding Corp. Defense counsel further questions the Limited Power of Attorney submitted on behalf of plaintiff and the authority of Susan Moy to execute such document in her capacity as vice president of HSBC. However, here the record establishes that

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plaintiff was validly assigned the note and mortgage that is the subject of this foreclosure action (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Neither the defenses raised in his answer nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment. Notably, defendant Elias did not deny having received the loan proceeds and having defaulted on his loan payments in his opposition papers. Therefore, plaintiff's motion for summary judgment as against defendant Elias and for order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see 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]).

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

Dated: September 22, 2014

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

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