

**HSBC Bank USA v Lacerra**

2015 NY Slip Op 30901(U)

May 28, 2015

Supreme Court, Richmond County

Docket Number: 130061/2011

Judge: Thomas P. Aliotta

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

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HSBC Bank USA, National Association as Trustee for  
Homestar Mortgage Mortgage Acceptance Corp.,  
Asset-Backed Pass-Through Certificates, Series 2004-5

TP - 12

Plaintiff,  
  
- against -

Present:  
Hon. Thomas P. Aliotta

Annmarie Lacerra a/k/a Ann Marie Lacerra, National City  
Bank, and "JOHN DOE #1" through "JOHN DOE #10", the **DECISION and ORDER**  
last ten names being fictitious and unknown to the Plaintiff,  
the persons 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,

Index No. 130061/ 2011

Motion No. 3172 - 002

Defendants.

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The following papers numbered 1 to 4 were fully submitted on March 26, 2015.

Papers Numbered

Plaintiff's Notice of Motion for a Judgment of Foreclosure and Sale, with Supporting Papers (dated September 18, 2014).....	1
Affidavit in Opposition by Defendant Ann Marie Lacerra (dated January 23, 2015).....	2
Plaintiff's Reply Affirmation (dated March 10, 2015).....	3
Reply Affirmation by Defendant Ann Marie Lacerra (dated March 23, 2015).....	4

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Upon the foregoing papers, plaintiff's motion for, *inter alia*, a Judgment of Foreclosure  
and Sale is granted.

This action to foreclose a certain mortgage dated June 15, 2004, encumbering the

premises located at 408 Craig Avenue, Staten Island, New York, was commenced on January 21, 2011 by plaintiff HSBC Bank USA, National Association as Trustee for Homestar Mortgage Acceptance Corp., Asset-Backed Pass-Through Certificates, Series 2004-5 (hereinafter, “plaintiff”). Said mortgage was given to secure a note executed by defendant Annmarie Lacerra a/k/a Ann Marie Lacerra (hereinafter, “defendant”) on June 15, 2004 in the principal sum of \$301,000.00. On or about June 1, 2011, defendant interposed a *pro se* verified answer to the complaint, asserting but a single “defense and affirmative defense”, *i.e.*, that plaintiff was not the legal owner and holder of the subject note and mortgage.<sup>1</sup> On April 11, 2013, this Court granted plaintiff’s unopposed motion for an Order of Reference appointing a referee to compute, and amending the caption by substituting Nelson Zabala, Vilma Zabala and Crystal Sarcone in place of “John Doe #1 through John Doe #3.

In opposition to the instant motion, by plaintiff, for the entry of a Judgment of Foreclosure and Sale, defendant Lacerra requests “the production of the original promissory note and mortgage and all assignments pertaining to the chain of title”. In brief, she maintains that this foreclosure action should be dismissed based upon plaintiff’s failure to prove “proper possession and ownership” of her note and mortgage. In support, Lacerra claims that plaintiff’s alleged acquisition of her mortgage loan did not comply with the terms of the Pooling and Servicing Agreement (hereinafter, the “PSA”) which governs the plaintiff trust, *i.e.*, Homestar Mortgage Acceptance Corp., Asset-Backed Pass-Through Certificates, Series 2004-5 (hereinafter,

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<sup>1</sup> Insofar as it appears on the papers before the court, defendant’s *pro se* verified answer to the complaint was rejected by plaintiff’s counsel as untimely. Nevertheless, the merits of defendant’s affirmative defense requires consideration in the application presently before this Court.

“Homestar Trust”), and that her mortgage was not assigned to the plaintiff trustee until January 14, 2010, as evidenced by the related MERS written assignment of mortgage. As a result, defendant maintains that the purported transfer of her mortgage loan to plaintiff was void as it varied materially from the terms of the PSA, which prohibited the acquisition of any asset to fund the trust after the closing date of October 1, 2004 unless the party permitting the acquisition has received an “Opinion of Counsel” that such transfer will not adversely affect the status of the trust. Defendant also argues that plaintiff violated the terms of the PSA by acquiring her note directly from the sponsor’s successor-in-interest rather than the Depositor, ABFC, and that certain records plaintiff filed with the Securities Exchange Commission (*e.g.*, Form 8- K) indicate that her loan was not one of the “listed mortgage loans” included in the Homestar Trust. Finally, Lacerra contends that plaintiff has produced documents that are either forged, falsified and/or robo-signed, and that certain records of the Florida Department of State Division of Corporations reveal that MERS, INC., the purported assignor of the subject mortgage, was not a legal entity at the time of the purported assignment of her mortgage on January 14, 2010. Based on the foregoing, defendant alleges that plaintiff has no standing to maintain this foreclosure action.

It is well established that “[w]here standing is put into issue by a defendant, a plaintiff must prove its standing if it is to be entitled to relief” (Bank of Am., N.A. v Paulsen, 125 AD3d 909, 910; *see* Bank of N.Y. Mellon v Gales, 116 AD3d 723, 724; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931, 932). “[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, 281 [2<sup>nd</sup> Dept 2011]; *US Bank N. A. v Madero*, 80 AD3d 751, 753 [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, plaintiff has established its standing as the holder of the Lacerra note and mortgage by demonstrating that said note was in its possession prior to the commencement of this action, as evidenced by its attachment of an allonge endorsed by defendant's lender, Finance America, LLC, to Homestar Mortgage Services, LLC, to the summons and complaint at the time the action was commenced (*see Nationstar Mortgage, LLC v Catizone*, 2015 NY Slip Op 03510, \_\_\_ AD3d \_\_\_; *cf. Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682-683). Moreover, contrary to defendant Lacerra's contentions, it is the opinion of this Court that the standing of plaintiff to commence this foreclosure action is unaffected by any perceived noncompliance with the terms of the PSA, which should not be construed to impair the long recognized methods of transferring a negotiable instrument such as a promissory note under the Uniform Commercial Code (*see UCC 3-202[1]; 3-204[2]*).

Finally, defendant has failed to demonstrate how discovery in this foreclosure action might yield material facts which would warrant the denial of plaintiff's motion for a judgment of foreclosure and sale (*see De Lage Landen Fin. Servs. v Mannetti Assoc.*, 305 AD2d 365, 366; *Min Whan Ock v City of New York*, 34 AD3d 542, 543; *see also Charter One Bank, FSB v Houston*, 300 AD2d 429, 430, *lv dismissed* 99 NY2d 651).

Accordingly, it is

ORDERED, that plaintiff's motion for a Judgment of Foreclosure and Sale is granted;

and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

Dated: May 28, 2015

/s/ \_\_\_\_\_  
Hon. Thomas P. Aliotta  
J.S.C.