

<b>HSBC Bank USA, N.A. v Williams</b>
2021 NY Slip Op 32118(U)
October 28, 2021
Supreme Court, Kings County
Docket Number: Index No. 41469/07
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm. 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of October, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
HSBC BANK USA, N.A., AS INDENTURE TRUSTEE  
FOR THE REGISTERED NOTEHOLDERS OF  
RENAISSANCE HOME EQUITY LOAN TRUST 2006-2,

Plaintiff,

- against -

Index No. 41469/07

JOSEPH WILLIAMS; SYLVIA WILLIAMS; CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and 256 BEDFORD AVENUE, LLC,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

2-6      10-24

Opposing Affidavits (Affirmations) \_\_\_\_\_

10-24    27-28

Reply Affidavits (Affirmations) \_\_\_\_\_

27-28    31

Upon the foregoing papers in this action to foreclose a mortgage on the real property at 1015 East 103<sup>rd</sup> Street in Brooklyn (Block 8230, Lot 35) (Property), intervenor-defendant 256 Bedford Avenue LLC (Bedford) moves (in motion sequence [mot. seq.] six) for an order: (1) precluding plaintiff HSBC Bank USA, N.A. (HSBC) from presenting any

evidence in support of its pleading and directing that all issues be resolved in Bedford's favor, pursuant to CPLR 3126, based on HSBC's failure and refusal to respond to Bedford's notice of discovery and inspection, demand for HSBC's deposition and demand for names and addresses of witnesses, and (2) granting Bedford the costs of this motion, including an award of attorneys' fees and expenses of at least \$5,000.00.

HSBC cross-moves (in mot. seq. seven) for an order: (1) granting it summary judgment against Bedford, pursuant to CPLR 3212; (2) striking Bedford's answer to the complaint; (3) confirming the appointment of a successor referee to compute the amount due and owing; and (4) denying Bedford's motion to preclude.

### **Background**

On November 8, 2007, HSBC commenced this action to foreclose a consolidated mortgage encumbering the Property by filing a summons, a complaint and a notice of pendency against the Property. The mortgage consolidation agreement was entered into by defendants Joseph Williams and Sylvia Williams, as borrowers (borrower defendants), and Delta Funding Corporation (Delta), as lender, on March 31, 2006. The agreement consolidated mortgages previously executed by the borrower defendants in favor of Delta with an additional mortgage in favor of Delta to form a single lien in the principal amount of \$490,000.00. The consolidated mortgage was recorded on June 13, 2006 in the name of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Delta. The complaint alleges that HSBC is the "true and lawful owner" of the mortgage and note.

All of the defendants failed to answer or otherwise respond to the complaint. On September 8, 2008, the court (Martin, J.) granted HSBC an order of reference on default. HSBC subsequently moved for a judgment of foreclosure and sale, and by a March 19, 2010 order, the court (Martin, J.) denied HSBC's motion without prejudice to renewal after a court-mandated settlement conference.

By a November 12, 2013 order, this court dismissed the action as abandoned, pursuant to CPLR 3215 (c), based on HSBC's failure to proceed with entry of judgment within one year of defendants' appearance default and cancelled the notice of pendency filed against the Property (2013 Dismissal Order).

After this action was dismissed, the borrower defendants transferred the Property to Bedford by a July 7, 2014 deed, which was recorded on May 15, 2015.

Subsequently, on or about September 24, 2015, HSBC moved to vacate the 2013 Dismissal Order and restore this action to the court's active calendar, which was granted on default by this court's April 28, 2016 order. By a February 17, 2017 order, this court appointed a successor referee to compute the amount due and owing to HSBC, and on March 25, 2017, the successor referee issued her report. On May 8, 2017, HSBC again moved for a judgment of foreclosure and sale.

On or about August 23, 2017, Bedford moved for leave to intervene in this foreclosure action and to file an answer to the complaint. Bedford opposed HSBC's second motion for a judgment of foreclosure and sale. By a September 20, 2017 order, this court granted Bedford's motion to intervene and added Bedford as a defendant.

By a November 26, 2018 decision and order, this court deemed Bedford's proposed answer to the complaint interposed and denied HSBC's second motion for a judgment of foreclosure and sale without prejudice. This court specifically held that Bedford was "not bound by the proceedings in this action, including the prior orders of reference issued on the default of defendants" since "the notice of pendency was cancelled and this action [was] dismissed at the time [that] the deed to the subject property was recorded by Bedford."

Bedford's July 24, 2017 answer denies the material allegations in the complaint, including that the borrower defendants are the owners of the Property or have any valid interest in the Property, that "any interest in the subject mortgage was effectively assigned to [HSBC]," that HSBC "owns" any valid mortgage encumbering the Property and that "any amount is due and owing to [HSBC]" (*see* answer at ¶¶ 3-7). In addition, the answer asserts that Bedford "specifically denies the authenticity of the documents presented by [HSBC]" (*id.* at ¶ 8). Bedford's answer asserts ten affirmative defenses: (1) lack of standing; (2) HSBC and its predecessors failed to give proper annual accountings of the funds in the borrower defendants' escrow account; (3) HSBC and/or its predecessors "failed to provide appropriate and required notices" under the mortgage and/or note . . . ; (4) the mortgage was improperly assigned to HSBC without the original note; (5) HSBC's alleged damages were caused, in whole or in part, by its own culpable conduct because HSBC and/or its predecessors failed to exercise due diligence prior to lending money to the borrower defendants; (6) HSBC failed to satisfy conditions precedent to foreclosure, including the service of a 90-day pre-foreclosure notice upon the borrower defendants; (7)

the statute of frauds; (8) the assignor of the obligations alleged to be due and owing against the borrower defendants had no authority; and (9) HSBC is estopped from seeking payment from the borrower defendants because they were compelled to obtain mortgage insurance to protect the mortgagee against a default.

***Bedford's Instant Motion to Preclude***

On April 8, 2021, Bedford filed the instant motion for an order precluding HSBC from presenting any evidence in support of its complaint and directing that all issues be deemed resolved in its favor, pursuant to CPLR 3126, based on HSBC's "arbitrary and inexcusable failure and refusal" to respond to Bedford's February 19, 2021 notice of discovery and inspection, notice to take HSBC's deposition and demand for names and addresses of HSBC's witnesses (Discovery Demands). Bedford also seeks the cost of this motion, including an award of attorneys' fees and expenses of at least \$5,000.00.

Bedford submits an attorney affirmation asserting that HSBC has failed to respond to its February 19, 2021 Discovery Demands, even after defense counsel served a good faith letter in an effort to resolve the issues with the outstanding Discovery Demands. Defense counsel argues that Bedford "must be guaranteed a lawful opportunity to conduct discovery and to depose Plaintiff . . . to, among other things, obtain the information and documents demanded in order to sufficiently and adequately prepare this case for trial . . ."

***HSBC's Opposition and Summary Judgment Cross Motion***

HSBC opposes Bedford's discovery motion and cross-moves for an order granting it summary judgment against Bedford, striking Bedford's answer and confirming the

appointment of a successor referee and/or appointing a new successor referee to compute the amount due and owing.

HSBC submits a memorandum of law asserting that Bedford's motion to preclude is both "improper" and "premature" because defense counsel made no effort and/or refused to consult with HSBC's counsel in a good faith effort to resolve this discovery dispute. HSBC's counsel submits an affirmation claiming that he sent two emails to defense counsel on May 24, 2021 and June 25, 2021 in which he inquired if defense counsel "would be willing to withdraw its motion and participate in a conference . . ." but he received no response. HSBC further argues that "incomplete" discovery does not prevent this court from granting it summary judgment because Bedford "has failed to make the required showing that 'further discovery may raise a triable issue of fact.'"

HSBC, in support of its summary judgment cross motion, submits a March 19, 2019 "Affidavit of Indebtedness" from Vital Philma (Philma) who attests that he is employed as a Vice President of Ocwen Loan Servicing, LLC (Ocwen Servicing), "a mortgage loan servicer," and that his affidavit is based on his review of Ocwen Servicing's business records, which include "prior servicer records, account ledgers, data compilations, and electronically imaged documents." Philma attests that the borrower defendants defaulted under the mortgage by "fail[ing] to make the payment . . . commencing with the June 1, 2007 payment, which default remains uncured." Philma further attests to the amounts that are due and owing under the note and mortgage "[a]ccording to the Records" and that Ocwen Servicing sent the borrower defendants a notice of default, as required under the

mortgage. Collectively annexed as Exhibit D to Philma's affidavit is: (1) Ocwen Servicing's July 24, 2007 notice of default addressed to the borrower defendants at the Property; (2) a computer printout of the amounts due and owing from May 1, 2007 through March 14, 2019; (3) a "Payment Reconciliation History"; and (4) a listing of advances made on behalf of the borrower defendants, including taxes and insurance. Notably, Philma's "Affidavit of Indebtedness" does not include a power of attorney or any other documentation establishing Ocwen Servicing's authority to act on behalf of HSBC.

In addition, HSBC submits a July 21, 2020 "Affidavit of Mailing" from Tiffany Hollis (Hollis), who attests that she is employed as a Vice President by PHH Mortgage Corporation (PHH), "a subsidiary of Ocwen Financial Corporation" (Ocwen Financial) and "the successor by merger" to Ocwen Servicing. Hollis, based on her review of PHH's business records and her familiarity with its mailing practices, and those of Ocwen Servicing and Ocwen Financial, attests that a July 24, 2007 default notice was mailed to the borrower defendants at the Property address.

Finally, HSBC submits a March 18, 2021 "Affidavit of Physical Possession" from Daniel Delpesche (Delpesche), who attests that he is employed as a vice president by PHH, "servicer for HSBC . . ." and annexes a power of attorney from HSBC to PHH. Delpesche attests that his affidavit is based on his review of PHH's business records. Delpesche attests that "[p]laintiff came into possession of the original Notes on April 20, 2006" and "[p]laintiff was in possession of the original Notes at the time of commencement of this action." Delpesche further attest that:

“Plaintiff has maintained possession of the original Notes since April 20, 2006 up to and including the date of the commencement of this action. The original Notes contain Allonges that are so firmly affixed thereto as to become a part thereof. True and correct copies of the original Notes (including the aforementioned Allonges) and Plaintiff’s business records, confirming possession and delivery, are annexed hereto as **Exhibit B.**”

Delpesche’s affidavit collectively annexes copies of an April 24, 2004 note in the amount of \$346,500.00, an April 13, 2005 note in the amount of \$71,169.24 and a March 31, 2006 note in the amount of \$80,303.09, all of which include allonges endorsed in blank by Carol Hollmann, Vice President of Delta. Delpesche’s affidavit, however, *does not* annex a copy of the March 31, 2006 consolidated note in the amount of \$490,000.00.

Furthermore, the business record upon which Delpesche’s affidavit testimony relies regarding HSBC’s possession of “the original note” consist of a single page containing the following notation:

“PER WELLS FARGO, THE CUSTODIAN, THE ORIGINAL NOTE WAS DEPOSITED ON 4/20/2006. WELLS FARGO HAD POSSESSION OF THE ORIGINAL NOTE ON 6/1/2007. WELLS FARGO RELEASED THE ORIGINAL NOTE ON 3/12/12. PER PHH RECORDS, PHH RECEIVED THE ORIGINAL NOTE ON 3/19/12. PHH RELEASED THE ORIGINAL NOTE TO SHAPIRO & DICARO ON 4/19/12. PER THE FIRM THE ORIGINAL NOTE WAS RETURNED ON 8/2/13. PHH RELEASED THE ORIGINAL NOTE TO WELLS FARGO ON 9/6/13. PHH RECEIVED THE ORIGINAL NOTE ON 11/14/13. PHH HAD POSSESSION OF THE ORIGINAL NOTE OIN 3/5/2021. PHH IS CURRENTLY IN POSSESSION OF THE ORIGINAL CEMA. HELD AT PHH MORTGAGE 5720 PREMIER PARK DRM WEST PALM BEACH, FL 33407.”

Notably, the foregoing “business record” say nothing about HSBC’s possession of the consolidated note and does not identify the date or amount of the note, the loan number, the borrower defendants or the Property address.

***Bedford’s Opposition to HSBC’s Cross Motion and Reply***

Bedford, in opposition to HSBC’s summary judgment cross motion and in further support of its discovery motion, submits an attorney affirmation asserting that:

“[t]here exist material issues of fact precluding the relief of summary judgment in Plaintiff’s favor including, but not limited to: (1) whether Plaintiff was in possession of the original note that allegedly consolidated related notes to create[] a single note in the amount of \$490,000 at the time this action was commenced; (2) whether the borrowers defaulted on the subject mortgage loan under the circumstances alleged by Plaintiff; and (3) whether the pre-commencement notice of default was mailed.”

Bedford submits a memorandum of law asserting that HSBC’s summary judgment cross motion does not establish HSBC’s standing to foreclose because “HSBC Bank fails to include a copy of a consolidated note for the alleged \$490,000.” Bedford notes that while Delpesche’s “Affidavit of Possession” annexes copies of three notes, it fails to annex the \$490,000.00 consolidated note secured by the consolidated mortgage. Bedford further notes that the \$490,000.00 consolidated note was not annexed to HSBC’s complaint. Bedford also challenges the adequacy of the business record annexed to Delpesche’s “Affidavit of Possession” because “the page does not include . . . identifying information, such as [the] loan number, the borrowers’ address, or even where and by whom the record was generated . . .”

Bedford also claims that Philma's "Affidavit of Indebtedness" "is nothing but inadmissible hearsay . . . that fails to establish any default in payment" since "the affidavit is from [an] unrelated loan servicer's employee without any authority to testify on behalf of HSBC Bank[,] "Philma fails to produce, incorporate, or attach to her affidavit any proof of authority . . ." and "the record is devoid of any power of attorney granted to Ocwen by either the originator of the mortgage loan, Delta . . . or Plaintiff HSBC Bank."

In addition, Bedford challenges the adequacy of Hollis' "Affidavit of Mailing" of the notice of default as "unsubstantiated" and "conclusory." Bedford claims that "Hollis fails to offer any proof of actual mailing. . ."

Finally, Bedford argues that HSBC's summary judgment cross motion should be denied as "premature" because HSBC has failed to respond to its Discovery Demands. Bedford asserts that "HSBC Bank is in complete control of all the necessary documents that Bedford requested, including but not limited to the proof of the original note and the chain or custody of the original note."

### *HSBC's Reply*

HSBC, in reply, submits an attorney affirmation asserting that the alleged material issues of fact "are easily defeated upon a cursory review of the exhibits attached and referenced in Plaintiff's Cross-Motion." HSBC's counsel further asserts that the Delpesche affidavit and production of the mortgage assignments proves that "there was a physical transfer of the Notes and Mortgage (CEMA) prior to the commencement of the action . . ." HSBC's counsel also claims that "there is no" consolidated note in the amount of

\$490,000.00 and that HSBC's production of the underlying notes that were consolidated and secured by the CEMA is sufficient.

### Discussion

(1)

#### *HSBC's Summary Judgment Cross Motion*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower's default (*see Deutsche Bank Natl. Trust Co. v*

*Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). When the plaintiff's standing has been placed in issue by a defendant, plaintiff is required to prove standing as part of its prima facie case (*Loancare v Firshing*, 130 AD3d 787, 789 [2015]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [1997]).

Here, HSBC has failed to establish its standing to foreclose and there are triable issues of fact regarding HSBC's ownership and possession of the \$490,000.00 consolidated note that preclude summary judgment. Delpesche's "Affidavit of Physical Possession," which is based on his review of PHH's business records, attests that "[p]laintiff came into possession of the original Notes on April 20, 2006" and "[p]laintiff was in possession of the original Notes at the time of commencement of this action." Delpesche references the one-page business record annexed to his affidavit (as Exhibit B, NYSCEF Doc No. 24) and claims that it "confirm[s] possession and delivery." However, PHH's business record annexed to Delpesche's affidavit does not support his testimony. The business record produced by HSBC says nothing about HSBC's possession of the consolidated note and only mentions Wells Fargo, the purported "custodian," and PHH, the servicer. Additionally, the vague notation in the one-page business record produced by HSBC does not identify the date or amount of the note(s), the loan number, the borrower defendants or

the Property address. The Second Department has held that “it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted” (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 205 [2019]). Here, PHH’s business record produced by HSBC does not prove that HSBC had physical possession of the \$490,000.00 consolidated note allegedly executed by the borrower defendants on March 31, 2006.

Notably, Delpesche’s affidavit annexes copies of an April 24, 2004 note in the amount of \$346,500.00, an April 13, 2005 note in the amount of \$71,169.24 and a March 31, 2006 note in the amount of \$80,303.09. Delpesche’s affidavit, however, does not annex a copy of the March 31, 2006 consolidated note in the amount of \$490,000.00. HSBC’s counsel’s assertion that there is no consolidated note is not only unavailing, but constitutes inadmissible hearsay (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] [holding that “an affirmation by counsel is without evidentiary value and thus unavailing”]).

Furthermore, the “Affidavit of Indebtedness” from Philma of Ocwen Servicing does not include a power of attorney or any other documentation establishing Ocwen Servicing’s authority to testify on behalf of HSBC regarding the borrower defendants’ alleged payment default (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009] [affirming denial of plaintiff’s motion for order of reference based on affidavit of plaintiff’s servicer because “the record is barren of any evidence demonstrating that agent’s authority to act on behalf of the plaintiff”]). Thus, in addition to its standing to foreclose, HSBC has failed to evidence the borrower defendants’ payment default. For the foregoing reasons, HSBC’s summary judgment cross motion is denied in its entirety.

(2)

*Bedford's Motion to Preclude*

CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” CPLR 3126 provides that “[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just . . .” “The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court’s discretion” (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2012]). “In general, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties’ competing interests” (*JPMorgan Chase Bank, Nat. Ass’n v Levenson*, 149 AD3d 1053, 1054 [2017] [internal quotation marks omitted]).

Here, HSBC has inexplicably failed to respond, or even to object, to Bedford’s outstanding Discovery Demands, and provides no real opposition to Bedford’s motion to preclude. As previously discussed, there are issues of triable fact regarding HSBC’s standing to foreclose; and HSBC, at a minimum, is entitled to discovery regarding HSBC’s alleged possession of the consolidated note and the chain of custody. Given the fact that there are no prior discovery orders that HSBC has violated, this court finds that preclusion, at this stage, would be premature. However, Bedford’s motion is granted to the extent that HSBC is now required to respond to Bedford’s outstanding Discovery Demands within 60

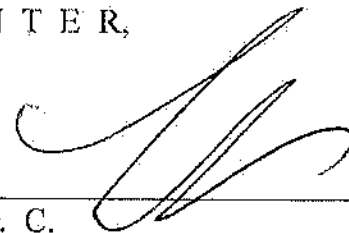
days or it will be precluded from introducing any evidence at trial upon further motion for such sanction. Accordingly, it is hereby

**ORDERED** that Bedford's motion (mot. seq. six) is granted only to the extent that HSBC shall respond to Bedford's Discovery Demands within 60 days after service of this decision and order with notice of entry thereof; if HSBC fails to comply with this directive, it will be precluded from offering any evidence at trial upon further motion for same, and Bedford's motion is otherwise denied; and it is further

**ORDERED** that HSBC's summary judgment cross motion (mot. seq. seven) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.  
HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE