

HSBC Bank USA v Kone
2021 NY Slip Op 32701(U)
December 8, 2021
Supreme Court, Kings County
Docket Number: Index No. 41591/07
Judge: Lawrence S. Knipel
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At an IAS Term, Part FRP3 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 8th day of December, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR NAAC 2007-3,

Plaintiff,

- against -

Index No. 41591/07

MARIAME KONE; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE FOR
FIRST UNITED MORTGAGE BANKING CORP.;
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; NEW YORK CITY TRANSIT ADJUDICATION
BUREAU; PEOPLE OF THE STATE OF NEW YORK;
JANET SHARPTON; JENNIFER HAGLER; LOUISE
ANDERSON; LYNDON HANGLER; TRUDY
ANDERSON; VICTOR PENSAS and "JOHN DOE #1"
through "JOHN DOE #10", the 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,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.¹

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

1-3

Opposing Affidavits (Affirmations)_____

11-14

Reply Affidavits (Affirmations)_____

15-16

Upon the foregoing papers in this action to foreclose the property at 179 Buffalo Avenue in Brooklyn (Block 1363, Lot 4) (Property), plaintiff HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2007-3 (HSBC) moves (in motion sequence [mot. seq.] 10) for an order, pursuant to RPAPL 1325 and RPL 254 (10), appointing a temporary receiver for the benefit of HSBC to collect the rents and profits now due and unpaid or that become due during the pendency of this action and issuing out of the mortgaged Property.

On November 9, 2007, HSBC commenced this action to foreclose a \$615,200.00 mortgage encumbering defendant Mariame Kone's residential Property by filing a summons, a complaint verified by counsel and a notice of pendency. Kone executed the mortgage on February 2, 2007 to secure an adjustable rate promissory note in favor of First United Mortgage Banking Corp. (First United). One week after HSBC commenced this foreclosure action, First United assigned the mortgage "together with the bond or

¹ Plaintiff's moving papers (the January 6, 2020 notice of motion, Samantha Moreno's September 9, 2019 affidavit and Gerald M. Jacob's January 6, 2020 affirmation), which are numbered 1-3, are the only papers on this motion that are not electronically filed.

obligation described in said mortgage . . .” to HSBC by a November 16, 2007 Assignment of Mortgage. In 2013, the action was dismissed for failure to prosecute and, by a March 15, 2018 order, this action was restored to the court’s active calendar on the condition that HSBC accept Kone’s answer to the complaint. On or about April 19, 2018, Kone answered the complaint, denied the allegations therein, and asserted several affirmative defenses, including lack of standing.

After issue was joined, HSBC moved for summary judgment and an order of reference and defendant Kone cross-moved for summary judgment dismissing the complaint. By a March 5, 2020 decision and order, the court (Joseph, J.) denied the parties’ summary judgment motion and cross motion and held that “there are issues of fact that preclude an award of summary judgment in favor of either party on the issue of standing” because “there are two different versions of the note, only one of which contains an executed endorsement in blank [and] the submission by HSBC of two different copies of the note with endorsements raise a triable issue of fact as to whether the note was assigned to HSBC prior to the commencement of the instant action . . .”

HSBC’s Instant Motion For the Appointment of a Receiver

Meanwhile, on January 24, 2020, while the parties’ summary judgment motion and cross motion were pending, HSBC filed the instant motion for the appointment of a receiver to collect the rents and profits.

HSBC submits an affidavit from Samantha Moreno (Moreno), an Assistant Vice

President of Wells Fargo Bank, N.A. (Wells Fargo), HSBC's purported servicing agent,² which states that it is based entirely on Moreno's review of Wells Fargo's business records. Moreno asserts that the subject mortgage, a copy of which is annexed as Exhibit 1 to her affidavit, "encumbers" the Property "together with the buildings, improvements, fixtures, royalties, profits and all other rights owned or held by the defendant mortgagor, Mariame Kone." Moreno references and quotes the "1-4 Family Rider (Assignment of Rent)" to the mortgage, which provides, in relevant part, that:

"1-4 FAMILY COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

* * *

"H. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all of the rents and revenues ('Rents') of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender's Agents to collect the items, and agrees that each tenant of the Property shall pay the rents to Lender or Lender's agents.

"If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums due under the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender's agents upon Lender's written demand to the tenant . . . and (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the

² There is no power of attorney or any other document indicating that Wells Fargo is the authorized servicing agent of the subject loan for HSBC in the record.

Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

“Lender, or Lender’s agents or a judicially appointed receiver, shall not be required to enter upon, take control of or maintain the Property before or after giving notice of default to Borrower. However, Lender, or Lender’s agents or a judicially appointed receiver, may do so at any time when a default occurs.”

Moreno attests, *upon information and belief*, that the Property is “a non-owner-occupied multi-unit residential building consisting of at least two units, with at least two tenants” and that “the gross monthly rental income for the Mortgaged Premises is approximately \$5,200.” Notably, Moreno does not annex any business records supporting this assertion. Moreno also asserts that Kone has not paid the property taxes for the Property since 2007, and that HSBC has made tax payments in the aggregate amount of \$86,046.60 in order to protect its security interest. Exhibit 2 to Moreno’s moving affidavit is a one-page list of years and dollar amounts, without any indication of what they represent. Moreno alleges that although Kone remains in default, she continues to collect rents generated by the Property while failing and refusing to pay the real property taxes. Moreno further asserts that the appointment of a receiver is needed “to collect the rents generated by the Mortgaged Premises and to protect, maintain and preserve the real property.”

Defendant Kone’s Opposition

Kone, in opposition, submits an attorney affirmation noting that HSBC

“conveniently omitted” to tell the court about the parties’ summary judgment motion and cross motion, which were sub judice at the time that HSBC filed the instant motion for the appointment of a receiver. Defense counsel submits a copy of the court’s March 5, 2020 decision and order denying the parties’ summary judgment motion and cross motion because HSBC submitted two different versions of the note and failed to establish that it was the holder of the promissory note at the time when this action was commenced. Defense counsel argues that “Plaintiff cannot be entitled to a court-appointed receiver for the very same reasons it cannot foreclose; as a threshold matter, any entitlement to a receiver . . . is inexorably bound and predicated upon standing to enforce the subject mortgage . . .” Defense counsel contends that the Family Rider in the mortgage specifically states that the “Lender” is entitled to a receiver, and the “Lender” was First United. Defense counsel argues that “only if Plaintiff is the valid transferee of the rights of First United and can stand in the proverbial shoes of First United, can Plaintiff have standing to enforce said mortgage.”

Defense counsel further argues that HSBC’s motion for the appointment of a receiver should also be denied because it is based on Moreno’s inadmissible hearsay. Defense counsel notes that Moreno’s affidavit regarding HSBC’s payment of property taxes is inadmissible hearsay because it is based entirely on Moreno’s review of Wells Fargo’s business records, which were not produced.

HSBC’s Reply

HSBC, in reply, argues that “New York courts have previously granted motions to

appoint temporary receivers where standing has not yet been demonstrated as a matter of law” and provides a copy of a 2019 decision by the Bronx County Supreme Court. HSBC’s counsel asserts that “Defendant has not provided any basis in fact or law for this Court to disregard *the parties’* express contractual agreement . . . simply because standing has not yet been finally determined in this case” (emphasis added). HSBC’s counsel further asserts that HSBC did annex business records to Moreno’s affidavit and references Exhibit 2, a single page listing of years and dollar amounts without any indication that it relates to the Property and the mortgage loan at issue here.

Discussion

The Second Department has held that “[u]nder Real Property Law § 254 (10), where . . . *the parties to a mortgage* agree that a receiver may be appointed in the event of default, the appointment of a receiver without notice and without regard to the adequacy of security is proper” (*366 Fourth St. Corp. v Foxfire Enterprises, Inc.*, 149 AD2d 692, 692 [1989] [emphasis added]). In addition, the Second Department has specifically acknowledged that “under appropriate circumstances, a court of equity may deny such application” (*id.*; see also *Essex v Newman*, 220 AD2d 639, 640 [1995] [holding that “a court of equity, in its discretion and under appropriate circumstances, may deny . . . an application [for the appointment of a receiver]].

While the subject mortgage specifically authorizes the appointment of a receiver in favor of “Lender” to collect the rents in the event that Kone defaults, the court (Joseph, J.) previously denied HSBC summary judgment because it failed to demonstrate its standing

to foreclose. The court held that the production of two different versions of the promissory note raised triable issues of fact regarding HSBC's ownership of the note when this action was commenced. Thus, HSBC has failed to establish that it stands in the shoes of First United, the original "Lender" in the mortgage, and is thus entitled to enforce the terms of the mortgage, including the Family Rider regarding the appointment of a receiver.

Furthermore, HSBC's motion is based on Moreno's inadmissible hearsay testimony regarding HSBC's payment of property taxes for the subject Property, which is not supported by Wells Fargo's purported business record annexed to Moreno's affidavit as Exhibit 2 (*see Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1021 [2020]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2019]). Indeed, the one-page document, which has no heading or indication that it is from Wells Fargo or HSBC's business records, merely lists the years 2007 through 2019 followed by a dollar amount and does not identify or reference what the dollar amounts represent, the subject loan, Kone as the borrower or the subject Property. In addition, there is no evidentiary support for Moreno's conclusory assertion that a receiver is necessary and warranted to protect, maintain and preserve the Property during the pendency of this foreclosure action, which HSBC commenced over a decade ago in 2007.

Under the circumstances presented here, where the court has previously held that there are triable issues of fact regarding HSBC's standing to enforce the mortgage and foreclose on the Property and HSBC's motion for the appointment of a receiver is not supported by admissible evidence of HSBC's entitlement to a receiver or the need for a

receiver to protect, maintain and preserve the Property, this court finds, in its discretion, that the appointment of a receiver is unwarranted. Accordingly, it is hereby

ORDERED that HSBC's motion (mot. seq. 10) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE