

HSBC Bank USA, N.A. v Babb

2025 NY Slip Op 34677(U)

December 4, 2025

Supreme Court, Kings County

Docket Number: Index No. 506933/2015

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP-1 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 4th day of December, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
Justice.

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AP3,

Plaintiff,

- against -

Index No. 506933/15

CAROLYN BABB, 325 WASHINGTON AVENUE LLC, CITIBANK N.A. AS INDENTURE TRUSTEE FOR CERTIFICATEHOLDERS OF GREENPOINT MORTGAGE FUNDING TRUST 2007-HE1, MORTGAGE-BACKED NOTES, SERIES 2007-HE1, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the persons or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint,

Defendants.

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The following papers read herein:

NYSCEF and hard copies

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

72-89, 91 100-103
1-2 104-105
93

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 325 Washington Avenue in Brooklyn (Block 1932, Lot 14)

(Property), plaintiff HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2005-AP3 (Plaintiff or HSBC) moves (in motion sequence [mot. seq.] two) for an order: (1) awarding it summary judgment, pursuant to CPLR 3212; (2) striking the answer interposed on behalf of the defendants; (3) awarding it a default judgment against the non-answering defendants; (4) appointing a referee to compute the total sums due and owing to plaintiff; and (4) amending the caption¹ (NYSCEF Doc No. 91).

Defendants Carolyn Babb (Babb) and 325 Washington Avenue LLC (collectively, Defendants) cross-move (in mot. seq. three) for an order, pursuant to CPLR 2214 (c), granting them leave “to submit [a] sur-reply to and/or to expand the record on Plaintiff’s summary judgment motion . . .” (NYSCEF Doc No. 100).

Background

On June 5, 2015, HSBC commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on or about June 25, 2004, Ada Babb executed and delivered a \$993,750.00 promissory note to Ameritrust Mortgage Bankers, Inc. (Ameritrust), which was secured by a mortgage encumbering the Property (Complaint at ¶¶ 2-3). Thereafter, by a March 11,

¹ Specifically, HSBC seeks to amend the caption to substitute Luke “Doe” (Refused Last Name), “John” Overil (Refused First Name), “Jane” Overil (Refused First Name), Kobie Babb, Candice “Doe” (Refused Last Name), Daniella “Doe” (Refused Last Name), Carl “Doe” (Refused Last Name), Tamara “Doe” (Refused Last Name), Sean “Doe” (Refused Last Name) and New York State Department of Taxation and Finance as defendants in place and instead of the JOHN DOE defendants (NYSCEF Doc No. 73 at ¶¶ 1 [e] and 18).

2005, deed, title to the Property was transferred from Ada Babb to Ada and Carolyn Babb (*id.* at ¶ 5). The complaint alleges that on March 24, 2005, a second note in the amount of \$361,989.53 was executed by Ada and Carolyn Babb in favor of Fairmont Funding, Ltd. (Fairmont), which was consolidated with the first note and mortgage, pursuant to a Consolidation Extension and Modification Agreement (CEMA) and a consolidated note, to form a single lien in the amount of \$1,350,000.00 (*id.* at ¶¶ 6-7). Allegedly, on May 9, 2010, Ada Babb passed away (*id.* at ¶ 8). The complaint alleges that “Carolyn Babb failed to comply with the terms, covenants and conditions of said Consolidated Note, mortgages and consolidation agreement by failing and omitting to pay, to the plaintiff, payments due on January 1, 2009 and said default has continued . . .” (*id.* at ¶ 12).

Notably, annexed to HSBC’s complaint are: (1) a copy of the June 25, 2004, note with: (a) an endorsement from Ameritrust made to the order of DLJ Mortgage Capital, Inc. (DLJ); (b) a blank endorsement from Fairmont; and (c) an Allonge executed by Wells Fargo Bank, N.A. (Wells Fargo) as attorney-in-fact for DLJ (*id.* at 10-14); (2) a copy of the March 24, 2005, note with a blank endorsement from Fairmont (*id.* at 15-17); (3) a copy of the March 24, 2005, consolidated note with a blank endorsement from Fairmont (*id.* at 18-20); (4) a May 15, 2013, Lost Note Affidavit from Todd Hiller (Hiller), Vice President Loan Documentation of Wells Fargo d/b/a America’s Servicing Company (ASC), attesting that the June 25, 2004, note “has been inadvertently lost, misplaced or destroyed” and a diligent and extensive search was made, including with the Custodian and with HSBC’s current and former counsel (*id.* at 21-23); and (5) a May 15, 2013, Lost Note

Affidavit from Hiller of Wells Fargo attesting that the March 24, 2005, consolidated note “has been inadvertently lost, misplaced or destroyed” and a diligent and extensive search was made, including with the Custodian of records and HSBC’s current and former counsel (*id.* at 24-26).

On June 30, 2015, Defendants answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that: (1) HSBC failed to mail a notice of default, and (2) HSBC lacks standing (NYSCEF Doc No. 6). The remaining defendants failed to answer or otherwise appear in the action.

On October 10, 2016, HSBC moved for summary judgment, an order of reference, a default judgment against the non-answering defendants and to amend the caption (NYSCEF Doc No. 41). Defendant Babb opposed HSBC’s motion. By a July 5, 2017, decision and order, the court (Dear, J.) denied HSBC’s motion “without prejudice” (NYSCEF Doc No. 69).

HSBC’s Second Summary Judgment Motion

On June 15, 2018, HSBC filed its second motion for summary judgment, an order of reference, a default judgment and to amend the caption (NYSCEF Doc No. 72). HSBC submitted an “Affidavit of Possession of Original Note” from Sherri W. McManus (McManus), a Vice President Loan Documentation of Wells Fargo, the servicing agent and attorney-in-fact for HSBC, pursuant to a December 10, 2012, Limited Power of Attorney (NYSCEF Doc No. 75 at ¶ 1 and pages 9-18). McManus attests that her affidavit is based on her review of Wells Fargo’s business records relating to the subject loan (*id.* at ¶ 2).

McManus attests that HSBC “by and through its counsel, is in possession of the original Consolidated Note” (*id.* at ¶ 3). While McManus seemingly reviewed Wells Fargo’s business records as of December 10, 2012 (when it became attorney-in-fact for HSBC), she attests that HSBC “had possession of the original loan documents, including the original Consolidated Note on November 5, 2005” without providing any documentary evidence in support of that statement or explaining how she obtained such information (*id.*).

Although Hiller’s May 15, 2013, Lost Note Affidavit annexed to HSBC’s complaint attests that the March 24, 2005, Consolidated Note was lost, misplaced or destroyed, and that a diligent and extensive search was made by Wells Fargo, *including with the Custodian and HSBC’s counsel* (Complaint at 24-26), McManus now inconsistently attests that:

“[t]he business records reflect that Lost Note Affidavits were requested and were executed on May 15, 2013. Thereafter, the custodial file was pulled in order to be sent to counsel for Plaintiff for the purposes of commencing this action. *The custodial file contained the original loan documents, including the original Consolidated Note.* A review of *the custodial records* indicate that original loan documents, including the original Consolidated Note, *were continuously in the custodial file* from November 5, 2005 until the original Consolidated Note was shipped to counsel for Plaintiff on or before October 30, 2014. Therefore, *the Lost Note Affidavits were executed in error.* I confirm that HSBC . . . through its counsel, had possession of the Promissory Note on or before June 5, 2015, the date that this action was commenced” (*id.* [emphasis added]).

Finally, McManus attests that “[t]here is in fact a default under the terms and conditions of the Consolidated Promissory Note and Mortgage, because the January 1,

2009 and subsequent payments were not made” (*id.* at ¶ 4). However, McManus fails to reference or submit any documentary evidence of Defendants’ alleged payment default, such as a payment history or other business records maintained by Wells Fargo, to corroborate her hearsay testimony.

HSBC also submits an “Affidavit of Mailing” from Shareka Pearson (Pearson), the Vice President Loan Documentation of Wells Fargo, which is based on her review of Wells Fargo’s records kept in the ordinary course of business (NYSCEF Doc No. 76 at ¶ 1-2). Pearson attests that “[a]s servicer, Wells Fargo maintains the payment history, processes payments, sends out notices with respect to any default, assists with loss mitigation, along with other servicing duties” (*id.* at ¶ 3). Pearson attests that she is familiar with “Wells Fargo’s policies for mailing notices . . .”; “[i]t is Wells Fargo’s standard business practice and procedure regarding the mailing of default notices and 90-Day Notices to enter the mailing information concerning such notices into its system contemporaneously with, or within a reasonable time after, the mailing of said notices . . .” and references the “mailing information” contained in Wells Fargo’s business records annexed as Exhibits 1 through 5 (*id.* at ¶¶ 4-5). Regarding the notice of default, Pearson attests that:

“[i]n accordance with the provisions of the Mortgage and Wells Fargo’s policies and procedures for mailing notices, a notice of default was mailed via first class mail on or about February 24, 2015 addressed to Carolyn Babb and Ada Babb, 325 Washington Avenue, Brooklyn, NY 11205. A notice of default was also mailed via first class mail on February 24, 2015 addressed to Carolyn Babb and Ada Babb, PO Box 6996, Piscataway, NJ 08855-6996, said address was the last known address provided to this institution by the mortgagor. The

default stated in said notices was not cured. Copies of the notices of default are attached as **Exhibit 4**. Copies of the proof of mailing of the notices of default are attached as **Exhibit 5** (*id.* at ¶ 8).

Copies of the February 20, 2015, notices of default collectively addressed to Carolyn and Ada Babb (then deceased) at the Property and at a P.O. Box in Piscataway, New Jersey, are annexed to Pearson’s affidavit as Exhibit 4 (*id.* at 47-53). Exhibit 5, labeled “Transaction Detail – Track Right,” reflects that the “Letters” were “Mailed By: Walz Facility” to Carolyn Babb on February 24, 2015 (*id.* at 55-56).

HSBC also submits an attorney affirmation asserting that “[t]he Court previously determined that the Plaintiff’s affidavits submitted in support of the Prior Motion failed to demonstrate that the notice of default was sent to the defendant Carolyn Babb” and “additional information was required to establish Plaintiff’s standing in this action” (NYSCEF Doc No. 73 at ¶ 23). Plaintiff’s counsel explains that “[i]n order to cure the deficiencies identified in the Decision and Order, Plaintiff submits the *Pearson Affidavit* and the *McManus Affidavit*, together with the exhibits annexed thereto” (*id.* at ¶ 25). Without addressing the inconsistencies in Hiller’s Lost Note Affidavits and the McManus affidavit – both of which claim to be based on a review of the Custodian’s file – Plaintiff’s counsel offers to produce the original Consolidated Note “for an *in camera* inspection, should this Court desire”² (*id.* at ¶ 27). Plaintiff’s counsel further asserts that HSBC has

² An *in camera* inspection of the original Consolidated Note would not establish HSBC’s standing because it would not prove that HSBC was in physical possession of the original Consolidated Note on June 5, 2015, the date on which this action was commenced.

established its prima facie right to summary judgment by producing the loan documents and McManus's affidavit testimony "as evidence of the default" (*id.* at ¶ 30).

Defendants' Opposition

Defendants, in opposition, submit an affidavit from Defendant Babb asserting that "triable issues of fact exist warranting a denial of the plaintiff's motion" (Babb Aff. at ¶ 1). Babb attests that HSBC failed to mail her notice of the alleged default, as required by Paragraph 22 of the Consolidated Mortgage, and that she never received it (*id.* at ¶ 14). Babb further attests that the February 20, 2015, notice of default reflects that it was mailed to the Property and to New Jersey, although she resided at 200 East 82nd Street at that time (*id.* at ¶¶ 21-24). Babb also argues that there are issues of fact regarding HSBC's possession of the original Consolidated Note, since the Hiller Lost Note Affidavit annexed to HSBC's complaint attests that Wells Fargo "attempted to locate the Consolidated Note including [by checking] with the custodian" and the McManus Affidavit inconsistently attests that "the custodial file revealed that the original consolidated note was continuously in the custodial file from November 5, 2005 . . ." (*id.* at ¶¶ 34-35). Babb asserts that a hearing is warranted to determine whether HSBC was in possession of the Consolidated Note when this action was commenced based on the "contradictory statements" set forth in the Hiller Lost Note Affidavit and the McManus Affidavit (*id.* at ¶ 38).

HSBC's Reply

HSBC, in reply, submits an attorney affirmation asserting that "Plaintiff established a *prima facie* case by presenting the Note, Mortgage, Assignments, evidence of possession

of the original Note prior to the commencement of this action and evidence of Defendant’s default” and “Defendant’s opposition does not provide any evidence to dispute her default” (NYSCEF Doc No. 93 at ¶ 3). Plaintiff’s counsel argues that “[i]t is well settled that a loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff’s *prima facie* case [based] on records it maintains in the regular course of business[,]” despite the fact that the McManus affidavit fails to annex any business records evidencing Defendant’s alleged January 1, 2009, payment default (*id.* at ¶¶ 17 and 32). Plaintiff’s counsel argues that the McManus affidavit testimony, *on its own*, is sufficient to establish Defendant’s payment default (*id.* at ¶ 32). Plaintiff’s counsel also asserts that the February 20, 2015, notice of default was properly mailed to the Property address and to the P.O. Box in New Jersey, the last known address that Defendant Babb provided to Wells Fargo in accordance with Paragraph 15 of the Consolidated Mortgage (*id.* at ¶¶ 13-14). Plaintiff’s counsel reiterates that the McManus affidavit established that “Plaintiff or its attorney, have been in possession of the original Consolidated Note, indorsed in blank, since November 5, 2005, which is prior to commencement of this foreclosure” without addressing the inconsistent information in the Hiller Lost Note Affidavit and the McManus affidavit regarding Wells Fargo’s review of the Custodian files (*id.* at ¶ 30).

Discussion

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 [2d Dept 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 [2d Dept 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 [2d Dept 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 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]). “Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief” and “[a] plaintiff has standing in a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced” (*Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]). 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 [2d Dept 2016]).

Here, HSBC submitted copies of the loan documents, but it failed to submit any admissible evidence of Defendant Babb's alleged January 1, 2009, payment default. While McManus of Wells Fargo attests that "[t]here is in fact a default under the terms and conditions of the Consolidated Promissory Note and Mortgage, because the January 1, 2009 and subsequent payments were not made" (NYSCEF Doc No. 75 at ¶ 4), McManus's affidavit does not annex any business records evidencing Babb's alleged payment default. The Second Department has repeatedly held that affidavit testimony regarding a borrower's alleged payment default based on a review of business records is inadmissible hearsay and lacks probative value if the business records themselves are not produced (*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]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-1517 [2019]). Thus, McManus's affidavit testimony regarding Defendant Babb's alleged payment default based on her review of unidentified business records is inadmissible hearsay because HSBC failed to produce the business records upon which McManus's knowledge is based.

Furthermore, McManus's April 23, 2018, affidavit testimony regarding HSBC's possession of the Consolidated Note prior to commencement raises more questions than it answers regarding HSBC's standing to foreclose. McManus attests that the Consolidated Note was located on an unspecified date in the Custodial file, where it has been located

since November 5, 2005, after which it was sent to HSBC's counsel *on or before* October 30, 2014, for the purposes of commencing this action (NYSCEF Doc No. 75 at ¶3). However, the May 15, 2013, Hiller Lost Note Affidavit annexed to the June 3, 2015, complaint attests that Wells Fargo engaged in a "diligent and extensive" search for the Consolidated Note, which included checking with *the Custodian* and with HSBC's current and prior attorneys. Notably, neither affidavit from Wells Fargo identifies the actual Custodian of the Consolidated Note, who may be required to testify at a later hearing. Under these circumstances, where Wells Fargo submitted directly conflicting affidavits regarding HSBC's possession of the Consolidated Note at the time of commencement, there are material issues of fact regarding HSBC's standing to foreclose that preclude summary judgment.

The court has considered Defendant Babb's cross motion for leave to serve a sur-reply or otherwise expand the record on HSBC's summary judgment motion and has determined that such relief is unnecessary and unwarranted. Accordingly, it is hereby

ORDERED that HSBC's motion (mot. seq. two) is only granted to the extent that the caption is amended to substitute Luke "Doe" (Refused Last Name), "John" Overil (Refused First Name), "Jane" Overil (Refused First Name), Kobie Babb, Candice "Doe" (Refused Last Name), Daniella "Doe" (Refused Last Name), Carl "Doe" (Refused Last Name), Tamara "Doe" (Refused Last Name), Sean "Doe" (Refused Last Name) as party defendants in place and instead of the John Doe defendants; HSBC's motion is otherwise denied; and it is further

ORDERED that the caption shall hereinafter read as follows:

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HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR NOMURA ASSET ACCEPTANCE
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-AP3,

Plaintiff,

- against -

CAROLYN BABB, 325 WASHINGTON AVENUE LLC,
CITIBANK N.A. AS INDENTURE TRUSTEE FOR
CERTIFICATEHOLDERS OF GREENPOINT MORTGAGE
FUNDING TRUST 2007-HE1, MORTGAGE-BACKED
NOTES, SERIES 2007-HE1, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, LUKE
“DOE” (REFUSED LAST NAME), “JOHN” OVERIL
(REFUSED FIRST NAME), “JANE” OVERIL
(REFUSED FIRST NAME), KOBIE BABB, CANDICE
“DOE” (REFUSED LAST NAME), DANIELLA “DOE”
(REFUSED LAST NAME), CARL “DOE” (REFUSED
LAST NAME), TAMARA “DOE” (REFUSED LAST
NAME), SEAN “DOE” (REFUSED LAST NAME),

Defendants.

-----X; and it is further

ORDERED that Defendant’s cross-motion (mot. seq. three) is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Cenceria P. Edwards, JSC, CPA