

HSBC Bank USA, N.A. v Gross

2025 NY Slip Op 35017(U)

December 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 511849/2019

Judge: Cenceria P. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 22nd day of December, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
Justice.

-----X
HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR DEUTSCHE ALT-B SECURITIES,
MORTGAGE LOAN TRUST, SERIES 2006-AB2,

Plaintiff,

- against -

Index No. 511849/2019

MICHAEL GROSS; MIRIAM GROSS; CRIMINAL COURT OF THE CITY OF NEW YORK; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

“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 Subject Property described in the Complaint,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

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

41-42, 44-67
72
73-75

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 3315 Avenue L in Brooklyn (Block 7633, Lot 3) (Property), plaintiff HSBC Bank USA, National Association as Trustee for Deutsche ALT-B Securities,

Mortgage Loan Trust, Series 2006-AB2 (HSBC or Plaintiff) moves (in mot. seq. one) for an order: (1) awarding it summary judgment, pursuant to CPLR 3212, and dismissing the affirmative defenses and counterclaims asserted by defendants Michael Gross and Miriam Gross (collectively, the Gross Defendants); (2) amending the caption; (3) granting it a default judgment against non-answering defendants Criminal Court of the City of New York, New York State Department of Taxation and Finance, New York City Transit Adjudication Bureau, New York City Parking Violations Bureau, New York City Environmental Control Board and the John Doe defendants; and (4) appointing a referee to compute the amount due to Plaintiff, pursuant to RPAPL § 1321 and CPLR 4311 (NYSCEF Doc No. 41).

Background

On May 29, 2019, 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 August 17, 2005, Defendant Michael Gross Miller executed and delivered a \$645,000.00 promissory note in favor of American Brokers Conduit (ABC), which was secured by a mortgage executed by the Gross Defendants encumbering the Property (Complaint at ¶¶ 7 and 9). The complaint alleges that the loan was subsequently modified on October 1, 2016 (*id.* at ¶ 12). The complaint further alleges that Michael Gross “defaulted on his obligation having failed to comply with the conditions of the Subject Note by withholding the payment amount that became due on August 1, 2018, and plaintiff is entitled to enforce its security interest against MICHAEL GROSS AND MIRIAM

GROSS pursuant to the terms of the Subject Mortgage” (*id.* at ¶ 15). Notably, annexed to the complaint as Exhibit A is a copy of the August 17, 2005, promissory note with a blank endorsement from Rosa Montella, Assistant Secretary of ABC, on the third page of the document (*id.* at 12-14).¹

On June 27, 2019, the Gross Defendants answered the complaint, denied the material allegations therein and asserted affirmative defenses, including lack of standing, failure to serve a notice of default and failure to comply with RPAPL §§ 1303, 1304 and 1306 (NYSCEF Doc No. 30). The Gross Defendants also asserted two counterclaims seemingly against ABC, the original lender, for: (1) breach of its “duty to exercise good faith and fair dealing with defendants causing damages equal to the amount of the loan” and (2) “violation of the law for allowing defendants to enter into a loan agreement which was wholly unsuitable for them” (*id.* at ¶¶ 48 and 51). On July 24, 2029, HSBC responded to the Gross Defendants’ counterclaims (NYSCEF Doc No. 33).

HSBC’s Instant Summary Judgment Motion

On March 25, 2021, HSBC moved for summary judgment and an order dismissing the Gross Defendants’ affirmative defenses and counterclaims, an order of reference, a default judgment against the non-appearing and non-answering defendants and to amend the caption (NYSCEF Doc No. 41). HSBC submits a moving affidavit from Daniel

¹ A plaintiff establishes its prima facie standing to foreclose “by demonstrating that it had physical possession of the note prior to the commencement of the action, as evidenced by its attachment of the note, endorsed in blank, to the summons and complaint” (*U.S. Bank Nat’l Ass’n v Romano*, 231 AD3d 1079, 1080 [2d Dept 2024]).

Delpesche (Delpesche), a Vice President at “Ocwen Financial Corporation, whose subsidiary is PHH Mortgage Corporation (‘PHH’), successor by merger with Ocwen Loan Servicing, LLC (‘Ocwen’)” who attests that “I submit this affidavit based both upon my personal knowledge and on my review of PHH’s business records made in the ordinary course of business” (NYSCEF Doc No. 44 at ¶¶ 1 and 3). HSBC submits a November 15, 2019, Limited Power of Attorney, appointing PHH as its attorney-in-fact and referencing a May 1, 2006, Pooling and Servicing Agreement (*id.* at ¶ 9 and NYSCEF Doc No. 59).

Delpesche attests that “[a]s part of its regular business practices and record keeping system, PHH maintains a computer database (the ‘Loan Records’) of acts, transactions, payments, communications, escrow account activity, disbursements, events, and analyses (the ‘Loan Transactions’) with respect to the mortgage loans which PHH services” (NYSCEF Doc No. 44 at ¶ 3). Delpesche attests that “[t]he servicing rights to the subject loan were transferred from Ocwen to PHH, effective April 1, 2019” at which time “all of Ocwen’s servicing documents and information relating to the Borrower’s loan . . . were transferred to and incorporated into PHH’s Loan Records” (*id.* at ¶ 4).

Delpesche reiterates that allegations in the complaint regarding the execution of the subject note and mortgage and references copies of the loan documents in the record,² including the August 17, 2005, note and mortgage and the August 15, 2016, Modification Agreement with Ocwen (*id.* at ¶¶ 10-13). Delpesche attests that “Borrower failed to make

² See NYSCEF Doc Nos. 45-47

the Monthly Payment due on August 1, 2018 and has failed to make any Monthly Payments since then” and submits copies of Ocwen and PHH’s payment history as “Exhibit G” (*id.* at ¶ 22). Exhibit G consists of: (1) Ocwen’s “Detail Transaction History” from July 5, 2013 through April 1, 2019, and (2) PHH’s “Customer Account Activity Statement” from January 1, 2019, through August 19, 2020 (NYSCEF Doc No. 51). Delpesche attests that on September 21, 2018, Ocwen subsequently sent the Gross Defendants a Notice of Default (NYSCEF Doc No. 44 at ¶ 30).

Although Delpesche attests that the Gross Defendants defaulted on August 1, 2018, and that Ocwen sent the Gross Defendants a Notice of Default on September 21, 2018, Delpesche attests that on July 6, 2018 (prior to the alleged payment default), Ocwen sent the Gross Defendants a 90-day notice advising them that they were *35 days in default*:

“[t]he Loan Records confirm that *on July 6, 2018*, pursuant to NY RPAPL § 1304, Ocwen sent Defendants two notices (collectively the ‘90-Day Notice’) by Certified Mail (tracking no. 9314 8100 1170 0963 5784 10) and First-Class U.S. Mail (tracking no. 2334618013), respectively, addressed to the Property *notifying them that the Mortgage Loan was 35 days in default*” (*id.* at ¶ 26 [emphasis added]).

Thus, according to the 90-day foreclosure notice that Ocwen sent to the Gross Defendants (NYSCEF Doc No. 53), the Gross Defendants purportedly defaulted on June 1, 2018, while HSBC’s complaint inconsistently alleges that the payment default was August 1, 2018 (Complaint at ¶ 15).

HSBC also submits a memorandum of law arguing that “[s]ince Plaintiff established its *prima facie* case for summary judgment, the burden shifts to the Defendants to

demonstrate a triable issue of fact regarding a bona fide defense to foreclosure, which they cannot do” (NYSCEF Doc No. 43 at 13).³ HSBC argues that the Gross Defendants’ second counterclaim asserted against non-party ABC regarding the origination of the “unsuitable” loan in August 17, 2005, should be dismissed because “[t]he statute of limitations to allege predatory lending is six years and accrues at origination” (*id.* at 16). HSBC also argues that “Defendants waived these claims by reaffirming the validity of the Mortgage Loan” since “Defendants made payments towards the Mortgage Loan for nine years, thereby acquiescing and assenting to its terms as a matter of law” (*id.*). Finally, HSBC asserts that “Defendants’ conclusory allegations of wrongdoing fail to provide Plaintiff with adequate notice of these claims” (*id.* at 17).

The Gross Defendants’ Opposition

The Gross Defendants, in opposition, submit only an attorney affirmation making several conclusory assertions without providing any evidentiary support, including that: (1) “Defendant disputes plaintiff’s claim that it is the holder of the promissory note . . .”; (2) “Defendant disputes that ‘[o]n July 6, 2018, pursuant to NY RPAPL § 1304, Ocwen sent Defendants two notices . . .’”; (3) “Defendant disputes that plaintiff or Ocwen sent defendant any notice of default . . .”; (4) “Plaintiff’s witness (DelPesche) does not work for plaintiff, but for Ocwen, a third party . . .”; (5) “[t]here is no indication that Ocwen has

³ HSBC’s moving memorandum of law references “[t]he *Affidavit of Ronald E. Casperite*, and the Attorney Affirmation of Timothy W. Salter for the facts pertaining to this Motion . . .” however, the only fact affidavit submitted by HSBC in support of its summary judgment motion is from Daniel Delpesche (*id.* at 10 [emphasis added]).

anything to do with the subject mortgage, the subject property, any party to this case, or this case in any way”; and (6) “DelPesche’s affidavit is made by a person with no personal knowledge . . .” (NYSCEF Doc No. 72 at ¶¶ 1-3, 7 and 12-13).

Defense counsel asserts that the first counterclaim is for “continuous calls” which “interfered with the quiet enjoyment of defendant’s home on a daily basis” (*id.* at ¶¶ 26-27). Defense counsel also asserts that “[t]he second counterclaim is that for the nuisance created by plaintiff” when it called the Gross Defendants’ home (*id.* at ¶¶ 27-28). Although the Gross Defendants’ answer *only asserted two* counterclaims (*see* NYSCEF Doc No. 30), defense counsel asserts that “[t]he third counterclaim is for the intentional infliction of emotional distress[,]” “[t]he fourth counterclaim is for the violation of NYGBL Section 349” and “[t]he fifth counterclaim is one for trespass to chattels” (*id.* at ¶¶ 29, 35 and 39).

HSBC’s Reply

HSBC, in reply, submits a memorandum of law arguing that “Defendants abandoned twenty-two of their Affirmative Defenses and both Counterclaims by failing to address them[,]” “Defendants failed to rebut Plaintiff’s *prima facie* case to foreclose, as they did not, and cannot, dispute they executed the Note and Mortgage, and are in default” and “Defendants’ attorney’s affirmation, alone, is insufficient as a matter of law to defeat Plaintiff’s Motion” (NYSCEF Doc No. 76 at 2). HSBC also argues that the court should disregard the five counterclaims that were not asserted in the Gross Defendants’ answer (*id.* at 13).

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 evidence of the borrower’s default (*Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]). Where the issue of standing is raised by a defendant, a plaintiff must establish its standing

as part of its prima facie case (*Wells Fargo Bank, N.A. v Frankson*, 157 AD3d 844, 845 [2d Dept 2018]; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2d Dept 2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2d Dept 2016]).

Importantly, proper service of a 90-day pre-foreclosure notice, pursuant to RPAPL § 1304, is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing strict compliance with RPAPL § 1304 (*Citibank, N.A. v Wood*, 150 AD3d 813, 814 [2d Dept 2017]). “Where a defendant in a residential foreclosure action raises the issue of compliance with RPAPL 1304, the plaintiff must tender sufficient evidence demonstrating the absence of triable issues of fact as to its strict compliance with that statute” (*Sparta GP Holding Reo Corp. v Lynch*, 186 AD3d 894, 895 [2d Dept 2020]). RPAPL 1304 provides that, “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower.” The statute further provides the required content for the notice and requires that the notice be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (RPAPL 1304 [2]).

Here, the 90-day notices sent to the Gross Defendants stated that as of July 6, 2018, the loan was 35 days in default, thus stating a default date of June 1, 2018, however, HSBC’s complaint and Delpesche’s moving affidavit inconsistently allege that August 1, 2018, was the date of the Gross Defendants’ payment default. Consequently, HSBC’s own moving papers raise a triable issue of fact regarding whether the 90-day notices were

defective on their face and present a discrepancy regarding the actual date of default (*see Green Tree Servicing, LLC v Helmsorig*, 227 AD3d 1053, 1055 [2d Dept 2024] [holding that “triable issues of fact existed as to whether 90-day notices sent to borrower were defective on their face” since they reflected a date of default of June 1, 2012, while the complaint and the notice of default sent to the defendant listed the date of default as December 1, 2012]; *U.S. Bank Nat’l Ass’n v Cox*, 203 AD3d 1206, 1209-1210 [2d Dept 2022] [holding that “plaintiff failed to tender sufficient evidence demonstrating the absence of triable issues of fact as to its strict compliance with the content requirements of RPAPL 1304” because “90-day notice sent to the defendant stated that, as of November 18, 2015, her loan was 2330 days in default – indicating a default date in July 2009” but “both the notice of default . . . and the complaint alleged that the plaintiff had defaulted on the loan in May 2011”]). Because HSBC failed to establish its strict compliance with RPAPL § 1304, and the record contains discrepancies regarding the actual date of the Gross Defendants’ alleged default, denial of HSBC’s motion for summary judgment and for an order of reference is warranted, as a matter of law, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

However, that branch of HSBC’s motion seeking dismissal of the Gross Defendants’ two counterclaims asserted against non-party ABC regarding the origination of the loan on August 17, 2005, is granted. The vague and conclusory allegations that ABC, HSBC’s predecessor, breached its “duty to exercise good faith and fair dealing with defendants . . .” by “allowing” them “to enter into a loan agreement which was wholly

unsuitable for them” are dismissed, pursuant to CPLR 3011 and 3013, because they are seemingly asserted against a non-party and are not sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved. Accordingly, it is hereby

ORDERED that HSBC’s motion (mot. seq. one) is only granted to the extent that: (1) the Gross Defendants’ counterclaims are dismissed, and (2) the caption is amended; the motion is otherwise denied; and it is further

ORDERED that the caption shall hereinafter read as follows:

-----X
HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE
FOR DEUTSCHE ALT-B SECURITIES, MORTGAGE LOAN
TRUST, SERIES 2006-AB2,

Plaintiff,

- against -

MICHAEL GROSS; MIRIAM GROSS; CRIMINAL COURT OF
THE CITY OF NEW YORK; NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU; NEW YORK CITY PARKING
VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD and “JOHN DOE #1” through “JOHN
DOE #4”,

Defendants.

-----X.

This constitutes the decision and order of the court.

E N T E R,



Hon. Cenceria P. Edwards, J.S.C., CPA