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<b>HSBC Bank USA, NA v Symons</b>
2015 NY Slip Op 50339(U)
Decided on March 18, 2015
Supreme Court, Suffolk County
Whelan, J.
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Decided on March 18, 2015

Supreme Court, Suffolk County

**HSBC Bank USA, NA, as Indenture Trustee for the registered  
holders of Renaissance Home Equity Loan Asset-Backed  
Certificates Series 2005-1, Plaintiff,**

**against**

**Patricia Symons, Defendant.**

18465-10

LEOPOLD &amp; ASSOC., PLLC

Attys. For Plaintiff

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Armonk, NY 10504

PATRICIA SYMONS

Defendant Pro Se

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Thomas F. Whelan, J.

Upon the following papers numbered 1 to 3 read on this motion *for an order to amend the complaint*; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers; Answering papers; Reply papers; Other; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#002) by the plaintiff for an order "amending the complaint, nunc pro tunc, all without prejudice to any of the proceedings heretofore had herein, or to be had herein" to add an allegation that the "plaintiff or plaintiff's agent is in possession of the note at the commencement of the instant action" is considered under CPLR 3025 and is denied.

The plaintiff commenced this mortgage foreclosure action in May of 2010 and moved for an order of reference following the default in answering of the named defendant who

was joined herein by service of process. That application was granted by order of this court dated November 19, 2013. The default of the mortgagor defendant was thus fixed and determined by such order.

The plaintiff now moves for an order granting it leave to amend its complaint to add the allegation that the plaintiff or plaintiff's agent was in possession of the note at the commencement of the action. The motion is supported by an affirmation of the plaintiff's counsel who alleges that while the original complaint conclusively alleged ownership of the note thereby establishing authority to foreclose, "this motion is brought forth out of an abundance of caution to clarify the plaintiff's compliance with pleading requirements". The origin, source or existence of these pleading requirements is nowhere advanced in the moving papers.

Contrary to the contentions of counsel, neither equity nor case law warrant the granting of this motion and there are no statutory or other pleading requirements mandating that the plaintiff allege that it or its agent is the owner of the note and mortgage at the time of the commencement of this action. For it is well established that entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (*see One West Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept. 2015]; [Midfirst Bank v Agho](#), 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; [Plaza Equities, LLC v Lamberti](#), 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; [Emigrant Mtge. Co., Inc. v Beckerman](#), 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Solomon v Burden*, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; *US Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; [Baron Assoc., LLC v Garcia Group Enter.](#), 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). This standard is, however, enlarged to include a demonstration that the plaintiff is possessed of the requisite standing to pursue its claims where, and only where, the defense of standing is due and timely asserted by a defendant possessed of such defense (*see Deutsche Bank Natl. Trust Co v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; [Midfirst Bank v Agho](#), 121 AD3d 343, *supra*; [Plaza Equities, LLC v Lamberti](#), 118 AD3d 688, *supra*; *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; [Deutsche Bank Natl.](#)

[\*Trust Co. v \[\\*2\]Whalen\*, 107 AD3d 931](#), 969 NYS2d 82 [2d Dept 2013]; [\*Deutsche Bank Natl. Trust Co. v Rivas\*, 95 AD3d 1061](#), 945 NYS2d 328 [2d Dept 2012]; [\*Citimortgage, Inc. v Stosel\*](#), 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2011]; [\*US Bank, N.A. v Adrian Collymore\*](#), 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; [\*Wells Fargo Bank Minn., N.A. v Mastropaolo\*, 42 AD3d 239](#), 837 NYS2d 247 [2d Dept 2007]).

The last stated rule is discernible from the general precept that the standing of a plaintiff is not an element of his or her claim (*see id.*, at 42 AD3d 250; *see also Deutsche Bank Natl. Trust Co., v Islar* \_\_\_ AD3d \_\_\_, 2014 WL 563883 [2d Dept 2014]; [\*Midfirst Bank v Agho\*, 121 AD3d 343](#), *supra*; [\*Plaza Equities, LLC v Lamberti\*](#), 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]). This is particularly evident in the mortgage foreclosure arena wherein recent appellate case authorities have repeatedly held that a lack of standing is merely an affirmative defense which must be timely raised by a defendant possessed of such defense or it is waived (*see* CPLR 3018[b]; CPLR 3211[e]; [\*HSBC Bank USA, Natl. Ass'n v Simmons\*](#), 125 AD3d 930, 2015 WL 775078 [2d Dept 2015]; [\*JP Morgan Mtge. Acquisition Corp. v Hayles\*, 113 AD3d 821](#), 979 NYS2d 620 [2d Dept 2014]; [\*Deutsche Bank Trust Co. Americas v Cox\*](#), 110 AD3d 760, 973 NYS2d 662, [2d Dept 2013]; [\*US Bank Natl. Ass'n v Denaro\*](#), 98 AD3d 964, *supra*; [\*Capital One, N.A. v Knollwood Prop. II, LLC\*](#), 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; [\*Countrywide Home Loans, Inc. v Delphonse\*](#), 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; [\*Wells Fargo Bank Minn., N.A. v Mastropaolo\*, 42 AD3d 239](#), *supra*). More telling, perhaps, is that entities such as mortgage servicers, who may be without ownership of the note and mortgage, are statutorily empowered to commence and prosecute an action for foreclosure (*see* RPAPL §§1302; 1304).

A standing defense is thus not jurisdictional in nature (*see Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766, 980 NYS2d 535 [2d Dept 2014]; [\*Citimortgage, Inc. v Friedman\*](#), 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]; [\*HSBC Bank USA, N.A. v Taher\*](#), 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; [\*Deutsche Bank Natl. Trust Co. v Pietranico\*](#), 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; [\*US Bank Natl. Ass'n v Tate\*](#), 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; [\*Deutsche Bank Natl. Trust Co. v Hunter\*](#), 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; [\*Bank of New York v Alderazi\*](#), 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; [\*US Bank Natl. Ass'n. v Denaro\*](#), 98

AD3d 964, *supra*; ***US Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; [Wells Fargo Bank Minn., N.A. v Mastropaolo](#), 42 AD3d 239, 242-244, *supra*). Moreover, the prosecution of a claim for foreclosure and sale by one without standing is not an actionable wrong, as the claimant may prevail even in the absence of standing (*see* [Deutsche Bank Natl. Trust Co. v Islar](#), 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Bank of New York v Cepeda***, 120 AD3d 451, 989 NYS2d 910 [2d Dept 2014]; [Wells Fargo Bank Minn., N.A. v Mastropaolo](#), 42 AD3d 239, 242, *supra*; *see also* ***US Bank, NA v Reed***, 38 Misc 3d 1206, 967 NYS2d 870 [Sup. Ct. Suffolk County 2013]). Nor does the prosecution of a claim for foreclosure and sale by one without standing vitiate or otherwise affect, adversely, the validity of the mortgage (*see* [Homar v American Home Mtge. Acceptance, Inc.](#), 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]).

Recent appellate case authorities have repeatedly instructed that once a standing defense has been waived, it may not be resurrected by its assertion in opposition to a motion for summary [\*3] judgment (*see* ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; [Capital One, N.A. v Knollwood Prop. II, LLC](#), 98 AD3d 707, *supra*; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***US Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; ***HSBC Bank, USA v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank Natl. Ass'n v Eaddy***, 79 AD3d 1022, *supra*). Nor may it be used in support of an untimely motion to dismiss pursuant to CPLR 3211 (*see* ***EMC Mtge. Corp. v Gass***, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; ***US Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; [US Bank N.A. v Gonzalez](#), 99 AD3d 694, 694—695, 952 NYS2d 59 [2d Dept 2012]; ***McGee v Dunn***, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]; [Countrywide Home Loans, Inc. v Delphouse](#), 64 AD3d 624, *supra*). Nor may a waived standing defense be asserted by a party in default in support of an application to vacate such default under CPLR 5015(a)(1) (*see* ***US Bank, N.A. v Bernabel***, 125 AD3d 541, 2015 WL 752831 [1st Dept 2015]; [JPMorgan Mtge. Acquisition Corp. v Hayles](#), 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014], *supra*; [Citibank, N.A. v Swiatkowski](#), 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; [HSBC Bank, USA v Dammond](#), 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

In the instant action, the plaintiff was under no common law or statutory compulsion to assert that it or its agent was in possession of the mortgage note at the time of the commencement of the action, since as indicated above, the plaintiff's standing in a mortgage foreclosure action is not an element of its claim. The complaint served and filed herein contained allegations that the plaintiff as assignee of the note and mortgage had a sufficient jural interest in both to prosecute the pleaded claim for foreclosure and sale. Counsel's claim that the proposed amendment is warranted so as to bring the original complaint into compliance with unidentified "pleading requirements" lacks merit. This circumstance, coupled with the fact that this court has previously adjudicated the default in answering of the sole defendant in this action thereby leaving her without any viable standing defense due to its waiver, renders the proposed amendment palpably improper and wholly lacking in merit.

In addition to these substantive deficiencies, the plaintiff failed to attach a copy of a proposed amended complaint to its moving papers as required by CPLR 3025(b), which pursuant to CPLR 3025, must be served upon all parties in default. Finally, the plaintiff's moving papers failed to advance any ground for the plaintiff's demand for nunc pro tunc treatment of the proposed amendment since nunc pro tunc treatment, is generally reserved for "correct[ing] irregularities in the entry of judicial mandates or like procedural errors" and may not be wielded when third parties have substantive rights in play that may be altered by recording a fact as of a prior date when it did not then exist (*see Gletzer v Harris*, 12 NY3d 468, 882 NYS2d 386 [2009]; *Cornell v Cornell*, 7 NY2d 164, 167, 196 NYS2d 98 [1959]).

In view of the foregoing, the instant motion is denied, but such denial is without prejudice and with leave to renew. The proposed order attached to the moving papers has been marked "not signed".

Dated: March 18, 2015 \_\_\_\_\_

THOMAS F. WHELAN, J.S.C.

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