

-----X

Index No. 702257/2014

Plaintiffs,

V.

MORTGAGE ELECTRONIC REGISTRATION :
SYSTEMS, INC., AS NOMINEE FOR HSBC :
MORTGAGE CORPORATION (USA) ITS :
SUCCESSORS AND ASSIGNS; ALLY BANK FKA :
GMAC BANK; RESIDENTIAL FUNDING COMPANY, :
LLC; HSBC BANK, USA, N.A.; 21ST CENTURY :
MORTGAGE CORPORATION; AND JOHN DOE 1-5 :
Defendants. :

-----X

DEFENDANT HSBC BANK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT WITH PREJUDICE

Table of Contents

	Page
INTRODUCTION.....	1
LEGAL ARGUMENT.....	2
A. The Note And Mortgage Were Not Split Because MERS Was Named As Nominee for HSBC.....	3
B. Borrower Fails To Specify How HSBC Violated The National Mortgage Settlement Or HAMP, And Even If Sufficient Allegations Were Pled, There Is No Private Remedy For Any Violation.	4

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bank of N.Y. v. Raftogianis</i> , 418 N.J. Super. 323, 13 A.3d 435, 447–50 (N.J.Super.Ch. 2010).....	4
<i>Chudoba v. Chudoba</i> , 36 Misc. 2d 213 (1962).....	5
<i>Citibank, N.A. v. Suthers</i> , 68 A.D.2d 790, 418 N.Y.S.2d 679 (4th Dept.1979)	6
<i>Deutsche Bank Nat. Trust Co. v. Pietranico</i> , 33 Misc. 3d 528, 928 N.Y.S. 2d 818 (N.Y.Sup.Ct. 2011)	3, 4
<i>Golliday v. Chase Home Finance, LLC</i> , 2011 WL 4352554 (W.D. Mich. 2011).....	4
<i>In re Queen</i> , 2013 WL 6116864 (N.D. Ga. 2013)	5
<i>In re Tucker</i> , 441 B.R. 638 (Bankr. W.D. Mo.2010).....	4
<i>Rehbein v. CitiMortgage, Inc.</i> , 937 F.Supp.2d 753 (E.D. Va. 2013)	5
<i>Ruotolo v. Fannie Mae</i> , 933 F.Supp.2d 512 (S.D.N.Y. 2012).....	5
<i>Suss v. JP Morgan Chase Bank, N.A.</i> , 2010 WL 2733097 (D. Md. 2010)	4
<i>Vanscoy v. Namic USA Corp.</i> , 234 A.D. 2d 680 (3d Dept. 1996)	5
<i>Wheeler v. Citigroup</i> , 938 F. Supp. 2d 466 (S.D.N.Y. 2012).....	5
STATUTES	
CPLR 3025(b).....	6

HSBC Bank, USA, N.A., by its undersigned counsel and pursuant to NYCPLR § 3211(a)(7), hereby files this Memorandum of Law in support of its Motion to Dismiss Plaintiff's, Quamia Ballard ("Borrower"), Verified Complaint to Quiet Title and for Other Relief (the "Complaint").

INTRODUCTION

In her Complaint, Borrower, *inter alia*, purports to quiet title and void a mortgage *that she unequivocally signed* on residential property located at 40 227th Street, Cambia Heights, NY, 11411 (the "Property"), on the grounds that the subject note and mortgage were "separated" at closing because the note listed HSBC as holder while the mortgage identified MERS as the mortgagee, as nominee for HSBC. Borrower alleges that as the note and mortgage were separated at closing, MERS lacked authority to assign the mortgage and thus, all subsequent assignments of the mortgage are invalid. Borrower ignores, however, that courts have repeatedly held – as a matter of law -- that the designation of MERS as nominee does *not* separate the mortgage from the note, because MERS is only acting as agent for the note holder. Accordingly, the Complaint fails on its face and should be dismissed with prejudice.

More specifically, Plaintiff alleges that on April 30, 2007, she executed a note (the "Note") in the principal amount of \$389,200 (the "Loan") in favor of HSBC to finance the purchase of the Property. *See* Complaint at ¶35. The Note was secured by a mortgage on the Property (the "Mortgage") which listed MERS "as the mortgage as nominee for HSBC." *See* Complaint at ¶4. Plaintiff claims that because HSBC is payee under the note while MERS is mortgagee under the Mortgage, "the note and mortgage were intentionally separated at their inception by the parties." *See* Complaint at ¶38. Plaintiff alleges that subsequent to the closing, the following assignments of Mortgage occurred.

Assignment Recorded	Assignor	Assignee
November 4, 2009	MERS, as nominee for HSBC	GMAC Bank

October 21, 2011	Ally Bank f/k/a GMAC Bank	Residential Funding Company, LLC
October 24, 2011 (corrective assignment)	MERS as nominee for HSBC	HSBC
October 24, 2011	HSBC	Residential Funding Company, LLC
September 19, 2013	Residential Funding Company, LLC	21 st Mortgage Corporation

According to Plaintiff, MERS never possessed the note and thus, “had no authority to assign the mortgage where it was not the lawful holder of the underlying note and mortgage.” *See* Complaint at ¶12. While Plaintiff does not dispute the repayment obligation under the Note, she claims that “it is virtually impossible to determine who the owner of the note and mortgage is.” *See* Complaint at ¶5. Further, Plaintiff alleges that “Defendants.....cannot claim an interest in [the Property] based on an assignment that is executed by MERS in any capacity, as any such assignment would be null and void.” *See* Complaint at ¶48. Plaintiff seeks an order quieting title (Count I), as well as a declaratory judgment (Count II) “ruling that the Note is unsecured.” *See* Complaint at ¶¶ 40 & 47.

Plaintiff also alleges that Defendants improperly failed to modify the Loan. Specifically, in Count IV, Plaintiff claims Defendants violated the “Loss Mitigation Guidelines and Loan Modification Times” in the National Mortgage Settlement Consent Judgment. *See* Complaint at ¶68. In Count V, Plaintiff alleges that Defendants “delayed, obfuscated and otherwise done everything in their power to avoid approving the Plaintiff under the Making Home Affordable Program (“HAMP”).” *See* Complaint at ¶91. However, in neither Count IV nor Count V, does Plaintiff identify any conduct allegedly taken by HSBC that violates HAMP or the National Mortgage Settlement.¹

LEGAL ARGUMENT

¹ Count III is only directed to Defendants, 21st Century Mortgage and Residential Funding Company, LLC.

A. The Note And Mortgage Were Not Split Because MERS Was Named As Nominee for HSBC.

Borrower's quiet title and declaratory relief claims are predicated on her theory that the Note and Mortgage were separated at closing when MERS was named mortgagee as nominee for HSBC. However, it is well-established that "[t]he use of a nominee in real estate transactions, and as a mortgagee in a recorded mortgage, is a long-standing practice." *Deutsche Bank Nat. Trust Co. v. Pietranico*, 33 Misc. 3d 528, 928 N.Y.S. 2d 818 (N.Y.Sup.Ct. 2011). Indeed, in *Pietranico*, the Court considered – and rejected – the same argument advanced by Borrower here. There, the subject note identified American Brokers Conduit as the payee, while the mortgage named MERS as mortgagee as nominee for American Brokers Conduit. *Id.* at 540.

The borrower argued that the assignment from MERS to the plaintiff was invalid because the note and mortgage were separated at closing. The Court reasoned, however, that "the note and mortgage travel together on the same path, by virtue of the role of MERS as the common agent of the lender and the lender's successors and assigns. It is clear from the wording of the mortgage loan documents that the intent of the parties is to designate MERS as the mortgagee and for MERS to serve as the common nominee or agent for MERS member lenders and their successors and assigns." *Id.* at 550.

Indeed, "courts have uniformly held, however, that this separation argument is unavailing to mortgagors trying to invalidate a mortgage written in favor of MERS, for the simple reason that there is no separation of the debt from the security. The debt is held by the lender, and the security is held by the lender's nominee, MERS, *as the lender's agent.*" *Golliday v. Chase Home Finance, LLC*, 2011 WL 4352554, at *7 (W.D. Mich. 2011) (emphasis added); *see also Suss v. JP Morgan Chase Bank, N.A.*, 2010 WL 2733097, at * 5 (D. Md. 2010) ("As to Plaintiff's criticism of MERS, courts that have considered the issue have found that the system of recordation is proper and assignments made through that system are valid."); *In re Tucker*, 441

B.R. 638, 645–46 (Bankr. W.D. Mo.2010) (noting that “MERS was the agent for New Century under the Deed of Trust from the inception, and MERS became agent for each subsequent noteholder under the Deed of Trust when each such noteholder negotiated the Note to its successor and assign.”); *Bank of N.Y. v. Raftogianis*, 418 N.J. Super. 323, 13 A.3d 435, 447–50 (N.J.Super.Ch. 2010) (noting that “designation of MERS as nominee on the mortgage was simply intended to permit the recording of the mortgage in a way that would facilitate subsequent transfers through MERS without the recording of additional documents....[i]t is clear, however, that there was no real intent to separate ownership of the note and mortgage at the time those documents were created.”). Accordingly, Borrower’s claim that the Mortgage was split from the Note and is now a nullity fails as a matter of law, and thus, Count I and Count II should be dismissed with prejudice.

B. Borrower Fails To Specify How HSBC Violated The National Mortgage Settlement Or HAMP, And Even If Sufficient Allegations Were Pled, There Is No Private Remedy For Any Violation.

In Counts IV and V, Borrower alleges that Defendants violated the servicing and modification guidelines in both the National Mortgage Settlement and HAMP. Yet Borrower fails to identify *how* HSBC specifically violated either the National Mortgage Settlement or HAMP. Borrower does not even allege that she sought a modification under either program from HSBC. “Conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts.” *Vanscoy v. Namic USA Corp.*, 234 A.D. 2d 680, 681–682 (3d Dept. 1996). “It should be remembered that a pleading must allege the facts which constitute the wrong charged and that conclusions are not enough.” *Chudoba v. Chudoba*, 36 Misc. 2d 213, 216 (1962). This defect alone warrants dismissal of Counts IV and V against HSBC.

However, amendment of these claims would be futile given that there is no private remedy under the National Mortgage Settlement or HAMP. *See e.g. In re Queen*, 2013 WL

6116864, at *3 (N.D. Ga. 2013) (holding that “[t]here is no third-party right of enforcement under the National Mortgage Settlement.”); *Rehbein v. CitiMortgage, Inc.*, 937 F.Supp.2d 753, 761 (E.D. Va. 2013) (dismissing breach of National Mortgage Settlement claim as “[t]he language of the Consent Judgment indicates that the parties to the agreement did not intend the individual borrowers to be able to sue to protect the benefits the consent judgment confers.”); *Wheeler v. Citigroup*, 938 F. Supp. 2d 466, 471 (S.D.N.Y. 2012) (emphasizing that “HAMP does not create a private right of action for borrowers against loan servicers.”); *Ruotolo v. Fannie Mae*, 933 F.Supp.2d 512, 523 (S.D.N.Y. 2012) (rejecting argument that TARP contained an implied private right of action as “nothing about the statute evinces congressional intent to create a private right of action against TARP fund recipients.”).

Accordingly, Counts IV and V should be dismissed against HSBC with prejudice. *See e.g. Citibank, N.A. v. Suthers*, 68 A.D.2d 790, 795, 418 N.Y.S.2d 679 (4th Dept.1979) (noting that CPLR 3025(b) “does not require courts to permit futile amendments.”)

WHEREFORE, Defendant, HSBC Bank, USA, respectfully requests that the Court enter an Order dismissing the Complaint against it with prejudice, and for such other and further relief that it deems just and proper.

By: _____


Justin Angelo
Ballard Spahr LLP
425 Park Avenue
New York, NY 10022-3556
Telephone: 646.346.8012
angeloj@ballardspahr.com
Attorneys for Defendant HSBC

Of counsel:
Dan McKenna
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.864.8321
mckennad@ballardspahr.com