

**Deutsche Bank Natl. Trust Co. v Cuesta**

2012 NY Slip Op 32590(U)

September 11, 2012

Supreme Court, Suffolk County

Docket Number: 3998-11

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 34 - SUFFOLK COUNTY

**COPY**

PRESENT: Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 5-14-12  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001-MD

\_\_\_\_\_  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY AS INDENTURE TRUSTEE FOR  
AMERICAN HOME MORTGAGE  
INVESTMENT TRUST 2007-2

LAW OFFICES OF  
JORDAN S. KATZ, P.C.  
Attorneys for Plaintiff  
395 North Service Road, Suite 401  
Melville, N. Y. 11747

Plaintiff,

-against-

MARTHA L. CUESTA  
8 Spruce Road  
Amityville, N. Y. 11701

MARTHA L. CUESTA, and "JOHN DOE" and  
"JANE DOE", the last two names being  
fictitious, said parties intended being tenants  
or occupants, if any having or claiming an  
interest in, or lien upon the premises  
described in the complaint,

MARTHA CABAELLERO  
3490 Great Neck Road  
Amityville, N. Y. 11701

Defendants.

JANE DOE-REFUSED NAME  
3490 Great Neck Road  
Amityville, N. Y. 11701

\_\_\_\_\_  
x

LUZ GALEAS  
3490 Great Neck Road  
Amityville, N. Y. 11701

JORGE GALERS  
3490 Great Neck Road  
Amityville, N. Y. 11701

Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers \_\_\_\_\_;  
Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_;  
Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED**, that this unopposed motion (001) by the plaintiff for, inter alia, an order: (1)  
pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant, Martha L.  
Cuesta, and striking her answer and affirmative defenses; (2) pursuant to RPAPL § 1321 appointing a  
referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether  
the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption, is  
denied without prejudice to renew within One Hundred and Twenty (120) Days of the date of this  
Order; and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this Order upon the defendant, Martha L. Cuesta, and upon all other defendants who have answered or appeared, if any, via first class mail, and shall promptly file the affidavit(s) of such service along with a copy of this Order as exhibits to any future motion resubmitted pursuant to this Order.

The plaintiff commenced this residential foreclosure action by the filing of a summons and verified complaint on February 4, 2011. In the complaint, the plaintiff alleges that Martha L. Cuesta (the defendant mortgagor) defaulted in repaying a note dated December 20, 2006 and given to the original lender, American Brokers Conduit (American), in the principal sum of \$292,000. As security for the loan, the defendant mortgagor allegedly gave American a mortgage also dated December 20, 2006 against certain real property that is described as 3490 Great Neck Road, Amityville, NY 11701. The defendant mortgagor allegedly defaulted on her loan payments due on September 1, 2010 and thereafter. Upon the failure of the defendant mortgagor to cure her default, the loan was accelerated.

In response to the complaint, the defendant mortgagor filed an answer dated February 22, 2011. By her answer, the defendant mortgagor admits her default in payment to the plaintiff, but denies the remaining material allegations set forth in the complaint. By her answer, the defendant mortgagor also asserts two purported affirmative defenses: 1) The defendant mortgagor is working on a loan modification; and 2) The defendant mortgagor will not make payments to the plaintiff for the subject mortgage until a loan modification is approved. The defendant mortgagor also alleges that the subject property was vacant for several months. No other answers or appearances have been filed.

Parenthetically, according to the information maintained by the Court's computerized database, a foreclosure settlement conference was held in this Court's Specialized Mortgage Foreclosure Conference Part on December 16, 2011. At the conference, the defendant mortgagor did not appear or otherwise participate. As a result, this matter was referred as an IAS case. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 granting summary judgment in its favor and against the answering defendant, Martha L. Cuesta, and striking her joint answer and affirmative defenses; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption. No opposition has been filed in response to the motion.

Familiarity with this matter is presumed and the Court need not recite the history of this foreclosure matter and only relevant facts will be restated where necessary. The instant motion is considered and is denied as deficient without prejudice to renewal upon proper papers which shall include the following:

1) An affidavit of merit from the plaintiff or, if the plaintiff's office submits an affidavit made by a servicing agent or attorney-in-fact for the plaintiff, then any renewed application must also be

supported by a recorded or certified copy of the limited power-of-attorney document and the relevant excerpts of the servicing agreement (*see e.g., Wolf v Citibank, N.A.*, 34 AD3d 574, 824 NYS2d 176 [2d Dept 2006]). Without a properly offered copy of a recorded or certified power-of-attorney document, or an affidavit from an officer of the plaintiff itself, the Court is unable to ascertain whether or not a plaintiff's servicing agent may properly act on behalf of the plaintiff to set forth the facts constituting the claim, the default and the amounts due, as required by statute (*see, HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 888 NYS2d 203 [2d Dept 2009]). In the absence of either a complaint verified by the plaintiff or a proper affidavit by the party or its authorized agent, the entry of judgment by default is erroneous (*see, Mullins v DiLorenzo*, 199 AD2d 218, 606 NYS2d 161 [1<sup>st</sup> Dept 1993]; *Hazim v Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]; *Finnegan v Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]).

2) Evidentiary proof, including an affidavit or affirmation from one with personal knowledge, of compliance with the type-size and content requirements of RPAPL § 1304 regarding the pre-commencement notice required in foreclosure actions, as well as an affidavit of proper service of such notice by registered or certified mail and by first class mail to the last known address of the defendant mortgagor, as required by RPAPL § 1304(2) or, in the alternative, an affidavit from one with personal knowledge sufficient to show why the requirements of RPAPL § 1304(1) do not apply (*see, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *see also, Deutsche Bank Trust Co. Ams. v Day*, 2011 NY Misc LEXIS 6227, 2011 WL 7014817, 2011 NY Slip Op 33455U [Sup Ct, Suffolk County, Dec. 15, 2011, Pitts, J.]). Pursuant to RPAPL §1304(2), the requisite 90-day notice must be "sent by the lender, assignee or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence which is the subject of the mortgage." Additionally, RPAPL §1304(2) provides that the requisite "notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice." The notice must also contain a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides. Pursuant to RPAPL § 1304(3), the 90-day period specified in RPAPL § 1304(1) does not apply "if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling."

The papers submitted show that this action was commenced on February 4, 2011, therefore, the plaintiff was required to show compliance with RPAPL § 1304 as amended by Laws of 2009, chapter 507, signed December 15, 2009 (*see, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra*). In its current form, RPAPL § 1304 is applicable to any "home loan," as defined in subdivision (5)(a) of that section. In this case, the plaintiff has not submitted proof of service the RPAPL § 1304 notice by way of evidence in admissible form (*see, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra*). The mere allegation in the attorney-verified complaint that service of the 90-day notice was made, is without first-hand knowledge and, therefore, without probative value (*e.g., Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NYS2d 595 [1980]; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]; *Simpson v King*, 48 AD3d 788, 788, 851 NYS2d 357 [2d Dept 2008]). Without an affidavit of service from one with personal knowledge of compliance with the specific service requirements of RPAPL § 1304 or, in the alternative, an affidavit sufficient to

show why the requirements of § 1304 do not apply, the Court may not grant summary judgment or an order of reference to the plaintiff (*see generally, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Also, the plaintiff has not annexed a copy of the purported 90-day notice to the moving papers.

3) Evidentiary proof, including an affidavit from one with personal knowledge, as to whether, pursuant to RPAPL § 1302, the action involves a "high-cost home loan" or a "subprime home loan" (as such terms are defined in Banking Law § 6-l and § 6-m, respectively) and, if so, evidentiary proof, including an attorney's affirmation, of compliance with the pleading requirements of RPAPL § 1302 regarding high-cost and subprime home loans (*see, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra*).

4) Evidentiary proof, including an affidavit from an individual with personal knowledge of the facts as to the proper and timely assignment of the subject note and mortgage or endorsement of the subject note and assignment of the subject mortgage, sufficient to establish that plaintiff was the owner or holder of the subject note and mortgage at the time the action was commenced (*see, Mtge. Elec. Registration Sys. Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). In his affidavit, the plaintiff's representative has not addressed the particulars of the transfer of the note or the assignment of the mortgage to the plaintiff. Additionally, the assignment dated January 27, 2011, which is referred to in the plaintiff's complaint, has not been attached to the moving papers.

5) A copy of the applicable default notice(s) purportedly sent to the defendant mortgagor, along with proof of mailing or service of the notice(s) of default by someone with personal knowledge upon the defendant mortgagor pursuant to sections 15 and 22 of the mortgage (*see, Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]). The default notice, referenced as Exhibit "D" by the plaintiff, has not been annexed to the moving papers.

6) A certificate of conformity for the affidavit by the plaintiff's servicer notarized outside of the State of New York (*see, CPLR 2309 [c]; U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]).

7) An affidavit or affirmation of non-military status of the defendant-homeowner pursuant to 50 USC 521 et. seq. along with accompanying printouts from the Department of Defense Manpower Data Center (*see, Deutsche Bank Trust Co. Ams. v Day*, 2011 NY Slip Op 33455U, *supra*; *Central Mtge. Co. v Acevedo*, 34 Misc3d 213, 934 NYS2d 285 [Sup Ct, Kings County, 2011]).

8) An affirmation from counsel and/or an affidavit from the plaintiff or the plaintiff's representative that he/she has reviewed the file in this case and that he/she documents that all paperwork is correct in compliance with AO 431/11.

9) The plaintiff's filed Request for Judicial Intervention in this action.

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Accordingly, the instant summary judgment motion is denied without prejudice to resubmission of the motion upon proper papers, including but not limited to a copy of all the papers submitted with this motion, a copy of this Order, and the evidentiary proof specified above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: September 11, 2012

  
\_\_\_\_\_  
**HON. JOSEPH C. PASTORESSA, J.S.C.**

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION