

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

2016 NY Slip Op 32121(U)

June 16, 2016

Supreme Court, Queens County

Docket Number: 704872/15

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

Short Form Order

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS Part 6  
Justice

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 DEUTSCHE BANK NATIONAL TRUST  
 COMPANY AS TRUSTEE OF THE INDYMAC  
 INDX MORTGAGE LOAN TRUST 2006-AR14,  
 MORTGAGE PASS-THROUGH CERTIFICATES  
 SERIES 2006-ARF14 UNDER THE POOLING  
 AND SERVICING AGREEMENT DATED  
 OCTOBER 1, 2006,

Plaintiff,

-against-

MICHAEL COLE, et al.,

Defendants.

Index  
Number 704872/ 15Motion  
Date April 7, 2016Motion Seq. No. 1Motion Cal. No. 41

The following papers read on this motion by plaintiff (1) pursuant to CPLR 3212 for summary judgment against defendants Michael Cole and Moonachi, Inc., (2) pursuant to CPLR 3211(b) to dismiss the affirmative defenses asserted by defendants Michael Cole and Moonachi, Inc., (3) pursuant to CPLR 3215 for leave to enter a default judgment against defendants IndyMac Bank, F.S.B., New York City Environmental Control Board, FIA Card Services, N.A., New York State Department of Taxation and Finance, New York City Transit Adjudication Bureau, Criminal Court of the City of New York and Cliff Roberts s/h/a "John Doe #1," and (4) for leave to appoint a referee to compute the sums due and owing plaintiff and to ascertain whether the mortgaged premises should be sold as a single parcel.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....	EF 27- 46
Answering Affidavits - Exhibits .....	EF 47- 59
Reply Affidavits .....	EF 61- 68

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on May 12, 2015 to foreclose a mortgage encumbering the real property known as 106-51 Roscoe Street, Jamaica, New York given by defendant Cole (the subject mortgage) to secure a promissory note evidencing a loan from IndyMac Bank, F.S.B. (IndyMac) in the principal amount of \$400,000.00 plus interest. Plaintiff named Moonachi, Inc. (Moonachi), the record owner of the subject property, as a party defendant. Plaintiff alleges that it is the holder of the note and owner of the mortgage. It also alleges that defendant Cole

defaulted under the terms of the mortgage and note by failing to make the monthly mortgage installment payment due on August 1, 2008 and thereafter, and as a consequence, it elects to accelerate the mortgage debt.

Defendants Cole and Moonachi served an answer, asserting various affirmative defenses, including lack of standing. The remaining defendants have not appeared or answered.

A settlement conference pursuant to CPLR 3408 was scheduled for September 8, 2015, at which defendant Cole did not appear in person or by counsel. By order dated the same date, the Court Attorney Referee directed plaintiff to appear at a status conference on May 31, 2016 and make an application for an order of reference by the status conference date.

Defendants Cole and Moonachi oppose the motion, asserting that plaintiff lacked standing to bring the action. The remaining defendants have not appeared in relation to the motion.

That branch of the motion by plaintiff for leave to amend the caption substituting Cliff Roberts in place and stead of defendant “John Doe #1” is granted. Plaintiff has determined that the remaining “John Doe” defendants are unnecessary party defendants. It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS TRUSTEE OF THE INDYMAC INDX MORTGAGE  
LOAN TRUST 2006-AR 14, MORTGAGE PASS-  
THROUGH CERTIFICATES, SERIES 2006-ARF14  
UNDER THE POOLING AND SERVICING  
AGREEMENT DATED OCTOBER 1, 2006,

Index No. 704872/2015

Plaintiff ,

-against-

MICHAEL COLE, MOONACHI INC., MICHELE  
MILERSON, BERNARD MCCONVILLE, INDYMAC  
BANK F.S.B., NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, FIA CARD SERVICES, N.A.,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, CRIMINAL COURT OF  
THE CITY OF NEW YORK and CLIFF ROBERTS,

Defendants.  
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With respect to the branch of the motion by plaintiff for summary judgment against defendants Cole and Moonachi, a plaintiff establishes its case as a matter of law through the

production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Where standing is at issue, the plaintiff seeking summary judgment must prove its standing as part of its prima facie showing (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]; *Loancare v Firshing*, 130 AD3d 787, 789 [2d Dept 2015]; *Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, 830–831 [2d Dept 2015]) by demonstrating that it is either the holder or assignee of the underlying note at the time the action is commenced (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d at 984; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *Loancare v Firshing*, 130 AD3d at 789). “ ‘The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note’ ” (*HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d at 984, quoting *U.S. Bank N.A. v Guy*, 125 AD3d 845, 846–847 [2d Dept 2015]). The mortgage passes with the debt as an inseparable incident (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 109 [2d Dept 2011], citing *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

In support of its motion, plaintiff submits, among other things, a copy of the complaint with annexed exhibits, including the note and mortgage, assignments of mortgage dated October 21, 2011 and April 15, 2015, the answer of defendants Cole and Moonachi, an excerpted copy of a pooling and servicing agreement dated as of October 1, 2006 (the PSA), affirmations of both of its co-counsel, and an affidavit of Howard R. Handville, as “Senior Loan Analyst” employed by Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Servicing, LLC (Ocwen), the loan servicer and attorney-in-fact for plaintiff. In his affidavit dated December 7, 2015, Mr. Handville states he reviewed records kept and maintained by Ocwen in its ordinary course of business, and that plaintiff was transferred the mortgage loan pursuant to the PSA, and has been the owner and holder of the note since October 1, 2006. He also states that on September 10, 2014, Ocwen took physical possession of the note, a copy of which is annexed to his affidavit as Exhibit “1.” According to Mr. Handville, the note was delivered to Ocwen at 5720 Premier Park Drive, West Palm Beach, Florida, where it has since remained. He further states that defendant Cole defaulted in payment of the monthly mortgage installment due in August 2008 and thereafter. The copy of the note annexed to the December 7, 2015 affidavit of Mr. Handville, as Exhibit “1,” is five pages in length and bears, on page 5, an undated endorsement in blank without recourse by IndyMac, by Bruce Seitz, as vice president of IndyMac.

By these submissions, plaintiff has made a prima facie showing of defendant Cole’s default in payment under the note and mortgage and that it has standing by virtue of its pre-commencement physical possession of the note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015], *affg* 114 AD3d 627 [2d Dept 2014]; *Bank of America, N.A. v O’Gorman*, 137 AD3d 1179 [2d Dept 2016]; *see also U.S. Bank N.A. v Aske*, 138 AD3d 402 [1<sup>st</sup> Dept 2016]).

The burden shifts to defendants Cole and Moonachi to submit proof sufficient to raise a genuine question of fact rebutting plaintiff’s prima facie showing, or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Jessabell Realty Corp. v Gonzalez*, 117 AD3d 908 [2d Dept 2014]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]).

Here, the only pleaded affirmative defenses raised by defendants Cole and Moonachi in

opposition to the instant motion is their defense of lack of standing. Defendants Cole and Moonachi, in opposition, assert that the copy of the note offered as an exhibit to the complaint does not bear the Seitz endorsement on page 5, and instead has an additional sheet of paper, which contains only an undated blank endorsement without recourse by IndyMac by Ned Payant, as vice president of IndyMac. Defendants Cole and Moonachi also assert that the copy of the complaint filed in the action entitled *OneWest Bank, FSB v Cole*, (Supreme Court, Queens County, Index No. 12794/2009), included, as an annexed exhibit, a copy of the note without the Seitz endorsement and with the separate sheet of paper bearing the Payant endorsement. In that action (Index No. 12794/2009), OneWest Bank, as the successor in interest to IndyMac, sought foreclosure of the same mortgage as is one involved herein, based upon a claimed default in payment of a monthly mortgage installment due on January 1, 2008. (The action [Index No. 12794/2009] was discontinued in 2015 without prejudice.)

Defendants Cole and Moonachi, however, make no claim that plaintiff has represented the copy of the note attached to the complaint is the most recent version of the note. The copy of the note attached by plaintiff to the complaint does not vary in its terms from the copy of the note relied upon by plaintiff (Exhibit #1) to prove the foreclosure claim. The existence of the Payant endorsement does not give rise to a question of fact with respect to plaintiff's right to commence the action, particularly where both copies of the note are endorsed in blank (*see also Citimortgage, Inc. v Friedman*, 109 AD3d 573 [2d Dept 2013]).

In addition, plaintiff offers, in reply, the affidavit of Rebecca Marks, an assistant vice president for CIT Bank, N.A. (CIT) (formerly known as OneWest Bank N.A. f/k/a OneWest Bank, FSB), the former servicer of the subject mortgage loan from March 2009 to November 2013. Ms. Marks states she reviewed business records kept and maintained by CIT, concerning the servicing of the subject mortgage loan, and indicates the records show that the original note was held by plaintiff's record custodian, Deutsche Bank National Trust Company at 1761 East St. Andrew Place, Santa Ana, California from June 1, 2006 until September 1, 2014 when it was sent to Ocwen, as the new servicer for the loan. She indicates a review of the CIT files also shows that on May 8, 2013, the original indorsed note, as found in CIT's files, was scanned into CIT's "system," and the (scanned) note is the same as the copy of the note attached to the December 7, 2015 affidavit of Mr. Handville as Exhibit "1," i.e. bearing the Seitz endorsement. Consequently, plaintiff has shown physical delivery of the note, endorsed in blank to it prior to the commencement of the action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-361; *U.S. Bank, N.A. v Askew*, 138 AD3d 402; *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737 [3d Dept 2015]; *Wells Fargo Bank, N.A. v Burke*, 2016 WL 3177560, 2016 NY Misc LEXIS 2054; 2016 NY Slip Op 26181; *cf.*, *HSBC Bank USA, Nat. Assn v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]).

Furthermore, to the extent defendants Cole and Moonachi assert IndyMac was closed prior to the commencement of this action, plaintiff offers an additional affidavit by Mr. Handville, wherein he explains that IndyMac existed as of October 1, 2006 when the loan was placed in the Trust, and it was not until July 11, 2008, that the Office of Thrift Supervision closed IndyMac, and transferred IndyMac's assets to IndyMac Federal Bank, FSB, and appointed the Federal Deposit Insurance Corporation as conservator for IndyMac Federal Bank, FSB. Therefore, there is no genuine issue of fact as to whether IndyMac lacked authority to endorse the note.

Under these circumstances, defendants Cole and Moonachi have failed to raise a triable

issue of fact in opposition to plaintiff's prima facie showing of entitlement to judgment as a matter of law (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-361; *U.S. Bank, N.A. v Askew*, 138 AD3d 402; *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737 [3d Dept 2015]; *Wells Fargo Bank, N.A. v Burke*, 2016 WL 3177560, 2016 NY Misc LEXIS 2054; 2016 NY Slip Op 26181; cf., *HSBC Bank USA, Nat. Assn v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]).

That branch of the motion by plaintiff for summary judgment against defendants Cole and Moonachi is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against defendants IndyMac Bank, F.S.B., New York City Environmental Control Board, FIA Card Services, N.A., New York State Department of Taxation and Finance, New York City Transit Adjudication Bureau, Criminal Court of the City of New York and Cliff Roberts is granted.

That branch of the motion by plaintiff for leave to appoint a referee is denied without prejudice to renewal. A reference to compute the amount due is prescribed when the defendant is in default in answering the complaint within the time allowed or the right of the plaintiff is admitted by the answer (see RPAPL 1321[1]; *Scharaga v Schwartzberg*, 149 AD2d 578, 578–579 [2d Dept 1989]). Plaintiff has failed to demonstrate that defendants Michele Milerson and Bernard McConville have been served with process, or that such defendants are unnecessary party defendants in the action.

Dated: June 16, 2016

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**Howard G. Lane, J.S.C.**