

Deutsche Bank Natl. Trust Co. v Deluca

2021 NY Slip Op 34075(U)

December 14, 2021

Supreme Court, Otsego County

Docket Number: Ind. No. EF2020-623

Judge: Brian D. Burns

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Cooperstown, New York on December 10, 2021.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO**

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE REGISTERED HOLDER OF
EQUIFIRST MORTGAGE LOAN TRUST 2004-2
ASSET-BACKED CERTIFICATES, SERIES 2004-2,

Filed and Entered
Dec. 15, 2021
Otsego County Clerk's Office

Plaintiff,

DECISION AND ORDER

-against-

Ind. No. EF2020-623

MICHAEL DELUCA; KEY BANK, NATIONAL ASSOCIATION; MIDLAND FUNDING LLC, "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 premises described in the Complaint,

Defendants.

BEFORE: HON. BRIAN D. BURNS
SUPREME COURT JUSTICE

APPEARANCES: For Plaintiff
ROBERTSON, ANSCHUTZ, SCHNEID, CRANE & PARTNERS, PLLC
By William Knox, Esq.

For Defendants
LEGAL AID SOCIETY OF MID-NEW YORK, INC.
By Jay Flemma, Esq.

Plaintiff filed a motion seeking an order granting default judgment, and order of reference, and judgment of foreclosure and sale. The motion was made returnable at a

submitted term of the court but adjourned to November 5, 2021 upon stipulation of the parties. Defendant Michael Deluca filed a cross-motion seeking an order permitting defendant to file a late Answer, dismissing the complaint as time-barred, sanctioning plaintiff and plaintiff's attorneys, quieting title in favor of defendant, and granting costs and attorney's fees. Both motions were adjourned by agreement of the parties. The court has now considered all papers filed on NYSCEF in connection with the motions.

Procedural History

The Summons and Complaint were filed on October 19, 2020. Defendant Michael Deluca was personally served on November 18, 2020. Defendant Deluca did not serve an Answer.

Plaintiff commenced a previous foreclosure action by filing a Summons and Complaint on March 17, 2011 with a Lis Pendens. The action was dismissed by Hon. Michael Coccoma by order dated September 1, 2015 for plaintiff's failure to comply with a court directive to submit a motion for a judgment of foreclosure in a timely manner. Plaintiff filed a motion to vacate the dismissal, which was denied by decision and order dated April 21, 2016.

Plaintiff filed a Notice of Appeal on October 8, 2019, and subsequently filed a motion seeking an extension of time to perfect the appeal. The Appellate Division denied the motion by decision and order dated September 11, 2020. Plaintiff's appeal has been dismissed due to plaintiff's failure to perfect the appeal.

Conclusions of Law

Regarding plaintiff's motion for a default judgment, such relief is authorized under CPLR § 3215 when a defendant has failed to appear. There is no dispute that defendant did not interpose an answer prior to plaintiff's motion. Defendant has, however, cross-moved to permit

late service of an answer pursuant to CPLR § 3012(d). Such relief may be granted “upon such terms as may be just and upon a showing of reasonable excuse for delay or default (CPLR § 3012(d)).” The decision whether to grant such relief is within the court’s discretion and must be viewed in light of the strong public policy in favor of resolving matters on their merits (see, Bank of N.Y. Mellon v. Jinks, 127 A.D.3d 1367, 1369, 7 N.Y.S.3d 634 [3rd Dept. 2015]).

The court finds that defendant’s belief that the lawsuit was over in light of the previous dismissal of the complaint, denial of the motion to vacate the dismissal, and inactivity regarding the appeal, to be reasonable. The motion to permit late service of the answer is granted. Defendant’s statute of limitations defense is, therefore, preserved (U.S. Bank Natl. Assn. v Kaufman, 187 A.D.3d 1456, 1457, 135 N.Y.S.3d 496 [3rd Dept. 2020]), and his cross-motion to dismiss the complaint as time-barred under CPLR § 213(4) will now be addressed.

“The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage. A lender’s election to accelerate a mortgage debt may be revoked only through an affirmative act occurring within the statute of limitations period (United States Bank Nat’l Ass’n v. Creative Encounters Llc, 194 A.D.3d 1135, 1136, 149 N.Y.S.3d 285 [3rd Dept. 2021][internal citations omitted].” A dismissal by the court does not constitute an affirmative act by the lender to revoke its election to accelerate (see, Specialized Loan Servicing Inc. v Nimec, 183 A.D.3d 962, 964, 123 N.Y.S.3d 713 [3rd Dept. 2020]).

Here, the acceleration to loan began when the first summons and complaint was filed on March 17, 2011. There is no evidence in the record which would support an argument that

plaintiff revoked its election to accelerate the debt. Without exempting any periods of time, the statute of limitations in this proceeding expired on March 17, 2017. The cross-motion to dismiss is granted.

Defendant has also established entitlement to relief under RPAPL § 1501(4). As such, the mortgage encumbering the property is cancelled and discharged, and defendant is entitled to quiet title of the subject property.

Defendant has not demonstrated entitlement to attorneys' fees as a matter of law under Real Property Law § 282, nor has he demonstrated that he incurred any attorneys' fees for which he was personally responsible in defense of this action.

Finally, the court does not find that the plaintiff's conduct was so frivolous such that sanctions are warranted (see, 22 NYCRR § 130-1.1(c)).

The court has examined all other requests and arguments. To the extent they are not specifically addressed, they are denied.

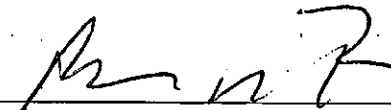
Based on the forgoing, it is hereby

ORDERED that the motion by plaintiff is denied and dismissed as set forth above; and it is further

ORDERED that defendant's cross-motion is granted to the extent set forth above.

Dated: December 14, 2021
Cooperstown, New York

ENTER,


Hon. BRIAN D. BURNS
Supreme Court Justice

To All Parties Via NYSCEF