

**Deutsche Bank National Trust Co. v Cruz**

2007 NY Slip Op 34358(U)

December 24, 2007

Supreme Court, Nassau County

Docket Number: 0114-06/

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**  
**HON. F. DANA WINSLOW,**  
**Justice**

**DEUTSCHE BANK NATIONAL TRUST COMPANY,  
TRUSTEE FOR NEW CENTURY,**

**TRIAL/IAS, PART 9  
NASSAU COUNTY**

**INDEX NO.: 020114/06**

**Plaintiff,**

**MOTION DATE: 9/20/07**

**-against-**

**MOTION SEQ NO.: 001**

**EMIGDEO S. CRUZ; SERGIO A. CRUZ; HOME123  
CORPORATION; "JOHN DOES" and "JANE DOES",  
said names being fictitious, parties intended being  
possible tenants or occupants of premises, and  
corporations, other entities or persons who claim,  
or may claim, a lien against the premises,**

**Defendants.**

**The following papers read on this motion (numbered 1):**

**Notice of Motion..... 1**

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

Plaintiff in this mortgage foreclosure action moves for an Order appointing a referee to compute the amount due to plaintiff for principal, interest and other charges. In support of its application, plaintiff has presented proof of service of the summons and complaint, an affidavit setting forth the facts constituting its claim, and the affirmation of plaintiff's attorney as to defendant Emigdeo S. Cruz's and Sergio A. Cruz's failure to appear or answer. See CPLR §3215(f). Defendant Deutsche Bank National Trust Company, Trustee s/h/a Home123 Corporation has submitted a notice of appearance. Plaintiff states that a previous application to appoint a referee was withdrawn due to New

Century filing for Chapter 11 Bankruptcy protection in Delaware. Plaintiff submits an Order, dated April 3, 2007, of Hon. Kevin J. Carey of US Bankruptcy Court for the District of Delaware which authorizes New Century TRS Holdings, Inc. and numerous related entities to “continue operating as mortgage servicer in the ordinary course of business.”

Plaintiff presents an affidavit of An Dang, Assistant Secretary of plaintiff, setting forth proof of the facts constituting the claim. A note and mortgage covering a property located at 22 Ellwood Street, Glen Cove, NY 11542 (the “Property”) was executed by defendants Emigdeo S. Cruz and Sergio A. Cruz and plaintiff’s purported assignor Home 123 Corporation on September 26, 2005 (the “Mortgage”).

Plaintiff submits an Affidavit of Service, sworn to on December 18, 2006, attesting to personal service on defendant Sergio A. Cruz pursuant to **CPLR §308(1)** on December 16, 2006 at 610 Governors Road, Wilmington, NC 28411. An Affidavit of Service, sworn to on December 18, 2006, reveals that defendant Emigdeo S. Cruz was served by “nail and mail” service on December 12, 2006 pursuant to **CPLR §308(4)** at the address of the Property.

The Court finds that the Affidavit of Service covering service on defendant Emigdeo S. Cruz raises issues regarding proper service upon him. **CPLR §308(4)** provides that, where service cannot be made pursuant to **CPLR §308(1) or (2)** “with due diligence,” the summons and complaint may be affixed to the door of either “the actual place of business, dwelling place or usual place of abode” of the defendant, followed by a subsequent mailing.

The due diligence requirement must be strictly observed, given the reduced likelihood that “nail and mail” service will actually be received. **Gurevitch v. Goodman**, 269 AD2d 355. Here, the process server attempted personal service four times, on four different weekdays: Monday, 12/04/06 at 1:20 p.m.; Wednesday, 12/06/06 at 6:45 p.m. and Friday, 12/08/06 at 7:50 a.m. On Tuesday, December 12, 2006 at 6:05 p.m., the papers were affixed to the door. It is not clear that the attempts were made at a time when defendant Emigdeo S. Cruz could reasonably be expected to be home. All but one of the attempts were made during normal working hours or at a time when defendant could reasonably be expected to be in transit to or from work. *See Earle v. Valente*, 302 AD2d 353; **Annis v. Long**, 298 AD2d 340.

More troubling to the Court is whether the summons and complaint were affixed at the proper address in the first place. The Affidavit does not show a sufficient attempt to ascertain whether this address was defendant Emigdeo S. Cruz’s actual dwelling place or

usual place of abode. While the Affidavit indicates that the Property address was defendant's "residence within the state", the process server merely stated that he "confirmed with the neighbor" without indicating the identity of such neighbor and where the neighbor resides. When service is made pursuant to CPLR §308(4), the Court cannot determine solely from a notation that the process server spoke to "the neighbor", without more information about the person spoken with, whether the process server made a sufficient attempt to ascertain whether this address was defendant Emigdeo Cruz's actual dwelling place or usual place of abode on the date of service. Moreover, it is well settled that purported service by affixation to the door of defendant's last known residence, as opposed to defendant's dwelling place, usual place of abode or actual place of business, is ineffective. **Feinstein v. Bergner**, 48 NY2d 234. The Affidavit also does not show that the process server ever spoke to anyone at the address in question, to ascertain defendant Emigdeo Cruz's normal working hours or defendant's place of business, or that the process server spoke with anyone to confirm defendant's non-military status. The Court notes, however, that plaintiff's submission of Department of Defense reports for both defendants indicating that neither defendant is on active duty, is sufficient proof of their non-military status.

Moreover, plaintiff submits an assignment of mortgage, dated January 9, 2007, made "effective as of on or before October 27, 2006", whereby Home123 assigned the Mortgage to "Deutsche Bank National Trust Company, Trustee". However, the plaintiff has failed to provide an assignment of mortgage from Home 123 Corporation to the party seeking to foreclose the Mortgage, 'Deutsche Bank National Trust Company, Trustee *for New Century*'. Without such an assignment, the Court is unable to conclude that plaintiff has an ownership interest in the Mortgage.

Plaintiff also seeks to amend the caption to substitute Deutsche Bank National Trust Company, Trustee s/h/a Home 123 Corporation for defendant Home123 Corporation. Plaintiff provides no evidence, such as an assignment between these two parties, to support this request. The Court cannot help but noting that defendant Deutsche Bank National Trust Company, Trustee s/h/a Home123 Corporation and plaintiff Deutsche Bank National Trust Company, Trustee for New Century are both represented by the firm of Rosicki, Rosicki & Associates, P.C.

On the basis of the foregoing, it is

ORDERED, that the motion by plaintiff is **denied without prejudice** insofar as it seeks an Order of Reference and to substitute Deutsche Bank National Trust Company, Trustee s/h/a Home123 Corporation in place of defendant Home123 Corporation, with leave to renew upon proper papers within 30 days of date of entry; and it is further

ORDERED, that the motion by plaintiff is **granted** insofar as it seeks to amend the caption to strike the names of defendants "JOHN DOES" and "JANE DOES" said names being fictitious. All proceedings and papers heretofore had and filed herein are deemed amended accordingly.

Plaintiff shall serve a copy of this Order with Notice of Entry upon (1) defendants Emigdeo S. Cruz and Sergio A. Cruz pursuant to **CPLR §308(1)** or **§308(2)**, and (2) defendant Home123 Corporation pursuant to **CPLR §311(a)(1)**, within 15 days of entry of this Order in the records of the Nassau County Clerk.

This constitutes the Order of the Court.

Dated: 12/24, 2007

ENTER:

*[Handwritten signature]*  
J.S.C.

**ENTERED**

MAR 12 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**