

Deutsche Bank v Michael Millon

2009 NY Slip Op 33217(U)

February 21, 2009

Supreme Court, Greene County

Docket Number: 09/748

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

DEUTSCHE BANK TRUST
COMPANY AMERICAS AS TRUSTEE,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 09-748
RJI NO. 19-09-4720

MICHAEL MILLON, GMAC MORTGAGE,
LLC d/b/a DITECH.COM, AMERICAN EXPRESS
CENTURION BANK,
"JOHN DOE", "RICHARD ROE", "JANE DOE",
"CORA COE", "DICK MOE" and "RUBY POE"
the six defendants last named in quotation marks
being intended to designate tenants or occupants in
possession of the herein described premises or portions
thereof, if any there be, said names being fictitious,
their true name being unknown to plaintiff,

Defendants.

Supreme Court Greene County All Purpose Term, February 4, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Gerald Roth, Esq.
Stein, Weiner & Roth, L.L.P.
Attorneys for Plaintiff
One Old Country Road, Suite 113
Carle Place, New York 11514

Monique N. Thomas, Esq.
Legal Aid Society of Northeastern NY
Attorneys for Defendant Michael Millon
55 Colvin Avenue
Albany, New York 12206

TERESI, J.:

Plaintiff commenced this action to foreclose the mortgage it holds on property owned by Michael Millon (hereinafter "Defendant"). Issue was joined by Defendant, and Plaintiff now

moves for summary judgment against Defendant, default judgments against the non appearing co-defendants, for the appointment of a referee to compute and to amend the caption of the action. Defendant opposes the motion. Because Plaintiff demonstrated its entitlement to judgment as a matter of law and Defendant raised no issue of material fact, Plaintiff's motion for summary judgment is granted. Likewise, Plaintiff also demonstrated its entitlement to default judgments, to amend the caption of the action and to the appointment of a referee.

“[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]).

On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law.” (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). “It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor.” (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b] [stating that a summary judgment motion “shall be supported by affidavit, [which] shall be by a person having knowledge of the facts...”]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

“Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact.” (HSBC Bank USA v. Merrill, 37 AD3d 899, 900 [3d Dept. 2007]; United Cos. Lending Corp. v. Hingos,

283 AD2d 764 [3d Dept.2001]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

On this record, Plaintiff properly produced both the note and mortgage being foreclosed, and sufficiently demonstrated Defendant's default in payment. Attached to Plaintiff's attorney's affirmation is the "Note" and duly recorded "Mortgage" demonstrating Defendant's indebtedness to Ulster Savings Bank. Plaintiff further attached a duly recorded "Assignment of Mortgage" (hereinafter "Assignment"), wherein both the Note and Mortgage were assigned by Ulster Savings Bank to Plaintiff. Additionally, Plaintiff's Assistant Vice President for Collections alleged, based upon her personal knowledge and her review of Plaintiff's business records, that Defendant failed to make his January 1, 2009 payment or any payment thereafter. She further alleged that on March 30, 2009 Plaintiff sent to Defendant a thirty day default notice. She both attached the default notice and confirmed Defendant's failure to cure such default. From the foregoing, Plaintiff duly demonstrated its entitlement to judgment as a matter of law, shifting the burden of proof onto Defendant. (Merrill, supra; Hingos, supra).

In opposition, Defendant raised no triable issue of fact. Importantly, Defendant failed to allege that he did not default on his payment of the Note and Mortgage. Instead, Defendant claims Plaintiff lacks standing in this matter because the Assignment of Mortgage is defective. Defendant correctly notes that the Assignment of Mortgage, while executed May 1, 2006, includes a handwritten in "May 15, 2006" recording date for the assigned Mortgage. However, Defendant's challenge to the authenticity of such document, because the Assignment was executed prior to the Mortgage recording date being handwritten into the Assignment, is both speculative and irrelevant. The Assignment was complete on May 1, 2006 when it was executed.

(Lasalle Bank Nat. Ass'n v. Ahearn, 59 AD3d 911 [3d Dept.2009]). The Mortgage recording information was neither a required element nor a material term of the parties' assignment agreement, as the Note and Mortgage were properly identified without such information. Moreover, it is undisputed that the Assignment was itself recorded on June 12, 2007. As such recording occurred almost two years prior to Plaintiff's commencement of this action, Plaintiff has standing to bring this action as the irrefutable owner of the Note and Mortgage. (Id.) Similarly unavailing is Defendant's claim that the Assignment is void because it does not name the Plaintiff trustee's beneficiary. It has long been established that an essential element to the creation of a trust is a named beneficiary. (In re Fontanella's Estate, 33 AD2d 29 [3d Dept. 1969]). No corresponding requirement exists, however, for a trust beneficiary to be named in a mortgage assignment. Defendant seeks to demonstrate the invalidity of the trust by negating one of its required elements, i.e. that it has no named beneficiary. However, the Assignment's non-inclusion of the Trust's beneficiary is of no probative value in demonstrating the lack of a named beneficiary. Rather, it only demonstrates that the beneficiary was not named in the Assignment, nothing more. Such argument does not constitute competent and admissible evidence raising a triable issue of fact about the Trust's validity. As such, Plaintiff's motion for summary judgment is granted.

Plaintiff likewise demonstrated its entitlement to a default judgment against the non appearing defendants and its entitlement to amend the caption of the action. Plaintiff submitted an affidavit of service demonstrating proper service on both GMAC Mortgage, LLC and American Express Centurion Bank. It further established, by its attorney's affirmation, that neither appeared and that it fully complied with CPLR §3215. Accordingly, Plaintiff

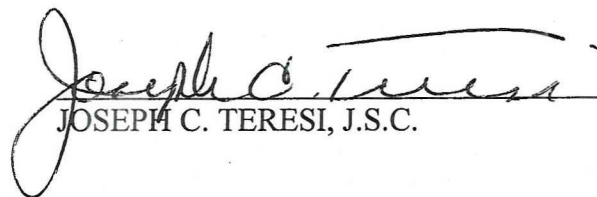
demonstrated its entitlement to a default judgment against both GMAC Mortgage, LLC and American Express Centurion Bank. Additionally, Plaintiff sufficiently demonstrated that the fictitiously named defendants in the caption are unnecessary, as there are no tenants or other occupants that fit the caption's description. Accordingly, the caption of this action is hereby amended to delete defendants: "JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE", "DICK MOE" and "RUBY POE".

With Plaintiff's motions for summary judgment and default judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872 [2d Dept. 2009]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept. 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept. 1994]). Accordingly, Plaintiff may submit a proposed order of reference, on notice to Defendant, referring this matter to a referee to compute.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 21, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 15, 2009, Affirmation of Gerald Roth, dated December December 11, 2009, Affidavit of Ellen Clewis, dated December 14, 2009, with attached Exhibits A-I.
2. Affirmation of Monique Thomas, dated January 8, 2009, Affidavit of Michael Millon, dated, January 7, 2010, with attached Exhibits A-D.
3. Affirmation of Gerald Roth, dated January 26, 2010.