

Deutsche Bank Natl. Trust Co. v LeRose

2011 NY Slip Op 31024(U)

April 7, 2011

Supreme Court, Nassau County

Docket Number: 4095/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

**DEUTSCHE BANK NATIONAL TRUST
COMPANY, ET AL.,**

Plaintiff(s),

-against-

Index No. 4095/08

**Motion Submitted: 2/7/11
Motion Sequence: 004**

**ENNIO LEROSE, ASSET ACCEPTANCE LLC
(APO), CACH LLC, DISCOVER BANK, MNP,
INC., NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, SONDRALEROSE,
ET AL.,**

Defendant(s).

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X

Defendant Lerosse moves this Court by order to show cause for an Order vacating the Order of Reference dated December 7, 2009, and staying the Referee from selling subject premises at foreclosure. Counsel's affirmation in support of the instant application is presented as a motion to renew and reargue pursuant to CPLR §§ 2221(d) and (e). Plaintiff Deutsche Bank National Trust Company ("Deutsche Bank") opposes the requested relief.

Defendant's application apparently stems from the fact that he noticed the Court's typographical error in neglecting to edit the caption appearing on the last page of the Order of Reference to reflect Deutsche Bank's name. As a result, defendant contends that the Court granted summary judgment to a non-party. The caption of the action appearing on the first page of the same Order clearly reflects that Deutsche Bank is the plaintiff in this action.

Plaintiff Deutsche Bank asserts that defendant should not be permitted to thwart the foreclosure and cause undue delay due to a scrivener's error, but that the Court can correct that error.

By way of background, on or about March 4, 2008, Long Beach Mortgage Company commenced an action against defendant in the Supreme Court, Nassau County for non-payment of his mortgage. Defendant interposed an Answer thereto in April 2008. Subsequent to defendant's Answer, Long Beach Mortgage Company sold defendant's mortgage to plaintiff, Deutsche Bank. Plaintiff moved unopposed for its substitution as plaintiff and amendment of the lawsuit's caption to reflect its name. This Court granted plaintiff's motion on February 25, 2009, upon satisfactory proof that Long Beach Mortgage Company assigned defendant's mortgage to Deutsche Bank on July 14, 2008. Deutsche Bank was substituted as plaintiff in lieu of Long Beach Mortgage Company *nunc pro tunc* to July 29, 2008.

After being substituted as plaintiff, Deutsche Bank made a summary judgment motion and moved to amend the caption to delete "John Doe" as a defendant in the action as no tenants reside at the subject premises. Plaintiff also requested that the caption be amended to delete its address. Defendant opposed the requested relief and raised an issue regarding service of process upon him. On April 28, 2009, the Court held a hearing regarding the validity of the service on defendant. Following the hearing, the Court sustained the service of process, and granted plaintiff leave to renew its summary judgment motion.

On December 7, 2009, the Court granted plaintiff's summary judgment motion, issuing a written decision and contemporaneously signing the Order of Reference referred to above. It is undisputed that the first page of the Order of Reference is correctly captioned to reflect Deutsche Bank as plaintiff. It is also undisputed that the Court's decision on the summary judgment motion granted summary judgment in favor of plaintiff Deutsche Bank, and stated that "[t]he order of reference previously submitted shall be signed contemporaneously with this order."

Upon review of the entire Order of Reference, it is clear to the Court that the typed portions of the Order were prepared prior to Deutsche Bank's substitution as plaintiff, and that the Order had been previously submitted to the Court by Long Beach Mortgage Company. In signing the Order of Reference, the Court inserted Deutsche Bank's name in the caption on the first page, but inadvertently neglected to delete a later reference to Long Beach Mortgage Company and replace it with plaintiff's name, as captioned. Thus, the Order of Reference reads that summary judgment is granted in favor of Long Beach Mortgage Company, instead of plaintiff Deutsche Bank, and that the case's caption shall read "Long Beach Mortgage Company, Plaintiff."

As a result of this oversight, defendant now moves this Court for an order vacating the December 7, 2009 Order of Reference and staying the sale of the subject premises. Defendant claims that the Court “overlooked or misapprehended matters of fact or law in determining the prior motion,” and that the “new fact” that would change the prior determination of the Court is that the Court allegedly granted summary judgment to a non-party. Defendant further claims that the reasonable justification for not raising these issues earlier “involves law office failure” of defendant’s prior counsel.

The fact that the body of the Order of Reference incorrectly refers to Long Beach Mortgage Company is neither a misapprehension of fact or law on the part of the Court, nor is it a “new fact” justifying a vacatur of this Court’s Order. It is simply a ministerial/typographical error that is well within the province of the Court to correct in order to conform the Order with the decision on which it is based (*CPLR § 5019(a)*). Furthermore, it is evident from the procedural history of this action, including this Court’s February 25, 2009 decision substituting Deutsche Bank as plaintiff, that the correction of this error will not affect the substantial right of a party, in this case the defendant (*Kiker v. Nassau County*, 85 N.Y.2d 879, 649 N.E.2d 1199 (1995); *Matter of Stewart*, 65 A.D.3d 634, 885 N.Y.S.2d 256 (2d Dept., 2009); *Adams v. Fellingham*, 52 A.D.2d 443, 859 N.Y.S.2d 484 (2d Dept., 2008); *Scheuering v. Scheuering*, 27 A.D.3d 446, 811 N.Y.S.2d 100 (2d Dept., 2006); *DiProspero v. Ford Motor Company*, 105 A.D.2d 479, 480 N.Y.S.2d 784 [3d Dept., 1984]). Moreover, the defendant concedes in paragraph 35 of his Emergency Affirmation that Deutsche Bank “is the proper Plaintiff as of July 29, 2008.”

Thus, the Court finds that plaintiff has failed to demonstrate that this Court overlooked or misapprehended any matters of law or fact applicable to this action in determining the original motions. (*CPLR § 2221(d)(2)*; *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept., 1999); *Amato v. Lord & Taylor*, 10 A.D.3d 374, 781 N.Y.S.2d 125 [2d Dept., 2004]). Furthermore, as the Court’s ministerial error does not constitute a “new fact,” defendant’s motion to renew based upon CPLR § 2221(e) is also without merit. Defendant’s motion to renew and/or reargue is denied.

The inconsistency between the Order of Reference and the December 7, 2009 decision on which it is based should have been sought to be corrected by defendant by way of a motion for resettlement, or on appeal, but not by a motion to vacate (*Spier v. Horowitz*, 16 A.D.3d 400, 791 N.Y.S.2d 156 [2d Dept., 2005]). Thus, defendant’s motion to vacate this Court’s Order of Reference is denied.

Defendant’s additional argument that he should be permitted to renew and/or reargue the summary judgment motion because he was pursuing a loan modification with a company that allegedly defrauded him is equally unavailing. The mortgage modification company is not a party to this action. Moreover, defendant’s argument is moot. The parties have

repeatedly adjourned the instant motion, since April 2010, in order to afford defendant Lerose an opportunity to engage in a loan modification directly with plaintiff Deutsche Bank over the course of the last year. That process has apparently come to an end, and defendant Lerose's loan has not been modified by plaintiff. Although unsuccessful, this Court finds that defendant Lerose has had a full and fair opportunity to re-negotiate his loan.

Accordingly, the Court hereby corrects its December 7, 2009 Order of Reference to conform to its decision issued on that same day, replacing all references to Long Beach Mortgage Company with "Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004-3 Asset Backed Certificates Series 2004-3." The caption shall read as follows:

_____ X

DEUTSCHE BANK NATIONAL TRUST
COMPANY, ET AL.,

Plaintiff(s),

Index No. 4095/08

-against-

ENNIO LEROSE, ASSET ACCEPTANCE LLC,
(APO), CACH LLC, DISCOVER BANK, MNP,
INC., NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, SONDRALEROSE,

Defendant(s).

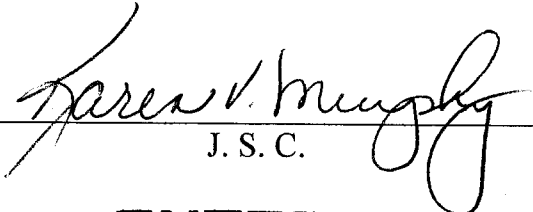
_____ X

The stay of the foreclosure proceeding granted by the Hon. Ute W. Lally, a Justice of this Supreme Court, pending the determination of the instant application is now extinguished, this application having been decided.

The Referee previously appointed in the Order of Reference dated December 7, 2010 is hereby directed to proceed as directed therein.

The foregoing constitutes the Order of this Court.

Dated: April 7, 2011
Mineola, N.Y.



J. S. C.

ENTERED

APR 12 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**