

Deutsche Bank Trust Co. Americas v Cox

2011 NY Slip Op 31489(U)

May 19, 2011

Sup Ct, Queens County

Docket Number: 9637/2010

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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DEUTSCHE BANK TRUST COMPANY AMERICAS,
AS TRUSTEE FOR SAXON ASSET SECURITIES
TRUST 2002-3
300 Grand Avenue
Los Angeles, California 90071,

Index No.: 9637/2010
Motion Date: 02/24/11
Motion No.: 16
Motion Seq.: 1

Plaintiff,

- against -

ANTHONY COX,

Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff, striking the answer of the defendant and declaring that the fee interest in the subject premises is subject, subordinate to and burdened by plaintiff's mortgage nunc pro tunc from October 11, 2002 and directing the City Register to record a copy of the subject mortgage and defendant's cross-motion for an order dismissing the complaint pursuant to CPLR 3211(a) (1), (3) or (10) or in the alternative granting leave to serve an amended answer:

Papers Numbered

Plaintiff's Notice of Motion-Affidavits-Exhibits.....	1 - 5
Defendant's Cross-Motion.....	6 - 8
Plaintiff's Affirmation in Opposition to Cross-Motion...	9 - 11
Defendant's Reply Affirmation.....	12 - 13

The plaintiff commenced an action by filing a summons and complaint on April 19, 2010 pursuant to Article 15 of the RPAPL for an order declaring that the plaintiff holds an equitable mortgage

upon the premises located at 120-21 198th Street Saint Albans, New York and for an order directing the City Register of the City of New York to record as an original a copy of the mortgage held by the plaintiff. Issue was joined by the service of a timely answer by the defendant, pro se, dated May 19, 2010.

Plaintiff's counsel now moves for summary judgment on the ground that the defendant's answer fails to give rise to any triable issue of fact. In her affidavit in support of the motion, plaintiff's counsel, Sarah Feor, Esq. states that the plaintiff, through this action, seeks to establish the mortgage contract on the subject property as a lien against the real property in the public records maintained by the City Register of the City of New York by directing that the City Register accept for recording a copy of the mortgage instrument in lieu of the original.

In support of the motion, counsel submits an affidavit of John Cottrell, the Assistant Vice-President of Saxon Mortgage Services, attorney in fact for the plaintiff. Mr. Cottrell states that plaintiff is the owner and holder of a note and mortgage executed by the defendant on October 11, 2002 in the original principal sum of \$243,000. The note and mortgage were refinanced by the defendant in order to pay several prior existing debts as well as to take out cash (See HUD -1 Settlement statement). Mr. Cottrell states that by inadvertence the original mortgage was either lost in the mail or lost in the office of the City Register and was never filed of

record and the plaintiff is presently possessed only of a copy of the mortgage and not an original version. Mr. Cottrell states that plaintiff seeks through this action to determine that plaintiff holds an equitable mortgage upon the premises and to direct the City Register to record the copy of the mortgage as an original. Mr. Cottrell also states that the mortgage and Note are valid and binding as evidenced by payments made by defendant on the Note and Mortgage.

In further support of the motion, Counsel also submits copies of the Note and Mortgage bearing the notarized signature of defendant, Mr. Cox. The mortgage, dated October 11, 2002, was given by the defendant to America's MoneyLine, Inc. to secure the sum of \$243,000. The mortgage and note were subsequently assigned in the secondary market to Saxon Mortgage, Inc., and then to plaintiff by assignment dated March 23, 2010. A copy of the assignments have also been provided by counsel.

Defendant filed a cross-motion for an order dismissing the complaint based upon the plaintiff's failure to show standing, to cancel the lis pendens, to prohibit the filing of the assignment of the mortgage or, in the alternative, for leave to file an amended answer.

In support of the cross-motion, counsel Alice A. Nicholson, Esq. states that the defendant should be permitted to serve an amended answer and to depose Mr. Cottrell to inquire into the

nature of his affiliation with Deutsche Bank and the circumstances surrounding his examination of books and records kept at Deutsche Bank. Counsel also raises certain affirmative defenses regarding the standing of the plaintiff and the validity of the assignments of the mortgage dated March 23, 2010. The defendant submits a proposed answer containing eleven affirmative defenses.

In reply the plaintiff submits that the issue of standing was waived by the failure of the defendant to assert said defense in its initial answer and moreover that standing has been established pursuant to RPAPL § 1501. Counsel also opposes the defendant's leave to amend the answer on the ground that the defendant did not move until 5 months after the initial answer was filed and well after the plaintiff proceeded with its motion for summary judgment and on the ground that the proposed affirmative defenses lack merit.

Upon review and consideration of the plaintiff's motion, defendant's cross-motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds as follows:

The defendant's motion for leave to submit an amended answer is denied. The defendant has not submitted sufficient evidence to demonstrate that any of the affirmative defenses have merit or are applicable to this RPAPL Article 15 proceeding to quiet title. The plaintiff established standing pursuant to RPAPL § 1501 and sufficiently established the validity of the assignments as

necessary for this action. Should defendant be subject to an action for default in payment, the affirmative defenses raised by the defendant may be relevant therein. However, for purposes of this action to cure title the affirmative defenses raised are palpably insufficient and patently devoid of merit (see Ferriola v. DiMarzio, 919 NYS2d 871 [2d Dept. 2011]; Ferdico v Zweig, 919 NYS2d 521 [2d Dept. 2011]; SCG Architects v Smith, Buss & Jacobs, LLP, 918 NYS2d 733 [2d Dept. 2011]).

The plaintiff's motion for summary judgment is granted and the defendant's cross-motion to dismiss the complaint is denied.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Here, the plaintiff submitted sufficient evidentiary proof including the subject note and mortgage executed by the defendant Anthony Cox on October 11, 2002, the assignments of the mortgage to the plaintiff and the affidavit of John Cottrell, Asst. Vice President of Saxon Mortgage Services attesting to the fact that the plaintiff is the owner and holder of the subject note and mortgage executed by defendant. Mr. Cottrell also attests to the fact that

the original mortgage was lost and never filed of record and that the plaintiff is only possessed of a copy of the original version. As such, the plaintiff has demonstrated, prima facie, that the mortgage and note are valid and binding between the parties and that plaintiff is entitled to a declaration that the fee interest in the subject premises of the defendant is subordinate to and burdened by the plaintiff's mortgage, nunc pro tunc from October 11, 2002 and for an order declaring that the plaintiff is the owner and holder of an equitable mortgage upon the premises as and from October 11, 2002 and that the judgment be indexed against the Section, Block, and Lot of the premises by the City Register of the City of New York. In addition, the plaintiff is entitled to an order directing the City Register of the City of New York to record a copy of the subject Mortgage as an original, upon submission of an attorney-certified copy of the judgment together with the proper fees and/or tax to facilitate that recording.

In opposition, the defendant has failed to raise a triable question of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d at 562). The defendant has not submitted an affidavit disputing that he is the record holder of the mortgagee or the borrower of the note in question. Moreover, defendant has acknowledged the validity of the mortgage and note by making payments towards the principal and by recognizing the loan and his obligations under the Note and Mortgage by listing the debt

as one of his obligations when applying for Chapter 13 Bankruptcy relief in 2008. The final Chapter 13 Plan submitted by defendant Cox provided for payment by defendant to Saxon on the mortgage debt in issue.

Settle Order on Notice.

Dated: May 19, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.