

Deutsche Bank Natl. Trust Co. v Seidlin

2011 NY Slip Op 31551(U)

June 6, 2011

Sup Ct, NY County

Docket Number: 105162/2009

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEASED: **SALIANN SCARPULLA**

PART 19

Index Number : 105162/2009

DEUTSCHE BANK NATIONAL TRUST

vs
SEIDLIN, MARTIN

Sequence Number : 002

VACATE NOTE OF ISSUE/ READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

JUN 08 2011

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COUNTY CLERK'S OFFICE

motion and cross-motion are decided in accordance
with accompanying memorandum decision.

*This constitutes the decision and order of the
Court.*

Dated: June 6, 2011

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR AMERICAN HOME MORTGAGE
ASSETS TRUST 2006-5 MORTGAGE-BACKED PASS-
THROUGH CERTIFICATES, SERIES 2006-5
4600 Regents Boulevard
Suite 200
Irving, TX 75063-1730

Index Number 105162/2009
Submission Date 2/16/11
Mot. Seq. No. 002
DECISION and ORDER

Plaintiff,

-against-

MARTIN SEIDLIN, JUNGKIL HAN, INA ZALOOM,

JOHN DOE (Said name being fictitious, it being the
intention of Plaintiff to designate any and all occupants,
tenants, persons or corporations, if any, having or claiming
an interest in or lien upon the premises),

FILED

JUN 08 2011

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Defendants.

-----X

Appearances: For Plaintiff :
Steven J. Baum, P.C.
By Jill Anderson, Esq.
220 Northpointe Parkway Suite G
Amherst, NY 14228
716-204-2400

For Defendant Ina Zaloom:
Stein Simpson & Rosen, P.A.
By David B. Simpson, Esq.
Rockefeller Plaza
1270 Avenue of the Americas, Suite 220
New York, New York 10020
212-557-1520

Papers considered in review of this motion for summary judgment:

Papers	Numbered
IAC's Notice of Mot. and Affirm in Supp with Exhib. Attached.....	<u>1</u>
Turner's Affirm. in Opp with Exhib. Attached	<u>2</u>
IAC's Reply Affirm. in Further Supp and Opp.....	<u>3</u>

HON SALIANN SCARPULLA, J.:

In this foreclosure action, plaintiff (hereinafter "Deutsche Bank") moves for leave
to voluntarily discontinue without prejudice pursuant to CPLR 3217(b) "due to the

assignment of the mortgage being incorrectly and/or incompletely acknowledged.”

(Anderson Affirm., ¶ 6). Defendant Ina Zaloom (“Zaloom”), on behalf of herself and co-defendant Martin B. Seidlin (“Seidlin”), cross-moves for summary judgment, seeking dismissal of the plaintiff’s complaint with prejudice and an order (a) that no amounts are owed by Zaloom to Deutsche Bank under the mortgage note; (b) that plaintiff may not foreclose the subject mortgage; (c) that bars Deutsche Bank from seeking a deficiency judgment against Zaloom; and (d) that awards sanctions against Deutsche Bank pursuant to 22 NYCRR §130-1.1, including reasonable attorney’s fees.

Zaloom argues that Deutsche Bank should not be permitted to withdraw this foreclosure action, because Deutsche Bank “has been caught in acts of fraud in the prosecution of this action.” Zaloom attests that for two years following commencement of this foreclosure action, Deutsche Bank provided allegedly “insufficient, contradictory and false information” in response to discovery requests seeking the original note and proof of assignment before finally admitting that it did not possess requisite documents. In support, Zaloom cites a few lower court decisions, pursuant to which without possessing the original note and proof of assignment, one has no standing to bring an application of foreclosure, and such an action may be frivolous. *See e.g., Resurgent Capital Servs., LLC v Mackey*, 2011 N.Y. Slip. Op. 21159, *2-3 (Sup.Ct., Nassau County, May 2, 2011); *see also Deutsche Bank Natl. Trust Co. v Campbell*, 21 Misc.3d 1145A (Sup.Ct., Kings County, December 16, 2008). As a result of the expenses incurred in two

years of defending an allegedly baseless proceeding and suffering damaged credit and a cloud on the property's title, Zaloom seeks dismissal with prejudice.

Zaloom also wishes to pursue her counterclaim for fraud in the execution of a "bait-and-switch" tactic at the closing on the purchase of the subject property by the original lending entity, non-party American Brokers Conduit, and the broker, non-party Cutaia Mortgage Group, Inc.

Discussion

The determination of a motion for leave to voluntarily discontinue an action, without prejudice, pursuant to CPLR 3217(b), rests within the sound discretion of the court. *See Expedite Video Conferencing Services, Inc. v Botello*, 67 A.D.3d 961, 961 (2nd Dep't 2009). "In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted." *Id.* "The mere delay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for a voluntary discontinuance under CPLR 3217(b)," where plaintiff presents a reasonable explanation for withdrawing its complaint *Eugenia VI Venture Holdings, Ltd. v MapleWood Equity Partners, L.P.*, 38 A.D.3d 264, 265 (1st Dep't 2007).

Here, defendants have not established requisite proof of "special circumstances" justifying dismissal of Deutsche Bank's complaint with prejudice. Defendants have not established that Deutsche Bank's litigation was frivolous. While some lower court

decisions maintain that the foreclosure action under similar circumstances is invalid, the First Department recently held to the contrary in *CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC* (2011 N.Y. Slip. Op. 03907 (1st Dep't 2011)) that “[a]lthough a plaintiff in a foreclosure action must generally establish ownership of the mortgage and mortgage note [citation omitted], and the plaintiff in this action does not hold the mortgage, it has standing to bring the foreclosure action and seek appointment of a receiver.” The First Department also held that there is no requirement that the agent’s authority to foreclose be granted in any loan document. *Id.* Therefore, because of the current uncertainties among New York courts as to the nature of documents required to commence an action of foreclosure on a securitized mortgage pooled in a trust, the Court finds that this proceeding has not been frivolous.

Further, Zaloom’s argument that the present action has had a negative effect on defendants’ credit standing and property title, is unpersuasive, because it is undisputed that the defendants defaulted on their mortgage. *See Great Western Bank v Terio*, 200 A.D.2d 608, 608 (2nd Dep’t 1994). Therefore, there is no justification to foreclose Deutsche Bank from discontinuing this action without prejudice pursuant to CPLR 3217(b).

However, Deutsche Bank’s pleading against defendant Jungkil Han, previous owner of the subject apartment, is dismissed with prejudice, because Deutsche Bank has not alleged any basis of claim against him.

With respect to Zaloom's counterclaim, it must also be dismissed without prejudice. Because both parties agree that plaintiff cannot currently establish by admissible documentation assignment of the note and therefore may not foreclose on defendants' mortgage, Zaloom cannot currently establish that Deutsche Bank at any time assumed liability for the actions of non-parties American Brokers Conduit and Cutaia Mortgage Group, Inc.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion brought pursuant to CPLR 3217(b) for leave to discontinue its application of foreclosure is granted in part and denied in part; and it is further

ORDERED that plaintiff's pleading is dismissed without prejudice as against defendants Ina Zaloom and Martin Seidlin; and it is further

ORDERED that plaintiff's pleading is dismissed with prejudice as against defendant Jungkil Han; and it is further

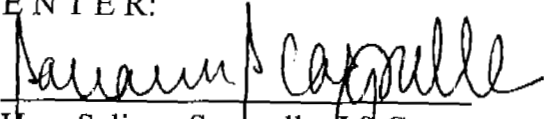
ORDERED that the Clerk of the County of New York shall cancel and discharge the Notice of Pendency filed in this action in the Office of the Clerk of the County of New York on the 13th day of April, 2009; and it is further

ORDERED that defendant Ina Zaloom's cross-motion is denied in its entirety; and it is further

ORDERED that defendant Ina Zaloom's counterclaim is dismissed without prejudice.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 6, 2011

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED

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