

Onewest Bank, FSB v Deutsche Bank Natl. Trust Co.
2013 NY Slip Op 34237(U)
February 20, 2013
Supreme Court, Bronx County
Docket Number: 306119/2011
Judge: Mark Friedlander
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PART 25

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
 ONEWEST BANK, FSB

Index No. 306119/2011

-against-

Hon. Mark Friedlander,

DEUTSCHE BANK
 -----X

Justice.

The following papers numbered 1 to 4 Read on this motion,
 Noticed on **September 14, 2012** and duly submitted as No. _____ on the Motion Calendar of 9/14/2012

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided as follows

Motion is decided in accordance with the decision on an accompanying motion (submitted August 9, 2012) in this action, which decision was also Signed this date.

Respectfully Referred to:

 Dated: _____

Dated: 2/20/13

Hon. 
 Mark Friedlander, J.S.C.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

ONEWEST BANK, FSB,

Plaintiff,

DECISION/ORDER

Index No.: 306119/11

-against-

**DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for Asset-Backed Pass-Through Certificates,
Series 2003-W3, WAYNE CAMPBELL, LISA MILLS-
CAMPBELL, RUBIN & LICATESTI, P.C., NEW
WORLD ABSTRACT, INC., REGINALD HAMILTON,
and SHARON CHIN QUEE, RUEL RICHARDS, LORICE
MASSIAS, KIM SAUNDERS, SIGNATURE BANK and
TD BANK, N.A.,**

Defendants.

**The following papers numbered 1 to 2 read on this motion
on the calendar of August 9, 2012**

Papers Numbered

**Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed.....1-2.....
Answering Affidavits and Exhibits Annexed.....
Replying Affidavits and Exhibits Annexed.....**

**Upon the foregoing papers, this motion is decided in accordance with the annexed
memorandum decision.**

Dated: 2/25/13


MARK FRIEDLANDER, J.S.C.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

ONEWEST BANK, FSB,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 306119/11

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for Asset-Backed Pass-Through Certificates,
Series 2003-W3, WAYNE CAMPBELL, LISA MILLS-
CAMPBELL, RUBIN & LICATESTI, P.C., NEW
WORLD ABSTRACT, INC., REGINALD HAMILTON,
and SHARON CHIN QUEE, RUEL RICHARDS, LORICE
MASSIAS, KIM SAUNDERS, SIGNATURE BANK and
TD BANK, N.A.,

Defendants.

HON. MARK FRIEDLANDER

There are days when nothing seems to go right, as the old saying goes. If a parcel of real property could be heard to utter that complaint, it surely would have been uttered by a plot of land on Nereid Avenue in the Bronx, with regard to a peculiar closing held in 2007, and the seemingly inexplicable events surrounding it. The manner in which the participants conducted themselves has since given rise to a welter of claims, counter-claims and cross-claims involving numerous parties. Mercifully, the two motions considered here deal with only a small part of the legal cross-fire emerging from the said claims, and the opinion which follows will attempt the nearly impossible task of setting forth a limited and concise, yet hopefully comprehensible, account of what occurred. (Withal, the “what occurred” is the easier of the detail to set forth. As will be noted infra, the “why” remains totally inscrutable).

In the instant applications, defendant, TD Bank, N.A. ("TD Bank"), moves for an order, pursuant to CPLR§3211(a)(7), dismissing the amended complaint against it. Plaintiff, OneWest Bank, FSB ("OneWest"), moves for an order, pursuant to CPLR§3215, granting a default judgment against Wayne Campbell and Lisa Mills-Campbell ("the Campbells"), Kim Saunders ("Saunders") and Ruel Richards, on liability, for their failure to respond to the summons and complaint, severing the sixth cause of action against Saunders and Ruel Richards to allow OneWest to enter a clerk's judgment against these defendants in the amount of \$292,000.00 and deferring the issue of damages against the Campbells to the time of trial. OneWest's motion was submitted on default. These motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff OneWest, pursuant to Article 15 of the RPAPL, to quiet title and for ancillary relief set forth in five other causes of action.

The pleadings and documentation submitted reveal the following: By deed dated November 17, 2004, and recorded in the Office of the City Register, Bronx County, on February 7, 2006, Ivan Richards ("Ivan") conveyed to Ruel Richards ("Ruel") all title to the real property located at 2055 Nereid Avenue, Bronx, New York, and also described as Block 5096, Lot 6 (the "Property"). The Property was encumbered by a first mortgage, dated July 30, 2003 (the "2003 mortgage"), recorded in the Office of the City Register, Bronx County, on November 5, 2003, in the amount of \$337,250.00. Ivan was the mortgagor and Argent Mortgage Company, LLC ("Argent") was the mortgagee.

At some point not specified in these motion papers but presumably after the above property transfer, the 2003 mortgage went into foreclosure. Argent agreed to a "short-sale" and

also agreed to accept \$292,000.00 in full satisfaction of the 2003 mortgage. The Campbells agreed to purchase the property and a closing was held on October 11, 2007. It was in connection with this closing that things began to go seriously awry. At the closing, Ruel conveyed title to the Property to the Campbells, by deed dated October 11, 2007, and recorded in the Office of the City Register, Bronx County, on November 21, 2007.

The purchase of the Property by the Campbells was financed by Dynamic Mortgage Bankers, Ltd. ("Dynamic"). Dynamic loaned the Campbells the sum of \$509,400.00. This loan was to be secured by a first mortgage on the Property. It is not explained in these papers why Dynamic would lend more than a half million dollars, to be secured merely by a property which caused the previous mortgage holder (Argent) to permit a short sale and to write down the property's mortgage balance from \$337,250 to \$ 292,000. But then, this was 2007, and the world was still unaware that mortgage lending involved risk.

In any event, a mortgage, dated October 11, 2007, in the amount of \$509,400.00 (the "2007 mortgage"), was recorded in the Office of the City Register, Bronx County, on November 21, 2007. A portion of the loan proceeds was to be used to satisfy Argent's 2003 mortgage. Dynamic's settlement agent at the closing was Rubin & Licatesti, P.C. ("Rubin & Licatesti").

Charles Boyle ("Boyle"), a Vice President of OneWest, in his affidavit, states the following: Dynamic arranged to wire the mortgage proceeds to Rubin & Licatesti and Rubin & Licatesti used a portion of the 2007 mortgage proceeds to purchase a bank check from defendant, Signature Bank, in the amount of \$292,000.00 ("the Check"), payable to Steven J. Baum, P.C. ("Baum"), the attorney for Argent. The Check was intended to be used to satisfy Argent's 2003 mortgage. The Check was delivered to defendant Saunders, the title closer present at the closing.

On or about November 12, 2007, Saunders forwarded the Check to Baum via Federal Express overnight delivery. It is not explained in these papers why Argent was not present at the closing, either by its employee or by its own designated agent, whether Baum or someone else. Nor is there any explanation as to why Dynamic would part with its money at the closing (including the Check), without actually receiving in hand a satisfaction of Argent's mortgage. After all, they call it a "closing" because all aspects of the transaction should be closed at the time and place thereof.

It gets worse. On or about November 13, 2007, Baum returned the check to Saunders via UPS next day delivery. This kind of act would normally require some interesting explanation, but, at least as far as these papers reveal, none was forthcoming. It is perhaps noteworthy that the events described herein preceded by several years the well-publicized pressures later brought to bear upon Baum for its mortgage foreclosure procedures, so it seems unlikely that the latter can be blamed for the unexplained return of the Check. Meanwhile, Argent, which presumably knew the date of the closing (it had given permission for the short sale) apparently never grew curious as to what happened to its "payoff" check.

It would seem that the unanticipated return of the Check to the title closer should result in such recipient ensuring that the Check was handled in a manner which would protect all parties. After all, that is why they have closers at closings. But, once again, things became unglued.

As revealed in these papers, no one seems certain as to exactly what Saunders did next, though one affiant herein surmises that Saunders, for some reason, directed the Check to the seller, Ruel. What is known is that, on or about January 24, 2008, the Check was deposited into an account maintained by defendants Ruel and Lorice Massias ("Massias") at TD Bank. There is

only one endorsement on the check, which is difficult to read, but appears to be that of Ruel, not Baum. It remains unclear why TD Bank accepted a check which was endorsed by a party other than the payee. However, by reason of this event, Argent's 2003 mortgage was never satisfied (and, therefore, no satisfaction was recorded).

Thereafter, in seemingly blissful ignorance of the unconsummated closing, Dynamic executed an Assignment of Mortgage, dated August 28, 2009, recorded in the Office of the City Register, Bronx County, on September 28, 2009, assigning its 2007 mortgage and the indebtedness secured thereby to OneWest. It cannot be imagined why OneWest would have paid for the assignment to it of a purported 2007 mortgage, while there remained on the Property an unsatisfied 2003 mortgage held by Argent. It is probable that OneWest never checked, perhaps purchasing a bundle of mortgages, but, in any event, it does not appear from these papers that OneWest could have been aware of the 2003 mortgage when it accepted the assignment from Dynamic.

Co-incidentally, at almost the same time as the transaction between Dynamic and OneWest, Argent, presumably unaware of those dealings, foreclosed on the Property, because of its unsatisfied mortgage, and a foreclosure sale was held in 2009. Pursuant to a Judgment of Foreclosure and Sale of the Supreme Court, Bronx County, obtained by Argent, the Property was sold for \$355,253.77 to Deutsche Bank National Trust Company as Trustee for Asset-Backed Pass-Through Certificates, Series 2003-W3 ("Deutsche"), to satisfy Argent's 2003 mortgage. By Referee's Deed, dated September 21, 2009, and recorded in the Office of the City Register, Bronx County, on October 9, 2009, the Property was conveyed to Deutsche. The sale to Deutsche occurred one week before the recording of the assignment from Dynamic to OneWest.

Who blew it? And how? As Shakespeare would have put it, "Let me count the ways." Plaintiff, OneWest, accepted an assignment of doubtful value, in apparent ignorance of the prior recorded and unsatisfied mortgage. Dynamic, which inexplicably is not a defendant here, loaned an amount far in excess of the value of the property (judging by both Argent's evaluation and Deutsche's), and, more importantly, parted with its funds without assuring receipt of a satisfaction of the 2003 mortgage. Argent did not have a presence at the closing, to assure a simultaneous exchange of the funds for the satisfaction. Baum, acting as Argent's agent, unaccountably returned the Check meant for Argent. There is no record of Argent investigating what happened to its check. During the two months between the closing and the improper diversion of the funds, Argent presumably could have acted to head off Ruel's actions. Saunders, the closer, unaccountably permitted the Check to fall into the hands of the seller, rather than Argent's hands.

Ruel wrongfully deposited a check not meant for him, and is presumably far away at this writing (reputedly in Alpharetta, Georgia). TD Bank improperly accepted for payment a check which was not endorsed by the payee. (Even if the endorser's signature is illegible, it is unimaginable that TD Bank would credit Ruel's account with an amount that large, payable to a party other than the depositor, and containing an unrestricted endorsement which is unreadable, in the absence of verifying his identity and entitlement to the funds). And, significantly for this Decision, Signature Bank paid to TD Bank the value of a check which was wrongly endorsed.

The Court notes that there are other defendants in the caption who may well have played a role which contributed to the commercial carnage, but, for purposes of the instant applications, such role was not delineated in these papers. Thus, the above list will have to suffice for now.

TD BANK'S MOTION TO DISMISS

The only causes of action against TD Bank contained in the amended complaint are the third and fourth causes of action. Reduced to its essence, OneWest argues that: (1) Dynamic was the equitable owner of the check; (2) Dynamic's Assignment of its Mortgage and the indebtedness secured thereby to OneWest is sufficiently broad to encompass a transfer of Dynamic's rights to the check, permitting OneWest to step into the shoes of its assignor, Dynamic; and (3) since Baum, the payee of the check, never endorsed the check, TD Bank breached the warranties contained in Uniform Commercial Code ("UCC") §4-207.

The parties argue at length over whether TD Bank owes any obligation to OneWest, with TD Bank contending that Dynamic's assignment of the mortgage to OneWest did not serve to extend to OneWest any rights to the Check. Because these causes of action are based on the alleged mishandling of the Check, TD Bank would therefore claim that it breached no duty owed to OneWest. OneWest counters that, after the assignment, it had ownership rights to the Check which Dynamic had previously possessed.

With due respect to the arguments of the parties, the Court finds those arguments to be miscast. The question to be determined here is whether Dynamic itself had any claims against TD Bank at the time of TD Bank's actions in 2008, because, if Dynamic had no such claims, it of course could not assign any to OneWest. Review of the provisions of UCC section 4-207, and the cases interpreting it, strongly indicates that Dynamic would never have had a claim against TD Bank.

Section 4-207 provides that a collecting bank (in this case, TD Bank) which obtains acceptance of an item warrants to the payor bank who pays or accepts the item (in this case,

Signature Bank) that the collecting bank has good title (4-207[1]) and further provides that a collecting bank which transfers an item and receives a settlement or other consideration (in this case, TD Bank) warrants to the transferee (in this case, Signature Bank) and to any subsequent collecting bank that such collecting bank has good title to the item and that all signatures are genuine and authorized (4-207[2]). The warranties contained in the UCC clearly run to Signature Bank, which issued the Check, and, in honoring the Check, paid out funds to TD Bank. There is nothing in the statutory language, however, which supports an obligation to make whole the party who wired funds to the payor bank in exchange for issuance of the Check (in this case, Dynamic).

Plaintiff may argue that TD Bank behaved in a commercially indefensible manner and should be responsible to OneWest on some common law ground for the loss suffered by plaintiff, but the case law makes clear that, although TD Bank may owe damages to Signature Bank, it need not answer to Dynamic. The reason for this distinction is clearly set forth. Dynamic's relationship is with Signature Bank, to which it wired the funds. When Signature Bank depleted Dynamic's account by using those funds to pay a check which was improperly endorsed on its face, it incurred an obligation to Dynamic. In other words, given the defect in the "item," Signature Bank was allegedly wrong in paying TD Bank. However, the rights against TD Bank are those of Signature Bank alone, and not of any more remote party. Thus, Dynamic, and, by extension, OneWest, would have no basis for a claim against TD Bank. See Horovitz v. Roadworks of Great Neck, 76 N.Y.2d 975; Maldonado v. Aetna, 184 A.D.2d 553; Central Cadillac v. Stern, 356 F.Supp. 1280, at 1283 (concluding that the common law in New York

never provided for a right by a drawer of a check against the collecting bank, and that the UCC left such principle undisturbed).

Furthermore, language in plaintiff's application which suggests that the Check was "owned" by Dynamic is erroneous, and helps misdirect plaintiff's argument. In fact, the proper owner of the Check was Baum, to whom it was directed, and it is Baum, in addition to Signature Bank, who might have a claim against TD Bank – but, in any event, not Dynamic.

(There is insufficient evidence for a conclusion that Baum actually renounced ownership of the check, because the reasons for the check's return are not discernable. As an example, it could have been sent back as part of an effort - albeit unwise and ineffectual - to merely ascertain the file number to which it pertained. Furthermore, Baum was acting as agent for Argent, and may not have had authority to renounce ownership of a check sent for the benefit of Argent).

The case law refers mostly to the lack of any claim by the "drawer" of a check against the collecting bank, and thus relates most directly to parties who write checks drawing on their existing bank accounts. In the instant situation, Dynamic was not technically a "drawer" on its standing account, but a party paying for a bank check with wired funds from another source. Nevertheless, the principle laid out in the above citations would certainly apply. Dynamic was, if anything, even more remote from the "item," or check, discussed in UCC 4-207, because it did not even draft the check.

Even if Dynamic, and, by extension OneWest, had rights against TD Bank, such rights would have been forfeited by reason of subsection 4 of UCC 4-207, which requires a claim against a collecting bank to be made within a "reasonable time." Although the Check, being a bank check issued by another banking entity, was not returned to Dynamic or its agent, this

action was initiated more than three years after TD Bank accepted the Check, and, in that time, Dynamic and/or its assignee could and should have discerned that no satisfaction had ever been received concerning the 2003 mortgage and that the Check, therefore, must have been misdirected.

ONEWEST'S MOTION FOR DEFAULT JUDGMENT AGAINST SANDERS AND RUEL

OneWest seeks a default judgment against Sanders and Ruel for their respective roles in misdirecting the funds which were intended to satisfy Argent's mortgage. Plaintiff shows that service of the supplemental summons and amended complaint were properly made on the two aforementioned defendants, that no answer has been received, and that the time to answer has long since expired. Further, plaintiff shows that the additional notice required under CPLR 3215(g)(3) has been mailed to these two defendants.

However, the affidavit of merits submitted by an officer of plaintiff is summary, and is not by a person with knowledge of the facts, as the affiant could not have been present at the events which occurred prior to the assignment of the mortgage to his bank. This is especially true with regard to the claim against Sanders. While it may be surmised by counsel for OneWest, in his supporting affirmation, that Saunders directed the Check to Ruel, the Boyle affidavit, which is intended to supply the merits for purposes of eliciting default, does not even go that far. An affidavit of merits cannot be premised on a surmise or on speculation, even if a reasonable probability supports such assertion. There is no statement of fact before the Court as to precisely what Saunders did, or why she did it. Consequently, a default judgment against Saunders is not available on this showing.

As to the claims against Ruel, the inability of OneWest to secure relief from TD Bank does not impair its right to damages from Ruel. The rights of plaintiff in the latter regard are not determined by the UCC Article on Bank Collections and Deposits (or even by UCC 3-414 and/or 3-417, dealing with commercial paper generally), but rather by generic common law principles. Whatever limitations of rights are contained in those UCC sections are clearly conceived to protect entities dealing with commercial paper in the normal course of commerce, and not to protect wrongdoers who intentionally and stealthily seek unjust gain which sabotages such commerce. Ruel had reason to know that the funds he was stealing originated from Dynamic and were intended for Argent, and not for him. His conversion of those funds while they were effectively in transit between sender and recipient would seem to be actionable by whichever of them sustained the loss. The facts as to his actions are sufficiently shown by the combination of the affidavit of merits and the copy of the improperly endorsed check, attached as an exhibit to the motion papers.

The Court finds that Dynamic's assignment of its mortgage and the indebtedness secured thereby to OneWest is sufficiently broad to encompass an assignment of rights to OneWest to claim damages from Ruel, whose wrongful conduct undermined and/or negated the value of what OneWest purchased from Dynamic. Thus, default judgment can be entered against Ruel.

ONEWEST'S MOTION FOR DEFAULT JUDGMENT AGAINST THE CAMPBELLS

The branch of OneWest's motion for a default judgment against the Campbells is denied. OneWest submits affidavits of service upon the Campbells of the original summons and complaint. However, OneWest issued a supplemental summons and amended complaint and no affidavits of service are annexed, showing service of these later pleadings on the Campbells.

Furthermore, although the motion against the Campbells is submitted on default, the Court has serious reservations as to the viability of OneWest's first cause of action to quiet title against the Campbells and Deutsche, based upon the facts stated above. In fact, the Campbells seem to be the ultimate victims, and the most blameless participants, in a series of events involving questionable actions by nearly everyone else. The Campbells, in the narrative before the Court, have borrowed a large sum from Dynamic, and taken out a mortgage on a home, only to find that the home now belongs to Deutsche Bank, that they still owe money on their note to Dynamic (now replaced by OneWest), and that they have also lost their down payment (if any). On these facts, any claim against the Campbells must await discovery and trial.

Lastly, OneWest's application to elicit a judgment against the Campbells suffers from a fatal inconsistency. The amended complaint does not seek monetary damages against the Campbells, but its Notice of Motion seeks both liability against the Campbells and to refer the issue of damages against the Campbells to the time of trial.

By reason of the foregoing, Plaintiff's motion for default judgment against Saunders and against the Campbells is denied, while plaintiff's motion for default judgment against Ruel, only, is granted. Plaintiff's sixth cause of action against Ruel is severed, and plaintiff may enter a judgment against Ruel in the amount of \$292,000. As has been stated supra, TD Bank's motion to dismiss the claims against it is granted.

This constitutes the Decision and Order of the Court.

Dated: 2/20/13



MARK FRIEDLANDER, J.S.C.