

**Deutsche Bank Natl. Trust Co. v Piccione**

2014 NY Slip Op 32529(U)

September 25, 2014

Supreme Court, Suffolk County

Docket Number: 10-4963

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 6-6-13  
MOTION DATE 7-17-13  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - XMD

-----X  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, AS TRUSTEE FOR J.P. MORGAN  
MORTGAGE ACQUISITION TRUST 2007-  
CH3, ASSET BACKED PASS-THROUGH  
CERTIFICATES, SERIES 2007-CH3,

Plaintiff,

- against -

JOSEPH PICCIONE; SUANNE PICCIONE; JP  
MORGAN CHASE BANK, N.A.; NEW YORK  
STATE DEPARTMENT OF TAXATION AND  
FINANCE; PERILLO BROS, FUEL OIL CORP.;  
THE SUFFOLK COUNTY NATIONAL BANK;  
HARVEST CREDIT MANAGEMENT VII, LLC;  
MARK LEWIS TAX GRIEVANCE SERVICE,  
INC; CITIBANK, NA; UNITED STATES OF  
AMERICA INTERNAL REVENUE SERVICE;  
"JOHN DOES" and "JANE DOES", said names  
being fictitious, parties intended being possible  
tenants or occupants of premises, and  
corporations, other entities or persons who claim,  
or may claim, a lien against the premises,

Defendants.  
-----X

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment and an order of reference and cross motion for leave to amend answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 20; Answering Affidavits and supporting papers 21 - 28; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Joseph Piccione and Suanne Piccione, for leave to amend the

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caption, for an order fixing the defaults of the non-appearing, non-answering defendants, for *nunc pro tunc* relief and, for an order of reference pursuant to RPAPL 1321 is granted; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants “John Does” and “Jane Does”; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_  
 DEUTSCHE BANK NATIONAL TRUST COMPANY, AS  
 TRUSTEE FOR J.P. MORGAN MORTGAGE ACQUISITION  
 TRUST 2007-CH3, ASSET BACKED PASS-THROUGH  
 CERTIFICATES, SERIES 2007-CH3,

Plaintiff,

- against -

JOSEPH PICCIONE; SUANNE PICCIONE; JP MORGAN  
 CHASE BANK, N.A.; NEW YORK STATE DEPARTMENT  
 OF TAXATION AND FINANCE; PERILLO BROS, FUEL  
 OIL CORP.; THE SUFFOLK COUNTY NATIONAL BANK;  
 HARVEST CREDIT MANAGEMENT VII, LLC; MARK  
 LEWIS TAX GRIEVANCE SERVICE, INC; CITIBANK,  
 NA; UNITED STATES OF AMERICA INTERNAL REVENUE  
 SERVICE,

Defendants.

\_\_\_\_\_  
**ORDERED** that the cross motion by defendants Joseph Piccione and Suanne Piccione for an order pursuant to CPLR 3025 for leave to amend their answer and an order pursuant to CPLR 3211(a)(3) dismissing the complaint is denied.

This is an action to foreclose a mortgage on property known as 1339 Waverly Avenue, Farmingville, New York. On October 12, 2006, defendants Joseph Piccione and Suanne Piccione (defendants Piccione) executed an adjustable rate balloon note in favor of JP Morgan Chase Bank, N.A. (Chase) agreeing to pay the sum of \$318,700.00 at the starting yearly rate of 7.975 percent. On said date, defendants Piccione also executed a mortgage in the principal sum of \$318,700.00 on the subject property. The mortgage was

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recorded on November 2, 2006 in the Suffolk County Clerk's Office. By assignment dated May 13, 2009, Chase assigned said note and mortgage to plaintiff, Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH3, Asset Backed Pass-Through Certificates, Series 2007-CH3 (Deutsche Bank). Said assignment was recorded in the Suffolk County Clerk's Office on January 19, 2010.

A notice of default was sent to defendants Piccione at the borrower's last known address which is 1339 Waverly Avenue, Farmingville, New York. As a result of their continuing default, plaintiff commenced this foreclosure action on February 3, 2010. In its complaint, plaintiff alleges in pertinent part that defendants Piccione breached their obligations under the terms of the note and mortgage by failing to make their monthly payments due on July 20, 2008 and thereafter.

Defendants Piccione interposed an answer with one affirmative defense and two counterclaims. The defendants assert as their only affirmative defense that the court lacks jurisdiction because the plaintiff failed to serve the summons and complaint in the manner required by law. Plaintiff served a reply to the counterclaim with eight affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 7, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Piccione defaulted under the terms of the loan agreement and mortgage for failure to pay the July 20, 2008 payment and that defendants' answer and defenses are without merit. In support of its motion, plaintiff submits among other things, the affirmation of Kenneth Sheehan, Esq. in support of the motion; the affirmation of Kenneth Sheehan, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Christopher Griffith, a vice president of Chase, the servicer of the loan that is authorized to act on behalf of the plaintiff in this action; the pleadings; the note, mortgage and assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; and an affidavit of service of the instant summary judgment motion on the defendants in this action.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then shifts to the defendant to demonstrate ‘the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff established its prima facie entitlement to summary judgment by providing evidence of the assignment, the mortgage, the note, the default of defendants Piccione, and by demonstrating that their affirmative defenses and counterclaim are without merit (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). Christopher Griffith, vice president of Chase, loan servicer for plaintiff, attests that Chase is authorized to act on behalf of plaintiff in this action; that defendants Piccione defaulted on their loan payments; that a notice of default was sent to them; and, that a 90-day pre-foreclosure notice pursuant to RPAPL 1304 was sent to defendants Piccione by regular and certified mail.

The burden then shifted to defendants Piccione to lay bare their proof in opposition to plaintiff's prima facie showing (*see Jessabell Realty Corp. v Gonzales, supra*).

Defendants Piccione cross-move for leave to amend their answer and oppose plaintiff's motion based upon the alleged failure of plaintiff to establish compliance with RPAPL 1304. They assert that their amended answer is not palpably insufficient and will not cause plaintiff any surprise or prejudice. They also assert as a reasonable excuse for their three year delay in moving for leave to amend their answer that they were engaged in settlement conferences and were prohibited from filing same while settlement conferences were being conducted. They further argue that plaintiff lacks standing as it has failed to demonstrate compliance with the Pooling and Servicing Agreement's (PSA) document transfer protocols showing a complete and unbroken chain of endorsements of the note and assignments of the mortgage.

The sole argument in opposition to plaintiff's motion and in support of defendants' cross motion to dismiss the complaint is based upon the failure of plaintiff to provide sufficient evidence of compliance the notice requirements required by RPAPL 1304. Here, it is noted that the record contains sufficient evidence of compliance with the RPAPL 1304 notice requirements and that moving defendants have not submitted an affidavit in support of their motion denying receipt of same. Accordingly, defendants Piccione have failed to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by their remaining affirmative defenses (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, defendants do not deny that they have defaulted on their mortgage payments. As such, that branch of defendants' cross motion is denied.

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend (*see Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; *see also Seidman v Industrial Recycling Properties, Inc.*, 83 AD3d 1040, 1040-1041, 922 NYS2d 451 [2d Dept 2011]).

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Defendants' proposed affirmative defense of standing is based on the alleged failure of plaintiff to demonstrate that the note passed from the original lender to plaintiff by the transfers required in the PSA and that the assignment of mortgage was not in accordance with the PSA.

To the extent that defendants Piccione argue failure to demonstrate compliance with the PSA, they lack standing to void any purported unauthorized acts of plaintiff trustee on said basis inasmuch as defendants Piccione are not parties to, nor beneficiaries of, the securitization trusts (*see Rajamin v Deutsche Bank Natl. Trust Co.*, \_\_\_ F3d \_\_\_, 2014 WL 2922317, 2014 US App LEXIS 12251 [2d Cir 2014]). Based on the foregoing, the proposed affirmative defense lacks merit (*see Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]). Therefore, the cross motion by defendants Piccione for leave to amend their answer is denied.

Regarding plaintiff's default request, plaintiff has met all of the requirements with respect to the non-appearing, non-answering defendants (*see* CPLR 3215 [f]; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 932 NYS2d 109 [2d Dept 2011]). Therefore, that portion of plaintiff's motion for an order fixing the defaults of the non-answering, non-appearing defendants is granted (*see Green Tree Serv., v Cary, supra*). Accordingly, that portion of plaintiff's motion for an order of reference appointing a referee to compute the amount due under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed as modified by the court.

Dated: SEP 25 2014



\_\_\_\_\_  
 HON. JOSEPH A. SANTORELLI  
 J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION