

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

2015 NY Slip Op 30637(U)

April 15, 2015

Supreme Court, Suffolk County

Docket Number: 12-8876

Judge: W. Gerard Asher

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 32 - SUFFOLK COUNTY

PRESENT: HON. W. GERARD ASHER  
Justice of the Supreme Court

\_\_\_\_\_  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, AS TRUSTEE OF THE HOME  
EQUITY MORTGAGE LOAN ASSET-BACKED  
TRUST SERIES INABS 2005-A, HOME EQUITY  
MORTGAGE LOAN ASSET-BACKED  
CERTIFICATES, SERIES INABS 2005-A  
UNDER THE POOLING AND SERVICING  
AGREEMENT DATED MAR 1, 2005

Plaintiff,

-against-

MIRKO PANICCIA  
DONNA PANICCIA  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. AS NOMINEE FOR FULL  
SPECTRUM LENDING, INC.  
PETRO INC.  
CAVALRY PORTFOLIO SERVICES, LLC A/S/O  
CAVALRY INVESTMENTS, LLC A/S/O  
FIA CARD SERVICES, N.A.  
PRECISION RECOVERY ANALYTICS, INC.  
TARGET NATIONAL BANK  
CITIBANK SOUTH DAKOTA, NA  
"JOHN DOE #1" to "JOHN DOE #10", the last 10  
names being fictitious and unknown to plaintiff, the  
persons or parties intended being the persons or  
parties, if any, having or claiming an interest in or  
lien upon the mortgaged premises described in the  
verified complaint,

Defendants.

MOTION DATE 11-6-13

ADJ. DATE \_\_\_\_\_

Mot. Seq. #001 - MG

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and an order of reference;  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers \_\_\_\_\_;~~  
Answering Affidavits and supporting papers 14 - 16; Replying Affidavits and supporting papers 17 - 20; ~~Other \_\_\_\_\_; (and after~~  
~~hearing counsel in support and opposed to the motion) it is,~~

Deutsche v Paniccia  
 Index No. 12-8876  
 Page No. 2

**ORDERED** that the motion (001) by plaintiff, Deutsche Bank National Trust Company, as Trustee of the Home Equity Mortgage Loan Asset-Backed Trust Series Inabs 2005-A, Home Equity Mortgage Loan Asset-Backed Certificates, Series INABS 2005-A Under the Pooling and Servicing Agreement Dated Mar 1, 2005 (Deutsche Bank), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Mirko Paniccia and Donna Paniccia (defendants), fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the caption is hereby amended by substituting Carolann (last name refused) in place of "John Doe #1" and by striking therefrom defendants "John Doe #2" through "John Doe #10"; 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 OF THE HOME EQUITY MORTGAGE  
 LOAN ASSET-BACKED TRUST SERIES INABS 2005-A,  
 HOME EQUITY MORTGAGE LOAN ASSET-BACKED  
 CERTIFICATES, SERIES INABS 2005-A UNDER THE  
 POOLING AND SERVICING AGREEMENT DATED  
 MAR 1, 2005

Plaintiff,

-against-

MIRKO PANICCIA, DONNA PANICCIA,  
 MORTGAGE ELECTRONIC REGISTRATION  
 SYSTEMS, INC. AS NOMINEE FOR FULL  
 SPECTRUM LENDING, INC., PETRO INC.,  
 CAVALRY PORTFOLIO SERVICES, LLC A/S/O,  
 CAVALRY INVESTMENTS, LLC A/S/O,  
 FIA CARD SERVICES, N.A., PRECISION  
 RECOVERY ANALYTICS, INC., TARGET  
 NATIONAL BANK, CITIBANK SOUTH  
 DAKOTA, NA, CAROLANN (LAST NAME REFUSED)

Defendant.

\_\_\_\_\_  
 X

This is an action to foreclose a mortgage on property known as 158 Peconic Avenue, West Babylon, New York. On January 5, 2005, defendant Mirko Paniccia executed a fixed rate note in favor of IndyMac, FSB agreeing to pay the sum of \$292,000.00 at the yearly interest rate of 5.000 percent. On said date, defendants executed a mortgage in the principal sum of \$292,000.00 on the subject property. The mortgage indicated IndyMac, FSB to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of IndyMac, FSB as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 19, 2005 in the Suffolk County Clerk's Office. Thereafter, on June 8, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for IndyMac, FSB, to plaintiff Deutsche Bank. The assignment of mortgage was recorded on August 9, 2011 in the Suffolk County Clerk's Office.

IndyMac Mortgage Services sent a notice of default dated January 4, 2011 to defendant Mirko Paniccia stating that he had defaulted on his note and mortgage and that the amount past due was \$5,891.15. As a result of his continuing default, plaintiff commenced this foreclosure action on March 22, 2012. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to pay the installment due on November 1, 2010. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 24, 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. In support of its motion, plaintiff submits among other things, the affirmation of Mark Golab, Esq. in support of the motion; the affirmation of Mark Golab, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Diana C. Miralles, assistant secretary of OneWest Bank, FSB, the servicer of the mortgage loan; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon defendants' counsel; and, a proposed order appointing a referee to compute. Defendants have submitted opposition to the motion.

"[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 has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (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]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see *U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (see UCC § 3-202; § 3-204; § 9-203[g]). Here, Diana C. Miralles avers that "[p]laintiff is the holder and is in possession of, or is otherwise entitled to enforce the note given by Mirko Paniccia..." (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, it has standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, defendants re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that the Golab affirmations and Morales affidavit fail to resolve issues of fact and law sought to be determined by plaintiff's motion; that the Morales affidavit claims that OneWest Bank is the servicer of the mortgage loan however, fails to provide evidence of same; and, that the mortgage in question and the "robo signing" nature in which it has been handled from its creation raised concern as to its legitimacy.

The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff physically possessed the promissory note, which was indorsed in blank, prior to the commencement of the action. Here, neither the defenses raised in their answer nor those asserted in the opposing papers rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Deutsche v Paniccia  
 Index No. 12-8876  
 Page No. 5

With respect to their remaining affirmative defenses, defendants have failed to raise any triable issues 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 (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendants have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

Lastly, the Court notes that defendants do not deny having received the loan proceeds or having defaulted on their mortgage loan payments in their affidavit (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

Accordingly, the motion for summary judgment is granted against the answering defendants. Plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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 simultaneously herewith as modified by the court.

Dated: April 15, 2015

W. Grand Ashev  
 J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION