| **Deutsche Bank National Trust Co. v Davidov** |
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| 2015 NY Slip Op 31391(U) |
| July 21, 2015 |
| Supreme Court, Queens County |
| Docket Number: 704697/2013 |
| Judge: Howard G. Lane |
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# MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IAS PART 6

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| DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, IN TRUST FOR REGISTERED HOLDERS OF LONG BEACH MORTGAGE LOAN TRUST 2004-2, ASSET-BACKED CERTIFICATES SERIES 2004-2,<br>Plaintiff,<br><br>-against-<br><br>REGINA DAVIDOV, et al.,<br>Defendants. | Index No.: 704697/2013<br><br>**BY: Lane, J.**<br><br>Date: July 21, 2015<br><br>Motion Date: May 8, 2015<br><br>Motion Cal. No.: 31<br><br>Motion Seq. No.: 1 |

Plaintiff commenced this action on October 24, 2013 to foreclose a mortgage encumbering the real property known as 141-56 73rd Avenue, Flushing, New York after the mortgagor, Moshe Davidov, died intestate and the mortgage allegedly went into default thereafter. Plaintiff alleges that Moshe Davidov gave the mortgage to secure a note evidencing a loan from Long Beach Mortgage Company in the principal amount of $476,000.00, plus interest. Plaintiff named Regina Davidov, a record owner of the subject property, and Larisa Davidov, as the mortgagor's widow, and Elnatanchi Davidov, Rivka Davidov, Rachel Davidov and Sara Davidov, the mortgagor's children, as party defendants. Plaintiff alleges that it is the holder of the note and mortgage, and that it elects to accelerate the mortgage debt.

Issue has been joined with respect to the combined first amended answer of

defendants Larisa Davidov, as heir to the Estate of Moshe Davidov, deceased, Elnatanchi Davidov, as heir to the Estate of Moshe Davidov, deceased, Rivka Davidov, as heir to the Estate of Moshe Davidov, deceased, Rachel Davidov, as heir to the Estate of Moshe Davidov, deceased and Sara Davidov, as heir to the Estate of Moshe Davidov, deceased (the Larisa defendants) and the joint amended answer of defendants Regina Davidov and Ofer Davidov s/h/a "John Doe" (the Regina defendants). Issue has also been joined with respect to the counterclaims asserted by the Larisa defendants and the Regina defendants. Both the Larisa defendants and the Regina defendants raised, among other defenses, the affirmative defenses of lack of standing and failure to join a necessary party defendant in their amended answers.

A settlement conference pursuant to CPLR 3408 was held on August 6, 2014. By order of that date, the Court Attorney Referee, noting that the case had not been settled, directed the parties to appear at a status conference on March 24, 2015 and plaintiff to file an application seeking an order of reference by the status conference date. The Court Attorney Referee noted that there had been no loan modification activity, and it appeared certain issues might necessitate litigation.

Plaintiff moves for leave to amend the caption substituting Ofer Davidov for "John Doe" and excising "Jane Doe" without prejudice to any of the proceedings, pursuant to CPLR 3212 for summary judgment against the Regina defendants and the Larisa defendants, to strike the answers, affirmative defenses and counterclaims of the Regina

defendants and the Larisa defendants, pursuant to CPLR 3215 for leave to enter a default judgment against defendants New York State Department of Taxation and Finance, United States of America, and City of New York Environmental Control Board, and pursuant to RPAPL 1321 for leave to appoint a referee to ascertain damages due and owing to plaintiff and to issue a report.

The Larisa defendants oppose the motion by plaintiff and cross move to remove and consolidate this action with the Surrogate's Court proceeding entitled *Matter of the Petition of Davidov*, (Surrogate's Court, Queens County, File No. 2006-2639). Plaintiff opposes the cross motion by the Larisa defendants. The remaining defendants have not appeared in relation to the motion or cross motion.

With respect to the cross motion by the Larisa defendants pursuant to CPLR 325(e) to remove and consolidate this action with the Surrogate's Court proceeding, defendant Larisa Davidov asserts she and the decedent's children are the intestate distributees of Moshe Davidov, she has been named administrator of the Estate of Moshe Davidov pursuant to a decree dated July 31, 2006, and guardian of the property of the minor children pursuant to a decree dated May 6, 2012,[1] and that by order dated September 24, 2014,[2] the Surrogate's Court has appointed a guardian ad litem for the infant children. Defendant Larisa Davidov asserts she deeded her 50% interest in the property as the decedent's

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[1] The Larisa defendants have not provided a copy of these decrees to this court.

[2] The Larisa defendants have not supplied this court with a copy of this order.

surviving spouse and distributee (pursuant to EPTL 4-1.1) first to herself, and then to defendant Regina Davidov. Defendant Larisa Davidov also asserts that the remaining 50% interest in the property is presently administered by her as the administrator of the Estate of Moshe Davidov. She has petitioned the Surrogate's Court to permit her as the guardian of the minor children, to sell and transfer, the remaining 50% interest to Regina Davidov. According to the Larisa defendants, removal to Surrogate's Court would allow for the possibility of eliminating the interests of Larisa Davidov and the children as necessary party defendants and facilitate a settlement between the Regina defendants and plaintiff.

CPLR 325(e) expresses a preference for removal to Surrogate's Court of all matters affecting the administration of a decedent's estate (*see Discipio v Sullivan*, 14 AD3d 866 [3d Dept 2005]). Removal, however, is not mandatory, and instead rests within the sound discretion of the Supreme Court (*see Wain v Caton*, 224 AD2d 863 [3d Dept 1996]). In this case, transferring the foreclosure action will not itself expedite the settlement of the decedent's estate. It appears that the unresolved issue in the Surrogate's Court proceeding is whether the proposed sale of the remaining 50% interest in the property to defendant Regina Davidov will be approved. The question of whether the sale is approved, however, has no bearing on plaintiff's right to foreclose since the interests of defendant Regina Davidov and the decedent's children are subject to the mortgage lien. The Supreme Court is better equipped to hear and determine this foreclosure action, in view of its routine involvement with such matters. In addition, this case has proceeded through settlement

conferences, thus making it judicially economical to render a substantive determination. The court therefore, in an exercise of discretion, declines to transfer the action to Surrogate's Court (*see Wain v Caton*, 224 AD2d 863). The cross motion by the Larisa defendants to remove and consolidate this action with the Surrogate's Court proceeding (Surrogate's Court, Queens County, File No. 2006-2639) is denied.

That branch of the motion by plaintiff for leave to amend the caption as proposed is granted.

In a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965 [2d Dept 2015]; *One W. Bank, FSB v DiPilato*, 124 AD3d 735 [2d Dept 2015]). Where, as here, an answer includes a challenge to the plaintiff's standing to bring the action, the latter must also be established in order to succeed on a motion for summary judgment (*see Loancare v Firshing*, __ AD3d ___, 2015 WL 4256095, 2015 NY App Div LEXIS 5983 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]). In a foreclosure action, a plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the note, mortgage and assignment dated April 5, 2012, the affirmation of its counsel, an affidavit of Sherry Benight, a document control officer of Select Portfolio Servicing, Inc., as plaintiff's attorney-in-fact and servicing agent, attesting to the default in payment of the monthly mortgage installment due on July 1, 2011 and thereafter, and copies of limited powers of attorney.

These submissions are sufficient to demonstrate plaintiff had standing to bring this action as the holder of the note endorsed in blank by the lender, by physical possession at the time of commencement and that the mortgage was validly assigned to it, prior to the commencement of the action. They also establish plaintiff's prima facie entitlement to judgment as a matter of law (*see HSBC Bank USA, Nat. Assn. v Baptiste*, 128 AD3d 773 [2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895 [2d Dept 2013]). Likewise, these submissions meet plaintiff's initial burden of demonstrating its prima facie entitlement to judgment as a matter of law dismissing the affirmative defenses and counterclaims asserted by the Regina defendants and the Larisa defendants.

The Larisa defendants have failed to raise any triable issue of fact with respect to plaintiff's prima facie showing or regarding their affirmative defenses and counterclaims. To the extent the Larisa defendants assert the synagogue is in possession of the mortgaged premises and that plaintiff has failed to join it, RPAPL 1311, requires the joinder, as a party

defendant, of "[e]very person having an estate or interest in possession ... in the property as a tenant in fee," as well as all junior lienholders (*see* RPAPL 1311[1]). Tenants of the property, whose interest is claimed to be subject and subordinate to the plaintiff's lien, are necessary parties to a foreclosure action (RPAPL 1311), but are not indispensable parties (*see Balt v J.S. Funding Corp.*, 230 AD2d 699 [2d Dept 1996]). The Larisa defendants have failed to demonstrate the synagogue is a tenant, has an ownership interest or is a subordinate lienor or encumbrancer, and therefore have failed to demonstrate the synagogue is a necessary party defendant to this action (RPAPL 1311). The fact that the synagogue is in possession of the mortgaged premises does not make it a necessary party to the foreclosure (*see Douglas v Kohart*, 196 App Div 84 [2d Dept 1921]). The court notes, however, that to the extent the synagogue is an occupant or tenant, its rights and interests in the property, if any, will remain unaffected by any judgment of foreclosure and sale (*see 1426 46 St., LLC v Klein*, 60 AD3d 740 [2d Dept 2009]; *Matter of SI Bank & Trust v Sheriff of City of N.Y.*, 300 AD2d 667 [2d Dept 2002]; *Ridge Realty v Goldman*, 263 AD2d 22, 26 [2d Dept 1999], citing *Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 406 [2d Dept 1993]; *Nationwide Assoc. v Brunne*, 216 AD2d 547 [2d Dept 1995]).

That branch of the motion by plaintiff seeking summary judgment as against the Larisa defendants and to strike their affirmative defenses and counterclaims is granted.

To the extent the Regina defendants are in default in appearing with respect to the motion by plaintiff, no triable issue of fact was raised by them in response to plaintiff's

prima facie showing or as to the merits of any of their affirmative defenses or counterclaims (*see Nationstar Mortg., LLC v Silveri*, 126 AD3d 864 [2d Dept 2015]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1045 [2d Dept 2012]). That branch of the motion by plaintiff for summary judgment against the Regina defendants and to strike their affirmative defenses and counterclaims is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against defendants New York State Department of Taxation and Finance, United States of America, and City of New York Environmental Control Board is granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order and submit to the Motion Support Office, Room 140.

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**Howard G. Lane, J.S.C.**