

<b>Deutsche Bank Natl. Trust Co. v Barquero</b>
2015 NY Slip Op 32417(U)
December 14, 2015
Supreme Court, Queens County
Docket Number: 702181/2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, etc.,  
Plaintiff(s),

Index  
No. 702181 2014

- against -

Motion  
Date November 9, 2015

WILFREDO BARQUERO, et al.,  
Defendant(s).

Motion  
Cal No. 36

Motion  
Seq. No. 2

The following papers read on this motion by plaintiff for an order: (1) granting summary judgment in its favor an against defendants Wilfredo Barquero and Teresa Barquero (defendants Barquero); (2) granting judgment by default against the remaining parties herein; (3) appointing a referee to compute; and (4) amending the caption; and on this cross motion by defendants Barquero for an order: (1) dismissing the complaint; (2) allowing these defendants to conduct discovery; and (3) awarding costs, fees, and disbursements.<sup>1</sup>

Papers  
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF36-53
Notice of Cross Motion - Affirmation - Exhibits.....	EF54-56
Answering Affirmation - Exhibits.....	EF59-60
Reply.....	EF58

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1. Though as part of the affirmative relief sought in the cross motion, defendants Barquero seek denial of plaintiff's motion for summary judgment, the court deems that branch of the cross motion as opposition to plaintiff's motion instead of as affirmative relief sought thereby.

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action on April 1, 2014 to foreclose a modified mortgage on the real property known as 85-10 94<sup>th</sup> Street, Woodhaven, New York, given by defendants Barquero, as security for the payment of a note in favor of Countrywide Home Loans, Inc., evidencing an indebtedness in the principal amount of \$512,000.00, plus interest. In the complaint, plaintiff alleges that it is the owner and holder of the note and mortgage, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the note and mortgage. It also alleges that defendants Barquero defaulted under the mortgage by failing to pay the monthly payments due thereunder and, accordingly, plaintiff elected to accelerate the mortgage debt.

Defendants Barquero served a joint answer, asserting various affirmative defenses, including ones based upon lack of standing. The remaining defendants, including Raul Avalos, s/h/a defendant “John Doe,” have failed to answer or otherwise appear herein.

Defendants Barquero oppose the motion by plaintiff on the ground that triable issues of fact exist, and cross-move for summary judgment dismissing the complaint insofar as asserted against them on the ground that plaintiff failed to comply with RPAPL § 1304 and failed to establish its standing to maintain this action. No other party has appeared in relation to the motion or cross motion.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential 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 Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]). In addition, the plaintiff must make a prima facie showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107). The failure to make such a prima facie showing requires the denial of the

motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Initially, it is noted that, while defendants Barquero do not specifically raise non-compliance with RPAPL § 1304 as an affirmative defense in their answer, they raise the issue in opposition to the motion and in support of their cross motion. Contrary to plaintiff's contention in opposition to the cross motion defendants Barquero did not waive this defense, since it may be raised at any time prior to judgment (*see e.g. First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2010]; *Citimortgage, Inc. v Pemberton*, 39 Misc 3d 454 [Sup Ct., Suffolk Co 2013] [failure to comply with statutory conditions precedent may be raised at any time during the action by a non-defaulting defendant provided no judgment has been entered]; *cf. PHH Mortg. Corp. v Celestin*, 130 AD3d 703 [2015] [defendant precluded from raising RPAPL § 1304 defense since he was not entitled to an order vacating his default pursuant to CPLR 5015 [a]). Plaintiff's reliance upon, *inter alia*, *Pritchard v Curtis* (101 AD3d 1502 [2012]) is misplaced inasmuch as the defendant therein attempted to assert the defense of non-compliance with RPAPL § 1304 after judgment had already been awarded.

That being said, defendants Barquero have not established their entitlement to dismissal of the complaint on plaintiff's alleged failure to comply with RPAPL § 1304, as "[a] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Velasquez v Gomez*, 44 AD3d 649, 650–651 [2007], quoting *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [1992]; *see Fields v Village of Sag Harbor*, 92 AD3d 718 [2012]; *Calderone v Town of Cortlandt*, 15 AD3d 602 [2005]). Having failed to submit any evidence which would suggest that RPAPL § 1304 was not complied with in this action, defendants Barquero have failed to satisfy their initial burden on that branch of their cross motion for summary judgment dismissing the complaint insofar as asserted against them (*see Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]).

However, neither has plaintiff met its burden of establishing that it strictly complied with the statute. Plaintiff submits an affidavit dated September 8, 2014 of Gabriel Montoya, assistant secretary of Nationstar Mortgage LLC, the servicer of the mortgage loan, who states, among other things, in conclusory fashion, that based on the servicing records reviewed in connection with this action, the 90-day notices required by statute were mailed to defendants Barquero by regular and certified mail to the last known mailing address and to the property address on July 26, 2013. Mr. Montoya also states that the letters were sent in separate envelopes from any other mailing or notice and were accompanied by a list of housing counseling agencies as required by statute. "True copies" of the notices were attached as Exhibit E to the motion. As plaintiff has failed to submit an affidavit of service evincing that it properly served defendants Barquero with the requisite notices, it is not

entitled to summary judgment on its complaint (*see Bank of New York Mellon v Aquino*, 131 AD3d 1186 [2015]; *Wells Fargo Bank, N.A. v Moza*, 129 AD3d 946 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 65 [2015]; *Deutsche Bank Natl. Trust Co.*, 102 AD3d at 910). It is further noted that Mr. Montoya's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see St. Vincent's Hosp. of Richmond v Government Empls. Ins. Co.*, 50 AD3d 1123 [2008]; *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Urban Radiology, P.C. v Clarendon Nat. Ins. Co.*, 31 Misc 3d 132(A) [2011]; *Advanced Med., P.C. v Utica Mut. Ins. Co.*, 23 Misc 3d 141[A] [2009]). Thus, plaintiff is not entitled to summary judgment on its complaint.

Defendants Barquero also seek dismissal based on lack of standing. However, plaintiff conclusively established that it had standing to commence this action by attaching a copy of the indorsed note, mortgage, assignment, and modification agreement to the complaint (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015]; *see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]), irrespective of any deficiency which may exist with respect to the written assignment of mortgage, since standing may be established by physical delivery of the note, as discussed, *supra*.

The remaining branches of the cross motion for discovery and dismissal/costs and fees are denied as moot in light of the above finding that plaintiff has not established its entitlement to summary judgment, and denied for failure to submit any argument that defendants Barquero are entitled to such relief, respectively.

With respect to that branch of the motion by plaintiff for default judgment against all other parties in default of answering, plaintiff is entitled to such relief inasmuch as it has established that all other defendants were properly served with process and that none answered or otherwise appeared herein.

With respect to that branch of the motion for an amendment of the caption, same is granted. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS TRUSTEE FOR HOLDERS OF THE BCAP LLC  
TRUST 2007-AA3,

Plaintiff,

-against-

WILFREDO BARQUERO, TERESA BARQUERO,  
CITY OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, CITY OF NEW YORK  
PARKING VIOLATIONS BUEREAU, CITY OF  
NEW YORK TRANSIT ADJUDICATION BUREAU,  
RAUL AVALOS,

Defendants.

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It is noted that, while plaintiff’s counsel, also in support of plaintiff’s motion, tangentially addresses each affirmative defense raised by defendants Barquero in their answer, it remains unclear whether plaintiff seeks dismissal of any, some, or all of these defenses. As plaintiff has failed to affirmatively seek such relief in its Notice of Motion (CPLR 3211 [b]), indicating rather that said defenses are insufficient to bar summary judgment (CPLR 3212 [b]), the court declines to assume that plaintiff, in addition to the relief specifically requested, seeks dismissal of all of the defenses interposed by defendants Barquero. As such, it is unnecessary, in light of the above finding of the court, to address each remaining affirmative defense in turn.

Accordingly, those branches of plaintiff’s motion for an order granting them summary judgment against defendants Barquero for the relief demanded in the complaint and appointing a referee to compute are denied. The branch of the motion for judgment by default against the remaining defendants is granted to the extent that those defendants are in default in answering or otherwise appearing herein. The branch of the motion for an order amending the caption is granted as noted above. Defendants’ cross motion is denied.

Dated: December 14, 2015

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J.S.C.