

Deutsche Bank Natl. Trust Co. v Tlatelpa
2016 NY Slip Op 31157(U)
February 9, 2016
Supreme Court, Kings County
Docket Number: 511831-2014
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the **29** day of January, 2016.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE
FOR HARBOR VIEW MORTGAGE LOAN TRUST MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2005-9,
Plaintiff(s),
- against -
VICTORIA TLATELPA, AND JOHN DOE #1-10,
Defendant(s).

Index No.: **511831-2014**
Motion Seq. # 1 & 2
DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1-2
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	3-4
Affirmation in Opposition to Cross-Motion	
Plaintiff's Reply Affirmation, Affidavit and Exhibits	5

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Upon the foregoing papers Plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR HARBOR VIEW MORTGAGE LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-9, ("Deutsche") moves this Court for an order granting it summary judgment pursuant to CPLR § 3212. Plaintiff's complaint herein contains the following causes of action: 1) to compel execution of a duplicate original mortgage; 2) to direct the Register to record a duplicate copy of the mortgage; 3) to declare all other claims and/or interests subordinate to Plaintiff's; 4) to declare that Plaintiff holds an equitable mortgage; and 5) to direct the Register to record any decision and/or order in this action. Defendant Tlatelma cross-moves for an order dismissing the complaint and granting summary judgment in her favor pursuant to CPLR §§3211(a)(3)(5) and (7) and 3212, respectively.

On or about June 1, 2004, Washington Mutual Bank, FA ("WAMU") entered into a mortgage loan purchase agreement with Greenwich Capital Finance Products ("Greenwich"). This agreement provided that periodically Greenwich would purchase residential home mortgages issued by WAMU. On March 15, 2005, Defendant Victoria Tlatelpa ("Tlatelpa") executed a mortgage and note in favor of WAMU in the amount of \$600,000. However, WAMU failed to record this mortgage in the Office of the City Register. Thereafter, Greenwich entered into a pooling agreement with Deutsche on or about August 1, 2005 that created the mortgage backed security known as "Harbor View Mortgage Loan Trust 2005-9, Mortgage Loan Pass through Certificates, Series 2005-9". The mortgage that was executed by Defendant on March 15, 2005 was allegedly included in those mortgages that Greenwich sold to Deutsche. However, Plaintiff does not have the original mortgage executed by Tlatelpa and, as a result, seeks relief from this Court. In support of the within motion Plaintiff submits an affidavit by Theresa A. Klingelhofer, an Assistant Secretary of JP Morgan Chase Bank, N.A. (JP Morgan), as Attorney in Fact for Deutsche Bank. Additionally, Plaintiff submits a copy of the note executed by Tlatelpa with an undated blank endorsement by WAMU.

The instant action was commenced on or about December 12, 2014 and issue was joined when Tlatelpa interposed an answer on or about January 12, 2015. Defendant's answer contained six affirmative defenses. As a threshold issue we must address Defendant's fifth affirmative defense: that the instant action is barred by the Statute of Limitations. Defendant contends that the instant action is governed by a six year Statute of Limitations pursuant to CPLR § 213. According to Plaintiff, the instant action is governed by RPAPL Article 15 and, therefore, the

applicable Statute of Limitations is ten years. RPAPL§1501 (5) provides that "[t]he interest had by any mortgagee or contract vendee of real property or by any successor in interest of either of them, is an 'interest in real property' as that phrase is used in this article of the real property actions and proceedings law." Therefore, contrary to defendant's contention this action is not barred by the Statute of Limitations and was timely brought within ten years.

It is well settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. *Alvarez v Prospect Hosp*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc v Associated Fur Mfrs, Inc*, 46 NY2d 1065 (1979). The failure to make such a showing requires the denial of the motion regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ Med Ctr*, 64NY2d 851 (1985). Further, the credibility of the parties is not an appropriate consideration for the Court on such a motion *S.J. Capelin Assocs, Inc v Globe Mfg Corp*, 34 NY2d 338 (1974), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment. *Benincasa v Garrubbo*, 141 AD2d 636, 637(2d Dept 1988).

To establish title by a lost deed or a lien by a lost mortgage there must be clear and certain evidence showing that the deed or mortgage was properly executed with all the formalities required by law and a showing of the contents of such instrument. *Sadow v Poskin Realty Corp*, 63 Misc2d 499 (Sup Ct, Queens County 1970) citing *Edwards v Noyes*, 65 NY 125, 127 (1875); *City of Oneida v Drake*, 133 Misc 382, 385-386 (Sup Ct, Madison County 1928). While equitable declaratory relief under common law may be available to the owner of a deed or a mortgage that

was not recorded due its loss or destruction, the claim must rest upon allegations and proof of the due execution of the lost instrument and of its contents by proof of a certified copy thereof or other clear and convincing proof thereof. *Argent Mtge Co, LLC v 35 Plank Rd Realty Corp*, 15 NYS2d 473 (2d Dept 2015), citing *O'Brien v Town of Huntington*, 66 AD3d 160, 166 (2d Dept 2009); *La Capria v Bonazza*, 153 AD2d 551, 552-553 (2d Dept 1989); *Edwards v Noyes*, 65 NY 125, 127 (1875).

Where the lost instrument is a mortgage and the plaintiff is not the original lender listed in the mortgage indenture, proof of the plaintiff's ownership interest in the mortgage is also required, as such interest is not established by the mortgage indenture itself. *Alliance Funding Co v Taboada*, 39 AD3d 784, (2d Dept 2007), *Real Property Law §291*. Therefore, to support the instant motion Plaintiff must provide 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, or by physical delivery to the plaintiff of the mortgage and note. *Wells Fargo Bank, NA v Ali*, 2014 NY Slip Op 07653 (2d Dept 2014); *Midfirst Bank v Agho*, 121 AD3d 343 (2d Dept 2014); *Kondaur Capital Corp. v McCary*, 115 AD3d 649 (2d Dept 2014); *Aurora Loan Services, LLC v Taylor*, 114 AD3d 627 (2d Dept 2014).

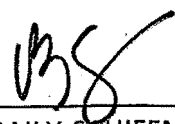
Ms. Klingelhofer states that JP Morgan is the Attorney in Fact for Plaintiff. However, Plaintiff has failed to offer any evidence to support this assertion. While Plaintiff submitted a copy of a "Purchase and Assumption Agreement" dated September 25, 2008 between FDIC, as receiver of WAMU residential mortgages, and JP Morgan, this agreement is clearly insufficient to establish personal knowledge of any issue on behalf of Deutsche Bank. Plaintiff failed to submit any

evidence to indicate that the mortgage in dispute was included in those that were taken over by Greenwich or bundled into the Harbor View Mortgage Loan Trust 2005-9, Mortgage Loan Pass through Certificates, Series 2005-9. Plaintiff did not submit any assignments of mortgage that could demonstrate the chain of title of the mortgage in dispute. Additionally, Ms. Klingelhofer did not set forth any facts as to when or how the note came into Deutsche's possession.

Moreover, relief in the form of a *nunc pro tunc* recording of a lost mortgage is not available absent due proof that no persons or entities would be adversely affected thereby. **Astoria Bank v Verzo, 2015 NY Slip Op 31974 (U) (Sup Ct Suffolk County), citing Wells Fargo Bank, NA v Perry, 23 Misc 827 (Sup Ct Suffolk County 2009).** Courts have consistently held that even upon presentation of a certified copy of a mortgage, the document may not be recorded *nunc pro tunc* to the date of the original execution, because such a finding would constitute unprecedented relief that is not only contrary to **Real Property Law §291** but to the expectations of *bona fide* purchasers for value, as well. **Citimortgage v Chouen, 2014 NY Slip Op 33251(U)(S Ct, Suffolk County), citing Reynolds v Springer Serv Sta, Inc, 151 AD2d 466 (2d Dept 1989); Wells Fargo Bank v Perry, supra at 830-831 (Sup Ct, Suffolk County 2009).**

Plaintiff has failed to meet the criteria set forth above for the relief requested. Accordingly, Plaintiff's motion for summary judgment is denied in all respects and Defendant's cross-motion to dismiss the complaint is granted.

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LOREN BAILY-SCHIFFMAN, JSC

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