

**Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.**

2016 NY Slip Op 31509(U)

August 8, 2016

Supreme Court, New York County

Docket Number: 850120/15

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32

-----X  
DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS TRUSTEE FOR AMERICAN HOME MORTGAGE  
ASSET TRUST 2006-6, MORTGAGE-BACKED  
PASS-THROUGH CERTIFICATES SERIES 2006-6,

Plaintiff,

Index No. 850120/15  
Motion Seq: 002

-against-

ROYAL BLUE REALTY HOLDINGS, INC.,  
JOHN SOUTO A/K/A JOHN R. SOUTO, AS HEIR TO THE ESTATE  
OF SERGE J. SOUTO A/K/A SERGE SOUTO  
MIDLAND FUNDING LLC, SING YU INTERNATIONAL INC  
SY MARBLE & GRANITE IMPORTORS,  
CORNICELLO TENDLER & BAUMEL-CORNICELLO,  
JESSE HERMAN, THOMAS HASKINS, G-NET CONSTRUCTION  
CORP., JORDAN BUTTORFF, LESLIE BUTTORFF,  
NEW YORK ENVIRONMENTAL CONTROL BOARD  
THE BOARD OF MANAGERS OF 130 BARROW STREET  
CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, UNITED STATES OF AMERICA,  
INTERNAL REVENUE SERVICE, and "JOHN DOE # 1- JOHN DOE # 10,"  
the last ten 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 complaint.

**DECISION/ORDER**  
**ARLENE P. BLUTH, JSC**

Defendants.

-----X  
Plaintiff moves by order to show cause for an injunction and temporary restraining order  
precluding the enforcement of this Court's order directing the cancellation of the notice of  
pendency and discharging plaintiff's mortgage, pending an appeal of the Court's order. Plaintiff  
also seeks an injunction and temporary restraining order precluding all defendants from  
transferring, encumbering, dissipating, or permitting to become subject to a security interest or  
lien the property located at 162-174 Christopher Street a/k/a 130-132 Barrow Street, Unit 170

TH3, New York, NY pending appeal of the Court's order. For the reasons described below, plaintiff's application is denied.

### **Background**

On July 5, 2016, the Court granted defendant Royal Blue's motion to dismiss plaintiff's complaint on the ground that plaintiff's action was time-barred pursuant to the six-year statute of limitations. The Court found that the statute of limitations began to accrue thirty days after plaintiff sent a thirty day notice to cure letter on January 15, 2009. When the default was not cured, the Court found that the loan was accelerated and the six year statute of limitations began to run on February 15, 2009. The Court held that plaintiff's foreclosure action was time-barred because it filed the instant action after the six-year statute of limitations period expired. In this same order, the Court directed the New York County Clerk to discharge the mortgage and to cancel the notice of pendency.

Plaintiff now moves for a preliminary injunction and temporary restraining order preventing enforcement of the July 5, 2016 order.

### **Discussion**

CPLR 6301 provides that:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

In order to receive a preliminary injunction a plaintiff must meet “its burden of demonstrating a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Barbes Rest., Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 33 NYS3d 43, 45 [1st Dept 2016] [citing *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840, 800 NYS2d 48 [2005]; see CPLR 6301).

As an initial matter, plaintiff’s request for a preliminary injunction is denied because plaintiff failed to show that defendant threatens or is about to commit an action that would violate plaintiff’s rights respecting the foreclosure action. Nor has plaintiff demonstrated that it has demanded and would be entitled to judgment restraining Royal Blue from an act which would produce injury to plaintiff if committed during the pendency of the action. The instant action is over - Royal Blue was granted summary judgment dismissing the action, cancelling the notice of pendency and discharging the mortgage.

The Court’s judgment in favor of Royal Blue does not present a clear-cut set of circumstances appropriate for a preliminary injunction. Instead, and as was apparent at oral argument, plaintiff appears to be seeking a stay of enforcement of the Court’s order pending its appeal as well as injunctive relief preventing Royal Blue from, *inter alia*, selling or transferring the property.

A stay pending appeal, where not automatically granted, can be sought pursuant to CPLR 5519(c). CPLR 5519(c) provides that:

“The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this

subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).”

Although plaintiff appears to have conflated CPLR 6301 and CPLR 5519(c), the Court denies plaintiff’s request for a preliminary injunction, its apparent request for a stay pending appeal, and its request for injunctive relief preventing Royal Blue from *inter alia* selling or transferring the property.

This Court, as the Court from which the appeal will be taken (*see* CPLR 5519(c)), has the discretion to consider whether to grant a stay pending appeal. “[S]tays pending appeal will not be granted or, where the stay is automatic, continued, in cases where the appeal is meritless” (*Herbert v City of New York*, 126 AD2d 404, 407, 510 NYS2d 112 [1st Dept 1987]). “Under [CPLR 5519(c)], there is no entitlement to a stay and, indeed, the court considering the stay may consider the merits of the appeal (*Da Silva v Musso*, 76 NY2d 436, 443, 560 NYS2d 109 n 4 [1990]). “In considering whether to grant a stay under subdivision (c), the court’s discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party” (Richard C. Reilly, Practice Commentaries McKinney’s Cons Laws of NY, CPLR C:5519:4).

Plaintiff argues that it has a high probability of success on the merits because it alleges that the statute of limitations has not expired. Plaintiff asserts, as it did in its opposition to defendants’ summary judgment motion, that the letter dated January 15, 2009 did not put into motion the acceleration of the mortgage. Plaintiff further claims it will be irreparably harmed if the Court’s order is enforced because Royal Blue would be allowed to transfer, encumber, or

dissipate the property. Finally, plaintiff claims that the equities clearly weigh in its favor because Royal Blue stands to gain a property free of a \$1.3 million mortgage lien.

In opposition, Royal Blue claims that plaintiff impliedly admits that the debt was accelerated in 2009 because the amount plaintiff claims due and owing is over \$1 million; Royal Blue insists that this total is only conceivable if the debt was accelerated in 2009. Royal Blue also claims that plaintiff has cited no new authority in support of its argument of the likelihood of success on the merits. Royal Blue contends that no matter who prevails in the appeal and ultimately this action, no one could sell the subject parcel individually because it would violate the Martin Act. Royal Blue asserts that because of the Martin Act, Royal Blue cannot transfer its interest in this individual unit; only the entire parcel (of many units) can be legally sold.

The Court denies plaintiff's purported attempt to stay enforcement of the order dated July 5, 2016. Plaintiff's claim on appeal is that its default letter did not properly accelerate the mortgage. This letter, dated January 15, 2009 stated that the loan "will accelerate" if the default was not cured within 30 days. The default letter contained declarative and unambiguous language that an acceleration was certain to occur if payment was not made. When payment was not made, the loan was accelerated. Certainly, the appellate courts may have a different view on the language necessary to accelerate a mortgage for purposes of starting the statute of limitations period in a foreclosure action. However, that does not compel this Court to grant a stay pending appeal. Plaintiff did not present binding caselaw compelling a decision in its favor in the underlying motion (Mot Seq 001) or in the instant application. The Court finds that although plaintiff's appeal is not necessarily meritless, it is not strong enough to warrant a stay pending appeal.

Further, other factors suggest that the instant application should be denied. Royal Blue's insistence that only the entire property can be sold suggests that a stay pending appeal is not warranted. Additionally, plaintiff filed a foreclosure action on this property on March 17, 2009 before discontinuing that initial action in 2010. Nearly six years later, plaintiff filed the instant action on March 16, 2015. For unspecified reasons, plaintiff waited over five years to recommence a foreclosure action despite plaintiff's knowledge that defendant had stopped paying long before, as evidenced by its previous foreclosure action and its default letter. Even assuming that plaintiff is correct that the January 15, 2009 letter did not accelerate the mortgage and that the commencement of the 2009 foreclosure action constituted proper acceleration, plaintiff waited until **the very last day possible** to start a new action. Plaintiff's actions do not indicate that it faces a hardship or exigency other than the one plaintiff itself created.

Plaintiff's request for injunctive relief preventing a sale or transfer of the property is also denied. Even if injunctive relief was appropriate in the instant application, plaintiff has not met the appropriate standard. Plaintiff is seeking to prohibit Royal Blue from doing anything with this property while it appeals the Court's decision dismissing the case. Certainly, it would be more convenient for plaintiff if Royal Blue were forced to wait until an appeal was decided, but that, by itself, does not constitute grounds for granting injunctive relief. "A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing" (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23, 924 NYS2d 35 [1st Dept 2011]).

The Court finds that plaintiff has not made the required showing to entitle it to injunctive relief preventing Royal Blue from seeking to transfer, sell, or to do what it wishes with the

property. Losing a summary judgment motion is not, by itself, grounds for a powerful provisional remedy. If it were, then every victory in a trial court would be rendered meaningless.

Accordingly, it is hereby

ORDERED that plaintiff's request for an injunction and temporary restraining order precluding the enforcement of the Court's order (dated July 5, 2016) that cancelled the notice of pendency and discharged the mortgage is denied; and it is further

ORDERED that plaintiff's request for an injunction precluding all defendants from transferring, encumbering, dissipating, or permitting to become subject to a security interest or lien, the property located at 162-174 Christopher Street, a/k/a 130-132 Barrow Street Unit 170, New York, NY is denied; and it is further

ORDERED that any temporary stays are hereby vacated.

This is the Decision and Order of the Court.

**Dated: August 8, 2016**  
**New York, New York**



**HON. ARLENE P. BLUTH, JSC**  
**ARLENE P. BLUTH**  
**J.S.C.**