

Deutsche Bank Natl. Trust Co. v Casanova
2017 NY Slip Op 32208(U)
September 6, 2017
Supreme Court, Queens County
Docket Number: 714454/2016
Judge: Rudolph E. Greco, Jr.
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[*1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE RUDOLPH E. GRECO, JR. IA Part 32
Justice

DEUTSCHE BANK NATIONAL TRUST
COMPANY as certificate holder on behalf of BOSCO
CREDIT II TRUST SERIES 2010-1,
Plaintiff,

Index No. 714454/2016
Motion Date: April 28, 2017
Motion Seq. No. 1
Motion Cal. No. 39

-against-

GLORIA CASANOVA,

Defendant.

The following papers were read on this motion by defendant Gloria Casanova to dismiss the complaint pursuant to (1) CPLR 3211(a)(1) based upon documentary evidence, (2) CPLR 3211(a)(2) based upon lack of subject matter jurisdiction, (3) CPLR 3211(a)(5) based upon the expiration of the statute of limitations, and the doctrines of res judicata and collateral estoppel, (4) CPLR 3211(a)(7) based upon failure to state a cause of action, and (5) CPLR 3211(a)(8) based upon lack of personal jurisdiction; and this cross motion by plaintiff pursuant to CPLR 602 to consolidate this action with the action entitled *Deutsche Bank National Trust Co. v Casanova* (Supreme Court, Queens County, Index No. 704084/2013) "for the purposes of joint discovery and trial."

Papers
Numbered

Notice of Motion - Affidavits - ExhibitsEF Doc. #5-#14
Notice of Cross Motion - Affidavits - ExhibitsEF Doc. #17-#32
Answering Affidavits - ExhibitsEF Doc. #40
Reply AffidavitsEF Doc #35-#38, #41,
#55-#57

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

FILED
SEP 14 2017
COUNTY CLERK
QUEENS COUNTY

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On April 28, 2006, Gloria Casanova, and her husband, Heriberto Casanova, gave a mortgage against the real property known as 241-05 87th Avenue, Bellerose, New York, in favor of Mortgage Electronic Registration Systems, Inc., acting solely as nominee for American Brokers Conduit, to secure a promissory note in favor of American Brokers Conduit, executed by them on the same day, in the principal sum of \$53,000.00 by Gloria Casanova and Heriberto Casanova (the subject note). The subject note bears an interest rate of 8.500%, payable in monthly installments of \$407.52, beginning on June 1, 2006, and with a final balloon payment due on May 1, 2021.

On September 25, 2013, plaintiff commenced an action, entitled *Deutsche Bank National Trust Co. v Casanova* (Supreme Court, Queens County, Index No. 704084/2013), by e-filing a summons and complaint against Gloria Casanova and Heriberto Casanova to recover on the subject note.¹ Following joinder of issue, plaintiff moved for summary judgment against the Casanovas, and the Casanovas cross moved to dismiss the complaint insofar as asserted against them on certain grounds, including that the complaint failed to state a cause of action against them. By order of the Hon. Robert L. Nahman, J.S.C., entered on June 30, 2016, the motion by plaintiff was denied, and the cross motion by the Casanovas was granted only to the extent of granting that branch of the cross motion by Gloria Casanova to dismiss the complaint insofar as asserted against her for failure to state a cause of action. The court determined that although Gloria Casanova was named as a party defendant in the caption, the allegations in the body of the complaint did not include any reference to her. The court also determined that plaintiff had not moved for leave to amend the complaint (to add such allegations), and therefore, such leave could not be granted.

On December 5, 2016, plaintiff commenced this action against defendant Gloria Casanova to recover on the subject note, by e-filing the summons and complaint. According to the affidavit of service process dated January 3, 2017, defendant Gloria Casanova was served with process on December 23, 2016 at 6:20 P.M. by delivery of a copy of the summons and complaint, to "KEVIN 'ROE' (REFUSED LAST NAME)," as a person of suitable age and discretion, at 84-46 250th Street, Bellerose, New York, the dwelling place and usual place of abode of Gloria Casanova, and a subsequent mailing of a copy of the summons and complaint to defendant Gloria Casanova on January 3, 2017 to the same address. The affidavit of service of process upon defendant Gloria Casanova was filed on January 4, 2017. The

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Plaintiff does not seek foreclosure of the mortgage securing the note in the action under Index No. 704084/2013.

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parties' counsel entered into a written stipulation,² extending Gloria Casanova's time to appear and answer, or move in relation to the summons or complaint, until February 27, 2017.

In lieu of answering, defendant Gloria Casanova moves to dismiss the complaint, on various grounds. Plaintiff opposes the motion on the ground it is thirteen days late, having been filed with the e-filing system on March 12, 2017.

A court possesses the discretion to excuse the defect in the method of service used by a defendant's attorney in serving a motion to dismiss (*see* CPLR 2001), and may also extend the time for serving a motion to dismiss the complaint (*see* CPLR 2004). In this instance, the short delay by defendant Gloria Casanova in serving her motion to dismiss the complaint was not wilful, but rather as a result of law office failure. In a detailed affirmation, her attorney indicates that he learned of the commencement of this action in the course of his discussion with plaintiff's counsel regarding the action under Index No. 704084/2013.³ According to counsel for defendant Gloria Casanova, he reviewed the documents in the online record at the court's web portal, which do not contain a copy of a notice of commencement of action subject to mandatory electronic filing was contained in the online record (*see* 22 NYCRR 202.5-bb[a][3]). He states he mistakenly believed the instant case was an "optional" one, i.e. allowing for the consensual/voluntary use of the electronic filing system because the action under Index No. 704084/2013, had been e-filed under the consensual/voluntary program.⁴ He further states that as a result, he mailed the motion papers

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It appears that the date "February 14, 2016" on the face of the stipulation is the result of scrivener's error since plaintiff's counsel admits he entered into the stipulation following his conversation with defense counsel on January 20, 2017.

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According to the court's records, the action under Index No. 704084/2013 is still pending against Heriberto Casanova.

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By virtue of Administrative Order 224/2016 of the Chief Administrative Judge of the Courts, effective October 19, 2016, commercial cases in the County of Queens, Supreme Court, are among the class of cases designated for mandatory use of the electronic means for the filing and service of documents (*see* Administrative Order 224/16) (*see* 22 NYCRR 202.5-bb[a][1]). Such designation with respect to commercial cases was first made effective on July 13, 2016 by Administrative Order 151/16 dated July 1, 2016. At the time of the commencement of the action under Index No. 704084/2013, commercial cases in Queens County were designated as among the class of cases for which service and filing of documents in the Supreme Court by electronic means was voluntary/consensual (*see* Administrative Order 222/13) (*see* 22 NYCRR 202.5-b[a][1]). Furthermore, plaintiff seeks to recover on a promissory note as a holder of the note (*see* UCC 1-201[b][21], UCC 3-301 ["The holder of an instrument whether or not he is the owner may

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to plaintiff's counsel on February 27, 2017,⁵ as permitted in such voluntary/consensual cases pursuant to 22 NYCRR 202.5-b(b)(2)(ii).

Plaintiff does not deny receipt of the mailed copy of the motion papers, and has failed to show it suffered any prejudice by virtue of the delay in service of the motion papers by e-filing. As public policy strongly favors the resolution of cases on their merits, the court excuses the defect by defendant Gloria Casanova in serving her motion to dismiss by mail, as opposed to by e-filing, (CPLR 2001) and extends the time to serve her motion nunc pro tunc to March 12, 2017. That branch of the motion by defendant Gloria Casanova, in effect, to extend her time to serve her motion to dismiss nunc pro tunc to March 12, 2017 is granted.

With respect to the branch of the motion by defendant Gloria Casanova to dismiss the complaint pursuant to CPLR 3211(a)(2) based upon lack of subject matter jurisdiction, the Supreme Court "is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (NY Const., art. VI)" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The Supreme Court has subject matter jurisdiction over actions to recover on a promissory note (*see e.g. Nunez v Channel Grocery & Deli Corp.*, 124 AD3d 734 [2d Dept 2015]). That branch of the motion by defendant Gloria Casanova to dismiss the complaint pursuant to CPLR 3211(a)(2) is denied.

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable limitations period, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (*see Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017]; *Ross v Jamaica Hosp. Med. Ctr.*, 122 AD3d 607, 608 [2d Dept 2014]; *Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795, 796 [2d Dept 2013]).

... enforce payment in his own name"). Where an instrument is indorsed in blank, it may be negotiated by delivery (*see* UCC 3-202[1]; 3-204[2]), and the Uniform Commercial Code governs negotiable instruments including notes (UCC 3-104[1][b]). This case is a commercial one, albeit it does not meet the monetary threshold for assignment to the Commercial Division (*see* 22 NYCRR 202.70[a]).

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The exhibit annexed to defense counsel's affirmation in support of the motion bears the date "February 28, 2017." The court accepts the explanation of defense counsel, as an officer of the court, (in his reply affirmation) that the document was obtained and printed from a laptop computer, after regular business hours, and that the computer had its internal clock incorrectly set for a time 12 hours ahead of the actual time (the time had been set manually for "PM" during "AM" hours).

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When determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see* CPLR 3026; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Randazzo v Nelson*, 128 AD3d 935, 936 [2d Dept 2015]). “A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’ ” (*Sullivan v State of New York*, 34 AD3d 443, 445 [2d Dept 2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; *see GuideOne Specialty Ins. Co. v Admiral Ins. Co.*, 57 AD3d 611, 613 [2d Dept 2008]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751, 752 [2d Dept 2007]).

Defendant Gloria Casanova asserts that the claims accrued upon the default under the note, which is alleged to have occurred on March 1, 2009, the period allowed by the applicable statute of limitations for the commencement of an action to recover on a note has expired, and plaintiff is not entitled to the benefit of the savings provision of CPLR 205(a).

Plaintiff alleges that it is a foreign corporation authorized to do business in New York and defendant Gloria Casanova is a New York resident. When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations (*see Antone v General Motors Corp.*, 64 NY2d 20, 27–28 [1984]). Pursuant to the “borrowing statute,” the applicable limitation period is the shorter of the New York limitation period or the limitation period of the place in which plaintiff “resides” – in this case, Delaware (*see* CPLR 202; *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]).

Under New York law, the statute of limitations for an action to recover on a promissory note is six years (*see* CPLR 213[2]; *Sce v Ach*, 56 AD3d 457, 458 [2d Dept 2008]). A cause of action to recover on a note which is payable on demand accrues at the time of its execution (*see* *Sce v Ach*, 56 AD3d at 458; *Comerica Bank, N.A. v Benedict*, 8 AD3d 221, 222 [2d Dept 2004]). A cause of action to recover on a note which is payable in full at one time accrues at the time it becomes due (*see* *Park Assoc. v Crescent Park Assoc.*, 159 AD2d 460, 461 [2d Dept 1990]). However, in relation to a note payable in installments, such as the one at bar, there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes due and is defaulted upon, unless the debt is accelerated (*see* *Morrison v Zaglool*, 88 AD3d 856 [2d Dept 2011]; *Sce v Ach*, 56 AD3d 457, 458). Commencement of an action to recover the

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entire amount due under a note may be sufficient to put the borrower on notice that the lender is holding the borrower in default under the note, and the debt is being accelerated (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2d Dept 2003]).

Under Delaware law, an action “to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date” (6 Del C § 3-118[a]). Likewise, a cause of action arising from a promissory note not under seal must be commenced within 6 years from its accrual (10 Del C § 8109;⁶ *Brossman v Fed. Deposit Ins. Corp.*, 510 A2d 471 [Del Supr Ct 1986]; *FDIC v Brossman*, 1984 WL 553542 [Del Super Ct, June 12, 1984]; *see also Milford Fertilizer Company v Hopkins*, 807 A2d 580 [Del Super Ct, Kent County, April 30, 2002]). As under New York law, the commencement of an action alleging a default in payment under a note, and demanding payment of the entire debt owed thereunder, constitutes the exercise of the note’s optional acceleration clause by the holder (*see LaSalle Nat. Bank v Ingram*, 2006 WL 1670418 [Del Super Ct, Kent County May 16, 2006]; *Wilmington Savings Fund Society, F.S.B. v Meconi*, 1989 WL 124888, at *4 [Del Super Ct, New Castle County] quoting *Giannone v Kennedy*, 1987 WL 8280, at *2 [Del Super Ct, New Castle County], *affd* 527 A 2d 732 [Del Supr 1987]).

In the complaint filed in the action under Index No. 704084/2013, plaintiff named Gloria Casanova as a party defendant in the caption, and alleged a default in payment on March 1, 2009 pursuant to the note, and demanded the entire sum due under the note, i.e. the principal sum of \$51,811.24, with interest thereon from March 1, 2009 at the annual rate of 8.500%, plus late charges and advances made by plaintiff and other charges. Thus, defendant Gloria Casanova was notified, by virtue of the bringing of the action under Index No. 704084/2013, that plaintiff claimed a default in payment of the obligation, for which she is jointly and severally liable under the note (*see* ¶ 8 of the subject note), and exercised the note’s optional acceleration clause (*see* ¶ 6[B],[C] of the subject note) insofar as it alleged that the full amount due under the note was owing.

Because both the applicable statute of limitations period under New York law and Delaware law is six years, and the claims herein to recover on the note began to run on the

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Contrary to the assertion by defendant Gloria Casanova, the governing statute of limitations under Delaware law is not found in 10 Del C. § 8106. That provision applies where the action to recover a debt is “not evidenced by a record or by an instrument under seal” (10 Del C. § 8016[a]).

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date of the commencement of the action under Index No. 704084/2013, this action was timely commenced within six years thereafter, and defendant Gloria Casanova has failed to establish, prima facie, that this action is time-barred.⁷ Consequently, the court need not consider whether plaintiff is entitled to rely upon the savings provision of CPLR 205(a).

Construed liberally, plaintiff's complaint states a valid cause of action against defendant Gloria Casanova to recover on the promissory note and for an award of reasonable attorneys' fees (*see Nunez v Channel Grocery & Deli Corp.*, 124 AD3d 734; *Rachmany v Regev*, 115 AD3d 840, 841 [2d Dept 2014]). In addition, the documentary evidence submitted by defendant Gloria Casanova in support of her motion does not conclusively dispose of plaintiff's claims.

To the extent defendant Gloria Casanova asserts the action should be dismissed based upon the doctrines of res judicata and collateral estoppel, "[u]nder the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Blue Sky, LLC v Jerry's Self Stor., LLC*, 145 AD3d 945, 946 [2d Dept 2016]; *see Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]). However, "[w]here a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply" (*Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009]; *see Canzona v Atanasio*, 118 AD3d 841, 842 [2d Dept 2014]; *Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 1007–1008 [2d Dept 2012]). A dismissal of a claim on the ground of failure to state a cause of action is not a determination on the merits for res judicata purposes (*see Hock v Cohen*, 125 AD3d 722 [2d Dept 2015]; *Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142 [2d Dept 2010]; *see also Rechais v McGivans*, 119 AD3d 666, 667 [2d Dept 2014]).

In addition, "[t]he doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, [1984]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final

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Furthermore, the court notes that those installment payments due beyond six years from commencement of the prior action are not time-barred (*see Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866, 868 [2d Dept 2016]).

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judgment on the merits' ” (*Clifford v County of Rockland*, 140 AD3d 1108, 1109 [2d Dept 2016], quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]). The instant action is not barred by the doctrine of collateral estoppel since the dismissal of the complaint in the action under Index No. 704084/2013, insofar as asserted against defendant Gloria Casanova for failure to state a cause of action, did not involve a determination on the merits (*see FC Notes SVC, LLC v United General Title Ins. Co.*, 146 AD3d 935 [2d Dept 2017]; *Canzona v Atanasio*, 118 AD3d 841, 842 [2d Dept 2014]; *see also Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456–457 [1985]).

That branch of the motion by defendant Gloria Casanova to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7) is denied.

With respect to that branch of the motion by defendant Gloria Casanova to dismiss the complaint pursuant to CPLR 3211(a)(8) based upon lack of personal jurisdiction due to improper service of process, the affidavit of the process server dated January 2, 2017 constitutes prima facie evidence that defendant Gloria Casanova was properly served pursuant to CPLR 308(2) (*see US Bank Nat. Assn. v Ramos*, ___ AD3d ___, 2017 WL 3611657, 2017 NY App Div LEXIS 628; *Central Mtge. Co. v Ward*, 127 AD3d 803, 803 [2d Dept 2015]; *Roberts v Anka*, 45 AD3d 752, 753–754 [2d Dept 2007]). Defendant Gloria Casanova has offered no evidence to rebut the presumption of proper service arising from the process server's affidavit upon her (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). The affirmation of her counsel is not based upon personal knowledge. That branch of the motion by defendant Gloria Casanova to dismiss the complaint based upon CPLR 3211(a)(8) is denied.

With respect to the cross motion by plaintiff, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted where common questions of law or fact exist, absent a showing of prejudice to a substantial right by the party opposing the motion (*see Bruno v Capetola*, 101 AD3d 785 [2d Dept 2012]; *see Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2d Dept 2006]). The instant action and the action under Index No. 704084/2013 arise from the same promissory note and involve common questions of law and fact. Defendant Gloria Casanova has failed to show a substantial right of hers will be prejudiced by virtue of consolidation. The note of issue in the action under Index No. 704084/2013 has not been filed (notwithstanding plaintiff therein has been directed to do so on or before May 26, 2017 [*see* compliance order dated November 22, 2016 issued under Index No. 704084/2013]). Defendant Gloria Casanova has not lost any opportunity to participate in examinations before trial in the action under Index No. 704084/2013, since it appears that there have been no depositions conducted therein. The cross motion by plaintiff to consolidate this action and the action under Index No. 704084/2013 is granted to the extent

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of consolidating this action with the action under Index No. 704084/2013, under Index No. 704084/2013 (CPLR 602).

The caption of the consolidated action shall be as follows:

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
as certificate trustee on behalf of BOSCO CREDIT II
TRUST SERIES 2010-1,

Plaintiff

Index No. 704084/2013

-against-

HERIBERTO CASANOVA and
GLORIA CASANOVA,

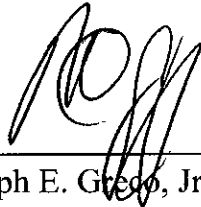
Defendants

-----X.

Plaintiff is directed to serve a copy of this order with notice of entry on the parties to the actions consolidated and on the Clerk of the Supreme Court, Queens County, who shall transfer all papers filed under Index No. 714454/2016 to the file under Index No. 704084/2013.

Defendant Gloria Casanova's time to serve an answer to the complaint in the consolidated action under Index No. 704084/2013 is extended until ten days after service of notice of entry of this order (CPLR 3211[f]).

Dated: Sept. 6, 2017



Rudolph E. Greco, Jr.
J. S.C.

FILED
SEP 14 2017
COUNTY CLERK
QUEENS COUNTY