

**Deutsche Bank Natl. Trust Co. v Bertini**

2018 NY Slip Op 30305(U)

February 15, 2018

Supreme Court, Suffolk County

Docket Number: 0038359/2009

Judge: C. Randall Hinrichs

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**SUPREME COURT - STATE OF NEW YORK  
IAS PART 49 - SUFFOLK COUNTY**

**PRESENT: Hon. C. RANDALL HINRICHS**  
Justice of the Supreme Court

**Motion Date: 001: 8-4-2016; 002: 9-8-2016**  
**Adjourned Date: 11-4-2016**  
**Motion Sequence: 001-MotD; 002-MD**

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DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS TRUSTEE FOR MORGAN STANLEY ABS  
CAPITAL I INC. TRUST 2006-HE5,

Plaintiff,

-against-

JAMES BERTINI A/K/A JAMES M. BERTINI,  
ELIZABETH BERTINI A/K/A ELIZABETH F.  
BERTINI, DANDELION LLC, LIPA DBA LONG  
ISLAND LIGHTING COMPANY, JOHN DOE (Said  
name being fictitious, it being the intention of Plaintiff to  
designate any and all occupants or premises being  
foreclosed herein and any parties, corporations or entities,  
if any, having or claiming an interest or lien upon the  
mortgaged premises.),

Defendants.  
\_\_\_\_\_x

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ELIZABETH BERTINI, Defendant Pro Se  
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Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4 - 5; and Answering Affidavits and supporting papers 6 - 7; it is,

**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the answering defendant JAMES BERTINI A/K/A JAMES M. BERTINI, striking his answer and dismissing the affirmative defenses set forth therein; (2) striking the name "JOHN DOE," and to amend the caption accordingly; (3) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (4) pursuant to RPAPL §1321, appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is granted in part and denied in part; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order awarding summary judgment in its favor, striking the answer of JAMES BERTINI A/K/A JAMES M. BERTINI and dismissing the affirmative defenses set forth therein, is denied, with leave to renew within 120 days of the date of this order, not to be extended without leave of Court; and it is further

**ORDERED** that so much of plaintiff's motion that seeks an order striking the name "JOHN DOE," and to amend the caption accordingly, is granted; and it is further

**ORDERED** that so much of plaintiff's motion that seeks an order fixing the defaults of all non-answering defendants is granted; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order of reference as to defendant ELIZABETH BERTINI A/K/A ELIZABETH F. BERTINI is granted; and it is further

**ORDERED** that this cross motion (002) by the defendants JAMES BERTINI A/K/A JAMES M. BERTINI and ELIZABETH BERTINI A/K/A ELIZABETH F. BERTINI for, inter alia, an order compelling plaintiff to accept the late answer of defendant ELIZABETH BERTINI A/K/A ELIZABETH F. BERTINI, and to dismiss the complaint as asserted against them, is denied; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon the answering defendant within thirty (30) days of the date herein, and to promptly file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York, commenced September 25, 2009. On February 10, 2006, defendants James Bertini a/k/a James M. Bertini and Elizabeth Bertini a/k/a Elizabeth F. Bertini executed a note in favor of New Century Mortgage Corporation ("New Century") in the amount of \$513,000.00. To secure said note, on the same date, defendants gave a mortgage on the subject property to New Century. On October 8, 2008, New Century executed an Assignment of Mortgage in favor of plaintiff. The subject note was indorsed by New Century in blank, though this indorsement is undated. By its complaint, plaintiff alleges that defendants defaulted in their payments on the note. By his answer, defendant James Bertini generally denies the material allegations set forth in the complaint, and he asserts 2 affirmative defenses, namely that he executed a loan modification agreement which materially changes the terms of the subject mortgage and invalidates plaintiff's complaint. No other defendants have answered the complaint or appeared in this action.

Plaintiff now moves for summary judgment and for an order of reference. In support of its motion, plaintiff submits, among other things, copies of the note and mortgage, several duly executed affidavits of service, and an affidavit of Armenia L. Harrell, Vice President of Loan Documentation for Wells Fargo Bank, N.A. ("Wells Fargo"), plaintiff's loan servicer. Defendants oppose the motion, and they cross-move

to compel plaintiff to accept Mrs. Bertini's late answer, and to dismiss the complaint as asserted against them, arguing, inter alia, that plaintiff has failed to establish its standing to prosecute this action, and that it has failed to establish its compliance with the notice requirements set forth by the subject loan documents and by Real Property Actions and Proceedings Law (RPAPL) §1304. In opposition, and in support of their cross motion, defendants submit several documents, including an affirmation of their attorney and their own affidavits.

A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see* CPLR 3012[d], 5015[a][1]; *Wells Fargo Bank, N.A. v Singh*, 153 AD3d 893, 57 NYS3d 903 [2d Dept 2017]; *US Bank, N.A. v Samuel*, 138 AD3d 1105, 30 NYS3d 305 [2d Dept 2016]; *HSBC Bank USA, N.A. v Rotimi*, 121 AD3d 855, 995 NYS2d 81 [2d Dept 2014]). Although the Court may consider law office failure to be a reasonable excuse to vacate a default, a party attributing his or her default to a former attorney must provide a detailed and credible explanation of the default, and conclusory, unsubstantiated allegations are not sufficient to do so (*see LaSalle Bank, N.A. v LoRusso*, 155 AD3d 706, 64 NYS3d 102 [2d Dept 2017]; *Bank of New York Mellon v Colucci*, 138 AD3d 1047, 30 NYS3d 667 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]). Here, the Court notes that the parties engaged in 9 settlement conferences over a period of 4 years, and that Mrs. Bertini now attempts to serve an answer to the complaint nearly 7 years after her time to do so has expired. In support of the cross motion, Mrs. Bertini submits her own affidavit by which she attests, among other things, that she believed that the attorney Mr. Bertini retained to serve an answer to the complaint was also representing her, and that it was never her intent to fail to interpose an answer. However, such contentions as to law office failure are vague, conclusory, and unsubstantiated; thus, Mrs. Bertini fails to show a reasonable excuse for her failure to answer the complaint, and the Court need not determine whether she has demonstrated the existence of a potentially meritorious defense to the action (*see LaSalle Bank, N.A. v LoRusso, supra; Bank of New York Mellon v Colucci, supra; Wells Fargo Bank, N.A. v Cervini, supra*).

Further, Mr. Bertini has waived the affirmative defense of standing, as he failed to raise same in his answer to the complaint or in a pre-answer motion to dismiss (*see JP Morgan Chase Bank, N.A. v Butler*, 129 AD3d 777, 12 NYS3d 145 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Eroboho*, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; *Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Wells Fargo Bank Minnesota, N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Moreover, Mr. Bertini's contention that plaintiff failed to comply with the notice requirements set forth by the mortgage are without merit, as plaintiff's submissions establish that a 30-day notice of default was sent to defendants on September 7, 2008, and that said notice substantially complied with the terms of the subject mortgage (*see Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *Indymac Bank, FSB v Kamen*, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]).

As to plaintiff's motion as to Mr. Bertini, its submissions establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and

evidence of nonpayment (see *Pennymac Holdings, LLC v Tomanelli*, *supra*; *Wachovia Bank, N.A. v Carcano*, *supra*; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By her affidavit of merit, Ms. Harrell attests that, based on records kept during the regular course of Wells Fargo's business, defendants failed to make a payment on the note scheduled for August 1, 2008, and that they failed to make subsequent payments to bring the loan current (see CPLR 4518[a]; *American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]).

Further, plaintiff's submissions as to Mrs. Bertini demonstrate its entitlement to an order of reference, namely the mortgage, the underlying unpaid note, the complaint setting forth the facts establishing the claim, an affidavit of its employee attesting to the default, and proof that she did not answer within the time allowed (see RPAPL §1321; *HSBC Bank USA v Angeles*, 143 AD3d 671, 38 NYS3d 580 [2d Dept 2016]; *Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *HSBC Bank v Taher*, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]). As Mrs. Bertini is in default, she is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them," (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727, 733 [2003]) and she has waived any affirmative defenses as to plaintiff's standing (see *HSBC Bank USA v Angeles*, *supra*; *HSBC Bank v Taher*, *supra*; *Bank of N.Y. v Alderazi*, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]) or its compliance with RPAPL §1304 (see *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]; *PIH Mortg. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]).

However, Mr. Bertini may raise plaintiff's compliance with RPAPL §1304 in his cross motion to dismiss the complaint as asserted against him (see *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106, 923 NYS2d 609, 616 [2d Dept 2011]). Here, plaintiff has not supplied the Court with adequate evidentiary proof of its compliance with RPAPL §1304 (see *Cenlar, FSB v Weisz*, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; *Hudson City Sav. Bank v DePasquale*, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). Although Ms. Harrell avers that the 90-day pre-foreclosure notices were sent to the borrower via certified and first class mail on February 19, 2009, the statements set forth in this affidavit are conclusory and they are insufficient to meet the requirements of the statute (see *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *Cenlar, FSB v Weisz*, *supra*; *Hudson City Sav. Bank v DePasquale*, *supra*). Although Ms. Harrell attached copies of the notices purportedly sent with tracking numbers stamped on them, this is insufficient to establish that same was actually sent to defendant in the manner required by RPAPL §1304, as she failed to provide proof of a standard office mailing procedure or any independent proof of actual mailing (see *Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *CitiMortgage, Inc. v Pappas*, *supra*; *JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536, 537, 36 NYS3d 235 [2d Dept 2016]; *cf. HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). As plaintiff has failed to establish its compliance with this condition precedent (see *Aurora Loan Servs., LLC v Weisblum*, *supra*), its motion is denied, and as Mr. Bertini's submissions fail to eliminate all triable issues of fact as to this issue, he fails to meet his burden on his cross motion to dismiss (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Although plaintiff has established its entitlement to relief as to Mrs. Bertini, in the interests of judicial economy, the Court will reserve signature on plaintiff's proposed order of reference, as plaintiff may renew its motion as to Mr. Bertini, and it may be granted similar relief at that time.

Accordingly, plaintiff's motion for summary judgment is granted in part, and denied in part, with leave to renew within 120 days of the date of this order, plaintiff's proposed order of reference has been reserved for signature, and defendants' cross motion is denied.

Dated: February 15, 2018

  
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C. RANDALL HINRICHS, J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION