

Deutsche Bank Natl. Trust Co. v Comer

2018 NY Slip Op 30800(U)

April 24, 2018

Supreme Court, Suffolk County

Docket Number: 004780/2009

Judge: C. Randall Hinrichs

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. C. RANDALL HINRICHS

Justice of the Supreme Court

Motion Date: 001: 3-20-2017; 002: 5-18-2017

Adjourned Date: 2-28-2018

Motion Sequence: 001-MotD; 002-MD

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE, IN TRUST FOR THE REGISTERED
HOLDERS OF ARGENT SECURITIES INC., ASSET-
BACKED PASS-THROUGH CERTIFICATES,
SERIES 2004-W2,

Plaintiff,

-against-

DOREANN COMER, SALVATORE J. FARRAUTO,
JP MORGAN CHASE BANK, NA, SOVEREIGN
BANK SUCCESSOR BY MERGER TO
INDEPENDENCE COMMUNITY BANK
SUCCESSOR BY MERGER TO SI BANK & TRUST,

Defendants.

RAS BORISKIN, LLC
Attorneys for Plaintiff
900 Merchants Concourse, Suite 106
Westbury, NY 11590

ROY J. LESTER, ESQ.
Attorney for Defendants, Comer and Farrauto
600 Old Country Road, Ste. 229
Garden City, NY 11530

ELIZABETH ANDERSON
SAL FARRUGGIO
10 Grove Drive
Mastic, NY 11950

JOHN DOE (Said name being fictitious, it being the
intention of Plaintiff to designate any and all occupants
of premises being foreclosed herein, and any parties,
corporations or entities, if any, having or claiming an
interest or lien upon the mortgaged premises.)

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and cross motion to
dismiss; Notice of Motion and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 6 - 25; Answering
Affidavits and supporting papers 26; Replying Affidavits and supporting papers 27; 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 defendants Doreann Comer
and Salvatore J. Farrauto, striking their answer and dismissing the affirmative defenses set forth therein;
(2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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; and (4)
amending the caption, is granted in part and denied in part; and it is further

ORDERED that the defendant's cross-motion (002) to dismiss the complaint is denied; and it is further

ORDERED that so much of the plaintiff's motion that seeks an order striking the First and Second affirmative defenses is granted, and the motion for summary judgment and an order of reference is otherwise denied, with leave to renew within 120 days of entry of this order, not to be extended without leave of Court; and it is further

ORDERED that so much of the plaintiff's motion that seeks to substitute Elizabeth Anderson and Sal Farruggio for defendants "JOHN DOE" and to amend the caption accordingly, is granted; and it is further

ORDERED, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE, IN TRUST FOR THE REGISTERED
HOLDERS OF ARGENT SECURITIES INC., ASSET-
BACKED PASS-THROUGH CERTIFICATES,
SERIES 2004-W2,

Index Number: 4780-2009

Plaintiff,

-against-

DOREANN COMER, SALVATORE J. FARRAUTO,
JP MORGAN CHASE BANK, NA, SOVEREIGN
BANK SUCCESSOR BY MERGER TO INDEPENDENCE
COMMUNITY BANK SUCCESSOR BY MERGER
TO SI BANK & TRUST, ELIZABETH ANDERSON,
SAL FARRUGGIO,

Defendants.

-----X

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 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 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. On November 18, 2003, defendant-mortgagor Doreann Comer executed a note in favor of plaintiff's predecessor in the principal amount of \$299,250. To secure said note, on the same date, defendant-mortgagor gave the lender a mortgage on the property. By way of a blank indorsement with physical delivery, the note was transferred to plaintiff prior to commencement of this action. Transfer of the note to the plaintiff was memorialized by a written assignment of the mortgage, duly recorded in the Office of the Suffolk County Clerk. Defendant-mortgagor allegedly defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on May 1, 2008. After defendant-mortgagor failed to cure the default in payment, plaintiff commenced the instant action by the filing of a *lis pendens*, summons and complaint on February 9, 2009. Issue was joined by the interposition of an answer dated, March 12, 2009, from defendants Doreann Comer and Salvatore J. Farrauto.

By their answer, the answering defendants generally deny the material allegations set forth in the complaint, and assert three affirmative defenses. The remaining defendants have neither appeared nor answered herein. Defendants' opposition to the present motion is limited to arguments that plaintiff allegedly lacks standing, failed to demonstrate compliance with RPAPL 1304, and failed to meet the standards for summary judgment.

A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *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]). Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Here, plaintiff has produced, *inter alia*, the note, mortgage, assignment and evidence of nonpayment. Plaintiff established its standing by submission of an affidavit from Marie Metellus, a representative of Ocwen Loan Servicing LLC ("Ocwen"), plaintiff's loan servicing agent, attesting to plaintiff's possession of the subject note prior to commencement of the action (*see Bethpage Federal Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]). Defendant has offered no evidence to contradict that. The Metellus affidavit also attests to the default in payment under the note and mortgage. Said affidavit was based upon personal knowledge acquired by a review of business records kept by Ocwen in the ordinary course of business. Ms. Metellus averred that the business records of Ocwen included records of the prior loan servicers, which were fully incorporated, maintained and relied upon by Ocwen in the routine course of business, and therefore the averments concerning possession of the note and payment default comport with CPLR 4518(a) (*see Carothers v GEICO Indemnity Co.*, 79 AD3d 864, 914 NYS2d 199 [2d Dept 2010]; *People of the State of New York v DiSalvo*, 284 AD2d 547, 727 NYS2d 146 [2d Dept 2001]; *Plymouth Rock Fuel Corp. v Leucadia*, 117 AD2d 727, 498 NYS2d 453 [2d Dept 1986]; *Johnson v Lutz*, 253 NY 124, 128 [1930]; *see also U.S. Bank N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]).

Plaintiff however failed to establish its prima facie entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of RPAPL § 1304 (*see Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). The plaintiff submitted neither affidavits of service, nor an affidavit from one with personal knowledge of the practices and procedures customarily used in the ordinary course of business for mailing of statutory notices (*see Citibank v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *Citimortgage v Papas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]). Plaintiff's affidavit avers, in conclusory fashion, that the notices were sent by certified or registered mail and first class mail. Such conclusory statements are insufficient (*see Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). The affidavit plaintiff provided here is not sufficient to establish that the requisite notices were sent because the affiant did not aver that she was familiar with the mailing practices and procedures for mailing the notices, "and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)" (*see Citimortgage v Papas, supra*, 147 AD3d at 901; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 61 NYS3d 244 [2d Dept 2017]).

Notwithstanding plaintiff's deficiency of proof, defendants, as moving parties on the cross motion, failed to affirmatively demonstrate that the requisite pre-foreclosure notices were not sent (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 Ad3d 909, 961 NYS2d 200 [2d Dept 2013]).

Accordingly, plaintiff's motion is granted in part and denied in part and the answering defendants' cross motion to dismiss is denied, as set forth herein.

Dated: April 17, 2018



HON. C. RANDALL HINRICH, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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

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

Motion Date: 3-22-2018
Motion Sequence: 003:Adjourned

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE FOR LONG BEACH MORTGAGE LOAN
TRUST 2005-1,

Plaintiff,

-against-

FEIN, SUCH, & CRANE
Attorney for Plaintiff
1400 Old Country Road
Suite C103
Westbury, NY 11590

SCOTT A. BRACHFELD a/k/a SCOTT BRACHFELD
CHERYL BRACHFELD, GE MONEY, HOUSEHOLD
FINANCE CORPORATION III, LAKEVILLE
INDUSTRIES, INC., NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE CIVIL ENFORCEMENT-
CO-ATC; DARA BRACHFELD, MYRA BRACHFELD,

SCOTT BRACHFELD
Defendant Pro Se
113 Dovecote Lane
Commack, NY 11725

Defendants.

The Court is in receipt of the plaintiff's Motion to Confirm Referee Report and for a Judgment of Foreclosure and Sale (#003), and a one-page response from defendant Scott Brachfeld ("defendant"), dated March 22, 2018.

The defendant indicates that he was not served with the plaintiff's motion for a judgment of foreclosure and sale. A review of the papers reveals that the plaintiff served the motion on Scott Lockwood, Esq., as the defendant's attorney. The defendant states that Mr. Lockwood is no longer his attorney. Previously, this Court was informed that the defendants would be changing counsel, although, to the Court's knowledge, no formal substitution was ever filed.

Since it is unclear whether the defendant, who is representing himself, received a copy of the motion, the return date for the motion is hereby extended to May 31, 2018, and the plaintiff is directed to mail a copy of the motion to the defendant at 113 Dovecote Lane, Commack, New York 11725 by May 10, 2018.

Dated: April 24, 2018



HON. C. RANDALL HINRICHS, J.S.C.

_____**FINAL DISPOSITION** X **NON-FINAL DISPOSITION**