

<b>Diji v Deutsche Bank Natl. Trust Co.</b>
2019 NY Slip Op 30197(U)
January 8, 2019
Supreme Court, Kings County
Docket Number: 508446/2015
Judge: Richard Velasquez
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**FILED**

JAN 22 2019

KINGS COUNTY CLERK'S OFFICE

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8<sup>th</sup> day of January, 2019.

PRESENT:  
HON. RICHARD VELASQUEZ

Justice.

-----X  
AUGUSTINE DIJI,

Plaintiff,

Index No.: 508446/2015

-against-

Decision and Order

DEUTSCHE BANK NATIONAL TRUST COMPANY AS  
TRUSTEE FOR LONG BEACH MORTGAGE LOAN  
TRUST 2004-1, ASSET-BACKED CERTIFICATES,  
SERIES 2004-1,

Defendants.  
-----X

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The following papers numbered 1 to 5 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	1-2
Opposing Affidavits (Affirmations) _____	3
Reply Affidavits (Affirmations) _____	4
Memorandum of Law _____	5

After oral argument and a review of the submissions herein, the Court finds as follows:

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Defendant, DEUTSCHE BANK NATIONAL TRUST COMPANY et al, (hereinafter DEUTSCHE BANK), moves for an order 1) pursuant to CPLR 603 to sever its counterclaims against the Plaintiff, AUGUSTINE DIJI, 2) pursuant to CPLR 6501 to permit defendant to file a Notice of Pendency against the real property located at 216 Greene Avenue, Brooklyn, New York 11238.

Plaintiff cross moves for an order pursuant to CPLR 3212 dismissing the defendant's counter claims.

### ***Background/Procedural History***

This is an action commenced by the plaintiff pursuant to Article 15 of the Real Property Actions and Proceedings Law seeking to extinguish a mortgage lien against the parcel of real property located at 216 Greene Avenue, Brooklyn, New York 11238.

On July 8, 2015 Plaintiff initiated this action by filing a summons and complaint. On August 3, 2015 Defendant interposed an answer asserting two counterclaims: 1) requesting a monetary judgment against plaintiff equal to the sum of all real estate taxes and hazard insurance premiums paid by defendant since September 2007; and 2) seeking an equitable lien against the Property for the same amount. Defendant alleges no Notice of Pendency was filed at that time because the mortgage remained a valid and enforceable lien. On September 15, 2015 plaintiff filed an amended complaint. On September 17, 2015 defendant served its Answer to the Amended Complaint. On September 21, 2015 plaintiff replied to defendant's counterclaims. On March 4, 2016 defendant filed a motion for summary judgment seeking to dismiss the Amended Complaint. Plaintiff opposed the motion.

On January 11, 2017 the court issued an Order denying defendants motion and granting summary judgment to the plaintiff declaring mortgage unenforceable due to expiration of Statute of Limitations and cancelling the mortgage as a lien or encumbrance against the property. Defendant appealed the order. The parties are currently awaiting scheduling of oral arguments by the Appellate Division Second Department.

### ***Arguments***

Defendant contends it intends to prosecute its counter-claims during the pendency of the appeal and requests this court to sever such claims to enable the defendants to prosecute the same.

Plaintiff contends the defendant failed to obtain a CPLR 5519 stay pending appeal. Moreover, plaintiff contends defendants counterclaim would not affect title to or the possession use or enjoyment of the subject property because the defendant is simply seeking a money judgment. Additionally, plaintiff contends the voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts and in absence of fraud or mistake of material fact or law. Plaintiff further contends the Defendants counter-claims are barred by the statute of limitations

### ***Analysis***

As a preliminary matter, there is no evidence submitted that the defendants requested a CPLR 5519 stay pending their appeal as they have failed to attach the Notice of Appeal as required, nor did they attach the Appeal. As such there is no evidence before this court that there is a stay pending appeal in the present case.

CPLR 603 states "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the

others." CPLR 603 (McKinney). In the present case the defendants fail to make any cognizable argument as to why its counter-claims should be severed.

Pursuant to CPLR 6501; "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party." CPLR 6501 (McKinney).

A notice of *lis pendens* cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment ... (*Hailey v. Ano*, 136 NY 569, 575-577; *Braunston v. Anchorage Woods, Inc.*, 10 NY2d 302, 305, 178 NE2d 717 (1961)). In the present case, the defendant is seeking a money judgment for payments it made based on a mortgage contract with the plaintiff that this court has previously dismissed. There is nothing in the counter-claims that claim a right title or interest in the subject property. Therefore, a Notice of Pendency is not proper in the present case.

"The essence of unjust enrichment is that one party has received money or a benefit at the expense of another" (*City of Syracuse v R.A.C. Holding*, 258 AD2d 905, 906 [1999]). However, "the voluntary payment doctrine . . . bars recovery of payments

voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]; see *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535-536 [1986]); *Wells Fargo Bank, N.A. v. Burke*, 155 AD3d 668, 671, 64 NYS3d 228 (NY App Div 2017). In that case, no fraud or mistake was alleged. Instead, the complaint alleged that "the plaintiff advanced funds for the real property taxes "to maintain its first lien position" and for the hazard insurance "to protect the property." *Id.* "These allegations portray the payments as a voluntary, calculated risk to protect the plaintiff's interest in the property while it continued to litigate the validity of the mortgage, rather than the product of mistake or fraud" (*cf. Wolf v National Council of Young Israel*, 264 AD2d 416, 417-418 [1999]); *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 671, 64 N.Y.S.3d 228 (N.Y. App. Div. 2017). The present case, is similar in that no fraud or mistake is alleged by the defendant in their counter-claims. Moreover, just as in *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, the payments made by defendants were voluntary in nature. In the present case, defendants advanced funds for real property taxes and insurance while it litigated the validity of their mortgage. As such, the plaintiff is protected by the voluntary payment doctrine and as a result the defendants counter claims are hereby dismissed. Plaintiff's request for summary judgment on defendant's counterclaims is hereby granted as no issues of fact remain.

Accordingly, Defendant's request 1) pursuant to CPLR 603 to sever its counterclaims against the Plaintiff, AUGUSTINE DIJI and 2) pursuant to CPLR 6501 to permit defendant to file a Notice of Pendency against the real property located at 216 Greene Avenue, Brooklyn, New York 11238 are hereby denied for the reasons stated

