

**Oakdale III LLC v Deutsche Bank Natl. Trust Co.**

2019 NY Slip Op 30768(U)

March 25, 2019

Supreme Court, Suffolk County

Docket Number: 607081/2017

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

INDEX NO. 607081/2017

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 01/02/2019  
ADJ. DATE: 02/27/2019  
Mot. Seq. 007-MD

MOTION DATE: 01/02/2019  
ADJ. DATE: 02/27/2019  
Mot. Seq. 008-MG  
*e-filed partial participation*  
CASEDISP

Oakdale III LLC,

Plaintiff

-against-

Deutsche Bank National Trust Company, as Trustee for IndyMac  
INDX Mortgage Loan Trust 2006-AR7, Mortgage Pass-Through  
Certificates Series 2006-AR7; IndyMac Federal Bank, F.S.B.  
F/K/A IndyMac Bank, F.S.B.; Capital One Bank USA N.A.; FIA  
Card Services, N.A.; and "ABC Corp.", the last name being  
fictitious and unknown to Plaintiff, the entity having or claiming  
an interest or lien upon the premises described in the Complaint,,

Defendants

**JUDGMENT**  
with  
**COUNTY CLERK**  
**DIRECTIVE**

and

**DECISION & ORDER**

DISTRICT: 0500  
SECTION: 287.00  
BLOCK: 02.00  
LOT: 094.000

34 East Oakdale Street  
Bay Shore, NY 11706

**TO:**

ZIMMERMAN LAW, PLLC  
BY: NAOMI TRAINER, ESQ.  
315 WALT WHITMAN RD, STE 215  
HUNTINGTON STATION, NY 11746  
516-355-8100

GREENBERG TRAURIG, LLP  
BY: BRIAN PANTALEO, ESQ.  
777 S FLAGLER DR, STE 300 EAST  
WEST PALM BEACH, FL 33401  
561-650-7960

**U**pon the reading and filing of the following papers in this matter: (1) Notice of Motion (Seq. #007) by Plaintiff for for an Order: granting Plaintiff leave to reargue its Motion for Summary Judgment filed on April 19, 2018 and upon re-argument modifying the Order dated July 23, 2018 by granting Summary Judgment pursuant to CPLR §3212 in favor of Plaintiff Oakdale III LLC declaring the Note dated February 7, 2006 to be invalid and unenforceable and

directing the Suffolk County Clerk's Office/the proper entity to cancel and discharge of record the Mortgage dated February 7, 2006 (hereinafter the "Mortgage") against the premises known as 34 East Oakdale Street, Bay Shore, New York 11706, District: 0500; Section: 287.00; Block: 02.00; Lot: 094.000 (hereinafter referred to as the "Premises") pursuant to RPAPL §1501(4) and striking Defendant's affirmative defenses; or in the alternative, renewing Plaintiff's Motion for Summary Judgment and upon renewal granting Summary Judgment pursuant to CPLR §3212 as requested herein in favor of Plaintiff pursuant to RPAPL §1501(4) and striking Defendant's affirmative defenses; and discontinuing the action as against Defendants "ABC Corp., the last name being fictitious and unknown to Plaintiff, the entity having or claiming an interest or lien upon the premises described in the Complaint" and against "IndyMac Federal Bank, F.S.B. F/K/A IndyMac Bank, F.S.B; Capital One Bank USA N.A." and amending the caption by deleting said Defendants therefrom; and granting such other and further relief as this Court deems just and proper; and (2) e-filed documents 96-108; and

(2) Notice of Cross Motion (Seq. #008) for an order: granting Deutsche Bank's cross motion for summary judgment; dismissing Oakdale's complaint with prejudice; and denying Oakdale's motion for summary judgment; and (3) e-filed documents 109-138; it is:

**ORDERED** that the Suffolk County Clerk is directed to cancel the notice of pendency filed at the commencement of this action with respect to property described on the Suffolk County Tax Map as:

DISTRICT: 0500  
SECTION: 287.00  
BLOCK: 02.00  
LOT: 094.000

and also known as 34 East Oakdale Street, Bay Shore, NY 11706

and it is further

**ORDERED** that Plaintiff's motion (Seq. 007) for summary judgment is denied; and it is further

**ORDERED** that Defendant's cross motion (Seq. 008) for an order granting Deutsche Bank summary judgment and dismissing Plaintiff's complaint with prejudice is granted; and it is further

**ORDERED** that, if applicable, within thirty (30) days of the entry date of this Order, notice pursuant to CPLR §8019(c) with a copy of the order shall be served upon the County Clerk, along with payment of any required fees

See: <https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notice.to.county.clerk.pdf>

**ORDERED** that Defendant is directed to serve upon the Plaintiff a copy of this decision and order together with notice of entry as soon as practicable See *Protocol for Electronic Filing in*

*Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.*  
<https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

**ENTER JUDGMENT DISMISSING THE ACTION WITH PREJUDICE**

**DECISION**

On April 14, 2017 Plaintiff commenced this action under Article 15 of the Real Property Actions and Proceedings Law. Plaintiff moved for summary judgment (Seq. # 004) and alleged that it is the *bona fide* purchaser for value of a fee simple interest in real property known as 34 East Oakdale Street, Bay Shore, NY, and is in actual possession of the premises. Plaintiff alleged it took title to the premises by deed from Natalie Harris, the survivor of two joint tenants. Plaintiff submitted: a copy of the deed for the subject property into Julian Carter and Natalie Harris recorded March 17, 2006; a death certificate for Julian Carter with a date of death of May 3, 2014; a copy of a quit claim deed from Harris to Carter dated April 2, 2013 that was not signed until May 13, 2014 (ten days after the death of Julian Carter); and Deed dated January 17, 2016 from Natalie Harris to Oakdale III, LLC recorded on March 16, 2017.

Plaintiff further alleged that on February 7, 2006 Natalie Harris and Julian Carter executed and delivered a note wherein they promised to repay IndyMac Bank, F.S.B. \$267,120.00 together with interest, and that this note was secured by a mortgage on the subject premises. Plaintiff further alleged that Mortgage Electronic Recording Systems, Inc., as nominee for IndyMac Bank, F.S.B. on or about November 24, 2009 assigned the mortgage and note to One West Bank F.S.B.<sup>1</sup> that commenced an action in foreclosure against Natalie Harris on December 7, 2009, but that this action was dismissed on April 13, 2016. Plaintiff contended that upon the commencement of that action in foreclosure the note was accelerated and now a foreclosure action upon the default in repayment of the note as secured by the mortgage is beyond the statute of limitations. *See e.g. Stewart Tit. Ins. Co. v Bank of N.Y. Mellon, 154 A.D.3d 656 (2<sup>nd</sup> Dept. 2017)*. Plaintiff moved for summary judgment to cancel the mortgage as being no longer enforceable as security for the note.

Plaintiff, however, submitted an affirmation of Loretta Carty, counsel for ONEWEST BANK FSB in the foreclosure action. At paragraph 13 Carty, in support of the mortgagee's original motion to discontinue that action references an exhibit (Exhibit J) in which she averred that the subject foreclosure action had been discontinued and the loan decelerated. *e-document 83*.

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<sup>1</sup> *its successor in interest is One West Bank, NA.*

13. Plaintiff avers that it is in the best interests of all parties and in the interests of judicial economy to discontinue the action and cancel the notice of pendency heretofore filed in the Office of the County Clerk of the County of Suffolk on December 4, 2009. This foreclosure has been discontinued due to Plaintiff's deceleration of the loan. (See Exhibit J).

This Court denied Plaintiff's motion (Seq. 004) and held that under the foregoing circumstances, there remains a question of whether a new action in foreclosure is barred by the statute of limitations, or instead whether the loan was decelerated and an action in foreclosure remains timely at least as to some of the past due payments and those that are to become due. See *Federal Nat'l Mortgage Ass'n v. Mebane*, 208 A.D.2d 892 (2<sup>nd</sup> Dept. 1994), *A lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage.*

Defendant Deutsche Bank National Trust Company (Hereinafter "Deutsche Bank") cross moved (Mot. 005) for an Order granting it, Deutsche Bank, summary judgment dismissing Oakdale's complaint with prejudice. Defendant Deutsche Bank alleged that the subject premises were originally purchased by Natalie Harris together with Julian Carter on April 2, 2013, while the action in foreclosure was still pending Natalie Harris filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York. Deutsche Bank alleged that either Harris had conveyed the premises to Carter by a quit claim deed, or in the alternative that in the bankruptcy Harris had conveyed her interest in the premises in her bankruptcy proceeding. Both of these contentions that Plaintiff does not have a fee simple interest in the premises are patently without merit. Harris could not have conveyed her interest to Carter when he was already dead and there is no evidence of any conveyance in the bankruptcy proceeding, much less that a deed had been recorded conveying her interest to anyone. *Goldstein v. Gold*, 106 A.D.2d 100 (2<sup>nd</sup> Dept. 1984). Defendants' reliance upon an unrecorded deed must fail in the face of the recorded deed to the Plaintiff, in the absence of some proof that Plaintiff was not a *bona fide* purchaser for value. *Id. and see Real Property Law § 291*. Accordingly, the court denied Defendant's cross motion (Mot. 005).

Plaintiff now moves to reargue its motion for summary judgment. Upon re-argument Plaintiff contends with respect to the statute of limitations:

1. On December 7, 2009 Defendant's predecessor in interest One West Bank FSB commenced an action in foreclosure and accelerated all amounts due under the note.
2. On December 7, 2015, while that foreclosure action was still pending and had not been dismissed, the statute of limitations expired.
3. By Order dated April 13, 2016 the Court dismissed the foreclosure action.

This is the same argument Plaintiff advanced upon the original motion.

In opposition Defendant argues that the statute of limitations did not expire on December 7, 2016, but was tolled for 100 days by the filing of a voluntary petition in bankruptcy by Plaintiff's predecessor in interest, such that the statute of limitations did not expire until March 17, 2017. Defendant further alleges that on February 12, 2017 counsel, McCabe, Weisberg & Conway, PC sent a letter advising borrower, Natalie Harris, that the loan was decelerated. *See e-filed document 123.*

Defendant further alleges that on February 25, 2017 Plaintiff in the foreclosure action filed a cross motion to discontinue on notice to Defendant Natalie Harris both that it was moving to discontinue the action against her and had also decelerating the loan.

Plaintiff in opposition to Defendant's contention that the loan was properly decelerated argues:

1. The February 12, 2016 letter offered by defendant is "inadmissible hearsay" because there is not foundation or authentication by the author, is unsigned and possibly written by someone without authority.
2. There is no affidavit of mailing of the February 12, 2016 letter.
3. The "lender" had no standing to decelerate the loan.
4. The letter and cross motion were "pre-textual" and did not effectively decelerate the loan.
5. The Cross Motion to discontinue the foreclosure action was untimely and should not have been considered by that court.

In addressing Plaintiff's arguments the court does note that Naomi Trainer, Esq. of Zimmerman Law, PC represented Natalie Harris in the underlying foreclosure action and now in this action represents Oakdale III LLC, a Delaware Company formed on December 30, 2015, the entity that purchased the property directly from her former client, Natalie Harris. Oakdale III LLC by its counsel, Naomi Trainer, Esq., is seeking to void the mortgage. Plaintiff's contention that the letter decelerating the mortgage constitutes hearsay is incorrect. The letter decelerating the loan is a legally operative communication, it is not a question of whether it is true or false but rather whether it was said or not by a person with real or apparent authority. *Prince, Richardson on Evidence §§ 8-105 and 8-602.* Accordingly, the objection that the communication was hearsay is without merit. However, the contention that there was no proof of mailing of the executed letter has merit, and further it is a letter addressed to Natalie Harris personally by counsel for the foreclosing note-holder at a time when Harris was represented by counsel. Accordingly, the proffered letter, without more is insufficient to support Defendant's contention in this action that the loan was timely decelerated.

However, the cross motion to discontinue the foreclosure action which expressly decelerated the loan was served upon counsel for Natalie Harris in that action. Plaintiff's contention that the cross motion, while served prior to the expiration of the statute of limitations, was not a timely cross motion is of no consequence. The issue before this court is whether it properly served as notice to Natalie Harris that the bank was decelerating the loan. It did. Further Plaintiff's contention that the deceleration was "pretextual" is without merit. In the foreclosure action Natalie Harris was successful in her motion to dismiss that action pursuant to CPLR § 3215(c) for Plaintiff's failure to move for a default judgment within one year of her default. The dismissal under those circumstances, however, did not bar the Plaintiff from refile within six months and avoiding the claim the statute of limitations had expired. *See Wells Fargo Bank, N.A. v Eitani, 148 A.D.3d 193 (2<sup>nd</sup> Dept. 2017)*. Instead, it elected to decelerate the loan as was its legal prerogative, and this court cannot take away that right in the absence of a compelling equitable claim that has not been advanced here. Accordingly, the Plaintiff's motion (Seq. #007) for summary judgment is denied and cross motion (Seq. #008) by Defendant, Deutsche Bank National Trust Company, as Trustee for IndyMac INDX Mortgage Loan Trust 2006-AR7, Mortgage Pass-Through Certificates Series 2006-AR7 to dismiss is granted.

*ENTER JUDGMENT DISMISSING THE ACTION WITH PREJUDICE*

Dated: March 25, 2019

  
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JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION