

Deutsche Bank Natl. Trust Co. v Kirschenbaum

2019 NY Slip Op 32173(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 850262/2013

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850262/2013

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
INDENTURE TRUSTEE UNDER THE INDENTURE RELATING
TO IMH ASSETS CORPS., COLLATERALIZED ASSET-BACKED
BONDS, SERIES 2005-7,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiffs,

- v -

JOSHUA KIRSCHENBAUM, NEW YORK CITY PARKING
VIOLATION BUREAU, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, UNITED STATES OF AMERICA-
INTERNAL REVENUE SERVICE, SETH WINSLOW, BOARD OF
MANAGERS OF THE 392 CENTRAL PARK WEST
CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, WINSTON CAPITAL, LLC, JOHN DOES AND
JANE DOES

**DECISION AND ORDER OF
REFERENCE**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff's motion for: (1) summary judgment against defendants Joshua Kirschenbaum, Winston Capital, LLC and Board of Managers of the 329 Central Park West Condominium (2) default judgment against the non-answering defendants (3) an Order of Reference is granted.

Background

This foreclosure case concerns a note secured by a residential apartment owned by defendant Kirschenbaum located at 392 Central Park West in Manhattan. On July 21, 2005, Kirschenbaum executed and delivered a note to First Financial Equites, Inc in the amount of \$600,000. As security for the note, he executed a mortgage encumbering the subject property to

Mortgage Electronic Registration Systems, Inc. (“MERS”). MERS assigned the mortgage to plaintiff Deutsche Bank on May 8, 2009. Plaintiff claims to have received physical possession of the note on September 29, 2005.

Defendant stopped making monthly payments of the principal and interest starting in April 2008. Plaintiff commenced this foreclosure action on August 29, 2013. Defendant appeared in the action, asserting several affirmative defenses. Defendants Winston Capital, LLC and Board of Managers of the 329 Central Park West Condominium also answered but have not submitted opposition papers in response to the summary judgment motion.

No action was taken on the case until January 31, 2018, when the Court held a foreclosure settlement conference. The matter was released from the settlement conference part and plaintiff filed this motion.

In opposition, Kirschenbaum insists that summary judgment cannot be granted for the following reasons: plaintiff did not establish standing to bring suit, it did not comply with the requirements of RPAPL 1304 and 1306¹, and it did not send defendant a default notice.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*).

¹ In his answer, Kirschenbaum alleged that plaintiff did not comply with the requirements of RPAPL 1301-1306. However, defendant only addressed RPAPL 1304 and 1306 in his opposition papers and has therefore abandoned the other RPAPL claims.

When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Standing to Bring Suit

Defendant claims that plaintiff lacks standing because it failed to demonstrate that it had physical possession of the note prior to commencing this action. Plaintiff claims it had physical possession of the note as of September 29, 2005 and in support of this assertion, submits an affidavit by an employee of plaintiff's loan servicer (NYSCEF Doc. No. 37). In the affidavit, the employee states: "Plaintiff was physically delivered the original Note on September 29, 2005 and Plaintiff remained in physical possession of the Note up to and through the date upon which this action was commenced" (*id.* at ¶ 5). In its opposition papers, defendant claims that this affidavit is not admissible because it is a business record and plaintiff has failed to establish a proper foundation because the employee does not state that she is personally familiar with plaintiff's business records and has failed to submit "any evidence, such as a power of attorney,

demonstrating that these affiants or Ocwen [the loan servicer] have the authority to act on behalf of the Plaintiff” (Defendant’s Opposition Papers at ¶ 24).

In its reply, plaintiff submits a power of attorney dated September 6, 2013 from Ocwen stating that it is authorized to maintain the foreclosure proceeding and to execute affidavits on behalf of plaintiff (NYSCEF Doc. No. 78). At oral argument, defendant claimed that this power of attorney is inadmissible because it was presented for the first time in reply and new issues cannot be brought up in reply.

“The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417, 585 NYS.2d 360 [1st Dept 1992]). In his opposition papers, defendant made an argument about the validity of the affidavits from the Ocwen employees and asserted that they are invalid unless accompanied by proof, such as a power of attorney. In addressing this argument, plaintiff attached the power of attorney.

The whole point of reply papers is to address the arguments made in opposition and that’s exactly what plaintiff did here. The power of attorney is admissible and as a result, the affidavits of the Ocwen employees (the Jennifer Jeudy Affidavit [NYSCEF Doc. No. 37 and the Vital Philma Affidavit [NYSCEF Doc. No. 38]) are admissible. Because the affidavits establish that plaintiff had physical possession of the note prior to the commencement of the suit, standing has been established.

RPAPL 1304 and 1306

Defendant claims that he was never served with a “90 Day” notice pursuant to RPAPL 1304. However, plaintiff submits an affidavit stating that such a notice was sent by first-class and certified mail (Vital Philma Affidavit, NYSCEF Doc. No. 38). The affidavit is admissible and rebuts defendant’s mere denial of receipt of service (*see Jonathan Woodner, Co. v Higgins*, 179 AD2d 444, 445, 578 NYS2d 561 [1st Dept 1992], holding, “Proof that a regular office practice and procedure is followed with respect to mailings raises a presumption of receipt that cannot be rebutted by a bare denial of receipt”). Defendant further claims that the notice is defective because it is not in the statutorily required 14 point font and instead, is in 12 point font (NYSCEF Doc. No. 63). However, upon viewing the document defendant submitted, it appears that the attached copy of this Notice is not a full-scale copy. Thus, defendant failed to meet its prima facie burden to show that this requirement was not met.

Defendant also insists that plaintiff failed to file a “Step 1” filing with the New York State Department of Financial Services as is required under RPAPL 1306. However, plaintiff has provided proof of the filing statement and acknowledged filing in an affidavit (NYSCEF Doc. No. 75 at ¶ 10, NYSCEF Doc. No.77).²

Default Notice

Defendant alleges that plaintiff has failed to establish that plaintiff mailed a default notice to defendant pursuant to the terms of the mortgage. However, the Jeudy Affidavit indicates “On March 13, 2009, the outstanding payments were duly demanded by mailing a demand letter pursuant to the terms of the Mortgage at the notice address” (NYSCEF Doc. No. 37 at ¶ 10).

² The Court recognizes that plaintiff did not attach proof of the filing statement in its motion papers, but the filing statement is attached in reply as Exhibit 2 (NYSCEF Doc. No.77).

Again, mere denial of receipt cannot overcome the presumption of service that is established by an affidavit.

Defendant has failed to successfully plead any defenses to the foreclosure action.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer and all affirmative defenses of defendants Joshua Kirschenbaum, Winston Capital, LLC and Board of Managers of the 329 Central Park West Condominium, are severed and dismissed and deemed notices of appearance and demand for notice of sale and notice of surplus money; and it is further

ORDERED that plaintiff is entitled to a default judgment against the non-answering defendants; and it is further

ORDERED that Joseph Buono with an address of 804 Route 9 Ste 4, Fishkill, New York 12524 and phone number of 845-765-1050, is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the

Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove the John and Jane Doe defendants; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK

Index No. 850262/2013

COUNTY OF NEW YORK

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE
TRUSTEE UNDER THE INDENTURE RELATING TO IMH ASSETS
CORPS., COLLATERALIZED ASSET-BACKED BONDS, SERIES 2005-7,

Plaintiffs,

v

JOSHUA KIRSCHENBAUM, NEW YORK CITY PARKING VIOLATION
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE, SETH
WINSLOW, BOARD OF MANAGERS OF THE 392 CENTRAL PARK
WEST CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, WINSTON CAPITAL, LLC

Defendants.
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and it is further

ORDERED that within thirty days, counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: December 3, 2019 at 2:15 p.m.

If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

7/8/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE