

**New York 1456 Ave. Corp. v Indymac Fed. Bank,
FSB**

2020 NY Slip Op 30126(U)

January 3, 2020

Supreme Court, Kings County

Docket Number: 501391/2018

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 501391/2018

Motion Date: 10-7-19

Mot. Cal. No.: 34-38

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NEW YORK 1456 AVE CORP.,

Plaintiff,

-against-

DECISION/ORDER

INDYMAC FEDERAL BANK, FSB, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS (MERS),
ONEWEST BANK, N.A., FKA ONEWEST BANK FSB,
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE, WELLS FARGO HOME MORTGAGE, INC.,

Defendants.
-----x

The following papers numbered 1 to 4 were read on these motions:

Papers:	Numbered:
Notice of Motion	
Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Notice of Cross-Motion	
Affidavits/Affirmations/Exhibits/Memos of Law.....	2
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	4
Other.....	

Upon the foregoing papers, the motions are decided as follows:

In this action to discharge a mortgage, the plaintiff, NEW YORK 1456 AVE CORP.,
the current owner of real property located at 1456 New York Avenue, Brooklyn, New York
moves for an order awarding it summary judgment discharging a mortgage on the property and
striking the answer of defendant DEUTSCHE BANK NATIONAL TRUST COMPANY
("DBNT"), as Trustee for Home Equity Loan Asset-Backed Certificates Series INABS 2006-D

MS #01
MS #02

and all counterclaims asserted in their answer. Defendant DBNT cross-moves for summary judgment dismissing the complaint. Both motions are consolidated for disposition.

The mortgage on the real property located at 1456 New York Avenue, Brooklyn, New York was initially given to Indymac Federal Bank, FSB, the original lender, by Rene Dadaille, the prior owner of the property in order to secure payment of a Note in the amount of \$468,000 dated August 16, 2006. The plaintiff maintains that after Rene Dadaille defaulted under the terms of the Note, Indymac Federal Bank, FSB accelerated payment of the Note on May 13, 2009 by commencing an action against her and other defendants to foreclose the mortgage. By order dated October 8, 2013, Hon. Laura Jacobson granted IndyMac's motion for leave to discontinue the action and to date, no other action to foreclose the mortgage has been commenced.

Plaintiff, NEW YORK 1456 AVE CORP., became the owner of the real property at issue on April 2, 2019 and now seeks summary judgment discharging the mortgage claiming that an action to foreclose the mortgage is now time barred. Plaintiff maintains that the six year statute of limitations applicable to foreclosure actions expired six years after May 13, 2009, when Indymac accelerated payment of the Note.

Defendant DBNT opposes the motion and seeks seeks summary judgment dismissing the action claiming that the alleged acceleration of the Note by Indymac was a nullity because it lacked standing to commence the foreclosure action.

Plaintiff's Motion:

While the commencement of an action to foreclose a mortgage may be sufficient to accelerate the payment of the mortgage Note thus triggering the running of the six year period

of limitations to commence an action to foreclose the mortgage (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2003]; *Arbisser v Gelbelman*, 286 AD2d 693, 694), where a plaintiff lacks standing to commence the foreclosure action, the commencement of the action is insufficient, as a matter of law, to demonstrate that the borrower's obligations to pay the Note had been accelerated (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v Suarez*, 49 AD3d at 593; *U.S. Bank Nat'l Ass'n v. Gordon*, 158 A.D.3d 832, 836, 72 N.Y.S.3d 156, *appeal withdrawn sub nom.*, 31 N.Y.3d 1144, 108 N.E.3d 499).

Plaintiff's motion is premised upon its contention that the six year limitations period began to run when Indymac commenced the foreclosure action and accelerated the mortgage Note. Plaintiff did not, however, submit any admissible proof demonstrating, as a matter of law, that Indymac had standing to commence the foreclosure action. Since plaintiff did not demonstrate that the Note was accelerated on May 13, 2009 when the foreclosure action was commenced, its motion for summary judgment must be denied.

The Cross-Motion:

In support of the cross-motion for summary judgment, defendant DBNTC submitted the affidavit of Ronaldo Reyes, the Vice President of DBNTC, who averred that based upon his review of DBNTC's business records, none of which were annexed to this affidavit, DBNTC came into possession of the original Note on August 24, 2006, before Indymac commenced the foreclosure action. He averred that DBNTC maintained continuous possession of the Note to on or about September 9, 2009, when it was shipped to the servicer One West Bank and that One West Bank returned the Note on about April 25, 2013. He goes on to state that on October

29, 2014, the Note was shipped to servicer Ocwen. Defendant DBNTC maintains that since it was in possession of the original Note when Indymac commenced the foreclosure action, Indymac lacked standing to commence the action and that the acceleration of the Note was therefore a nullity.

Evidence of the contents of business records is admissible only where the records themselves are introduced (*Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 205–06, 97 N.Y.S.3d 286, 294, citing 35 Carmody–Wait 2d § 194:94 [2019]; see *People v. Barnes*, 177 A.D.2d 989, 578 N.Y.S.2d 9; see also *People v. Olivero*, 27 Misc.3d 1218[A], 2010 N.Y. Slip Op. 50794[U], 2010 WL 1797036 [Civ. Ct., Kings County]; *People v. Ross*, 12 Misc.3d 755, 764, 814 N.Y.S.2d 861 [Crim. Ct., Kings County 2006]). “Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay” (35 Carmody–Wait 2d § 194:94 [2019]; see *U.S. Bank Natl. Assn. v. 22 S. Madison, LLC*, 170 A.D.3d 772, 774, 95 N.Y.S.3d 264, 2019 N.Y. Slip Op. 01635, 2019 WL 1051220 [2d Dept. 2019]; *People v. Barnes*, 177 A.D.2d 989, 578 N.Y.S.2d 9). Since Reyes did not annex any of defendant’s business records to his affidavit, the averments in his affidavit constitute hearsay. For this reason, defendant DBNTC did not establish as a matter of law that Indymac lacked standing when it commenced the foreclosure action and that the acceleration of the Note was a nullity (see *Aquino v. Ventures Tr. 2013-I-H-R by MCM Capital Partners*, 172 A.D.3d 663, 664, 100 N.Y.S.3d 386, 388–89). Thus, it has not been demonstrated, as a matter of law, an action to foreclose would not be time barred.

Accordingly, it is hereby

ORDERED that the motion and cross-motion are **DENIED**.


This constitutes the decision and order of the Court.

Dated: January 3, 2020



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.



KINGS COUNTY CLERK
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