

**Insiders Success Ventures, LLC v OneWest Bank,  
FSB**

2020 NY Slip Op 32046(U)

February 21, 2020

Supreme Court, Kings County

Docket Number: 500172/17

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>st</sup> day of February, 2020.

PRESENT:

HON. CAROLYN E. WADE,  
Justice.

-----X  
INSIDERS SUCCESS VENTURES, LLC,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 500172/17

*Seq's 7, 8 & 11 L*

ONEWEST BANK, FSB AS SUCCESSOR IN INTEREST TO INDYMAC BANK, FSB, a DIVISION OF CIT BANK NA; and DEUTSCHE BANK NATIONAL TRUST COMPANY, as TRUSTEE of the RESIDENTIAL ASSET SECURITIZATION TRUST 2006-A5CB, MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-E UNDER THE POOLING AND SERVICING AGREEMENT DATED APRIL 1, 2006,

Defendants.

-----X

The following papers numbered 1 to 11 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1-2 3-4 5-7  
4 8-9 10  
8-9 11

Upon the foregoing papers in this action to cancel a mortgage, defendant Deutsche Bank National Trust Company, as Trustee of the Residential Asset Securitization Trust 2006-A5CB, Mortgage Passthrough Certificates, Series 2006-E under the Pooling and Servicing Agreement dated April 1, 2006 (Deutsche Bank) moves for an order granting it summary

judgment, pursuant to CPLR 3212, dismissing the complaint as against it (motion seq. 7). Plaintiff Insiders Success Ventures, LLC (Insiders) cross-moves for an order 1) pursuant to CPLR 3212, granting it summary judgment and 2) for an order cancelling and discharging the notice of pendency filed upon the subject property (motion seq. 8). Deutsche Bank also moves, by order to show cause, for leave to file an exhibit to a supporting affidavit under seal in further support of its motion for summary judgment (motion seq. 11).

**Relevant Background and Procedural History**

This foreclosure action involves a residential mortgage encumbering a multi-family property at 958 St. Marks Avenue, Brooklyn (Property) executed by Heru-Ur Nekhet (Nekhet), which secured a promissory note and mortgage in favor of Lancaster Mortgage Bankers (Lancaster) in the amount of \$608,000 on December 20, 2005, and was recorded on January 19, 2006. Nekhet defaulted, and at the time of said default, IndyMac Mortgage Services, a division of OneWest Bank FSB (OneWest), was servicing the loan.

Deutsche Bank claims it received physical delivery of the note on March 1, 2006 and had possession of it throughout 2009. However, on July 23, 2009, when OneWest commenced a foreclosure action against Nekhet, OneWest claimed it had possession of the note and attached a copy, which was stamped as a certified true copy of the original note. Nekhet appeared in the 2009 foreclosure action and asserted various affirmative defenses including that OneWest lacked standing because it was not actually the holder of the note. Deutsche Bank was not a party to that suit. Subsequently, OneWest and Nekhet executed

two stipulations dated February 25, 2010: one cancelling the notice of pendency and another discontinuing the action with prejudice.

By deed dated November 8, 2007 and recorded November 26, 2007, the property was conveyed by Nekhet to Corner Brownstone, Inc. Corner Brownstone, which was controlled by Nekhet, conveyed the property to Insiders by deed dated May 2, 2016 and recorded May 12, 2016. Nekhet is the managing member of Insiders.

Insiders filed this action on January 4, 2017 to cancel the mortgage on the property pursuant to RPAPL 1501. In its complaint, it alleged three causes of action: 1) to discharge the mortgage based on the expiration of the applicable statute of limitations to foreclose on the property under CPLR 1501(4) pursuant to the limitation set forth in CPLR 213(4) as an action upon a note, 2) to discharge the mortgage based on the expiration of the applicable statute of limitations to foreclose on the property under CPLR 1501(4) pursuant to the limitation set forth in CPLR 213(2) as an action upon a contractual liability and in CPLR 213(6) an action based upon mistake, and 3) to discharge the mortgage based on Deutsche Bank no longer having an interest to foreclose on the property under CPLR 1501(1). Deutsche Bank originally defaulted, but on January 11, 2018, its default was vacated by court order and it was given thirty days to file an answer. Deutsche Bank answered the complaint on January 23, 2018, denying the material allegations, and asserted seven affirmative various defenses. Insiders filed its note of issue on April 29, 2019 and Deutsche Bank filed its motion for summary judgment on June 28, 2019. The original motion was adjourned on July

29, 2019 to September 27, 2019 and Insiders filed its cross motion for summary judgment on August 8, 2019.

### Parties' Contentions

Deutsche Bank argues that judgment should be granted in its favor and the plaintiff's complaint dismissed because OneWest was not in possession of the note when it commenced the prior foreclosure action, or when it discontinued the action with prejudice, and therefore it lacked standing to accelerate or bar future action for Deutsche Bank. It argues that the mortgage cannot be time-barred for foreclosure because OneWest did not have the power to accelerate the note and trigger running of the statute of limitations on the whole debt. Deutsche Bank further argues that it is similarly not bound by OneWest's discontinuance of the action "with prejudice" under res judicata as it held the note throughout the commencement and discontinuance of the prior action and, thus, OneWest was never a predecessor in interest. Among its other exhibits in support of its allegations that it was the holder of the note, Deutsche Bank submits the version of the note it claims it held, which bears an indorsement by Lancaster, a specific indorsement to IndyMac Bank, F.S.B. (IndyMac) and an indorsement by IndyMac.

In its cross motion and opposition, Insiders claims it is entitled to summary judgment against Deutsche Bank because OneWest's 2009 foreclosure action accelerated the entire loan and commenced the six-year statute of limitations for anyone to bring an action to foreclose on the mortgage, and OneWest's stipulation discontinuing that action barred Deutsche Bank from commencing another foreclosure due to its privity with OneWest.

In response to Deutsche Bank's claims that OneWest lacked standing, Insiders argues that OneWest was a successor in interest to IndyMac through the sale and transfer of all loans to OneWest in the Loan Sale Agreement. In addition, OneWest attached the note to its summons and complaint when it commenced the 2009 foreclosure action showing it was the holder of the note at that time. Insiders argues this note showed OneWest's standing because it was a certified copy and it had only a single blank endorsement by Lancaster Mortgage Bankers, the original lender. Insiders contends that Deutsche Bank's submission of the note with an additional indorsement signed by Lancaster to IndyMac and a blank endorsement by IndyMac shows it only subsequently obtained an interest in the note after OneWest. Insiders similarly argues that the notice of pendency should be cancelled because Deutsche Bank cannot show it had an interest in the property in 2009. In this regard, Insiders claims that OneWest established it was the holder of the note throughout 2009 and still had possession of same since it attached the document to the complaint it filed against Lancaster on June 4, 2010 in the Article 15 action.

Amongst its exhibits, Insiders also provides a February 6, 2012 affidavit of Caryn Edwards, assistant secretary at OneWest, who swears to OneWest's possession of the note at the time the 2009 foreclosure action was filed. Insiders also refers to a prior motion filed by the attorney for OneWest wherein it claimed possession of the note in 2009. Insiders maintains that Deutsche Bank is barred under res judicata from enforcing the note because it claims OneWest "presumably" represented Deutsche Bank's interests at the 2009 foreclosure action, as servicer of the note and, therefore, Deutsche Bank would have

benefitted if OneWest was successful in the action (Garin affirmation dated August 26, 2019, ¶70). Insiders further states “it is likely” Deutsche Bank granted OneWest power to commence the action as its servicer (*id.*, ¶72). Additionally, Insiders points to the Deutsche Bank attorneys’ prior filing of a motion for OneWest as an indication of joint legal strategy (*see id.*, ¶73). Insiders also argues that it has a judgment against OneWest which it cites as the law of this case.

Insiders also objects to the records presented by Deutsche Bank, specifically the Ocwen logs and records presented. It claims they are inadmissible as business records because they are self serving, incomplete and not properly authenticated. Insiders argues that the affiant fails to claim familiarity with the record keeping practices of Ocwen, and is not personally familiar with the presented records. Insiders further argues that the affiant’s information is irrelevant because Ocwen became Deutsche Bank’s servicer four years after the 2009 foreclosure action was commenced. Insiders claims Deutsche Bank has failed to present evidence that it possessed the note at the time the 2009 action was commenced and objects to Deutsche Bank providing any additional documents it failed to present in its initial motion.

In reply, Deutsche Bank argues that Insiders’s cross motion is untimely, and that the records and affidavit from Ocwen are admissible. It claims that even though the affiant does not attest to his familiarity with the record keeping practices of Deutsche Bank, the documentary evidence is admissible because it is established that the records and logs were inherited and incorporated into Ocwen’s own records and relied upon routinely pursuant to the other business record exception. Deutsche Bank objects to Insiders’ use of presumptions,

speculation and indirect evidence to rebut Deutsche Bank's evidence. However, it also cites Insiders' withdrawal of a subpoena to depose OneWest during the pendency of this case as evidence that Insiders was fearful what a OneWest deposition would reveal. Deutsche Bank argues Insiders' submissions are insufficient to show OneWest's standing to bring a foreclosure action in 2009 or to bind Deutsche Bank.

In further support of its claims, Deutsche Bank submits a new affidavit from the Vice President of Deutsche Bank, Ronaldo Reyes, wherein he generally swears to Deutsche Bank's receipt of the note in 2006 with the additional endorsements, and possession of the note at the time the 2009 foreclosure action was commenced. Deutsche Bank also seeks leave to file an exhibit to the supporting affidavit under seal (motion seq. 11). Deutsche Bank claims the exhibit is part of the confidential and proprietary tracking system that it uses to track notes and mortgages for loans, and that disclosure of it could result in some kind of competitive harm to it. Deutsche Bank argues it is entitled to submit this additional affidavit because Insiders challenged the admissibility of Deutsche Bank's original submission, and Insiders has an opportunity to respond in its reply papers in further support of its cross motion. Deutsche Bank argues that the evidence it has submitted has fully rebutted Insiders' claims warranting summary judgment in its favor, or at least raises sufficient grounds to deny Insiders' cross motion.

Deutsche Bank goes on to admit that OneWest's attachment of a copy of the note to its foreclosure action summons and complaint was prima facie evidence that it had possession of the note, but it asks the court to consider Nekhet's answer in the 2009 action where he repeatedly claimed OneWest was not the holder of the note, and Nekhet's favorable

termination of the 2009 foreclosure action as grounds to estop him from changing his position in this case and now claiming OneWest did have standing. Deutsche Bank claims the indorsement history makes it clear that OneWest did not have possession of the note because IndyMac was shut down in 2008 and, therefore those IndyMac indorsements on the note had to have been made prior to OneWest's foreclosure action. Thus, OneWest did not have a real copy of the note at the time it commenced its foreclosure action.

Insiders opposes Deutsche Bank's submission of the Reyes affidavit as new evidence, inadmissible hearsay, and insufficient to rebut its evidence. It further objects to sealing of one of the exhibits as unwarranted and unfair.

Law

A party seeking summary judgment has the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see CPLR 3212[b]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (see CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]). Once movant has made its prima facie showing, the burden shifts to the non-moving party to show "facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]).

“As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action” (*Wells Fargo Bank N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; see also CPLR 213 [4]). “The statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated” (*Plaia v Safonte*, 45 AD3d 747, 748 [2d Dept 2007]).

It is “well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*EMC Mortgage Corporation v Patella*, 279 AD2d 604, 605 [2d Dept 2001] [internal citations omitted]). Indeed, once the mortgage debt is accelerated, the borrowers’ right and obligation to make monthly installments ceases and all sums become immediately due and payable (see *Federal National Mortgage Ass’n v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]). Further, commencement of a foreclosure action is sufficient to put the borrower on notice that the option to accelerate the debt has been exercised (see *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983 [2d Dept 2012]). “[W]hen a verified complaint contains an acceleration clause, the ‘unequivocal overt act’ of filing that document in the courthouse constitutes a valid election of the right to accelerate” (*Puzzuoli v JPMorgan Chase Bank, N.A.*, 55 Misc 3d 417, 425 [Sup. Ct. Dutchess County 2016]). “A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the

prior foreclosure action” (*NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]).

However, “[i]t is now well settled that an acceleration of a mortgaged debt, by either written notice or commencement of an action, is only valid if the party making the acceleration had standing at the time to do so” (*Milone v US Bank N.A.*, 164 AD3d 145, 153 [2d Dept 2018]; see *Federal National Mortgage Association v Onuoha*, 172 AD3d 1170, 1172 [2d Dept 2019]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note (see *Aurora Loan Servicing, LLC v Taylor*, 25 NY3d 355, 361–362 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 1099 [2d Dept 2015]). A plaintiff will fail to prove it has standing where it does not show it was the holder or assignee of the note at the time the foreclosure action was commenced by “showing either a written assignment of the underlying note or the physical delivery of the note” (*U.S. Bank, N.A. v Noble*, 144 AD 3d 786, 787 [2d Dept 2016], quoting *US Bank N.A. v Guy* 125 AD3d 845, 846-847 [2d Dept 2015]). A servicer of a loan can show its standing to commence a foreclosure action where it proves it took possession of the note prior to commencing the action from the trustee (see *Aurora*, 25 NY3d at 361). The mortgage passes as an incident to the note (*id.*). “Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [3d Dept 2015]; see *Central Mtge. Co. v Davis*, 149 AD3d 898, 900 [2d Dept 2017]; *U.S. Bank,*

*N.A. v Zwisler*, 147 AD3d 804, 806 [2d Dept 2017]).

KINGS COUNTY CLERK

Discussion

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As an initial matter, the court notes that Insiders' cross motion was timely given that when it was made Deutsche Bank's motion was still pending, it is premised on similar grounds for recovery, and was filed with sufficient notice prior to the return date given by the court.

In consideration of sealing records, "[s]ince confidentiality is the exception, the court must make an independent determination of whether to seal court records in whole or in part for "good cause" (*Mancheski v Gabello Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007]) "The party seeking to seal documents must demonstrate compelling circumstances" (*id.*). Usually sealing is in the courts discretion and "a case by case analysis is warranted" (*id.*). Here, Deutsche Bank's application to seal an exhibit to the Reyes affidavit is insufficient in that the affidavit in support is conclusory as to the cause and interest Deutsche Bank has in sealing that document. As such, the need to seal this document has not been sufficiently proven to the court.

Turning to the substantive arguments made by the parties on their respective motion and cross motion, the court finds that questions of fact exist regarding OneWest's standing to foreclose on the mortgage when it filed the 2009 action thereby precluding an award of summary judgment. The parties submitted two different versions of the note they claim they each held in 2009 (*see U.S. Bank Nat. Ass'n v Handler*, 140 AD3d 948, 949 [2d Dept 2016] ["the submission by the plaintiff of two different copies of the note with endorsements raises

a triable issue of fact as to whether the note was assigned to the plaintiff prior to the commencement of the action”). Further, the parties submitted competing affidavits which directly contradict each other on this key issue of who was the holder of the note at the time the 2009 foreclosure action was commenced.

For the reasons stated above, it is hereby

ORDERED that Deutsche Bank’s motion (in seq. # 7) seeking summary judgment dismissing the complaint is denied; and it is further

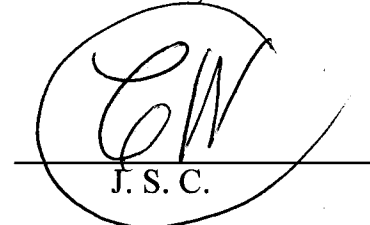
ORDERED that Insiders’ cross motion (in seq. #8) seeking summary judgment and to cancel and discharge the notice of pendency filed upon the subject property is denied; and it is further

ORDERED that Deutsche Bank’s motion (in seq. 11) seeking leave to file the exhibit under seal is denied; and it is hereby

ORDERED that Deutsche Bank’s refile of the exhibit previously filed under seal is stayed for fifteen (15) days from entry of this order on notice for Deutsche Bank to have leave to move and provide sufficient cause to seal this document to the Appellate Division.

The foregoing constitutes the decision and order of this court.

E N T E R,



Hon. Carolyn E. Wade  
Acting Supreme Court Justice

KINGS COUNTY CLERK  
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