

Deutsche Bank Natl. Trust Co. v Tracey

2021 NY Slip Op 30565(U)

February 24, 2021

Supreme Court, Kings County

Docket Number: 525050/2017

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 24th day of February 2021

HONORABLE FRANCOIS A. RIVERA

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DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR BOSCO CREDIT V TRUST
SERIES FOR SMY 2012-1,

Plaintiff,

DECISION & ORDER
Index No. 525050/2017

- against -

DONNA TRACEY,

Defendants.

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By notice of motion filed on December 23, 2019, Deutsche Bank National Trust Company, as Trustee for Bosco Credit V Trust Series for SMY 2012-1 (hereinafter DBNTC) has moved pursuant to CPLR 3212 for summary judgment against defendant Donna Tracey (hereinafter Tracey).

BACKGROUND

On December 29, 2017, DBNTC commenced the instant action by filing a summon and notice of motion in lieu of complaint (hereinafter the commencement papers) with the Kings County Clerk’s office. The return date for the hearing on the motion in lieu of complaint was March 29, 2018. On March 29, 2018, Tracey filed a notice of appearance. The return date for the hearing was rescheduled on consent of both parties to May 4, 2018. On May 4, 2018, DBTNC’s counsel failed to appear for oral argument and the case was marked off.

MOTION PAPERS

DBNTC's motion papers include, a notice of motion, a proposed order, an affirmation of its counsel, an affidavit from an officer of its servicer, and an affidavit of service of the motion papers. The affirmation of its counsel refers to six annexed exhibits labeled A through F. Exhibit A is described as the Note. Exhibit B is described as a notice of default. Exhibit C is a copy of the commencement papers without exhibits. Exhibit D is an affidavit of service of the commencement papers. Exhibit E is the notice of appearance of Tracey's counsel. Exhibit F is a letter reflecting that the parties had consented to adjourn the motion.

Tracey's opposition papers includes Tracey's affidavit and a memorandum of law.

LAW AND APPLICATION

CPLR 3213 provides as follows:

Motion for summary judgment in lieu of complaint. When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

CPLR 3213 is a hybrid procedure incorporating certain elements of an action and certain elements of motion practice (*Goldstein v Saltzman*, 13 Misc 3d 1023 [Sup Ct

2006], citing *Flushing Nat. Bank v Brightside Mfg. Inc.*, 59 Misc 2d 108 [Sup Ct 1969]).

DBTNC set the hearing date on the notice of motion in lieu of complaint for March 29, 2018. On March 29, 2018, Tracey filed a notice of appearance. According to DBNTC's counsel, as set forth in the affirmation in support of the motion, the notice of motion in lieu of complaint was adjourned on consent of both sides to May 4, 2018. On May 4, 2018, DBTNC's counsel failed to appear for oral argument and the case was marked off.

Rather than move to restore the notice of motion in lieu of complaint, DBTNC filed the instant motion for summary judgment. Due to the hybrid nature of an action commenced pursuant to CPLR 3213, DBTNC's default in appearing on May 4, 2018 rendered the action subject to dismissal. DBTNC's did not obtain the consent of Tracey or seek leave of the court to restore the notice of motion in lieu of complaint. Rather, DBTNC proceeded to make the instant motion.

Obviously, DBTNC's notice of motion in lieu of complaint was not granted due to DBTNC's default in appearing on the hearing date. Under these circumstances the action may either be dismissed or the summons and notice of motion in lieu of complaint may be converted to a summons and complaint, unless the court orders otherwise (CPLR 3213, *Mirham v Awad*, 131 AD3d 121 [2nd Dept 2015]).

If the action is not dismissed and the commencement papers are converted to a summons and complaint, it should be done on notice to the defendant with an opportunity to interpose an answer. It is noted that Tracey did not interpose an answer to the notice of motion in lieu of complaint. Rather Tracey submitted opposition to the instant notice

of motion.

In an exercise of discretion, the Court directs the following. The instant motion and Tracey's response to same are disregarded as nullities. DBTNC's is granted leave to move to restore the original notice of motion in lieu of complaint by a notice of motion filed on or before March 30, 2021. If DBTNC does not do so, the action will be dismissed without prejudice.

CONCLUSION

The notice of motion filed on December 23, 2019 by Deutsche Bank National Trust Company, as Trustee for Bosco Credit V Trust Series for SMY 2012-1 for summary judgment against defendant Donna Tracey and the defendant's opposition papers to same are deemed a nullity.

Deutsche Bank National Trust Company, as Trustee for Bosco Credit V Trust Series for SMY 2012-1 DBTNC's may move to restore the original notice of motion in lieu of complaint by a notice of motion filed on or before March 30, 2021. If Deutsche Bank National Trust Company, as Trustee for Bosco Credit V Trust Series for SMY 2012-1 does not move to restore the original notice of motion in lieu of complaint on or before March 30, 2021, the action will be dismissed without prejudice.

The foregoing constitutes the decision and order of this Court.

ENTER

Francis A. Rivera

J.S.C.

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