

**Deutsche Bank Natl. Trust Co. v Ezagui**

2021 NY Slip Op 30866(U)

March 18, 2021

Supreme Court, Kings County

Docket Number: 22601/2007

Judge: Richard Velasquez

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At an IAS Term, Part 66 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 18<sup>th</sup> day of March, 2021.

P R E S E N T:

HON. RICHARD VELASQUEZ,  
Justice.

-----X  
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS  
TRUSTEE OF AMERIQUEST MORTGAGE SECURITIES,  
INC., ASSET BACKED PASS THROUGH CERTIFICATES,  
SERIES 2005-R1, UNDER THE POOLING AND  
SERVICING AGREEMENT DATED AS OF FEBRUARY  
1, 2005, WITHOUT RECOURSE,

Plaintiff,

- against -

Index No. 22601/2007  
Motion Seq. No. 3

ELIYAHU EZAGUI; BOARD OF MANAGERS OF  
KINGSTON GARDENS CONDOMINIUM; TOVA  
EILENBERG C/O JAROSLAWICZ & JAROS, ESQ.;  
JACOB ECKHAUS; YONA GELERNTER; MENACHEN  
GUREVITCH; DOV JUNIK; SCHMUEL KESSELMAN;  
DAVID KRAINER; HILLEL LAUFER; MENACHEM  
LERMAN; ABRAHAM LOKSHIN; DAVID MALKA;  
SCHNEUR MINSKY AND YAAKOV OSDOBA C/O  
JAROSLAWICZ & JAROS, ESQS; "JOHN DOE" AND  
"JANE DOE," said names being fictitious, it being  
the intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein,

Defendants.

-----X  
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) _____	<u>2, 4-28</u>
Opposing Affidavits (Affirmations) _____	<u>45-62</u>
Reply Affidavits (Affirmations) _____	<u>30-41</u>

Upon the foregoing papers in this foreclosure action, plaintiff Deutsche Bank National Trust Company, as Trustee of Ameriquest Mortgage Securities, Inc., Asset

Backed Pass Through Certificates, Series 2005-R1, under the Pooling and Servicing Agreement dated as of February 1, 2005, without recourse (Deutsche Bank), moves (in motion sequence [mot. seq.] three) for an order: (1) granting it a default judgment against defendant Eliyahu Ezagui (Ezagui or borrower); (2) pursuant to CPLR 3212, granting it summary judgment on the complaint and dismissing the counterclaim asserted by defendants Tova Eilenberg, Jacob Eckhaus, Yona Gelernter, Menachem Gurevitch, Dov Junik, Schmucl Kesselman, David Krainer, Hillel Laufer, Menchem Lerman, Abraham Lokshin (Lokshin), David Malka, Schneur Minsky and Yaakov Osdoba (collectively, the non-borrower defendants); (3) granting it a default judgment against non-appearing defendants, Board of Managers of Kingston Gardens Condominium (Condominium) and Sneor Dahan (Dahan) s/h/a “John Doe”; (4) appointing a referee to compute the sum due under the note and mortgage, pursuant to RPAPL 1321 and CPLR 4311; and (5) amending the caption to substitute Sneor Dahan in place and instead of “John Doe” and striking “Jane Doe” from the caption.

### ***Background***

On or about June 20, 2007, Deutsche Bank commenced this action by filing a summons, a complaint and a notice of pendency to foreclose a mortgage encumbering the residential condominium at 613 East New York Avenue, Unit 3L, in Brooklyn (Property). The mortgage was executed by defendant Ezagui on December 28, 2004, to secure a \$459,000.00 note in favor of Deutsche Bank’s predecessor, Ameriquest Mortgage Company (Ameriquest). According to the complaint, Ezagui defaulted by failing to make the monthly mortgage payments due on February 1, 2007, and thereafter.

On or about July 24, 2007, the non-borrower defendants, Tova Eilenberg, Jacob Eckhaus, Yona Gelernter, Menachem Gurevitch, Dov Junik, Schmucl Kesselman, David Krainer, Hillel Laufer, Menchem Lerman, Lokshin, David Malka, Schneur Minsky and Yaakov Osdoba, collectively filed a verified answer to the complaint. The non-borrower defendants asserted a cross claim against Ezagui for a fraudulent conveyance of the Property in violation of New York Debtor Creditor Law (DCL) § 270 and asserted a counterclaim against Deutsche Bank to set aside the mortgage on the ground that Ezagui “did not properly have title or the right to mortgage the property” (non-borrower defendants’ answer at ¶ 32). Essentially, the counterclaim alleges that Ezagui engaged in a fraudulent scheme in which he took money from the non-borrowing defendants in exchange for a promise to deliver condominium units once constructed, but instead allegedly transferred the condominium units to himself or his family members, mortgaged the units and used the funds for his own purpose (*id.* at ¶ 15).

The counterclaim further alleges that, on or about February 18, 2003, non-borrowing defendant Lokshin paid Ezagui \$160,000.00 to purchase the Property (*id.* at ¶ 18). Ezagui allegedly permitted Lokshin to possess and occupy the Property once construction was completed, and Lokshin paid common charges to the condominium board (*id.* at ¶ 24). The counterclaim alleges that Ezagui “repeatedly promised” to provide Lokshin with a deed to the Property, but instead, transferred the Property to his “cohort” and then back to Ezagui so that he could mortgage the Property and pocket the funds (*id.* at ¶ 26). The counterclaim alleges that the conveyances of the Property to Ezagui and

his cohort were fraudulent conveyances to defraud creditors and contract vendees, like Lokshin.

On or about July 30, 2007, Deutsche Bank filed a reply to the non-borrower defendants' counterclaim. On or about August 9, 2007, the borrower, Ezagui, filed a response to the non-borrower defendants' cross claim for a fraudulent conveyance, but failed to answer or otherwise respond to Deutsche Bank's complaint. In addition, the Condominium and Dahan failed to answer or otherwise appear in this action. According to Deutsche Bank's affidavits of service, Ezagui, the Condominium and Dahan were all served with process in June 2007, *more than 13 years ago*.

On September 15, 2020, Deutsche Bank filed the instant motion for an order granting it a default judgment against Ezagui, the Condominium and Dahan more than a decade after those defendants defaulted, granting it summary judgment on its complaint, granting it an order of reference and dismissing the non-borrower defendants' counterclaim to set aside the mortgage.

Regarding the non-borrower defendants' counterclaim, Deutsche Bank submits a memorandum of law arguing that dismissal of the counterclaim is warranted, as a matter of law, because (1) the statute of limitations bars the non-borrower defendants' common-law fraud counterclaim against Deutsche Bank, which accrued on April 29, 2005 when the mortgage was recorded in public records, and (2) the non-borrower defendants failed to plead fraud against Deutsche Bank with the requisite specificity.

Lokshin, one of the non-borrower defendants, and a creditor of Ezagui, opposes that branch of Deutsche Bank's motion which seeks dismissal of his counterclaim.

Lokshin asserts that Deutsche Bank misconstrues his counterclaim as asserting a claim against Deutsche Bank for common-law fraud, which is not the case. Lokshin clarifies that his counterclaim asserts a cause of action against Ezagui for fraudulent conveyance of the Property in violation of DCL §§ 270-281, and to set aside the mortgage. Lokshin's counsel asserts that:

“The counterclaim alleges a conveyance from the developer entity Chaishorn to Eliyahu Ezagui without consideration and then a scheme by Ezagui to mortgage the property in an effort to subvert Lokshin's rights to the property.”

Lokshin argues that Deutsche Bank's summary judgment motion fails to address his actual counterclaim for fraudulent conveyance, and therefore, Deutsche Bank failed to satisfy its burden of proof on the motion.

### ***Discussion***

Deutsche Bank moves for an order granting it a default judgment against the borrower, Ezagui, the Condominium and Dahan more than one year after those defendants defaulted by failing to answer or otherwise respond to Deutsche Bank's 2007 complaint. Deutsche Bank does not address, or even mention, the fact that its motion for a default judgment is untimely, pursuant to CPLR 3215 (c), and fails to provide an excuse for its delay in moving for a default judgment.

CPLR 3215 (c) provides that:

“[i]f the plaintiff fails to take proceedings for the entry of judgment *within one year after the default*, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon

its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed” (emphasis added).

Where a plaintiff fails to seek leave to enter a default judgment within one year after a party’s default, the plaintiff must show “sufficient cause,” which requires the plaintiff to demonstrate both a reasonable excuse for the delay and a meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2011]; *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [1997]). “The policy underlying the statute is ‘to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims” (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2015], quoting *Giglio*, 86 AD3d at 307).

Here, Deutsche Bank’s affidavits of service in the record reflect that the borrower, Ezagui, the Condominium and Dahan were all served with process in June of 2007. Under CPLR 3215 (c), Deutsche Bank was required “to take proceedings for the entry of judgment within one year after [those parties’] default . . .” Deutsche Bank missed the one-year deadline, and inexplicably waited *more than 13 years* before it moved for the entry of a default judgment against those defendants, including the borrower. Deutsche Bank failed to provide any excuse for this extensive delay in prosecuting its action. Consequently, Deutsche Bank’s motion for a default judgment against Ezagui, the Condominium and Dahan is denied and Deutsche Bank’s complaint against Ezagui, the Condominium and Dahan is dismissed, pursuant to CPLR 3215 (c).

Because the complaint is dismissed as against Ezagui, the borrower, Deutsche Bank’s motion for summary judgment and an order of reference is denied as moot.

In addition, Deutsche Bank failed to satisfy its prima facie burden of establishing that the non-borrower defendants' counterclaim to set aside the mortgage based on Ezagui's alleged fraudulent conveyance of the Property is subject to dismissal. Deutsche Bank's moving papers incorrectly analyze the non-borrower defendants' counterclaim as if it were a claim for common-law fraud, which is not the case. Accordingly, it is

**ORDERED** that the branch of Deutsche Bank's motion (in mot. seq. three) seeking a default judgment against Ezagui, the Condominium and Dahan is denied, and the complaint is dismissed as against defendants Ezagui, the Condominium and Dahan, pursuant to CPLR 3215 (c); and it is further

**ORDERED** that those branches of Deutsche Bank's motion seeking summary judgment and an order of reference are denied as moot, since the complaint against Ezagui, the borrower, is dismissed; and it is further

**ORDERED** that the branch of Deutsche Bank's motion seeking to dismiss the non-borrower defendants' counterclaim is denied; and it is further

**ORDERED** that the branch of Deutsche Bank's motion seeking an order striking the Jane Doe defendant from the caption is granted.

This constitutes the decision and order of the court.

Dated: March 18, 2021

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ