

Deutsche Bank Natl. Trust Co. v Pototschnig

2022 NY Slip Op 30384(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 850142/2019

Judge: Arthur F. Engoron

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

PRESENT: HON. ARTHUR ENGORON PART **37**

Justice

-----X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
INDENTURE TRUSTEE, FOR NEW CENTURY HOME
EQUITY LOAN TRUST 2005-3,

Plaintiff,

- v -

HUBERT POTOTSCHNIG, JOSEPH RAIA, GEORGE
GALLETTI, BOARD OF MANAGERS OF CENTRAL PARK
PLACE CONDOMINIUM, DOUGLAS FARALDI, JOHN DOE,

Defendants.

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INDEX NO. 850142/2019
MOTION DATE 12/17/2021
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, the motion of defendant Board of Managers of Central Park Place Condominium for summary judgment dismissing the complaint is granted.

Background

This long-running foreclosure saga spans years, counselors, corrections, parties, index numbers, and motions, but the relevant facts are as follows.

i. The Note, The Mortgage, The Correction, and The Bankruptcy

On or about May 20, 2005, defendant Hubert W. Pototschnig executed and delivered to non-party New Century Mortgage Corporation (“New Century”) an Adjustable Rate Note promising to pay a principal of \$620,000.00, with interest (“The Note”). NYSCEF Doc. No. 53.

The Note was secured by a mortgage to New Century, purportedly of 301 West 57th Street, Unit 23B, New York, New York, recorded on August 1, 2005, at the Office of the New York City Register, CRFN 2005000427872 (“The Mortgage”). NYSCEF Doc. No. 53. However, because Mr. Pototschnig did not actually have title to Unit 23B, on December 9, 2005, a Correction Mortgage was filed that included the actual unit number and legal description of the property being mortgaged, namely Unit 49D (“The Correction”). Id.

Mr. Pototschnig's initials appear on every single page of The Note and The Mortgage, the latter of which is annexed to The Correction, but there are no signatures or initials anywhere on the four pages that constitute The Correction itself. NYSCEF Doc No. 53 at 40-44.

Mr. Pototschnig denies seeing, let alone executing, The Correction. NYSCEF Doc. No. 33.

On April 2, 2007, New Century filed a Voluntary Petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. NYSCEF Doc. No. 58.

On July 22, 2008, the Bankruptcy Court issued an Order Amending Order Confirming the Second Amended Joint Chapter 11 Plan of Liquidation of the Debtors and the Official Committee of the Unsecured Creditors ("The Plan"), correcting an error in paragraph 12 of a July 15, 2008 Order. NYSCEF Doc. No. 59.

Pursuant to The Plan, New Century was dissolved, and all its assets were transferred to the New Century Liquidating Trust ("Liquidating Trust"). NYSCEF Doc. No. 59. Pursuant to Article 8(E)(1) of The Plan, all New Century's assets were "deemed for all purposes" to have been distributed to the Liquidating Trust. NYSCEF Doc. No. 60.

And, pursuant to Article 9(K) of The Plan, titled "Cancellation of Notes and Instruments," "all notes, agreements and securities evidencing Claims and Interests and the rights thereunder of the holders thereof shall, with respect to the Debtors, be canceled and deemed null and void and of no further force and effect." NYSCEF Doc. No. 60.

In a letter dated December 22, 2008, non-party Carrington Mortgage Services, LLC ("Carrington") informed Mr. Pototschnig that The Mortgage was being modified, effective that day, to include, inter alia, a lowered interest rate and to waive any unpaid late charges ("The Carrington Modification"). NYSCEF Doc. No. 53 at 70-74. The letter listed a telephone number to call if Mr. Pototschnig did not agree to the modified terms. Id.

ii. The First Default, The 2010 Action, and The Second Default

On February 1, 2009, Mr. Pototschnig defaulted ("The First Default"), and, on February 19, 2010, was sent a "Notice of Intent to Foreclose." NYSCEF Doc. No. 61.

On June 30, 2010, an entity called New Century purported to assign to plaintiff, Deutsche Bank National Trust Company, as Indenture Trustee, for New Century Home Equity Loan Trust 2005-3 ("Deutsche"), The Mortgage, in exchange for one dollar, CRFN 2010000246941 ("The Purported Assignment"). NYSCEF Doc. No. 53 at 68-70.

On July 16, 2010, Deutsche filed a mortgage foreclosure action against Mr. Pototschnig in the Supreme Court of New York, New York County, under Index Number 109449/2010 ("The 2010 Action"). NYSCEF Doc. No. 57.

On December 1, 2013, Mr. Pototschnig allegedly ceased any further mortgage payments ("The Second Default").

In a Decision dated July 13, 2016, the Honorable Paul Wooten granted motions by Mr. Pototschnig in The 2010 Action to “supplement the record” with certain documentary evidence and for summary judgment dismissing the complaint, without prejudice. Deutsche v. Pototschnig, Index No. 109449/2010, (Sup. Ct., New York 2016). NYSCEF Doc. No. 61. In that decision Justice Wooten explained that Deutsche had “failed to establish any legal interest in the Note and Mortgage, or even that an enforceable mortgage exists.” NYSCEF Doc. No. 61. Specifically, the Court found that “the alleged assignment by Carrington was of no force or effect” as “plaintiff has offered no explanation as to how the note and mortgage could have been properly delivered to it after the New Century bankruptcy... Plaintiff’s argument that its mere possession of the documents creates a presumption of delivery is erroneous.” Id.

Justice Wooten also found that, due to the complex and coded nature of the 30,000+-entry Loan Schedule provided by plaintiff and associated with The Plan and the Liquidating Trust, absent “testimony from a person with knowledge regarding the Loan Schedule, the entry cannot be accepted as proof that the Note and Mortgage were part of” the Liquidated Trust created in the wake of New Century’s bankruptcy. NYSCEF Doc. No. 61.

Deutsche never perfected an appeal.

iii. The Instant Action

On July 27, 2019, plaintiff commenced the instant mortgage foreclosure action against Mr. Pototschnig, based on The Second Default. NYSCEF Doc. No. 53.

On January 28, 2020, Mr. Pototschnig moved to dismiss based on res judicata. NYSCEF Doc. No.

In a Decision and Order dated June 29, 2020, this Court denied Mr. Pototschnig’s motion, finding that res judicata did not apply as the instant foreclosure action and the prior foreclosure action were based upon different defaults, despite having the same parties. NYSCEF Doc. No. 40.

On October 14, 2021, defendant Board of Managers of Central Park Place Condominium (“Board”) made the instant motion, pursuant to CPLR 3212, for summary judgment dismissing Deutsche’s complaint, arguing that plaintiff lacked standing as it had “failed to establish it was either the holder or assignee of the subject mortgage or note at the time of the commencement of this action.” NYSCEF Doc. No. 52.

On December 3, 2021, Deutsche cross-moved for an order to amend its complaint, extend its time to serve, and to deny the Board’s motion. NYSCEF Doc. No. 69.

In its proposed Amended Complaint, Deutsche added a second cause of action seeking an order declaring that, because The Purported Assignment of The Mortgage in 2010 had been found by The 2010 Action Court to be “of no force and effect,” and because Deutsche believed “on or about May 26, 2006 the loan was transferred to” it, plaintiff “holds a first lien mortgage effective as of May 26, 2006 for the Mortgage in the original principal amount of \$620,000.00.” NYSCEF Doc. No. 77.

The proposed Amended Complaint also adds a third cause of action, requesting the Court order the Office of the City Register of the City of New York to expunge The Purported Assignment. NYSCEF Doc. No. 77.

As part of its motion, pursuant to 22 NYCRR 202.8-g(a), the Board included a statement of material facts as to which it contends there are no genuine issues to be tried. NYSCEF Doc. No. 67. Deutsche did not include its own Statement of Material Facts, nor did it respond to the Board's.

Discussion

Where “standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief. In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and holder or assignee of the underlying note at the time the action is commenced.” U.S. Bank N.A. v Collymore, 68 AD3d 752, 753 (2009) (internal citations omitted). “The mere assignment of the mortgage without an effective assignment of the underlying note is a nullity.” Id. citing Merritt v Bartholick, 36 NY 44, 45 (1867).

Here, Deutsche argues that it can prove its standing “as *both* assignee of the Note, endorsed in blank, and the Mortgage *and* as the holder of the Note under” the UCC.

Specifically, counsel for Deutsche claims it can prove that assignment occurred by directing the Court's attention to a copy of an unsigned Pooling and Servicing Agreement (“PSA”) located on an SEC website and dated June 24, 2005. Plaintiff says the PSA shows that “[o]n this date this Mortgage Loan was assigned to the Trust” but never explains how. Without further explication the PSA, does not appear to prove that New Century assigned The Note to plaintiff. Instead, the PSA appears to show only that Deutsche was an “Indenture Trustee” to New Century's “Master Servicer,” pursuant to the terms of an Indenture dated June 24, 2005. Notably, the referenced and incorporated Indenture is not included in plaintiff's papers.

Also not included in plaintiff's papers, but explicitly referenced and incorporated into the PSA: an Amended and Restated Trust Agreement, a Servicing Agreement, and a Mortgage Loan Purchase and Agreement.

If Deutsche intended for the Court to infer assignment from, for example, Article VI of the PSA, discussing the potential a New Century default, it never said or explained how.

None of which matters, however, as, pursuant to The Plan, the securitized mortgages seemingly implicated in the New Century Home Equity Loan Trust 2005-3 at the heart of the PSA were “canceled and deemed null and void” by New Century's bankruptcy in July 2008.

Other than its PSA theory of assignment, plaintiff's remaining arguments to support this Court finding it has standing are reruns from The 2010 Action, and fail for the same reasons.

Deutsche says that it has “standing as assignee of the endorsed Note and Mortgage by physical delivery” and, to prove this, provides the affidavit of Elizabeth Gonzales, a Default Fulfillment Manager at Carrington, in which she avers, without further explanation of when or why, “that Deutsche Bank, the document custodian, had possession of the Promissory Note on May 26, 2006” and “that [Carrington] had possession of the Promissory Note, on behalf of Plaintiff, on or before June 27, 2019, the date that this action was commenced.” NYSCEF Doc. No. 76.

Just as Justice Wooten found in The 2010 Action, however, plaintiff’s argument that its mere possession of the documents in question, absent any explanation of how the documents came to be there, creates a presumption of delivery, is erroneous. Wells Fargo Bank, N.A. v. Jones, 139 AD3d 520, 524 (2016) (“Conclusory boiler plate statements such as ‘[p]laintiff is the holder and is in possession of the original note,’ or ‘[p]laintiff is the holder and is in possession, or is otherwise entitled to enforce the note . . .’ will not suffice when standing is raised as a defense”) (internal citations omitted); See also U.S. Bank Nat. Ass’n v. Brjimohan, 153 AD3d 1164, 1165 (1st Dep’t 2017) (finding standing where plaintiff bank submitted affidavit of vice president of loan servicer attesting to specific date of physical delivery of note and its retention afterwards).

Plaintiff’s reliance on the fact The Note is “endorsed in blank” is also misguided. Just as in The 2010 Action, an undated, unnumbered, separate page with no specific reference to The Note or The Mortgage is simply not sufficient to support an allegation of delivery. Collymore, 68 AD3d at 754 (finding “[t]he affidavit of a vice-president of the Bank submitted in support of summary judgment did not indicate when the note was physically delivered to the Bank, and the version of the note attached to the vice-president’s affidavit contained an undated indorsement in blank by the original lender” and therefore was insufficient).

Therefore, because Deutsche has failed to show beyond a mere assertion that it took physical possession of The Note (and therefore The Mortgage with it) before it was nullified by New Century’s bankruptcy, it has not shown that it was the lawful holder of the Note at the time this action was commenced and therefore it has not proven that it has standing.

Conclusion

Thus, because plaintiff Deutsche Bank National Trust Company, As Indenture Trustee, for New Century Home Equity Loan Trust 2005-3, has not shown that it was the lawful holder of the Note at the time this action was commenced, it is hereby ordered that defendant Board of Managers of Central Park Place Condominium’s motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing the complaint.

ARTHUR ENGORON, J.S.C.

1/20/2022
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE