

**Deutsche Bank v Walton**

2023 NY Slip Op 31293(U)

March 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 35100/07

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2<sup>nd</sup> day of March 2023.

P R E S E N T:

HON. LARRY D MARTIN,  
J.S.C.

Index No.: 35100/07

*EF*

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DEUTSCHE BANK,

Plaintiff,

**DECISION AND ORDER**

*-against-*

PORTIA WALTON et al,

Defendant,

\_\_\_\_\_ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this

Motion:

<b>Papers</b>	<b>Numbered</b>
Motion (MS 2)	<u>1</u>
Opposition	<u>2</u>
Reply	<u>3</u>
Sur-reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced on September 18, 2007. All defendants initially defaulted and an order of reference was signed on February 7, 2008. Later that year, Plaintiff moved for judgment of foreclosure and sale and Defendant cross-moved for leave to file a late answer. In early 2009, The Honorable Donald Kurtz ordered that the motions be held in abeyance and referred the matter to the Foreclosure Settlement Conference Part. A series of conferences ensued, spanning the next three years. The JHO handling the matter, the Honorable

Muriel Hubsher, issued a series of orders taking issue with Plaintiff and its then-counsel's handling of the matter – and tolling interest from April 2010<sup>1</sup>.

In late 2011, the parties stipulated to withdraw the pending motions and for Defendant to file a late answer without jurisdictional defenses by January 13, 2012. She did so.

By order dated April 17, 2012, Judge Kurtz accepted the recommendation of Referee Dale Berson dated December 7, 2011<sup>2</sup> and referred the matter for a bad faith hearing. Thereafter, the Honorable Herbert Kramer appears to have marked the hearing off the calendar on June 1, 2012 and referred the matter back to the IAS part. Further conferences in front of Judge Kurtz were scheduled for May 7, May 29, and June 5, 2013. On the final date, the case was marked “Other Final Disposition (Pre-Note)” with the comment “P/Gina.”<sup>3</sup>

On June 18, 2021, Plaintiff filed the instant motion, seeking to restore the case to the active calendar and, thereafter, for summary judgment in its favor. Plaintiff's counsel – which substituted into the action in 2015 but apparently took no action until 2021 – offers no explanation of how and why this action was marked disposed. Instead, it suggests – accurately, but irrelevantly – that this case was not subject to dismissal pursuant to CPLR 3215[c] and 3216 and that a court's power to dismiss a complaint sua sponte should be used sparingly. However – this matter does not appear to have been dismissed by order. As Defendant does not appear to oppose restoring this matter to active status, the Court will nonetheless do so.

It is well established that “[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default” (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). As Defendant admits that she is in default, Plaintiff has done so.

Plaintiff has, however, failed to demonstrate its standing. “A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced” (*Bank of America, NA v Paulsen*, 125 AD3d 909, 910 [2d Dept 2015]). “Either a

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<sup>1</sup> The toll appears to remain ongoing.

<sup>2</sup> The referee's recommendation does not appear to be in the record.

<sup>3</sup> Upon information and belief, it is very likely that this notation is stating that the marking was per “Gina” who was Judge Kurtz's law clerk at that time.

written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*US Bank, NA v Collymore*, 68 AD3d 752, 754 [2d Dept 2009] [citations omitted]). Contrary to Plaintiff's contention, the Lopez Affidavit is insufficient to demonstrate that it was in possession of the note at the time of commencement of this action. Her testimony is based upon a review of unproduced business records and is, thus, inadmissible (*CitiMortgage, Inc. v. Goldberg*, 179 A.D.3d 1006 [2d Dept 2020]; *Nationstar Mortgage, LLC v. Jean-Baptiste*, 178 A.D.3d 883, 885 [2d Dept 2019]). Further, the assignment of mortgage from MERS could not have assigned the note which it never owned.

Defendants have abandoned their remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

Plaintiff's motion is granted to the extent that the instant action is restored to active status and Defendant's second and third affirmative defenses are stricken. The caption is amended by changing the name of the Plaintiff from Deutsche Bank National Trust to Deutsche Bank National Trust Company, as Trustee for Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2006-D, Home Equity Mortgage Loan Asset-Backed Certificates Series INABS 200 and shall now read:

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DEUTSCHE BANK NATIONAL TRUST  
COMPANY, AS TRUSTEE FOR HOME  
EQUITY MORTGAGE LOAN ASSET  
BACKED TRUST SERIES INABS 2006-D,  
HOME EQUITY MORTGAGE LOAN ASSET  
BACKED CERTIFICATES SERIES INABS  
2006,

Plaintiff,

-vs-

PORTIA WALTON; JUAN ALVARADO;

ANNA ALVARADO; CURTIS RILEY; GINA

RHODES,

Defendants

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The parties are directed to proceed to trial on the remaining issues.

This constitutes the decision and order of the Court.

ENTER:

  
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Hon. Larry D Martin JSC