

Deutsche Bank v Wilson

2023 NY Slip Op 32705(U)

May 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 511966/19

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 23rd day of May 2023.

P R E S E N T:

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

Index No.: 511966/19

_____ x

DEUTSCHE BANK,

Plaintiff,

DECISION AND ORDER

-against-

DIVINE K WILSON et al,

Defendant,

_____ x

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

Papers	Numbered
Motion (MS 2)	<u>1</u>
Opp/Cross (MS 3) ¹	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross Reply	<u>4</u>

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

The instant action was commenced on May 30, 2019. Defendant Wilson (and Co-Defendant Larmond) filed a pre-answer motion to dismiss on July 11, 2019, alleging that the instant action was filed beyond the applicable statute of limitations. On December 3, 2019, the motion was denied as – among other things – issues of fact were found to remain as to whether the loan had been properly deaccelerated. Notice of entry of the order was served approximately one week later and Defendant’s time to answer expired on December 23, 2019 (CPLR 3211[f]). He, though represented by counsel at the time, failed to do so.

¹ The opposition filed by non-party Orlena J Thomas-Johnson is not properly before the Court. Even were the Court to have considered it, it is substantially duplicative of the papers filed by Defendant.

A pre-settlement conference was scheduled for February 18, 2020 by the Foreclosure Department. From the record, it appears that a defendant appeared and the matter was referred to the screening settlement part for the first two-party conference before a referee. The Courts shut down before it was held, however. As part of the effort to restart matters in this county, a conference was held on April 25, 2022. The matter was referred back to the Foreclosure Settlement Conference Part and it appears that the initial conference was held there on October 27, 2022. Defendant then filed an answer on November 27, 2022 which was promptly rejected by Plaintiff.

On February 27, 2022, Plaintiff filed the instant motion for an order of reference. Defendant opposed and cross-moved for dismissal based on FAPA and, if necessary, to vacate his default in answering. Plaintiff opposed.

Defendant must vacate his default prior to again seeking dismissal based upon a statute of limitations defense (*21st Mtge Corp v Palazzotto*, 164 AD3d 1293 [2d Dept 2018]). "A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*Chase Home Fin., LLC v. Minott*, 115 A.D.3d 634[2d Dept 2014]). Here, Defendant offers no excuse for his default, admitting repeatedly in his papers that he elected not to defend the action once he determined that he had no defenses – but now wishes to do so following the passage of FAPA which, he believes, renders this action untimely. As such, he is unable to vacate his default.

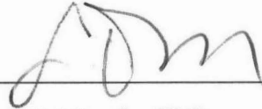
Even assuming that CPLR 3408[m] would be applicable to this action, Defendant failed to answer within thirty days following the first conference in FSCA.

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing. To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). Plaintiff met its burden (see, *Deutsche Bank v Silverman*, 178 AD3d 898 [2d Dept 2019]).

Motion for an order of reference granted (see accompanying order). Cross-motion denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

KINGS COUNTY CLERK
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