

Deutsche Bank v Lewis

2023 NY Slip Op 34114(U)

September 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 525912/18

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 22nd day of September 2023.

P R E S E N T:

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

Index No.: 525912/18

_____ x

DEUTSCHE BANK,

Plaintiff,

DECISION AND ORDER

-against-

AQUILA LEWIS 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 3)	<u>1</u>
Opp/Cross (MS 4)	<u>2</u>
Reply/Opp to Cross	<u>3</u>

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

Plaintiff moves for renewal of its motion for summary judgment and Defendant’s cross-motion for summary judgment which led to the dismissal of this action for failure to comply with RPAPL 1304. Defendant consents to renewal and the vacatur of the dismissal based upon *Kessler* but cross-moves for dismissal based upon an alleged failure to comply with RPAPL 1306.¹ Plaintiff opposes.

¹ RPAPL 1304 – and by extension RPAPL 1306 – can be raised by an answering Defendant even if she failed to include it in her answer (see, for example, *Nationstar v Gayle*, 191 AD3d 1003 [2d Dept 2021]). As such, Defendant does not need to amend her answer to assert it. However, were it necessary, this Court would have granted the portion of Defendant’s motion seeking to do so.

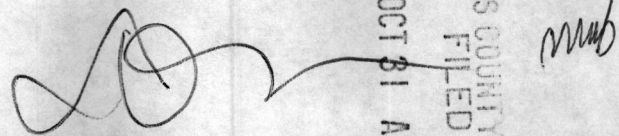
It is undisputed that Plaintiff's proof of filing statement reflects that it provided erroneous information to DFS. Specifically, Plaintiff characterized the loan as a 1st lien when actually it is in second position, as adjustable rate when it has a fixed rate of 12%, and its term as "other" rather than fifteen years. Defendant argues that, in doing so, Plaintiff defeated the purpose of RPAPL 1306 and, thus, did not comply with that precondition to suit. Plaintiff counters that the errors are non-prejudicial and can be overlooked.

"[C]ompliance with RPAPL 1306 is a condition precedent to the commencement of a foreclosure action" (*US Bank v Chiramannil*, 205 AD3d 966, 967 [2d Dept 2022]). "RPAPL 1306(2) specifically requires the filing of information that 'will enable the superintendent to ascertain the type of loan at issue' (emphasis added) and states that the data collected shall be used to 'perform an analysis of loan types' (id. § 1306[4]) and to direct appropriate services to borrowers in need" (*US Bank v Adams*, 202 AD3d 867, 870 [2d Dept 2022]). "[T]he principal objective of the filings is to provide statistical data permitting DFS to accurately track and analyze loans at risk of foreclosure and properly allocate foreclosure counseling resources statewide in order to combat the mortgage crisis—an aim also reflected in the legislative history" (*CIT Bank v Schiffman*, 36 NY3d 550, 559-560 [2021]). Herein, the errors thwart that goal – DFS has been provided with the wrong lien position, wrong loan type, and wrong loan term all of which are certainly material to its analyses (see, *Adams*, 202 AD3d at 871).

Motion granted to the extent that renewal is granted and, thereupon, the previous dismissal is vacated. Cross-motion to dismiss granted. Case dismissed for failure to comply with RPAPL 1306.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

2023 OCT 31 AM 9:33
KINGS COUNTY CLERK
FILED

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**