

Deutsche Bank Natl. Trust Co. v Velasquez

2023 NY Slip Op 34848(U)

April 11, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 601310/16

Judge: Joseph C. Pastorella

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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:

HON. JOSEPH C. PASTORESSA

JUSTICE OF THE SUPREME COURT

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR GSAMP TRUST
2005-WMC3,

Plaintiff(s),

-against-

NADINE VELASQUEZ AKA NADINE LEBRON,
DAVID VELASQUEZ, JP MORGAN CHASE
BANK NA, CLERK OF THE SUFFOLK
COUNTY DISTRICT COURT, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, MELISSA VELASQUEZ,

Defendant(s).

X

Mot Seq: # 004-MD

005-MG; CASE DISP

ATTYS FOR PLAINTIFF(S):

ROBERTSON ANSCHUTZ SCHNEID CRANE &
PARTNERS
900 MERCHANTS CONCOURSE, STE. 310
WESTBURY, NY 11590

ATTYS FOR DEFENDANT(S):

PETROFF AMSHEN
1795 CONEY ISLAND AVENUE, 3RD FLOOR
BROOKLYN, NY 11230

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Affidavit (Affirmation)	

Upon the foregoing papers, it is

ORDERED that the motion by the plaintiff for a judgment of foreclosure and sale is denied, and it is further

ORDERED that the cross-motion by the defendant Nadine Velasquez a/k/a Nadine Lebron for summary judgment in her favor is granted.

In this mortgage foreclosure action, the defendant Nadine Velasquez a/k/a Nadine Lebron served an answer to the complaint but did not raise the failure to comply with RPAPL 1304 as an affirmative defense. The defendant David Velasquez did not answer or appear in the action. The plaintiff made a motion for summary judgment that was granted without opposition. The plaintiff now moves for a judgment of foreclosure and sale and the defendant Nadine Velasquez a/k/a Nadine Lebron cross-moves for summary judgment on the grounds that, inter alia, the plaintiff failed to strictly comply with RPAPL 1304 because a single notice was jointly addressed to both defendants.

Contrary to the plaintiff's contention, the moving defendant did not waive her claim that the plaintiff failed to strictly comply with RPAPL 1304 as a defense based on noncompliance with RPAPL 1304 may be raised at any time prior to the entry of a judgment of foreclosure and sale (*see Wells Fargo Bank v Davidson*, 202 AD3d 880; *US Bank v Krakoff*, 199 AD3d 859; *US Bank v Mohammed*, 197 AD3d 1205; *Nationstar Mtg v Matles*, 185 AD3d 703).

The Appellate Division, Second Department has specifically held that RPAPL 1304 requires that the plaintiff mail a 90 day notice addressed to each borrower in separate envelopes as a condition precedent to commencing a foreclosure action (*see HSBC Bank v Schneps*, 210 AD3d 748; *Deutsche Bank v Loayza*, 204 AD3d 753; *Wells Fargo Bank v Davidson*, 202 AD3d 880; *Wells Fargo Bank v Yapkovitz*, 199 AD3d 126; *US Bank v Krakoff*, 199 AD3d 859). The Court noted that receipt of the notice is inconsequential as mailing the notice jointly addressed to both borrowers in the same envelope does not constitute strict compliance with the statute (*see Wells Fargo Bank v Yapkovitz*, *supra* at 136). The Appellate Division, First Department has reached the same result (*see US Bank v Maiorello*, 207 AD3d 428).

Here, the defendant submitted evidence which indicated that the 90 day notice was jointly addressed to both borrowers. In opposition, the plaintiff failed to demonstrate the existence of an issue of fact as the plaintiff submitted no evidence that it strictly complied with the statute. Accordingly, the motion for a judgment of foreclosure and sale is denied. The cross-motion by the defendant for summary judgment is granted and the complaint is dismissed insofar as asserted against the moving defendant.

DATED: April 11, 2023



HON. JOSEPH C. PASTORESSA, J.S.C.