

Deutsche Bank v Brown

2024 NY Slip Op 33262(U)

June 4, 2024

Supreme Court, Kings County

Docket Number: Index No. 528559/22

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 4th day of June 2024.

P R E S E N T:

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

Index No.: 528559/22

DEUTSCHE BANK,

Plaintiff,

DECISION AND ORDER

-against-

MICHELLE BROWN 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 1)	<u>1</u>
Opp/Cross (MS 2)	<u>2</u>
Reply/Opp to Cross	<u>3</u>

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

A foreclosure action was filed in 2014 against the borrower/deedholder to the property, La Dwan Brown. The case proceeded to auction and the property went back to the bank. Thereafter, 10224 Ave K LLC moved to intervene and vacate all prior proceedings in light of the defendant's death in 2010 – prior to the commencement of that action. By order dated December 13, 2022, this Court found that to dismiss that action as a nullity would abrogate Plaintiff's statutory right¹ to pursue its already-pending action for reforeclosure (the instant action) and held Ave K's motion in abeyance pending resolution of this case.

¹ Pursuant to RPAPL 1503, "[w]hen real property has been sold pursuant to a judgment in an action to foreclose a mortgage ... and it appears from the public records or from the allegations of the complaint that such judgment ...

Plaintiff now moves for summary judgment in its favor. Ave K, alleging that is the successor-in-interest to Defendant Michelle Brown, opposes and cross-moves for dismissal of this action as the underlying foreclosure is allegedly still pending. In the alternative, it seeks a stay pending the determination of its appeal from the order holding its motion to intervene in the foreclosure action in abeyance. Plaintiff opposes.

Where real property was sold pursuant to a judgment of foreclosure and sale but the judgment may be void or voidable as to any person, the purchaser (or its successor) in possession² of the property may maintain an action for reforeclosure (RPAPL 1503; *McWhite v I&I Realty Group*, 210 AD3d 1069, 1071 [2d Dept 2022]). “To prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action ‘was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby’” (*US Bank v Lomuto*, 198 AD3d 707, 708 [2d Dept 2021], quoting RPAPL 1523[2]).

Herein, there is no dispute that the defect in the foreclosure action was Plaintiff’s inclusion of the deceased instead of his heirs or estate as a party – and, thus, the absence of the legal owner of the property as a defendant. Plaintiff has also shown that the omission was not due to fraud or willful neglect, proffering the Oster Affidavit and appended exhibits which show that the affiant’s office ran a search of the Social Security Death Index in 2014 (prior to filing the foreclosure action) which did not reflect that La Dwan Brown was deceased and that it only learned of his passing in 2018 when Plaintiff attempted to sell the property to a third-party after the execution of the referee’s deed.³ The Court notes that, as in *Lomuto*, “[u]nder these facts, there is simply no reason why the plaintiff would willfully omit a necessary party” (*Lomuto*, 198

was or may have been, for any reason, void or voidable as against any person, including an owner of the real property mortgaged, the purchaser ... may maintain an action as provided in this article to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property...” (emphasis added).

² Ave K’s argument that Plaintiff cannot bring the instant action as it is not “in possession” of the property as required by RPAPL 1503 is unavailing. Plaintiff is the deeded owner of the property and, while it has not evicted the tenants, has (according to Ave K) expressed that fact to the tenants. It is, thus, in (legal) possession of the property.

³ Ave K suggests that Plaintiff’s failure to vacate the sale and prior proceedings when it learned of La Dwan’s death in 2018 is willful neglect. However, even were the Court to agree that decision was “neglect” (and it does not), the defect in the original foreclosure action which existed since its commencement four years earlier was certainly not due to “willful neglect.”

AD3d at 709, quoting *HSBC v Guardian Preservation*, 160 AD3d 1236, 1237 [3d Dept 2018]).⁴

As such, Plaintiff has met its initial burden.

Plaintiff argues that Ave K has not demonstrated that it is the successor-in-interest to Michelle Brown and, thus, its opposition and cross-motion are not properly before the Court. While it is true that the cross-movant did not proffer the unrecorded deed to it or any other proof that it acquired Michelle's interest in the property, Plaintiff is well aware of the basis for Ave K's claim and produced a copy of the deed as part of its opposition. Plaintiff also asserts – and Ave K does not challenge – that Michelle did not include list this property in her 2015 bankruptcy filing, limiting her ability to transfer the property without permission of the trustee and Bankruptcy Court. It suggests that the deed to Ave K is, thus, void. While Plaintiff may be technically correct that the property is still vested in the bankruptcy estate (11 USC 554[d]), this Court can find no case where a subsequent deed was vacated on that basis. As such, the Court will consider the cross-motion and opposition.

Ave K argues that the foreclosure action is still pending as its appeal has not terminated and, thus, that the instant action must be dismissed pursuant to RPAPL 1301 and CPLR 3211[a][4]. Plaintiff argues that Ave K's arguments are erroneous for a multitude of reasons. Michelle did not raise the co-pendency as a defense in her answer, thereby waiving the right to do so now. Additionally, the foreclosure action terminated and an auction was held. Indeed, the foreclosure had to have been completed for a reforeclosure cause of action to be viable. That a post-sale motion to vacate was filed and the resulting decision appealed does not resurrect the foreclosure action. Further, the instant reforeclosure case was commenced prior to Ave K's attempt to dismiss that action – so Plaintiff had no reason to seek permission to file it. Finally, nothing in RPAPL 1301 appears to prevent the filing of a re-foreclosure under Article 15 – which inherently is asserted against a non-party to the prior action. The Court substantially agrees with Plaintiff. As such, dismissal is denied.

A stay pending appeal from the foreclosure decision is also unwarranted. The appeal is unlikely to be heard anytime soon and the property remains largely in limbo due to the pendency

⁴ In both *Lomuto* and *Guardian Preservation*, the plaintiff relied upon a title search rather than a death index search – but the principle is the same.

of this action and Ave K's motion in the foreclosure. Were this action to advance to conclusion, the ultimate issues can all be brought up on appeal at the same time.

Motion 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
FILED
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