

Deutsche Bank Natl. Trust Co. v Salgado

2025 NY Slip Op 30426(U)

January 16, 2025

Supreme Court, New York County

Docket Number: Index No. 850447/2023

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

-----X
INDEX NO. 850447/2023
MOTION DATE _____
MOTION SEQ. NO. 001

Deutsche Bank National Trust Company, as Trustee for
BCAP Trust LLC 2007-AA3 Mortgage Pass-Through
Certificates Series 2007-AA3

Plaintiff,

- v -

Salgado, Elcio et al

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

In this action Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 105 Norfolk Street Apt 5B, New York, New York. The mortgage, dated March 28, 2007, was given by Defendant Elcio Salgado (“Salgado”) to non-party Mortgage Electronic Registration Systems, as nominee for non-party lender Countrywide Bank, FSB (“Countrywide”). The mortgage secures a loan with an original principal amount of \$912,000.00 and is evidenced by a note the same date as the mortgage. Defendant Salgado and non-party Nationstar Mortgage, LLC (“Nationstar”) executed two loan modification agreements, dated October 25, 2016, and October 1, 2022. In both documents, Salgado acknowledged the amount owed, including new money, and reaffirmed his promise to repay same under the note. Under the latter loan modification, the indebtedness is stated as \$1,220,364.72.

Plaintiff commenced this action alleging that Defendant Salgado defaulted in repayment of the loan. Salgado filed an answer and pled eighteen affirmative defenses, including lack of standing, failure to comply with RPAPL §§1303 and 1304 as well as failure to serve a contractual pre-foreclosure notice. Salgado also pled two counterclaims to which Plaintiff replied. Now, Plaintiff moves for summary judgment against Salgado, to strike the answer and affirmative defenses, a default judgment against the non-appearing Defendants, an order of reference and to amend the caption. Salgado opposes the motion and cross-moves to *inter alia* to dismiss Plaintiff’s complaint for lack of standing. Plaintiff opposes the cross-motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants’ default in repayment (*see U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see*

CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), its strict compliance with RPAPL §§1303 and 1304 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Talya Harris ("Harris"), a Document Execution Associate employed by Nationstar Mortgage LLC D/B/A Mr. Cooper ("Nationstar"), the servicer of Plaintiff. Harris stated that her affidavit was based upon both personal knowledge and examination of business records. However, she does not indicate what information is based on personal observation or derived from records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]. To the extent Harris' knowledge is based upon a review of the books and records, her affidavit laid a proper foundation for the admission of Nationstar's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Nevertheless, virtually all the salient loan documents were created by Plaintiff's assignors and Harris failed to demonstrate knowledge of any other entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Harris also failed to attest that any records received from prior makers were incorporated into the records her employer kept and were routinely relied on in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]).

As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Harris' allegations regarding Salgado's default were similarly deficient as she does not indicate whether her knowledge on this point is personal or founded in records. To the extent that it was based on records, the records evidencing the default (ie. an account ledger or similar records) were not proffered (*see eg US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The annexed default notices, even if admissible, are insufficient to establish the default in payment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]).

Accordingly, since the evidence proffered to demonstrate the note and mortgage is in admissible form and no records evidencing the default were produced, Plaintiff failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, 200 AD3d 947 [2d Dept 2021]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). “The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed a copy of the note to the complaint endorsed in blank by Countrywide on its face. This is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597).

Concerning the branch of the cross-motion to dismiss based upon lack of standing, the argument concerning purported irregularities in the written assignments of the note and mortgage as well as Plaintiff came into possession of the note are unavailing. “Attachment of the note to the complaint was sufficient to establish possession” (*U.S. Bank N.A. v Russell*, 186 AD3d 1181 [1st Dept 2020]). Under the circumstances “[t]here is simply no requirement that an entity. . . must establish how it came into possession of that instrument” (*JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]) and any deficiency in the assignments is irrelevant (*see PNC Bank v Salcedo*, 161 AD3d 571 [1st Dept 2018]).

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff’s motion to amend the caption is granted (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that the branch of Defendant’s cross-motion to dismiss is denied and the other branches are denied as unnecessary, and it is

ORDERED that the DOE defendants are stricken from the caption as the New York County Clerk will not accept any judgment with a “Doe” Defendant in the caption; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
Deutsche Bank National Trust Company, as Trustee for BCAP
Trust LLC 2007-AA3 Mortgage Pass-Through Certificates
Series 2007-AA3,

Plaintiff,

-against-

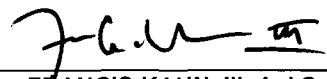
Elcio Salgado; The Board of Managers of The Blue Condominium Homeowners Association; City of New York Environmental Control Board; City of New York Parking Violations Bureau; City of New York Transit Adjudication Bureau,

Defendants.

-----X
and it is

ORDERED that this matter is set down for a status conference on **March 13, 2024 @ 12:00 pm** via Microsoft Teams.

1/16/2025
DATE



FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: