

**Deutsche Bank Natl. Trust Co. v Modena**

2025 NY Slip Op 31540(U)

April 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 504787/14

Judge: Cenceria P. Edwards

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.

At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the \_\_\_\_ day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SECURITIZED ASSET BACKED RECEIVABLES, LLC TRUST 2007-BR5, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-BR5,

Plaintiff,

- against -

Index No. 504787/14

SALVATORE MODENA; GIOVANNA MODENA, and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the Plaintiff, the persons or parties intended being the tenants, occupants, persons, or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____	<u>29, 31-40 44-45, 47</u>
Opposing Affidavits (Affirmations) _____	<u>45, 47</u>
Reply Affidavits (Affirmations) _____	<u>49, 51-52</u>

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1763 64<sup>th</sup> Street in Brooklyn (Block 5539, Lot 68) (Property), plaintiff Deutsche Bank National Trust Company, As Trustee for Securitized Asset Backed Receivables, LLC Trust 2007-BR5, Mortgage Pass-Through Certificates, Series 2007-BR5 (Deutsche Bank or Plaintiff) moves (in motion sequence [mot. seq.] two) for an order: (1)

vacating the court's November 6, 2017, dismissal order (2017 Dismissal Order); (2) restoring this foreclosure action to the calendar and reinstating the notice of pendency filed against the Property; and (3) amending the caption to substitute defendant Giovanna Modena with Angela Modena, as Administrator of the Estate of Giovanna Modena (NYSCEF Doc No. 29).

Defendant Salvatore Modena and the Estate of Giovanna Modena (Defendants) cross-move (in mot. seq. three) for an order: (1) dismissing this foreclosure action for failure to prosecute, pursuant to CPLR 3216 (a), or, alternatively, (2) directing that the Plaintiff waives interest, late charges, outstanding fees and costs, as well as attorneys' fees, since July 19, 2017 (NYSCEF Doc No. 44).

### **Background**

On May 27, 2014, Deutsche Bank commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1 and 3). The complaint alleges that on January 26, 2007, Defendants executed and delivered to New Century Mortgage Corporation a \$291,000.00 promissory note secured by a mortgage encumbering their Property (NYSCEF Doc No. 1 at ¶¶ 3-4). The complaint alleges that Salvatore and Giovanna Modena "defaulted on their obligation under the terms of the Note and Mortgage by failing and omitting to pay monthly installments due to the Plaintiff commencing with the monthly payment due on May 1, 2008, and each monthly payment due thereafter" (*id.* at ¶ 8). The complaint recites the law regarding the statute of limitations and alleges that "[i]n the instant case, plaintiff initially

commenced an action for foreclosure of the mortgage by filing of a summons and complaint on April 9, 2009” (*id.* at ¶ 8). The complaint further alleges that:

“[t]here have been two prior proceedings in foreclosure for enforcement of said Note and Mortgage; the first under index number 8784/2009 which was dismissed by the court without prejudice on February 3, 2012, the second was under index number 22166/2013 and was voluntarily dismissed by Plaintiff” (*id.* at ¶ 22).

On July 15, 2014, Defendants collectively answered the complaint, denied the material allegations there and asserted affirmative defenses and counterclaims (NYSCEF Doc No. 10). On August 14, 2014, Deutsche Bank replied to the Defendants’ counterclaims (NYSCEF Doc No. 12).

From January 2015 through April 2016, the parties participated in settlement conferencing, pursuant to CPLR 3408, before a special referee and the court (Rivera, J.), but there was no resolution (*see* NYSCEF Doc Nos. 14-19).

In April 2016, Deutsche Bank changed its counsel (NYSCEF Doc No. 20). The action inexplicably laid dormant for one year, and in April 2017, Deutsche Bank, once again, e-filed a consent to change its litigation counsel (NYSCEF Doc No. 22).

On April 28, 2017, Deutsche Bank’s new counsel e-filed a “Notice of Intent to Prosecute,” which states that:

“**PLEASE TAKE NOTICE**, that in response to the Notice of Administrative Dismissal issued by the Supreme Court, Kings County, applicable to actions commenced prior to January 1, 2016, and for which no activity has been calendared since September 30, 2016, Plaintiff intends to prosecute this above action.

“PLEASE TAKE FURTHER NOTICE, that this notice of intent to prosecute is submitted at the request of the Court, by the court imposed deadline of May 1, 2017 . . .” (NYSCEF Doc No. 24).

On July 19, 2017, the court (Dear, J.) issued a decision and order following a status conference on July 12, 2017, in which the court determined that Deutsche Bank “unreasonably neglected to prosecute this action”:

“[i]n light of the case history and the case update provided to the Court at conference, it is the finding of the Court that more than one year has passed since the joinder of issue and *Plaintiff has unreasonably neglected to prosecute this action.*

“Accordingly, it is

“**ORDERED** that Plaintiff must resume prosecution of the action by filing either a motion for entry of judgment or a note of issue within ninety days after receipt of this order; and it is further

“**ORDERED** that, if Plaintiff fails to do so within the specified time period, this Court will issue a subsequent order dismissing this case pursuant to CPLR 3216 *without notice to the parties*” (NYSCEF Doc No. 25 [emphasis added]).

The court served a CPLR 3216 notice upon Deutsche Bank’s counsel by certified mail return receipt requested.

On November 6, 2017, after Deutsche Bank failed to comply with the court’s July 19, 2017, order directing it to resume prosecution of this foreclosure action, the court issued the 2017 Dismissal Order dismissing the action without prejudice, pursuant to CPLR 3216 (NYSCEF Doc No. 26).

On June 14, 2019, Deutsche Bank changed its counsel to Aldridge Pite, LLP (NYSCEF Doc No. 27). Two years later, on June 11, 2021, Greenberg Traurig, LLP filed a notice of appearance on behalf of Deutsche Bank (NYSCEF Doc No. 28).

***Deutsche Bank's Motion to Vacate the 2017 Dismissal Order***

On June 11, 2021, about three years and seven months after the 2017 Dismissal Order was issued, Deutsche Bank, by its new counsel, moved for an order vacating the 2017 Dismissal Order, restoring this foreclosure action to the active calendar, reinstating the notice of pendency and amending the caption to substitute Angela Modena, as Administrator of the Estate of Giovanna Modena, for the decedent, Giovanna Modena<sup>1</sup> (NYSCEF Doc No. 29).

Deutsche Bank's new counsel submits a moving affirmation that fails to explain or even address Deutsche Bank's neglect to prosecute, and merely notes that defendant Giovanna Modena died on or about December 9, 2018, about one year after the 2017 Dismissal Order was issued, and thus, "[u]pon the passing of Ms. Modena, the Foreclosure Action was stayed pursuant to CPLR § 1015" (NYSCEF Doc No. 31 at ¶¶ 10-11). Deutsche Bank's counsel fails to explain how a dismissed action can be stayed by a party's death.

Deutsche Bank also submits a moving memorandum of law arguing that the 2017 Dismissal Order should be vacated "on grounds that the Court lacked the power to issue

---

<sup>1</sup> Deutsche Bank demonstrated that an Administrator was appointed for the deceased defendant, Giovanna Modena, by Letters of Administration issued October 23, 2019 (NYSCEF Doc No. 39).

the Order because the statutory conditions precedent to CPLR § 3216 dismissal had not been met” (NYSCEF Doc No. 30 at 5). Specifically, Deutsche Bank argues that “the Court lacked the power to enter the Dismissal Order because subsection three (3) of CPLR § 3216 was not met” (*id.* at 7). Deutsche Bank explains that:

“the Notice fails to, *inter alia*, explicitly state that plaintiff’s failure to comply with the notice ‘will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed’ and ‘set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation’” (*id.*).

Deutsche Bank also contends that the court “erred by dismissing the foreclosure action ‘without notice to the parties’” and that “the notice failed to set forth any specific conduct constituting neglect by Plaintiff, as required” (*id.* at 7-8). Deutsche Bank references several recent Second Department decisions vacating orders dismissing the action for failure to prosecute that are nearly identical to the 2017 Dismissal Order issued here (*id.* at 7-9).

Despite Deutsche Bank’s inexplicable delays in prosecuting this foreclosure action, Deutsche Bank argues that there were no extraordinary circumstances existing here to warrant the court’s *sua sponte* 2017 Dismissal Order (*id.* at 9-10).

### ***Defendants’ Cross-Motion***

On November 17, 2021, Defendants oppose Deutsche Bank’s motion, in part,<sup>2</sup> arguing that “this Court should not vacate the November 6<sup>th</sup> Order, or restore the

---

<sup>2</sup> Defense counsel asserts that “[i]f this Court were to vacate the November 6<sup>th</sup> Order and restore the foreclosure action to the Court’s calendar, Defendants do not object to the caption being

foreclosure action to the Court’s calendar” because Deutsche Bank failed to resume prosecution of the action, as directed by the court, “failed to appeal, or move to reargue the Order of July 19, 2017” and “failed to meet the conditions of the July 19, 2017 Order” (NYSCEF Doc No. 45 at ¶¶ 4, 6 and 7). Defense counsel asserts that “Plaintiff has done nothing for four years and failed to prosecute the action for quite some time before July 19, 2017” (*id.* at ¶ 9).

Defense counsel, in support of the cross-motion, argues that Deutsche Bank “failed to prosecute this action for nearly seven (7) years,” and withdrew prior foreclosure actions (*id.* at ¶ 11). Defense counsel asserts that Deutsche Bank continued to do nothing after the court issued the July 19, 2017 order, and thus, this action should be dismissed for failure to prosecute or, alternatively, “this Court should direct that that bank waive all interest, late charges, outstanding fees and costs on the loan, and attorneys[’] fees, since at least the date of the July 19, 2017 Order, which directed the Plaintiffs to prosecute” (*id.* at ¶ 14).

### ***Deutsche Bank’s Opposition and Reply***

Deutsche Bank, in opposition to the cross-motion and in reply, submits a memorandum of law arguing that Defendants’ cross-motion to dismiss for failure to prosecute fails because they did not serve a 90-day demand, pursuant to CPLR 3216 (NYSCEF Doc No. 48 at 1). Deutsche Bank asserts that “[t]he statute requires that a court

---

amended,” and thus, this branch of Deutsche Bank’s motion is granted without opposition (NYSCEF Doc No. 45 at ¶ 3).

or defendant must serve a ‘written demand’ that ‘will serve as a basis for a motion by the party serving said demand,’ be it the court or a defendant” (*id.*).

Deutsche Bank also argues that sanctions in the form of tolled interest are not appropriate here (*id.* at 3). Deutsche Bank argues that such sanctions are only available under CPLR 3408 for a failure to negotiate a settlement in good faith (*id.*). Deutsche Bank also contends that this foreclosure action was stayed (despite its dismissal) after defendant Giovanna Modena died in December 2018, and thus, interests cannot be tolled (*id.*). Finally, Deutsche Bank argues that “Defendants benefitted from any alleged delay” since they have been in default for 13 years (*id.*).

### **Discussion**

#### ***(1)***

#### ***Deutsche Bank’s Motion to Vacate***

In *Deutsche Bank Natl. Trust Co. v Bastelli*, 164 AD3d 748 (2d Dept 2018), the Appellate Division, Second Department, considered an appeal from an order of the Supreme Court, Kings County, which denied the plaintiff mortgagee’s motion to vacate a dismissal order issued for failure to prosecute. The order of dismissal issued in *Bastelli* and the 2017 Dismissal Order issued in this foreclosure action are quite similar.

In *Bastelli*, the Second Department modified the Supreme Court’s order by deleting the provision denying the plaintiff’s motion to vacate the order of dismissal and substituting a provision granting the motion. The Second Department then affirmed the order granting the motion and held that:

“an action cannot be dismissed pursuant to CPLR 3216 (a) ‘unless a written demand is served upon ‘the party against whom such relief is sought’ in accordance with the statutory requirements, along with a statement that the ‘default by the party upon whom such notice is served in complying with such demand within said ninety day period *will serve as a basis for a motion* by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed’” (*Cadichon v Facelle*, 18 NY3d 230, 235 [2011], quoting CPLR 3216 [b] [3]; *see Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d 1020, 1021 [2017]). While a conditional order of dismissal may have ‘the same effect as a valid 90-day notice pursuant to CPLR 3216’ (*Byers v Winthrop Univ. Hosp.*, 100 AD3d 817, 818 [2012]; *see Griffith v Wray*, 109 AD3d 512, 513 [2013]; *Stallone v Richard*, 95 AD3d 875, 876 [2012]), the conditional order here ‘was defective in that it failed to state that the plaintiff’s failure to comply with the notice “will serve as a basis for a motion” by the court to dismiss the action for failure to prosecute’ (*Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d at 1021 [emphasis added], quoting CPLR 3216 [b] [3]). . . . Lastly, the Supreme Court erred in administratively dismissing the action without further notice to the parties and without benefit of further judicial review (*see Cadichon v Facelle*, 18 NY3d at 235-236; *Deutsche Bank Natl. Trust Co. v Cotton*, 147 AD3d at 1021; *US Bank N.A. v Saraceno*, 147 AD3d 1005, 1006 [2017]; *Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [2012])” (*Deutsche Bank Natl. Trust Co. v Bastelli*, 164 AD3d at 749-750 [emphasis added]).

Here, the 2017 Dismissal Order, which purported to serve as a 90-day notice pursuant to CPLR 3216, “was defective in that it failed to state that the plaintiff’s failure to comply with the notice ‘will serve as a basis for a motion’ by the court to dismiss the action for failure to prosecute[,]” as expressly required by CPLR 3216 (b) (3) (*Element E, LLC v Allyson Enterprises, Inc.*, 167 AD3d 981, 982 [2d Dept 2018] [holding that “(t)he procedural device of dismissing an action for failure to prosecute is a legislative creation,

not a part of a court's inherent power . . . and, therefore, a court desiring to dismiss an action based upon the plaintiff's failure to prosecute must follow the statutory preconditions under CPLR 3216"). Consequently, Deutsche Bank's motion to vacate the 2017 Dismissal Order is granted.

(2)

*Defendants' Cross-Motion*

"A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Bank of New York Mellon v George*, 186 AD3d 661, 663 [2d Dept 2020]). "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Deutsche Bank Trust Co. Americas v Knights*, 231 AD3d 1016, 1018 [2d Dept 2024] [internal quotation marks omitted]). "[C]ontrary to the plaintiff's contention, a court's authority to toll the accrual of interest is not limited to situations where the conduct at issue is deemed wrongful" under CPLR 3408 (*Wells Fargo Bank, N.A. v Daniel*, 231 AD3d 899, 901 [2d Dept 2024]). The Second Department has repeatedly held that "a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" (*Deutsche Bank Trust Co. Americas v Knights*, 231 AD3d at 1018, quoting *GMAC Mtge., LLC v Yun*, 206 AD3d 798, 798-799 [2022]).

Here, Deutsche Bank failed to explain why this action laid dormant from the time issue was joined in August 2014 through the court's July 19, 2017, order finding that

“Plaintiff has unreasonably neglected to prosecute this action” (NYSCEF Doc No. 25). Deutsche Bank failed to offer any explanation for this delay, other than its participation in settlement discussions, pursuant to CPLR 3408. In addition, Deutsche Bank waited until June 11, 2021, before seeking an order vacating the 2017 Dismissal Order and reinstating this action. While some of this delay can be attributed to the Covid-19 pandemic, Deutsche Bank failed to provide an excuse for the delays that preceded the pandemic. Because Defendants are prejudiced by Deutsche Bank’s unexplained delay of approximately three years, during which time interest had been accruing, the interest on the loan is tolled for that length of time. Accordingly, it is hereby

**ORDERED** that Deutsche Bank’s motion (mot. seq. two) is granted to the extent that the November 6, 2017, Dismissal Order is vacated, this case is restored to the active calendar, the notice of pendency filed against the Property is reinstated and the caption is amended to substitute Angela Modena, as Administrator of the Estate of Giovanna Modena in place of the decedent, Giovanna Modena; and it is further

**ORDERED** that Defendants’ cross-motion is only granted to the extent that interest is tolled for three years based on Deutsche Bank’s inexplicable neglect to prosecute this action; the cross-motion is otherwise denied.

This constitutes the decision and order of the court.

April 14, 2025

E N T E R,



Hon. Cenceria P. Edwards, CPA, JSC