

Deutsche Bank Natl. Trust Co. v Bakarey

2025 NY Slip Op 31612(U)

April 28, 2025

Supreme Court, Kings County

Docket Number: Index No. 10320/2008

Judge: Cenceria P. Edwards

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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 _28th day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL 1 INC. TRUST 2006-HE6,

Plaintiff,

- against -

Index No. 10320/2008

TAWA BAKAREY, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

JOHN DOE (Said name being fictitious it being the Intention of Plaintiff to designate any and all Occupants of premises being foreclosed herein, And any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) _____

10-40 45-60

Opposing Affidavits (Affirmations) _____

46-60 62-65

Reply Affidavits (Affirmations) _____

62-65 68

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 1677 Prospect Place in Brooklyn (Block 1457, Lot 82) (Property), plaintiff Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS

Capital 1 Inc. Trust 2006-HE6 (Deutsche Bank or Plaintiff) moves (in motion sequence [mot. seq.] five) for an order: (1) amending the caption to remove the borrower defendant, Tawa Bakarey (Defendant Borrower or Bakarey), therefrom, pursuant to the Decision and Order of the Appellate Division, Second Department, dated October 13, 2021;¹ (2) confirming the May 4, 2017 Referee's Report of Amount Due to Plaintiff (2017 Referee's Report), pursuant to RPAPL § 1321; (3) granting it a judgment of foreclosure and sale, pursuant to RPAPL § 1351; (4) directing the distribution of the sale proceeds, pursuant to RPAPL § 1354; (5) consolidating the action filed under Kings County index No. 5800/2016 (Action 2) into this action (Action 1); (6) discharging the guardian ad litem and military attorney; (7) amending the caption to substitute Sonny Ahmed, Hossain Ahmed, Bibi Begum, Abdul Ahmed, Hasim Ahmed, Todd Bailey, Keisha Pitts, Byron Hesker and Dawn Hesker as defendants in the consolidated action in place and instead of the John Doe defendants named in Action 2; and (8) reforming the legal description of the Property in the mortgage (NYSCEF Doc No. 10).

Defendant Bakarey cross-moves (in mot. seq. six) for an order, pursuant to 22 NYCRR § 130-1.1 (Part 130), awarding her costs in the form of reimbursement for attorneys' fees incurred in opposing Plaintiff's frivolous motion (NYSCEF Doc No. 45).

¹ See *Deutsche Bank Nat'l Tr. Co. v Bakarey*, 198 AD3d 718 [2d Dept 2021]).

Background

On or about March 27, 2008, Deutsche Bank commenced this foreclosure action by filing a summons, a complaint verified by counsel and a notice of pendency against the Property (NYSCEF Doc No. 1 at 1-19). The complaint alleges that on or about March 24, 2006, Bakarey executed and delivered a \$448,000.00 promissory note, which was secured by a mortgage encumbering the Property (NYSCEF Doc No. 1 [complaint] at ¶¶ 2-3). The complaint alleges that Bakarey “failed to comply with the conditions of the mortgage and note by failing to pay principal and interest and/or taxes, assessments, water rates, insurance premiums, escrow and/or other charges that came due and payable on the 1st day of December, 2007. . .” (*id.* at ¶ 5).

On or about December 30, 2008, Deutsche Bank moved for an order granting it permission to serve Bakarey by publication. By an August 9, 2010 order, the court granted Deutsche Bank’s motion to serve Bakarey by publication, appointed a Guardian Ad Litem to protect and defend Bakarey’s interests in Action 1 and granted a 120-day extension for Plaintiff to serve all defendants (NYSCEF Doc No. 1 at 33-36).

Defendant Barkarey was served by publication, pursuant to the court’s August 9, 2010 order. Based on the first date of publication of August 26, 2010, service upon Bakarey was complete on September 23, 2010, and thus, Bakarey’s time within which to answer or otherwise respond to the complaint expired on October 25, 2010.

After this action inexplicably laid dormant, a status conference was scheduled for February 4, 2014, after which the court (Knipel, J.) issued a conditional order of dismissal

for Deutsche Bank's failure to prosecute, pursuant to CPLR 3216, and directed dismissal of Action 1 and cancellation of the notice of pendency unless Deutsche Bank filed a note of issue or otherwise proceeded by motion for the entry of judgment within 90 days (NYSCEF Doc No. 1 at 177).

On or about July 30, 2014, *more than three years after* Bakarey's appearance default in October 2010, Deutsche Bank moved for an order vacating the conditional order of dismissal, granting it an order of reference and granting it a default judgment against the non-appearing defendants, including Bakarey. Bakarey appeared and opposed the motion on the ground that Plaintiff failed to establish a reasonable excuse for the delay in prosecuting the action or a meritorious claim. By a March 31, 2016 decision and order, the court (Knipel, J.) vacated the conditional dismissal order, reinstated the notice of pendency, referred Plaintiff's motion for an order of reference to another Judge and held that Bakarey "may move for permission to file a late answer" (NYSCEF Doc No. 1 at 190).

In June 2016, Bakarey moved for an order, pursuant to CPLR 3215 (c), dismissing the complaint in Action 1 as abandoned or, alternatively, vacating her appearance default and granting her an extension of time to file an answer and dismissing the complaint based on Plaintiff's lack of standing.

In September 2016, Deutsche Bank commenced Action 2, a second action to foreclose the same mortgage encumbering the Property against 1677 Prospect Pl, LLC, the current owner of the Property.

By a January 5, 2017 decision and order, the court granted Plaintiff's motion for an order of reference and a default judgment against Bakarey in Action 1. The court also issued a January 5, 2017 order of reference appointing a referee to compute the amount due to Plaintiff. By an August 25, 2017, order, the court denied Bakarey's motion to dismiss Action 1 as abandoned, pursuant to CPLR 3215 (c).

On or about January 22, 2018, Deutsche Bank moved in Action 1 to confirm the referee's report of amounts due and for a judgment of foreclosure and sale. Bakarey opposed the motion. By a June 13, 2018 decision and order, the court granted Deutsche Bank's motion to confirm the referee's report and for a judgment of foreclosure and sale and issued a June 22, 2018 Judgment of Foreclosure and Sale, which consolidated Actions 1 and 2 and directed the sale of the Property. Bakarey appealed.

The Second Department's 2021 Appellate Order

The Second Department issued an October 13, 2021 decision and order reversing the June 2018 orders, denying Deutsche Bank's motion to confirm the referee's report and for a judgment of foreclosure and sale and granting Bakarey's June 2016 motion for an order, pursuant to CPLR 3215 (c), dismissing the complaint in Action 1 as abandoned (*Deutsche Bank Nat'l Tr. Co. v Bakarey*, 198 AD3d 718, 721-722 [2d Dept 2021]).

Specifically, the Second Department held that:

“Here, the Supreme Court improvidently exercised its discretion in finding that the plaintiff proffered a reasonable excuse for the delay. The defendant was served via publication pursuant to the order dated August 9, 2010. Based upon the first date of publication of August 26, 2010, service was

complete on September 23, 2010, and the defendant's time to answer the complaint expired on October 25, 2010 (*see* CPLR 316 [c]; 320 [a]). Nevertheless, the plaintiff did not take proceedings for the entry of judgment until on or about July 30, 2014, when it moved, *inter alia*, to vacate the conditional order of dismissal and for an order of reference. As a result, the plaintiff was required to provide reasonable excuse for its delay.

“In its motion papers, the plaintiff explained that the delay of more than three years prior to the issuance of the February 4, 2014 conditional order of dismissal was attributable to efforts to comply with Administrative Order of the Chief Administrative Judge of the Courts AO/548/10, the closure of the law firm of Steven J. Baum, P.C., and further delays associated with the aftermath of Hurricane Sandy. However, the *plaintiff's conclusory and unsubstantiated assertions that periods of delay were attributable to efforts to comply with Administrative Order AO/548/10 and the effects of Hurricane Sandy were insufficient to excuse the lengthy delay in this action, even when coupled with a change of counsel (see Wells Fargo Bank, N.A. v Cafasso, 158 AD3d 848 [2018])*” (*id.* [emphasis added]).

Discussion

According to the Second Department's October 13, 2021 decision and order, the complaint in Action 1 was dismissed as abandoned by Deutsche Bank, pursuant to CPLR 3215 (c), because the Second Department determined that Deutsche Bank failed to take proceedings for the entry of judgment *for more than three years* of Bakarey's appearance default and failed to demonstrate a reasonable excuse for its excessive delay. The complaint having been dismissed as against the Borrower Defendant, Bakarey, pursuant to CPLR 3215 (c), Deutsche Bank is now precluded from proceeding to litigate this terminated

foreclosure action and from seeking a judgment of foreclosure and sale or any other relief regarding the mortgage executed by Bakarey in dismissed Action 1.

Former Defendant Borrower Bakarey's cross-motion for an award of attorneys' fees incurred in defending Deutsche Bank's motion, pursuant to Part 130, is denied since the motion is not sufficiently frivolous to warrant the imposition of sanctions. Accordingly, it is hereby

ORDERED that Deutsche Bank's motion (mot. seq. five) is denied in its entirety; and it is further

ORDERED that Bakarey's cross-motion (mot. seq. six) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C. Cenceria P. Edwards, CPA