

Deutsche Bank Natl. Trust Co. v Baird

2025 NY Slip Op 31806(U)

May 12, 2025

Supreme Court, Kings County

Docket Number: Index No. 38122/2006

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 12 day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE IN TRUST FOR THE REGISTERED HOLDERS OF MORGAN STANLEY ABS CAPITAL I INC. TRUST 2006-HE6 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-HE6,

Plaintiff,

- against -

Index No. 38122/2006

JARVIN BAIRD; UM ACQUISITIONS, LLC; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; AKILAH JAMES; EMRIS JAMES; THONA BAIRD,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

6-30 33-53
33-53 54-56
54-56

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 1571 Bergen Street in Brooklyn (Block 1348, Lot 61) (Property), plaintiff Deutsche Bank National Trust Company as Trustee in Trust for the Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE6 Mortgage Pass-Through Certificates Series 2006-HE6 (Deutsche Bank or Plaintiff) moves (in motion sequence [mot. seq.] four)

for an order: (1) confirming the March 5, 2020 Referee's Report made in accordance with RPAPL § 1321; (2) granting it a Judgment of Foreclosure and Sale, pursuant to RPAPL § 1351; and (3) directing the distribution of the sale proceeds, pursuant to RPAPL § 1354 (NYSCEF Doc No. 6).

Defendant Jarvin Baird (Jarvin or Defendant) moves (in mot. seq. five) for an order: (1) dismissing this action for lack of standing, pursuant to RPAPL § 1302-a; (2) denying Plaintiff's motion for judgment of foreclosure and sale and to confirm the Referee's Report; and (3) tolling interest due to the inordinate delay by the Plaintiff in prosecuting this action (NYSCEF Doc No. 33).

Background

On December 12, 2006, New Century Mortgage Corporation (New Century) commenced this action to foreclose a May 30, 2006 mortgage in the principal amount of \$512,000.00 encumbering the Property, which was allegedly executed by Jarvin Baird (NYSCEF Doc No. 1 [complaint] at 2-10). The complaint alleges that Jarvin Baird "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 August, 2006 . . ." (*id.* at 3).

None of the defendants answered or otherwise responded to the complaint.

In or about January 2007, Deutsche Bank, as assignee and successor to New Century, moved for an order of reference, a default judgment against defendants and to amend the caption by substituting Deutsche Bank for New Century. On June 29, 2007, the

court (Bunyan, J.) granted the motion and issued an order of reference and a default judgment against defendants (*id.* at 31-34).

In April 2008, Deutsche Bank moved for an order vacating the June 29, 2007 Order of Reference and granting it a new order because New Century filed for Chapter 11 Bankruptcy on April 2, 2007, and the June 29, 2007 Order of Reference was granted during a bankruptcy stay (*id.* at 49-50). On December 2, 2008, the court (Bunyan, J.) granted the motion and issued a new Order of Reference and a default judgment against defendants (*id.* at 40-44).

Subsequently, the action inexplicably laid dormant. On July 16, 2013, a status conference was held, after which the court (Knipel, J.) issued an “Order of Dismissal (CPLR 3215 [c])” providing that:

“At a Status Conference held this day, it is the finding of this Court that the plaintiff has failed to proceed to entry of judgment within one year of default. Time spent prior to discharge from mandatory settlement conference has no been computed in calculating the one year period.

“Accordingly, the instant complaint is dismissed as abandoned pursuant to CPLR 3215 (c), without costs or prejudice and the County Clerk is directed to vacate the Notice of Pendency” (*id.* at 179).

Approximately one year later, on August 1, 2014, Deutsche Bank moved to vacate the July 16, 2013 Order of Dismissal and restore this action to the active calendar (*id.* at 180). Defendant Jarvin Baird, without vacating his default, opposed the motion on the ground that Plaintiff did not diligently prosecute this action (*id.* at 191-194). By a May 13, 2015

decision and order, the court (Bunyan, J.) granted Deutsche Bank's motion, vacated the dismissal and restored the action to the active calendar (*id.* at 187).

After a status conference on September 10, 2015, at which Defendant Jarvin Baird appeared by defense counsel for the first time, the court released the matter on consent and ordered that "all conference stays are vacated" (*id.* at 339).

On October 24, 2016, after the action laid dormant for another year, a status conference was held, after which the court (Knipel, J.) issued a "Conditional Order of Dismissal" providing that:

"At a Status Conference held this day, it is the finding of this Court that issue has not been joined and the plaintiff has failed to proceed to entry of judgment within one year of default.

"Accordingly, the instant complaint is dismissed as abandoned unless plaintiff proceeds to entry of judgment within 90 days hereof.

"Warning: Failure to comply with the terms of this order will result in the dismissal of the action" (*id.* at 344)

Deutsche Bank failed to file a note of issue or otherwise proceed to judgment within the specified 90-day period, as required by the October 24, 2016 Conditional Dismissal Order. Instead, on or about April 18, 2017, Deutsche Bank filed a "Notice of Intent to Prosecute" which provides, in part, that "this notice of intent to prosecute is submitted at the request of the court, by the court[-]imposed deadline of May 1, 2017 . . ." (*id.* at 345-350).

On November 16, 2018, Deutsche Bank moved for an order vacating the Conditional Order of Dismissal and restoring the action to the active calendar, once again

(*id.* at 351). By a March 21, 2019, order, the court granted Deutsche Bank's motion to vacate the Conditional Dismissal Order, restored the action to the active calendar without opposition, and reinstated the notice of pendency against the Property (*id.* at 362-364).

On or about July 10, 2019, Deutsche Bank moved for the appointment of a substitute referee because the originally appointed referee died on June 11, 2019 (*id.* at 511-516). By a December 2, 2019 order, the court (Dear, J.) appointed a new referee to compute the amount due to Plaintiff since the referee appointed in December 2008 "is unable to fulfill their duties as Referee" (*id.* at 509-510).

Deutsche Bank's Instant Motion

On March 22, 2022, Deutsche Bank moved for an order confirming the March 5, 2020 Referee's Report, granting it a judgment of foreclosure and sale and directing the distribution of the sale proceeds (NYSCEF Doc No. 6). The March 5, 2020 Referee's Report provides, in relevant part, that:

"I have computed and ascertained the amount due and owing to the Plaintiff under said Note and Mortgage and accordingly report, the amount now due to the Plaintiff to be the sum of \$984,869.09 as of March 12, 2019.

"That SCHEDULE 'A' hereto annexed is the affidavit of the Plaintiff.

"That SCHEDULE 'B' hereto annexed is an abstract of the documentary evidence produced before me" (NYSCEF Doc No. 24 at ¶¶ 2-4).

Schedule A to the Referee's Report is an "Affidavit of Amounts Due" from Stephanie Stoddard (Stoddard), a Document Control Officer of Select Portfolio Servicing, Inc. (SPS),

Deutsche Bank's servicing agent and attorney-in-fact,¹ which is based on Stoddard's review of SLS's business records (*id.* at 6-10). Stoddard attested as to the amount due under the mortgage for principal and interest "as of February 13, 2019 . . ." based on business records from SPS *that are blurry and practically illegible* (*id.* at 16-23). Notably, although Stoddard attests that SPS's business records include those of prior servicers, Stoddard fails to reference any prior servicing documents that evidence Jarvin Baird's payment default, which Stoddard attests was on June 1, 2009 (as opposed to the complaint's 2006 default).

Notably, the record on Deutsche Bank instant motion includes two different versions of the promissory note, only one of which contains an endorsement from New Century. Exhibit B to Deutsche Bank's motion is a copy of the four-page promissory note with a notary block on the fifth unnumbered page *with no endorsements* (*see* NYSCEF Doc No. 11). In contrast, the Referee's Report annexes a different version of the promissory note with a notary block on the fifth page and a duplicate copy of the fourth page of the note with a blurry endorsement from New Century (*see* NYSCEF Doc No. 24 at 29).

Deutsche Bank's counsel submits an affirmation asserting that "[i]n conjunction with the motion for an Order of Reference previously granted by this Court, Plaintiff established all the required elements for a foreclosure" (NYSCEF Doc No. 9 at ¶ 21).

Defendant's Opposition and Cross-Motion

Defendant Jarvin Baird opposes Deutsche Bank's motion and cross-moves to dismiss the complaint for lack of standing, pursuant to RPAPL § 1302-a, and to toll interest

¹ NYSCEF Doc No. 27.

based on Plaintiff's delay in prosecuting this foreclosure action, pursuant to CPLR 5001 (NYSCEF Doc No. 33). Defense counsel asserts that the Referee's Report should not be confirmed because it is based on a conclusory affidavit from Stoddard of STS based on unidentified business records, including those of a prior servicer:

“[t]he referee's SCHEDULE 'A' refers to the affidavit of Stephanie Stoddard, a S[PS] employee. She states, in a summary fashion, *relying on unidentified business records*, including those of a 'prior servicer', that Baird failed to make the payment that was due for 'June 1, 2009'. Next, she concludes, *without detail* that the interest good through 3/12/19 is \$361,362.50, escrow advances are \$111,319.02; she also provides a total of advances made on the defendant's behalf as \$6,194.70. Notably, the promissory note is an adjustable rate note; and *there is no breakdown* of the dates that the interest changed and the amounts due on those dates. *No bills* for taxes, insurance or other advances are produced from 2006 to the present” (NYSCEF Doc No. 34 at ¶ 11 [emphasis added]).

Regarding the documentary evidence considered by the Referee, defense counsel argues that “[t]he attachments to his report are totally incomplete and inadequate” (*id.* at ¶ 12). Defense counsel argues that the Referee's report is not substantially supported by the record because the Stoddard affidavit from SPS is not supported by the business records that Stoddard purportedly reviewed in calculating the amount owed (*id.* at ¶ 17).

Defense counsel also argues that dismissal is warranted for lack of standing, pursuant to RPAPL § 1302-a, because Deutsche Bank has submitted two completely different versions of the promissory note to the court, one of which has no endorsements (*id.* at ¶¶ 13 and 19).

Lastly, defense counsel asserts that interest should be tolled, pursuant to CPLR 5001 (a), “because the plaintiff unreasonably delayed prosecution of this action” (*id.* at ¶ 21). Defense counsel notes that the action was twice dismissed because Plaintiff abandoned prosecution in 2016, after which nothing happened for another three years (*id.* at ¶ 23).

Deutsche Bank’s Opposition and Reply

Deutsche Bank, in opposition to the cross-motion and in reply, submits an attorney affirmation asserting that “Defendant’s Motion to Dismiss is untimely, barred by the ‘law of the case’ doctrine, and Defendant’s default remains in effect as [he] never sought to vacate” (NYSCEF Doc No. 54 at ¶ 3).

Deutsche Bank’s counsel argues that Defendant Baird “is now barred by the law of the case doctrine from asserting lack of standing in this case” because he failed to appeal from the December 2019 Order of Reference and “Defendant was already provided a full and fair opportunity to address [his] arguments seeking dismissal . . .” although Deutsche Bank’s July 2019 motion for the appointment of a new referee was unopposed (*id.* at ¶ 9). Counsel also argues that “the Defendant never vacated its default and as such, cannot seek affirmative relief concerning standing or otherwise” (*id.* at ¶ 15). Finally, counsel argues that “RPAPL 1302-a is not to be applied retroactively” (*id.* at ¶ 18). Notably, Deutsche Bank fails to mention or even address the two versions of the promissory note in the record.

Deutsche Bank’s counsel also asserts that Defendant is “estopped” from cross-moving to toll interest based on a failure to prosecute “as Defendant has been actively litigating this matter since June 2018 (*see NYSCEF Doc. No. 56*), has failed to demonstrate

any significant delay in proceeding and has failed to serve Plaintiff with a 90 Day Notice to Resume Prosecution in accordance with CPLR §3216” (*id.* at ¶ 22). Counsel argues that “it would not be proper to toll interest in this instance, as the Defendant financially benefitted from Plaintiff’s purported delays in proceeding” since he “retained the use and enjoyment of the Subject Premises, rent-free and without making a mortgage payment, over the course of the past several years” (*id.* at ¶¶ 38-39). Finally, counsel argues that a “review of the procedural history of this case clearly reveals that Plaintiff has diligently prosecuted the action since its inception” (*id.* at ¶ 45).

Discussion

(1)

Defendant’s Dismissal Cross-Motion

RPAPL § 1302-a provides that:

“[n]otwithstanding the provisions of subdivision (e) of [CPLR 3211], any objection or defense based on the plaintiff’s lack of standing in a foreclosure proceeding related to a home loan . . . shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant’s default” (emphasis added).

The Second Department has noted that the statute was both enacted and immediately effective as of December 23, 2019 and that “[t]he purpose of the law is to help assure that issues of standing are resolved on their merits” (*GMAC Mortg., LLC v Winsome Coombs*, 191 AD3d 37, 46 [2d Dept 2020], citing Sponsor’s Mem, Bill Jacket, L 2019, ch 739).

While RPAPL § 1302-a has been cited when granting leave for defendants to amend their answers to assert lack of standing as an affirmative defense (*see, e.g., Deutsche Bank Nat'l Tr. Co. v Kreitzer*, 203 AD3d 800, 803 [2d Dept 2022]; *US Bank Nat'l Ass'n v Blake-Hovanec*, 191 AD3d 821, 825 [2d Dept 2021]), our research has disclosed no authority for the proposition that a defendant in default can implement RPAPL § 1302-a to assert lack of standing as grounds for a dismissal motion *without* vacating their default and filing a late answer with standing as an affirmative defense. Consequently, Defendant's motion to dismiss this action, pursuant to RPAPL § 1302-a, for lack of standing is denied.

That branch of Defendant's motion to toll interest on the ground that Defendant has been prejudiced by the inordinate delays in prosecuting this action is also denied. While this case has not been expeditiously litigated, as Deutsche Bank's counsel contends, and the action was administratively dismissed twice, some of the delays are due to New Century's bankruptcy, the Covid-19 pandemic and the death of the first appointed referee. Moreover, as Deutsche Bank's counsel argues, the Defendant borrower, who has not denied executing the mortgage loan, has resided at the Property for over a decade mortgage-free and has, thus, reaped some benefit and has not been prejudiced from the delays in this foreclosure action. For these reasons, interest will not be tolled in this action.

(2)

Deutsche Bank's Motion

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” “The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]). While CPLR 4403 authorizes a court to confirm or reject a referee’s report, “[t]he referee’s findings and recommendations are advisory only and have no binding effect on the court . . .” (*Indymac Federal Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2020]). “[T]he Supreme Court is the ultimate arbiter of the dispute and has the power to reject the referee’s report and make new findings” (*Bank of America, N.A. v Barton*, 199 AD3d at 627 [quoting *Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 (2020)]; see also *HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2019]).

Here, the court cannot review the propriety of the calculations in the Referee’s Report because it is based on SPS’s business records that are blurry and illegible (*see* NYSCEF Doc No. 24 at 16-23) and which are incomplete, since they do not include the payment history or business records from the prior mortgage loan servicer that were purportedly incorporated into SPS’s business records. In addition, Stoddard’s affidavit from STS upon which the Referee’s Report is based is conclusory and does not substantiate

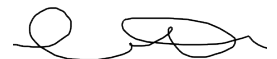
in detail the amounts purportedly due and owing to Plaintiff as of June 1, 2009 (*see* NYSCEF Doc No. 21 at ¶ 7). Finally, Deutsche Bank's production of two different versions of the promissory note, only one of which has an endorsement, raises an issue for the first time regarding Deutsche Bank's standing to obtain a judgment of foreclosure and sale (NYSCEF Doc No. 24 at 29). Accordingly, it is hereby

ORDERED that Deutsche Bank's motion (mot. seq. four) to confirm the 2019 Referee's Report and for a judgment of foreclosure and sale is denied without prejudice; and it is further

ORDERED that Defendant Jarvin Baird's cross-motion (mot. seq. five) is denied.

This constitutes the decision and order of the court.

E N T E R,



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