

Deutsche Bank Natl. Trust Co. v Marino

2025 NY Slip Op 31807(U)

May 12, 2025

Supreme Court, Kings County

Docket Number: Index No. 50104/15

Judge: Cenceria P. Edwards

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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 __12__ day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
INDENTURE TRUSTEE FOR AMERICAN HOME
MORTGAGE INVESTMENT TRUST 2005-1,

Plaintiff,

- against -

Index No. 501047/15

AMELIO P. MARINO; ROSE A. MARINO; MARIO CONTI; NEW YORK CITY DEPARTMENT OF FINANCE; "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

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

173-207 213-228
213-228 231-232
231-232 234-238

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 7402 Colonial Road in Brooklyn (Block 5926, Lot 37) (Property), Plaintiff Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2005-1 (Deutsche Bank or Plaintiff) moves (in mot. seq.

six) for an order: (1) awarding it a default judgment against Defendant Mario Conti (Conti), pursuant to CPLR 3215; or, alternatively (2) granting it summary judgment against Conti, pursuant to CPLR 3212; (3) dismissing the counterclaims interposed by Defendants Rose A. Marino and Conti; (4) deeming the answers interposed on behalf of Defendants Rose A. Marino and Conti to be appearances and waivers in foreclosure; (5) dismissing deceased defendant borrower Amelio P. Marino from this action; (6) appointing a referee to compute the amounts due, pursuant to RPAPL § 1321; and (7) amending the caption to eliminate Amelio P. Marino and the John Doe defendants (NYSCEF Doc No. 173).

Defendant Conti cross-moves (in mot. seq. seven) for an order granting him leave to file a late amended answer to the amended complaint, pursuant to CPLR 3012 (d) (NYSCEF Doc No. 213).

Background

On January 29, 2015, 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 March 23, 2005, Amelio P. Marino and Rose A. Marino executed and delivered a \$696,000.00 promissory note, which was secured by a mortgage encumbering the Property (erroneously identified in the complaint as “7402 COLONIAL *DRIVE*, BROOKLYN” instead of 7402 Colonial Road) (NYSCEF Doc No. 1 at ¶¶ 2 and 4-5). The complaint further alleges that “Defendants failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on April 1, 2013 and each subsequent payment thereafter” (*id.* at ¶ 9).

Defendants Amelio P. Marino, Rose A. Marino and Conti collectively answered the complaint and asserted affirmative defenses and counterclaims (NYSCEF Doc No. 20), but defense counsel was not authorized to submit an answer on Defendant Conti's behalf.

On September 14, 2016, Deutsche Bank moved for summary judgment, an order of reference and a default judgment (NYSCEF Doc No. 22). By a January 26, 2017, order, the court (Dear, J.) granted the motion without opposition (NYSCEF Doc No. 36).

On or about June 16, 2017, Defendant Conti moved, by Order to Show Cause (OSC), for an order vacating the court's January 26, 2017, order and either dismissing the action for lack of personal jurisdiction or granting Conti leave to file a late answer (NYSCEF Doc No. 58). By a June 29, 2017, decision and order the court vacated the order because "[i]t has come to the Court's attention that Defendant Amelio P. Marino was deceased prior to the date of [the January 26, 2017] order" (NYSCEF Doc No. 75). The court subsequently issued a November 27, 2017, decision and order granting Conti leave to interpose a late answer "on the grounds that the law office of Maria Malave, Esq. submitted an unauthorized answer on his behalf" and Defendant's proposed answer asserts defenses which are potentially meritorious (NYSCEF Doc No. 77).

On December 28, 2017, Defendant Conti e-filed a verified answer to the complaint wherein he denied the material allegations therein, asserted affirmative defenses, including failure to comply with the notice provisions of the RPAPL, fraud and forgery. Specifically, Conti's answer alleged that Defendants Amelio Marino and Rose Marino, Conti's former lawyer and his lawyer's daughter, defrauded Conti and his father, forged a deed transferring

the Property and mortgaged the Property as part of a fraudulent foreclosure rescue scheme (NYSCEF Doc No. 80 at ¶¶ 13-30).

On June 13, 2019, in light of Defendant Conti's fraud defense, Deutsche Bank moved for leave to amend its complaint to add causes of action against defendants for an equitable mortgage, equitable subrogation and unjust enrichment (NYSCEF Doc No. 119). By an October 10, 2019 decision and order, the court granted the motion and directed Deutsche Bank to serve its amended complaint within 60 days (NYSCEF Doc No. 139). On October 29, 2019, about five months before the Covid-19 pandemic began, Deutsche Bank e-filed its amended complaint (NYSCEF Doc Nos. 141 and 142).

None of the defendants answered or otherwise responded to the amended complaint, including Defendants Marino and Conti.

On April 7, 2021, Deutsche Bank filed a note of issue and certificate of readiness (NYSCEF Doc No. 169).

Deutsche Bank's Summary Judgment Motion

On May 20, 2021, Deutsche Bank moved for a default judgment against Conti, pursuant to CPLR 3215, or summary judgment against Conti, pursuant to CPLR 3212, an order dismissing the answers and counterclaims asserted by Rose Marino and Conti, dismissing the decedent borrower, Defendant Amelio P. Marino, from this action, appointing a referee to compute the amounts due and owing and amending the caption (NYSCEF Doc No. 173).

Deutsche Bank submits an affidavit from Benjamin Verdooran (Verdooran), a Senior Loan Analyst with “Ocwen Financial Corporation, whose wholly owned subsidiary is PHH Mortgage Corporation (‘PHH MC’) successor by merger with Ocwen Loan Servicing, LLC (‘Ocwen’), and the current loan servicer for the loan” (NYSCEF Doc No. 192 at ¶ 1). Verdooran attests that his affidavit is based on his review of PHH MC’s servicing records which include “electronic data compilations and imaged documents pertaining to the loans it services” and Verdooran is authorized to make the affidavit based on a November 20, 2019, Limited Power of Attorney between PHH MC and Deutsche Bank (*id.* at ¶ 2 and NYSCEF Doc No. 194). Verdooran attests that “[i]t is part of PHH MC’s regular course of business to accept and incorporate prior servicer records into PHH MC’s records when a loan is incorporated into PHH MC’s record keeping system . . .” (NYSCEF Doc No. 192 at ¶ 5).

Verdooran attests that the servicing records indicate that the borrowers, the Marino Defendants, executed the March 23, 2005 note in the principal amount of \$696,000.00, which was secured by the mortgage encumbering the Property (*id.* at ¶¶ 7-8). Based on his review of PHH MC’s computerized payment history of the loan through April 15, 2021 (NYSCEF Doc No. 198), Verdooran attests that “the Loan fell into default by the failure to timely tender a monthly installment which became due and payable and failing to tender all subsequent payments due thereafter” and “[a]t the time this action was commenced, the loan was due for the April 1, 2013 monthly payment” (NYSCEF Doc No. 192 at ¶ 12).

Defendant Conti's Opposition and Cross-Motion

On August 18, 2022, Defendant Conti opposed Deutsche Bank's motion and cross-moved for leave to file a late amended answer to the October 29, 2019, amended complaint (NYSCEF Doc No. 213).

Conti submits an affidavit explaining that the deceased defendant "Amelio P. Marino had been my father's trusted long[-]term attorney" and that "[h]e was supposed to have been helping my father with a loan modification, not stealing an interest in the property and taking out a mortgage in his own name" (*id.* [Conti Affidavit] at ¶ 10). Conti explains the alleged fraud and forgery as follows:

"When my father who had already been diagnosed with dementia at the time, complained about the extortionately high payments attendant to [his] Mortgage, Amelia Marino represented that he would personally loan him the money to pay off the Greenpoint Mortgage and then we could pay him back in installments. There was no discussion of either a new mortgage or any change in title to the property. Mr. Marino represented that had had sufficient funds in his personal bank account and he was loaning my father the money as his long term friend and advisor. . . Mr. Marino represented that he would take care of all the paperwork and that we could then start paying him back. Neither my parents nor I had any intention that this transaction would result in title being transferred at all, let alone that any estate would be granted [] in the attorney who was supposed to be protecting our interests.

"Between January 2005 and March 2005, when Amelia Marino claimed to be arranging for the pay off of the Greenpoint Mortgage with his own funds, both I and my parents were in Italy. We could not possibly have signed any documents before New York notaries during that time as we were not even in the county. We did not see any of the paperwork pertaining to the transaction. We just assumed that Mr. Marino was doing as he

had promised and utilizing his funds to pay off the mortgage and then we would pay him back in installments.

“When we arrived back in the United States, my father immediately paid Amelio Mario \$250,000.00 on the loan. Thereafter I made installment payments directly to Mr. Marino as I was the one living in the house. At all times our understanding was that Mr. Marino had personally loaned us the monies and that there was no longer a mortgage on the property.

“Unbeknownst to us, what Amelio Marino had actually done was to put title into his own and his daughter’s name and taken out an entirely new Mortgage with American Home Bank. He did so utilizing a purported Power of Attorney and Deed with forged signatures and dubious notarizations.

“While the Greenpoint Mortgage appears to have been paid off, there is no record as to who received the remaining funds from the new Mortgage. No one in my family received a penny of these monies. . . .” (*id.* at ¶¶ 16-20).

Defense counsel, in opposition to Deutsche Bank’s summary judgment motion, asserts that “even if this Court were to find that the plaintiff, had established its prima facie, entitlement to judgment as a matter of law, defendant Conti has raised triable issues of fact concerning the defense of fraud in the factum and in the inducement and forgery, which preclude the granting of summary judgment to the plaintiff” (*id.* [Stern Affirmation] at ¶ 37).

In support of Conti’s motion for leave to file a late amended answer, defense counsel asserts that Deutsche Bank filed the amended complaint “shortly before the holiday season and thereafter, the Covid-19 pandemic” and explains that Conti’s amended answer was not served due to law office failure and confusion associated with shut-downs during the Covid-19 pandemic:

“[o]ur office commenced preparation of an amended answer, however, due to an oversight, we did not realize that we had not filed it. This confusion was exacerbated by the intervening Covid-19 pandemic and shutdown. Additionally, since that time, further facts came to light during disclosure which warranted additional allegations and defenses therein” (*id.* at ¶¶ 66-67).

Regarding Conti’s proposed amended answer (*see* NYSCEF Doc No. 228), defense counsel asserts that the defenses and facts therein “will not take Plaintiff by surprise or cause any prejudice as they all either were previously alleged in the original answer and arise therefrom or were fully aired during disclosure” (NYSCEF Doc No. 213 [Stern Affirmation] at page 24 at ¶ 74).

Deutsche Bank’s Opposition and Reply

Deutsche Bank, in opposition and in reply, submitted a memorandum of law asserting that “Conti’s cross-motion should be denied as he makes said motion more than a year after the Note of Issue was filed on April 7, 2021” (NYSCEF Doc No. 230 at 3). Deutsche Bank also asserts that “there is no reasonable explanation provided” for Conti’s delay in cross-moving to e-file a late answer since “Conti had *five months* between service and the beginning of the pandemic in March of 2020” and “Conti had *more than one year* from the commencement of the pandemic to the filing of the Note of Issue . . . to seek leave to amend, as Covid-19 stays did not last the entirety of 2020” (*id.*). Deutsche Bank asserts that “seeking to amend an answer *three years* late and *more than one year* after the Note of Issue has been filed is extraordinary relief which should not be granted” (*id.* at 4).

Regarding Conti's fraud defense, Deutsche Bank asserts that "Mario Conti's fraud allegation is neither made on his behalf nor is it targeted at Plaintiff" and claims that Conti actually "claims that Amelio Marino allegedly defrauded Gaetano Conti, his father" (*id.* at 9-10). Deutsche Bank also asserts that "Conti remains silent on Plaintiff's secondary cause of action, seeking equitable subrogation in the circumstance that this Court finds that the Mortgage is invalid" (*id.* at 11).

Discussion

(1)

Defendant Conti's Cross-Motion

CPLR 3012 (d) provides that:

"(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

"In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff and that a potentially meritorious defense exists" (*Yongjie Xu v JJW Enterprises, Inc.*, 149 AD3d 1146, 1147 [2017]). "The showing of reasonable excuse that a defendant must establish to be entitled to relief under CPLR 3012 (d) is the same as that which a defendant must make to be entitled to vacate a default judgment"

(*Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC*, 140 AD3d 1054, 1054 [2d Dept 2016]).

Under the circumstances here, where there is a lack of any discernable prejudice to Plaintiff, Conti's motion to excuse his defense counsel's inadvertent law office failure and delays leading up to and during the Covid-19 pandemic and compel Deutsche Bank to accept his late answer to the amended complaint is granted, especially since the court previously determined that Conti's affirmative defenses are potentially meritorious.

(2)

Deutsche Bank's Summary Judgment Motion

“When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment [which] may be shown . . . by the plaintiff showing entitlement to summary judgment . . .” (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures* § 2.01 (4) (k) (note: online edition)]).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v*

City of New York, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower’s payment default (see *Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]). Here, Plaintiff satisfied its prima facie burden by producing the promissory note, the mortgage and evidence of the Marino Defendants’ payment default.

However, Conti’s testimonial and documentary evidence regarding the Marino Defendants’ fraud and forgery of a deed to the Property in order to encumber the Property with the subject mortgage raises triable issues regarding the validity of the subject mortgage that preclude summary judgment. “If documents purportedly conveying a property interest are void, they convey nothing, and a subsequent bona fide purchaser or bona fide encumbrancer for value receives nothing” (*First Nat. Bank of Nevada v Williams*,

74 AD3d 740, 742 [2d Dept 2010] [holding that “the documents submitted by the appellant raised a triable issue of fact as to the validity of the mortgage, precluding the award of summary judgment to the plaintiff”]). Indeed, it is well-settled that “[a] deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid” (*GMAC Mortg. Corp. v Chan*, 56 AD3d 521, 522 [2d Dept 2008] [holding that “the Supreme Court correctly held that there are triable issues of fact as to the validity of both the deed and subject mortgage and properly denied the plaintiff’s motion for summary judgment”]). Because Conti raised triable issues of fact regarding the validity of the deed and the subject mortgage, denial of Deutsche Bank’s summary judgment motion is required, as a matter of law. Accordingly, it is hereby

ORDERED that Deutsche Bank’s summary judgment motion (mot. seq. six) is denied; and it is further

ORDERED that Conti’s cross-motion (mot. seq. seven) for leave to file a late amended answer to the amended complaint is granted and Defendant Conti shall e-file his amended answer (proposed as NYSCEF Doc No. 228) within 20 days after service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,



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