

Deutsche Bank Natl. Trust Co. v Gorbulsky

2025 NY Slip Op 31938(U)

May 30, 2025

Supreme Court, Kings County

Docket Number: Index No. 13746/2009

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 30th 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 FOR HIS ASSET SECURITIZATION
CORPORATION 2006-OPT4 MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2006-OPT4,

Plaintiff,

- against -

Index No. 13746/2009

PHILIP GORBULSKY, SVETLANA GORBULSKY, SERGEI
GORBULSKY a/k/a SERGEY GOLDSHTEYN, CITY OF
NEW YORK PARKING VIOLATIONS BUREAU,

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) _____

2-15 22-27
28-30 32-35
32-35

Upon the foregoing papers in this action to foreclose a mortgage encumbering the one-family, residential property at 3939 Bedford Avenue in Brooklyn (Block 6831, Lot 71) (Property), plaintiff Deutsche Bank National Trust Company as Trustee for HIS Asset Securitization Corporation 2006-OPT4 Mortgage Pass-Through Certificates, Series 2006-OPT4 (Deutsche Bank or Plaintiff) moves (in motion sequence [mot. seq.] six) for an order: (1) “vacating and lifting the Court’s stay of proceedings and permitting Plaintiff to proceed

with this action . . .”; (2) directing the Kings County Clerk to enter the court’s June 7, 2016,¹ order granting Plaintiff’s motion for summary judgment (in mot. seq. three), or, alternatively, “settling the Proposed Order previously submitted by Plaintiff as part of Motion Sequence #3 and re-submitted herewith, to be entered with the Kings County Clerk . . .” (NYSCEF Doc No. 2).

Defendant Phillip Gorbulsky (Gorbulsky) moves (in mot. seq. seven) for an order dismissing the instant action, pursuant to Kings County Supreme Court Uniform Civil Term Rules, Part F, Rule 8 (NYSCEF Doc No. 22).

Background

On June 3, 2009, Deutsche Bank commenced this foreclosure action by filing a summons, a complaint verified by counsel and a notice of pendency against the Property. The complaint alleges that Defendants Phillip Gorbulsky, Svetlana Gorbulsky and Sergei Goldshteyn executed and delivered a \$800,000.00 promissory note, which was secured by a consolidation, extension and modification agreement (CEMA) encumbering the Property (NYSCEF Doc No. 1 [complaint] at ¶¶ 4-5). The complaint further alleges that “Philip Gorbulsky and Svetlana Gorbulsky and Sergei Goldshteyn, so named, have failed and neglected to comply with the conditions of said mortgage, bond or note by omitting and failing to pay the monthly payments of principal, interest, taxes, assessments, water rates,

¹ The record reflects that the court actually issued an Order of Reference on June *17*, 2016, rather than on June 7, 2016.

insurance premiums, escrow and/or other charges . . .” on February 1, 2009 (*id.* at ¶ 8 and Schedule C).

On or about August 31, 2009, Defendants Philip Gorbulsky and Svetlana Gorbulsky and Sergei Goldshteyn collectively answered the complaint, denied the material allegations therein and asserted seven counterclaims and several affirmative defenses, including that “answering defendant[s] tendered the amounts due under the note and mortgage and the plaintiff wrongfully refused to accept the amounts tendered” (NYSCEF Doc No. 1 at 65-78). On January 8, 2010, Deutsche Bank replied to Defendants’ counterclaims (*id.* at 83-89).

On or about April 1, 2010, Deutsche Bank filed a request for judicial intervention (RJI) indicating that this foreclosure action qualified for mandatory residential foreclosure settlement conferencing, pursuant to CPLR 3408 (*id.* at 90-91). By a December 7, 2010, order, this residential foreclosure action was released from the conference part (*id.* at 92).

On January 11, 2012, Deutsche Bank moved for summary judgment, an order of reference and a default judgment against the non-appearing and non-answering defendants (*id.* at 98 and 103-104). By a May 31, 2012, decision and order, the court (Battaglia, J.) denied Deutsche Bank’s summary judgment motion “with leave to renew on compliance with Rule § 202.12 (22 NYCRR § 202.12)” (*id.* at 100-102).

On September 14, 2012, Deutsche Bank moved, once again, for summary judgment, an order of reference and a default judgment against the non-appearing defendants (*id.* at

464 and 471-472). By a September 6, 2013, decision and order, the court (Battaglia, J.) denied Deutsche Bank's motion with leave to renew (*id.* at 469-470). The court held that:

“Plaintiff purports to comply with the Administrative Order of the Chief Administrative Judge of the Courts dated March 2, 2011 (A0/431/11) with an Affirmation of counsel. The Affirmation does not, however, comply with the Order in that it does follow Form A incorporated into the Order. Specifically, counsel does not assert that Plaintiff's representative ‘personally reviewed plaintiff's documents and records relating to this case for factual accuracy,’ and does not confirm ‘the accuracy of the notarizations contained in the supporting documents.’ Most disquieting is that counsel does not alert the Court that the Form has been modified, or provide an explanation. The failure to comply with the Administrative Order in itself requires denial of the motion. (*See Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576 [2d Dept 2012]; *US Bank, NA v Boyce*, 93 AD3d 782 [2d Dept 2012])” (*id.* at 470).

The court further held that Deutsche Bank failed to submit a copy of its reply to Defendants' counterclaims, as required by CPLR 3212 (b), and failed to establish its standing to foreclose, which was raised as a defense in Defendants' answer (*id.*).

On March 3, 2015, about a year and a half later, the court held a status conference, after which it issued the following “Conditional Order of Dismissal”:

“At a Status Conference held this day, it is the finding of this Court that more than one year has elapsed since the joinder of issue and plaintiff has unreasonably neglected to prosecute this action.

“Accordingly, this action is dismissed pursuant to CPLR 3216 and the County Clerk is directed to cancel the Notice of Pendency unless plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof.

“Warning: Failure to comply with the terms of this order will result in the dismissal of the action” (*id.* at 916).

On May 28, 2015, a few days before the expiration of the 90-day period, Deutsche Bank moved (in mot. seq. three), for the third time, for summary judgment, an order of reference and a default judgment (*id.* at 917).

On July 13, 2015, defense counsel moved, by order to show cause (OSC) for leave to withdraw as counsel to Phillip Gorbulsky (*id.* at 918 and 966-967). By order entered on July 28, 2015, the court (Spodek, J.) granted defense counsel’s OSC without opposition and the case was stayed for 30 days “for defendant to find new counsel or appear pro se” (*id.* at 919). On September 8, 2015, Phillip Gorbulsky moved for a further stay and to adjourn Deutsche Bank’s summary judgment motion, which was subsequently withdrawn (*id.* at 920 and 932-933).

After the expiration of the 30-day stay, the court (Spodek, J.) issued a March 22, 2016, order memorializing that Phillip Gorbulsky’s motion for a stay was withdrawn, Deutsche Bank’s summary judgment motion was adjourned until April 19, 2016, and marked “final” and the court directed that “Defendant shall serve opposition, if any, to plaintiff’s motion in a manner that such opposition shall be received by plaintiff’s counsel by close of business on April 5, 2016 (*id.* at 921).

On June 17, 2016, the court (Spodek, J.) issued an Order of Reference,² granting

² The record reflects that defense counsel for Phillip, Svetlana and Sergei Gorbulsky submitted an untimely affirmation and affidavit, both executed on April 18, 2016, in opposition to Deutsche Bank’s summary judgment motion (*id.* at 1248-1260).

Deutsche Bank's summary judgment motion, striking and dismissing Defendants' answer, affirmative defenses and counterclaims, granting Deutsche Bank a default judgment against the non-appearing defendants and appointing a referee to ascertain the amount due (*id.* at 974-977).

Deutsche Bank's Instant Motion

On April 30, 2021, Deutsche Bank moved for an order: (1) vacating and lifting the stay and permitting it to proceed with this action, and (2) directing the County Clerk to enter the court's June 17, 2016 order granting Deutsche Bank summary judgment and an order of reference (NYSCEF Doc No. 2).

Deutsche Bank's counsel submits an affirmation explaining that Deutsche Bank moved for summary judgment and an order of reference on May 28, 2015, after which defense counsel moved in July 2015 by OSC for leave to withdraw as counsel, which stayed the action for 30 days (NYSCEF Doc No. 3 at ¶¶ 1-2). Deutsche Bank's counsel asserts that “[p]ursuant to the eCourts Webcivil Supreme - Case Search Results page, the Case Status for this matter remains ‘Stayed[,]’” although the “stay has long since expired” (*id.* at ¶¶ 5 and 14). Counsel further explains that his law firm, McCabe, Weisberg & Conway, LLC (MWC) “was substituted as the Attorneys of Record for Plaintiff by Consent to Change Attorney (‘CTCA’) dated October 21, 2016, after which his firm repeatedly requested a copy of the court's July 17, 2015 Order of Reference from the County Clerk to no avail (*id.* at ¶¶ 6-7). Counsel affirms that the Order of Reference was never entered:

“[f]urther attempts were made to obtain the granted Order, and are ongoing, including the instant motion. Attorney Gregory Greene, who is no longer with the firm, made attempts when he would appear in Kings County Supreme Court at various times throughout 2018, and attorney Jose Hasbun, who is still employed with the firm, made attempts in early 2019.

“At a certain point mid-way through 2019, it was noted by MWC that the matter was stayed by the Court and no further action could be taken until same was lifted. Upon this matter being assigned to the affiant herein, it was determined that the stay should have been removed in or about September of 2015.

“Plaintiff therefore respectfully submits this motion to lift the stay, requesting that the Court enter and provide a copy of the Order granting Plaintiff's Motion Sequence #3 (or Settle the Proposed Order previously submitted with Plaintiff's MSJ and re-submitted herewith) and allow this action to proceed” (*id.* at ¶¶ 8-10).

Defendant Gorbulsky's Opposition and Cross-Motion

Defendant Phillip Gorbulsky, in opposition, submitted an attorney affirmation asserting that “[b]oth requests for relief are totally unnecessary” because there has not been a stay in this action since March 22, 2016, when the court ordered that Phillip Gorbulsky's motion for a further stay was withdrawn (NYSCEF Doc No. 28 at ¶ 2). Defense counsel also asserts that “the order for summary judgment that Plaintiff's now seeks entry was previously signed on June 17, 2016, and is already in the court file,” and thus, Deutsche Bank's motion should be denied as moot (*id.* at ¶ 3).

Defendant Gorbulsky also cross-moved to dismiss the complaint, pursuant to Kings County Supreme Court Uniform Civil Term Rules, Part F, Rule 8, which requires that a motion for a judgment of foreclosure and sale be made within one year after an Order of

Reference is issued (NYSCEF Doc No. 22). Defense counsel asserted that after Deutsche Bank's third summary judgment motion was granted and an Order of Reference was issued on June 17, 2015, "there was a gap of approximately five years until Plaintiff's attorney filed its most recent motion on April 13, 2021, to vacate an alleged stay and for the Court to sign an order for summary judgment" (NYSCEF Doc No. 23 at ¶¶ 4-5). Defense counsel asserts that Plaintiff's counsel's excuse for the delays "fail on numerous levels" including "the attorney's affirmation is merely hearsay as to the actions of other attorneys in the firm[,] "the allegedly missing order is contained in the Court's file which I was able to locate . . ." and "since its last attempts to locate the allegedly lost order were in 2019, Plaintiff's attorney fails to explain why the current motion was not filed until April 13, 2021, approximately two years later" (*id.* at ¶¶ 11-13).

Deutsche Bank's Opposition and Reply

Deutsche Bank, in reply, submits an attorney affirmation reiterating that e-courts indicated that the Order of Reference was issued on June 7, 2015 and that the action was stayed (NYSCEF Doc No. 32 at ¶¶ 7-8). Deutsche Bank's counsel also reiterates that a former attorney at his law firm "made various attempts" to get a copy of the June 2015 Order of Reference and produces email correspondence from March 1, 2018, and March 8, 2018, between that attorney and the court, which are submitted as MWC's business records (*id.* at ¶ 10). Counsel also reiterates that:

"[f]urther attempts were made to obtain the granted Order, and are ongoing, including the instant motion. Attorney Gregory Greene, who is no longer with the firm, made attempts when

he would appear in Kings County Supreme Court at various times throughout 2018, and attorney Jose Hasbun, who is still employed with the firm, made attempts in early 2019.

“At a certain point mid-way through 2019, it was noted by MWC that the matter was stayed by the Court and no further action could be taken until same was lifted. Upon this matter being assigned to the affiant herein, and pursuant to the New York State Unified Court System’s WebCivil Supreme - Case Search Results page e-filed as NYSCEF Doc. No. 13, it was determined that a motion to vacate the stay would be required in order to proceed” (*id.* at ¶¶ 12-13).

Regarding Phillip Gorbulsky’s dismissal cross-motion, Deutsche Bank’s counsel asserts that “[t]aking the facts as alleged in the complaint it is clear that the Defendant’s motion fails to state sufficient grounds for dismissal . . .” because Deutsche Bank already demonstrated a prima facie case by producing the note, the mortgage and evidence of defendants’ payment default (*id.* at ¶¶ 16 and 19-20). Regarding the extensive delays in prosecuting this action, counsel merely asserts that:

“Plaintiff has provided sufficient cause to demonstrate that it has a reasonable excuse for its delay. Whether by mistake or misunderstanding, or both, it is clear from the underlying motion, the exhibits annexed thereto and the instant Reply Affirmation (and the exhibits annexed hereto) that Plaintiff and/or MWC as counsel believed this matter to be stayed and were unable to obtain the signed order from the Court. . . .” (*id.* at ¶ 23).

Thus, without accounting for more than two years during which this case laid dormant, Plaintiff’s counsel merely claims that it mistakenly thought that this action was stayed the entire time.

Discussion

The Kings County Foreclosure Rules, Part F, Rule 8, provides that:

“[w]ithin one year after the signing and entry of an order of Reference, an application for a judgment of foreclosure and sale must be made. Such period of time will be suspended by the filing of Forbearance or Settlement Agreement with the clerk of the court. *Failure to comply will result in an automatic dismissal of the action*” (emphasis added).

The Second Department has held that “[w]here the plaintiff offers an excuse for its failure to comply with Rule 8, the determination of whether the excuse is reasonable is committed to the sound discretion of the motion court” (*U.S. Bank Nat’l Ass’n v Cabrera*, 192 AD3d 1176, 1177 [2d Dept 2021] [internal quotation marks omitted]).

The County Clerk’s Minutes prior to the conversion of this case to e-filing contains copies of all of the relevant orders referenced herein collectively as NYSCEF Doc No. 1. In setting forth the procedural background of this action, this court has referenced the pre-filing record with citations to the relevant motions and orders (*supra* at pages 2-6). Deutsche Bank has remained the plaintiff in this action since commencement, yet its counsel, MWC, seemingly lost track of the action after it was substituted as Plaintiff’s counsel. While attorneys from MWC may have tried to get the case back on track in 2018 and 2019, Plaintiff’s counsel fails to provide a reasonable explanation why this action laid dormant until Plaintiff’s April 30, 2021 motion to lift a long-expired stay and direct the entry of the June 17, 2015 Order of Reference. Accordingly, it is hereby

ORDERED that Deutsche Bank's motion (mot. seq. six) is denied as moot; and it is further

ORDERED that Defendant Phillip Gorbulsky's dismissal cross-motion (mot. seq. seven) is granted and this foreclosure action is dismissed for Deutsche Bank's failure to comply with Kings County Foreclosure Rules, Part F, Rule 8.

This constitutes the decision and order of the court.

E N T E R,



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