

Deutsche Bank Natl. Trust Co. v Etienne

2025 NY Slip Op 33590(U)

September 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 521176/2023

Judge: Menachem M. Mirocznik

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At IAS Part ^{PRC} of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the ^{1st} of September 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

Cal # 1b

Index No. 521176/2023

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR SOUNDVIEW HOME LOAN
TRUST 2005-OPT4, ASSET BACKED
CERTIFICATES, SERIES 2005-OPT4,

Plaintiff,

-against-

WILDA ETIENNE; MOHAMMAD SARWAR;
SHAHNAZ AKHTAR ;CLERK OF THE SUPREME
COURT AND COMMISSIONER OF JURORS;
CRIMINAL COURT OF THE CITY OF NEW YORK;
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD; WELLS FARGO BANK,N.A.; NEW YORK
CITY PARKING VIOLATIONS BUREAU; NEW
YORK CITY TRANSIT ADJUDICATION BUREAU;
OFFICE OF THE CITY REGISTER OF THE CITY OF
NEW YORK, KINGS COUNTY; "JOHN DOE#" 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 Subject Property described in the Complaint,

**Decision and Order
(Motion Seq. 2)**

Defendants.

Papers	Numbered
Notice of Motion	NYSCEF Doc. 49-62
Opposition Papers	NYSCEF Doc. 80-84
Reply Papers	NYSCEF Doc. 85

Upon the foregoing papers, the motion is determined in accordance with this Decision and Order as follows:

Procedural History

This action seeks to foreclose a mortgage encumbering the premises known as 225 East 53rd Street a/k/a 233 East 53rd Street, Brooklyn, New York 11203 in the County of Kings, and State of New York, also known as Block 4659 Lot 40 (the "property")

The property was previously owned by defendant Wilda Etienne and non-party David Etienne who executed the subject mortgage (the "Mortgage") which encumbers the property. David Etienne and Wilda Etienne were thereafter divorced and the property was transferred to non-party David Etienne. David Etienne and Wilda Etienne executed a loan modification on March 17, 2017 which modified the subject mortgage.

Non-party David Etienne purportedly died on March 27, 2020. Thereafter, the property was purportedly sold by the Estate of David Etienne and its distributees to defendants Mohammad Sarwar and Shahnaz Akhtar ("defendants") for \$500,000 (the "Sale").

Defendants filed a third-party summons and cross-claims against the third parties including the estate and distributees of David Etienne and its attorney claiming, inter alia, breach of contract and unjust enrichment arising out of sale of the premises to defendants. Specifically, as relates to the alleged breach of contract defendant allege

"Pursuant to Paragraph 4(d) of the Contract of Sale, it was covenanted, promised, and agreed that "Seller shall deliver to Purchaser at Closing a certificate ... certifying the amount of the unpaid principal, the date to which interest has been paid and the amounts, if any, claimed to be unpaid for principal or interest" or "if the holder of the existing mortgage is a bank... it may, instead of a certificate, furnish a letter. .. date not more than 30 days before Closing, containing the same information."

"Pursuant to Paragraph 4(e) of the Contract of Sale, "Seller represents and warrants that (i) Seller has delivered to Purchaser true and complete copies of the existing mortgage, the note secured thereby and any extension and modification thereof: (ii) the existing mortgage is not now, and at the time of the Closing will not be, in default. .."

Defendants do not appear to contend that they lacked knowledge of the subject mortgage, do not provide a copy of the subject contract of sale and do not provide a mortgage satisfaction or other proof of payment of the subject mortgage.

Plaintiff moves for summary judgment and to dismiss defendants answer and affirmative defenses, for a default judgment against the remaining defendants, an order of reference, to sever the third party complaint filed by defendants and to amend the caption.

Defendants oppose the motion contending that summary is premature prior to the completion of discovery because questions of fact remain whether the subject mortgage was paid off when they purchased the property. Defendants' contentions are without merit.

Discussion

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" *Hudson City Sav. Bank v Gemuth*, 148 AD3d 687 (2nd Dept. 2017) See *TD Bank, NA. v. Mandia*, 133 AD3d 590 (2nd Dept. 2015)

This showing shifts the burden to the non-movant to present evidence in admissible form sufficient to raise a material issue of fact. See *Gesuale v. Campanelli & Assocs., PC.*, 126 AD3d 936 (2nd Dept. 2015). See also *Dee v. Rakower*, 112 A.D.3d 204 (2nd Dept. 2013). See also *First Int 'I Bank of Israel, Ltd. v. L. Blankstein & Son, Inc.*, 59 NY3d 436 (1983)

Here, plaintiff demonstrated prima facie entitlement to judgment as a matter of law with the production of the note, mortgage and evidence of default including production of the payment history of the subject loan. Defendants failed to raise an issue of fact.

"While summary judgment may be denied when discovery has not been completed (see CPLR 3212[f]), the nonmoving party must produce some evidence indicating that further discovery "will yield material and relevant evidence" *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203 (3rd Dept. 2008);

"The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" *Wells Fargo Bank, NA. v Gonzalez*, 174 AD3d 555 (2nd Dept 2019); *HSBC Bank USA, Nat. Ass'n v Armijos*, 151 AD3d 943 (2nd Dept 2017)

Here, the sole contention raised by defendants is that further discovery is necessary to determine whether the subject mortgage was paid off. However, as noted above, plaintiff produced the payment history for the subject loan demonstrating the same was not paid off and defendants offered no evidentiary basis to contend otherwise. Accordingly, plaintiff's motion for summary judgment is granted.

Defendants also do not oppose the branch of plaintiff's motion seeking to sever defendants third party claims and did not oppose dismissal of defendant affirmative defenses. In any case, by failing to raise any of their affirmative defenses in opposition to plaintiff's motion he same are deemed abandoned, waived and now dismissed. See *Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 (1st Dept. 2018) *Starkman v City of Long Beach*, 106 AD3d 1076 (2nd Dept. 2013); *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 (2nd Dept. 2013)

Lastly, plaintiffs motion for default judgment against the remaining defendants and to amend the caption is granted.

Accordingly, it is hereby:

ORDERED, the motion is GRANTED; and it further

ORDERED, that Plaintiff is directed to settle an order on notice consistent herewith within 20 days of entry of this order; and it is further

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC

2025 SEP 19 A 9:50
KINGS COUNTY CLERK
FILED