Deutsche Bank v Cummings
2026 NY Slip Op 31593(U)
April 10, 2026
Supreme Court, Kings County
Docket Number: Index No. 533112/21
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2026.

P R E S E N T:
HON. CENCERIA P EDWARDS,
Justice.

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DEUTSCHE BANK,

Plaintiff,

-against-

Index No.: 533112/21
Mot. Seq. No.: 2+3
Calendar Date: 2/7/2024
Calendar No.(s): **1+2**

RAHSAAN CUMMINGS et al,

Defendant,

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The following e-filed papers read herein:	**NYSCEF Nos.**:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	77-113 126-129
Opposing Affidavits (Affirmations)	140-151 164
Affidavits/ Affirmations in Reply	152-153 166-167

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 95 Miller Avenue in Brooklyn (Block 3932, Lot 16), Plaintiff Deutsche Bank National Trust Company moves for summary judgment against the answering defendants, default judgment against the remaining defendants, amendment of the caption to substitute the tenants in place of the Doe defendants, and the appointment of a referee to compute the amount due to it. Defendants Rahsaan Cummings and 95 Miller Development Corp oppose. Defendants also move more an order declaring Plaintiff's motion to be outdated in light of the passage of FAPA and dismissing this action with prejudice as untimely. They further seek discharge of the mortgage and an award of costs, disbursements, and attorney's fees. Plaintiff opposes.

Background Facts and Procedural History

A prior action was filed by Argent Mortgage Company on August 16, 2006. Cummings, also a defendant therein, failed to timely appear. An order of reference was granted on default and substituted Plaintiff in place of Argent. Plaintiff's motion for judgment of foreclosure and sale, however, was marked off in 2008. After no further effort was made to advance the action, the matter was dismissed on February 6, 2014 upon Plaintiff's failure to appear at a status conference. A motion to vacate was filed in October 2016 but was denied in March 2017, the Court noting the age of the action and the delay in seeking restoration. A subsequent motion – again seeking to vacate the 2014 dismissal order – was filed in September 2017 and denied in February 2018, the Court terming it a "second motion to reargue the 2014 dismissal" and finding that it was "Too late." On October 1, 2021, a notice of appeal was filed but the appeal was never perfected.

Plaintiff commenced the instant foreclosure action on December 28, 2021. Defendants jointly answered through counsel, asserting thirty-one affirmative defenses and two counterclaims.

On May 16, 2022, Defendants filed a motion [MS 1] seeking dismissal of this action with prejudice and discharge of the mortgage. Alleging that the 2006 action accelerated the loan, Defendants argued that the instant action – filed fifteen years later in 2021 – is untimely. They further asserted that CPLR 205[a] is inapplicable as the prior action was dismissed for neglect and the instant action was filed more than six months following the expiration of the time to appeal from the 2017 order denying vacatur of the dismissal. Defendants also characterized the second motion to vacate as seeking reargument and, thus, that its denial was not appealable and would not have delayed the termination of the 2006 action. To the extent that the statute of limitations has expired, Defendants asserted that the mortgage must be discharged. In the alternative, 95 Miller argued that it was a bona fide purchaser for value, acquiring the property in 2021 for valuable consideration when no action was pending and there was no notice of pendency.

In opposition,[1] Plaintiff asserted that Argent lacked standing to commence the 2006 action as it had already transferred ownership of the loan to Plaintiff as part of a 2005 securitization

[1] Prior to opposing, Plaintiff filed a stand-alone motion for summary judgment [MS 2] which will be discussed separately.

transaction as memorialized in a PSA, among other documents. Plaintiff also claims to have been in physical possession of the original note since October 2005. It further challenged whether there was a clear and unequivocal acceleration, noting that Cummings claims not to have been served with the 2006 summons and complaint and that there is no evidence that pre-acceleration notices had been sent in advance of that action. Plaintiff also suggested that the pendency of the 2006 action – and RPAPL 1301's bar on filing a co-pending action to foreclose on the same lien – tolled the statute of limitations pursuant to CPLR 204[a]. Finally, Plaintiff argued that CPLR 205[a] would apply as the 2006 action was dismissed for a failure to appear at a conference – and there was no pattern of neglect. It also characterized the 2017 motion as a successive motion for vacatur, rather than a motion to reargue the prior denial, and suggested that the delay prior to the 2016 motion was of no legal significance.

In reply, Defendants argued that Plaintiff is estopped from arguing that Argent lacked standing. They further assert that Argent appended a copy of the note to the 2006 complaint and that the assignment of mortgage became effective during the pendency of that action. The PSA does not provide a transfer date and the remaining documents proffered by Plaintiff are inadmissible and do not support Plaintiff's position. Defendants further asserted that there was no adjudication that Cummings was not served in the prior action and the issue of whether pre-acceleration notices were sent was not raised therein – and, thus, the 2006 action did accelerate the loan. Nor, they argue, is CPLR 204[a] applicable – the pendency of an action to foreclose does not toll the statute of limitation on foreclosure. Finally, Defendants assert that the prior action was dismissed for want of prosecution and the motions to vacate were effectively seeking reargument – and, thus, the instant action would not be timely even were a toll available under CPLR 205[a].

Defendants' motion was marked off on October 6, 2022.

Plaintiff's Motion for Summary Judgment [MS 2]

Plaintiff's Moving Papers

On September 15, 2022, Plaintiff filed the instant motion for summary judgment against the answering defendants. Therein, Plaintiff, arguing that it has met its prima facie burden and that the defendants' affirmative defenses lack merit, seeks to strike the answer. Plaintiff further

seeks default judgment against the non-appearing defendants and to have a referee appointed to compute the amount due to it. Ancillary to the main relief, it seeks to substitute "John Doe #1 (Refused Name)," "John Doe #2 (Refused Name)," "John Doe #3 (Refused Name)," "John Doe #4 (Refused Name)," "John Doe #5 (Refused Name)," "John Doe #6 (Refused Name)," "John Doe #7 (Refused Name)," "John Doe #8 (Refused Name)," "John Doe #9 (Refused Name)," and "Axcel Reynoso" in place of the Doe defendants.

In support of its motion, Plaintiff proffers an affidavit signed by Benjamin Verdooren, a Senior Loan Analyst employed by Ocwen Financial Corporation, whose subsidiary is PHH Mortgage Corporation, the successor-by-merger to Ocwen Loan Servicing, LLC. Therein, he introduces, among other documents, copies of the note, mortgage, and assignments of mortgage. Verdooren further states that the loan has been in default since January 1, 2007 and proffers a payment history allegedly reflecting that. The affiant further asserts that the note and mortgage were transferred to Plaintiff pursuant to the PSA and Subsequent Transfer Instrument and that its custodian has been in possession of the original note since October 12, 2005. as of the commencement of this action. He also claims a personal familiarity with PHH and its vendor's mailing practices and appends copies of the RPAPL 1304 and mortgage default notices and the records upon which he bases his contention that they were sent.

Defendant's Opposition

On April 11, 2023, Defendants filed untimely opposition to Plaintiff's motion. Plaintiff filed a notice of rejection the following day. On April 14th, Defendants filed an order to show cause seeking either to compel acceptance of its opposition, leave to file a substitute opposition, for their new motion[2] to be treated as opposition to Plaintiff's motion, or for the motion to dismiss to be adjudicated prior to Plaintiff's motion. This Court declined to sign the order to show cause, noting that the excuse for Defendants' failure to timely oppose was unsubstantiated and deeming Plaintiff's motion "submitted/unopposed" but adjourning it to track Defendants' motion. By order dated November 15, 2023, however, this Court granted Defendants leave to file opposition.

On January 3, 2024, Defendants filed opposition to Plaintiff's motion. Therein, they argue that Plaintiff's motion is moot in light of FAPA – that CPLR 205-a, rather than 205[a], is applicable

[2] The cross-motion [MS 3] was filed at the same time as the opposition and will be addressed in the next section.

– and this action clearly untimely. Even were CPLR 205[a] to still apply, Defendants argue that this action terminated in 2008 (when the motion was marked off) or in 2014 (when the dismissal order was entered) and that the motions to vacate and appeal did not reset the start of the six month toll. They also note that Plaintiff did not file the prior action and suggest that no toll is available to it under CPLR 205[a] or 205-a.

Defendants further assert that the Verdooren Affidavit is insufficient to support the grant of summary judgment to Plaintiff. Ocwen's involvement with this loan began well after Plaintiff allegedly acquired this loan and no basis for Verdooren's "knowledge" that it possessed the note has been offered. Further, he admitted that a vendor would have mailed the notices but – Defendants claim – has not demonstrated a familiarity with its mailing practices.

Finally,[3] Defendants argue that 95 Miller is a bona fide purchaser for value as there was no notice of pendency in place at the time it acquired the property for valuable consideration. As such, it argues, Plaintiff cannot foreclose upon its interest.

Plaintiff's Reply

Plaintiff counters that the Verdooren Affidavit is sufficient. He laid a sufficient foundation for his employer's records and – including those created by prior servicers – which he proffered. The affiant also claimed personal knowledge of the procedures used by PHH and Walz to generate and mail notices, providing a detailed description thereof and introducing the documents upon which he based his contention that the notices were mailed herein.

Noting that Defendants did not address the bulk of their affirmative defenses, Plaintiff contends that they have been waived.

Plaintiff further argues that 95 Miller was not a bona fide purchaser for value. It was on notice of Plaintiff's encumbrance and paid a small fraction of the value of the property.

Asserting that Argent lacked standing to commence the 2006 action in light of the PSA and other documentary evidence, Plaintiff argues that Argent was unable to accelerate the loan. To the extent that Cummings claims not to have been served and there is no evidence that pre-acceleration

[3] Defendants also raise arguments in favor of the relief sought in its motion. Those will be addressed in that context.

notices were sent prior to that action, Plaintiff suggests the loan was not accelerated. Further, Plaintiff posits that the pendency of a foreclosure action serves as a toll of the statute of limitations in light of CPLR 204[a] and RPAPL 1301. Though the 2006 action was dismissed for failure to appear at a conference, Plaintiff maintains that there was no general pattern of delay and CPLR 205[a] is applicable. Finally, Plaintiff contends that FAPA is not retroactive and, if it were, would be unconstitutional.

Defendants' Motion to Dismiss [MS 3]

Defendants' Moving Papers

On April 11, 2023, Defendants filed the instant motion. Therein, they seek an order declaring Plaintiff's motion to be outdated in light of the passage of FAPA and dismissing this action with prejudice as untimely. More specifically, Defendants note that CPLR 205-a explicitly excludes a toll following "a dismissal of the complaint for any form of neglect, including … by default due to nonappearance for conference or at a calendar call." Case law also reflects that FAPA should be applied retroactively. Defendants further assert that this action would have been untimely under CPLR 205[a] as well – in their view, the instant action was filed more than six months after the prior case terminated in 2008 or 2014 and Plaintiff (which did not file the prior action) cannot seek the toll.

Asserting that it is a bona fide purchaser for value, 95 Miller also seeks dismissal on that basis.

Defendants also seek judgment on their quiet title claim and, thereupon, discharge of the mortgage. Presuming that they prevail in this action, they also seek the award of costs, disbursements, and attorney's fees pursuant to RPL 282 as requested within their counterclaims.

Plaintiff's Opposition

Plaintiff argues that the instant motion is barred by the "one-motion rule" and is an effort by Defendants to get around the rejection of their opposition. This is Defendants' second motion to dismiss and was filed after its time to contest Plaintiff's motion.

Plaintiff further raises the same arguments that it (later) raised in its reply to Defendants' opposition to MS 2 – that Argent lacked standing, there was no equivocal acceleration, the statute

of limitations was tolled by CPLR 204[a] and/or 205[a], and FAPA cannot be both retroactive and constitutional.

Arguing that the notice of motion does not mention RPL 282 and the answer only includes a request for such an award as part of the other counterclaims, Plaintiff contends that Defendants should not be awarded attorney's fees. It further suggests that the dismissal here would be on procedural grounds barring such an award. Finally, it notes that RPL 282 is only available to the mortgagor – and, thus, not to 95 Miller.

Defendants' Reply

Defendants counter that their previous motion was marked off and never decided and that the instant motion is upon a new ground – FAPA. As such, they argue that the "one-motion rule" is inapplicable.

Arguing that the statute of limitations has run, Defendants note that CPLR 213[4] bars Plaintiff from arguing that Argent lacked standing. Defendants further contend that they are not obligated to prove that the notices were properly sent prior to the 2006 action – Plaintiff argued therein that it had and there was no finding to the contrary. Per FAPA (which it argues is both retroactive and constitutional), the prior dismissal was for neglect to prosecute and no toll is available pursuant to CPLR 205-a. Even were that not so, the instant action was filed more than six months following the termination of the prior case – the motions to "vacate" and appeal did not restart the clock – and Plaintiff did not file the prior action.

95 Miller continues to argue that it is a bona fide purchaser, now proffering an affidavit in support from its vice president. There was no notice of pendency when it acquired the property and the prior action had already been dismissed. It believed Plaintiff's lien was unenforceable.

Finally, Defendants reiterate that they should be awarded costs, disbursements and attorney's fees.

Analysis

Defendants' motion is properly before the Court. Their previous filing was marked off. They now move substantially on the same ground, albeit upon updated legal arguments. As such, it is, in essence, a refiled motion for summary judgment which this Court will consider.

The statutory amendments within FAPA are retroactive and constitutional (see, for example, *Van Dyke v US Bank, NA*, 2025 NY Slip Op 06537 [Ct of Appeals November 25, 2025]).

It is undisputed that a prior action was filed in 2006 which would (ordinarily) serve as an acceleration. In the absence of a prior judicial determination that Argent lacked standing, Plaintiff cannot assert that it did not and could not accelerate the loan (CPLR 213[4][a]). Likewise, there was no judicial determination that Argent failed to serve the required pre-acceleration notices (*cf Nichols v US Bank*, 235 AD3d 651 [2d Dept 2025]). The 2006 action was dismissed upon Plaintiff's failure to appear at a conference and, thus, a toll pursuant to CPLR 205-a is unavailable. Nor does its pendency serve as a toll pursuant to CPLR 204[a] (*MTGLQ Investors v Baksh*, 215 AD3d 666, 668 [2d Dept 2023]). As such, the instant action is untimely.

"To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative" (*Acocella v Wells Fargo Bank, NA*, 139 AD3d 647 [2d Dept 2016]). 95 Miller is the owner of real property upon which Plaintiff has a lien. As the statute of limitations has passed on the lien and that it is thus unenforceable, judgment is granted in favor of the counterclaimant upon the quiet title counterclaim.

Defendants sufficiently asserted a counterclaim for attorney's fees (*cf US Bank NA v Onuoha*, 216 AD3d 1069, 1073 [2d Dept 2023]). Pursuant to RPL 282, "[w]henever a covenant contained in a mortgage on residential real property shall provide that ... the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage ... there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor ... in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract." As it is undisputed that the mortgage provides for the award of attorney fees and as Cummings – the mortgagor – has successfully defended this action, he (but not 95 Miller) is entitled to reasonable attorneys' fees.

Conclusion

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment and an order of reference [MS 2] is denied; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's claims and for judgment on their counterclaims is granted to the extent indicated; and it is further

ORDERED that Defendants' counsel is to settle on notice to Plaintiff's counsel a proposed order and an affirmation substantiating the requested attorney fees.

This constitutes the decision and order of the Court.

ENTER:

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