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Deutsche Bank Natl. Trust Co. v Francis
2011 NY Slip Op 50423(U)
Decided on March 25, 2011
Supreme Court, Kings County
schack, J.
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Decided on March 25, 2011

Supreme Court, Kings County

**Deutsche Bank National Trust Company as Trustee under the
Pooling and Servicing Agreement Dated as of February 1, 2007,
GSAMP TRUST 2007-FM2, Plaintiff,**

against

Walter Francis a/k/a Walter J. Francis, et. al., Defendants

10441/09

Plaintiff

Jordan S. Katz, PC

Melville NY

schack, J.

In this residential mortgage foreclosure action, for the premises located at 2155 Troy Avenue, Brooklyn, New York (Block 7842, Lot 11, County of Kings) plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF FEBRUARY 1, 2007, GSAMP TRUST 2007-FM2 [*2](DEUTSCHE BANK) moved for an order of reference alleging that defendant WALTER T. FRANCIS (FRANCIS) failed to file a timely answer. Plaintiff DEUTSCHE BANK and defendant FRANCIS appeared for oral argument on DEUTSCHE BANK'S motion on September 21, 2010. In a short form order issued that day I held that FRANCIS filed a timely answer and also denied plaintiff's motion for an order of reference because plaintiff DEUTSCHE BANK failed to serve defendant FRANCIS with its motion for an order of reference. I ordered the parties to appear before me on October 29, 2010 for a preliminary conference.

The parties appeared on October 29, 2010. Plaintiff's counsel agreed to try to work with defendant FRANCIS on a loan modification agreement if defendant FRANCIS provided DEUTSCHE BANK with numerous documents. Defendant FRANCIS provided plaintiff with the required documentation. The Court conducted several settlement conferences. The last settlement conference was scheduled for March 14, 2011. Plaintiff DEUTSCHE BANK defaulted in appearing, while defendant FRANCIS was present. Plaintiff's counsel did not contact my Part or file an affirmation of actual engagement. I then checked the file for this case maintained by the Kings County Clerk and the Automated City Register Information System (ACRIS). I discovered that there is no record of plaintiff DEUTSCHE BANK ever owning the subject mortgage and note. Therefore, with plaintiff DEUTSCHE BANK lacking standing, the instant action is dismissed with prejudice and the notice of pendency cancelled.

Background

According to the verified complaint and confirmed by my ACRIS check, defendant

FRANCIS borrowed \$445,500.00 from FREMONT INVESTMENT AND LOAN (FREMONT) on October 20, 2006. The mortgage to secure the note was recorded by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), "acting solely as a nominee for Lender [FREMONT]" and "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD," in the Office of the City Register of the City of New York, New York City Department of Finance, on November 21, 2006, at City Register File Number (CRFN) 2006000645448.

Plaintiff alleges in its verified complaint that FRANCIS executed a loan modification agreement on February 22, 2008 with FREMONT. This was never recorded with ACRIS. Further, the verified complaint alleges, in ¶ 6, that MERS, as nominee for FREMONT assigned the mortgage and note to plaintiff "by way of an assignment dated April 21, 2009 to be recorded in the Office of the Clerk of the County of Kings." It is almost two years since April 21, 2009 and this alleged assignment has not been recorded in ACRIS. Plaintiff should learn that mortgage assignments are not recorded in the Office of the Clerk of the County of Kings, but with the City Register of the New York City Department of Finance.

Defendant FRANCIS allegedly defaulted in his mortgage loan payments with his January 1, 2009 payment. Subsequently, plaintiff DEUTSCHE BANK commenced the instant action, on April 29, 2009, alleging in ¶ 7 of the verified complaint, that "Plaintiff [DEUTSCHE BANK] is the holder and owner of the aforesaid NOTE and MORTGAGE."

However, according to ACRIS, plaintiff DEUTSCHE BANK was not the holder of the note and mortgage on the day that the instant foreclosure action commenced. Thus, DEUTSCHE BANK lacks standing. The action is dismissed with prejudice. The notice of pendency [*3]cancelled. Plaintiff's lack of standing is enough to dismiss this action. The Court does not need to address MERS' probable lack of authority to assign the subject mortgage and note to DEUTSCHE BANK, if it was ever assigned.

Discussion

In the instant action, it is clear that plaintiff DEUTSCHE BANK lacks "standing." Therefore, the Court lacks jurisdiction. "Standing to sue is critical to the proper functioning

of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 812 [2003], *cert denied* 540 US 1017 [2003]). Professor Siegel (NY Prac, § 136, at 232 [4d ed]), instructs that:

[i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

"Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." ([Caprer v Nussbaum \(36 AD3d 176, 181 \[2d Dept 2006\]\)](#)). If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1st Dept 2002]).

Plaintiff DEUTSCHE BANK lacked standing to foreclose on the instant mortgage and note when this action commenced on April 29, 2009, the day that DEUTSCHE BANK filed the summons, verified complaint and notice of pendency with the Kings County Clerk, because it can not demonstrate that it owned the mortgage and note that day. Plaintiff alleges that the April 21, 2009 assignment from MERS, as nominee for FREMONT, to plaintiff DEUTSCHE BANK was to be recorded. As of today it has not been recorded. The Court, in [Campaign v Barba \(23 AD3d 327 \[2d Dept 2005\]\)](#),

instructed that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, **ownership of the mortgage**, and the defendant's default in payment [*Emphasis added*]." (*See Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]; *Household Finance Realty Corp. of New York v Wynn*, 19 AD3d 545 [2d Dept 2005]; *Sears Mortgage Corp. v Yahhobi*, 19 AD3d 402 [2d Dept 2005]; *Ocwen Federal Bank FSB v Miller*, 18 AD3d 527 [2d Dept 2005]; *U.S. Bank Trust Nat. Ass'n Trustee v Butti*, 16 AD3d 408 [2d Dept 2005]; *First Union Mortgage Corp. v Fern*, 298 AD2d 490 [2d Dept 2002]; *Village Bank v Wild Oaks, Holding, Inc.*, 196 AD2d 812 [2d Dept 1993]).

Assignments of mortgages and notes are made by either written instrument or the assignor physically delivering the mortgage and note to the assignee. "Our courts have repeatedly held that a bond and mortgage may be transferred by delivery without a written instrument of assignment." (*Flyer v Sullivan*, 284 AD 697, 699 [1d Dept 1954]). Plaintiff DEUTSCHE BANK has no evidence that it had physical possession of the note and mortgage on [*4]April 29, 2009 and admitted, in ¶ 6 of the instant verified complaint complaint, that the April 21, 2009 assignment is "to be recorded."

The Appellate Division, First Department, citing *Kluge v Fugazy*, in *Katz v East-Ville Realty Co.*, (249 AD2d 243 [1d Dept 1998]), instructed that "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact." Therefore, plaintiff DEUTSCHE BANK lacks standing and the Court lacks jurisdiction in this foreclosure action. The instant action is dismissed with prejudice.

The dismissal with prejudice of the instant foreclosure action requires the cancellation of the notice of pendency. CPLR § 6501 provides that the filing of a notice of pendency against a property is to give constructive notice to any purchaser of real property or encumbrancer against real property of an action that "would affect the title to, or the possession, use or enjoyment of real property, except in a summary proceeding brought to recover the possession of real property." The Court of Appeals, in *5308 Realty Corp. v O & Y Equity Corp.* (64 NY2d 313, 319 [1984]), commented that "[t]he purpose of the

doctrine was to assure that a court retained its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit," and, at 320, that "the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review."

CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:

The Court, upon motion of any person aggrieved and upon such

notice as it may require, *shall direct any county clerk to cancel*

a notice of pendency, if service of a summons has not been completed

within the time limited by section 6512; or *if the action has been*

settled, discontinued or *abated*; or if the time to appeal from a final

judgment against the plaintiff has expired; or if enforcement of a

final judgment against the plaintiff has not been stayed pursuant

to section 551. [*emphasis added*]

The plain meaning of the word "abated," as used in CPLR § 6514 (a) is the ending of an action. "Abatement" is defined as "the act of eliminating or nullifying." (Black's Law Dictionary 3 [7th ed 1999]). "An action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains (2A Carmody-Wait 2d § 11.1)." (*Nastasi v Natassi*, 26 AD3d 32, 40 [2d Dept 2005]). Further, *Nastasi* at 36, held that the "[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR § 6501 (*see 5303 Realty Corp. v O & Y Equity Corp.*, *supra* at 320-321; *Rose v Montt Assets*, 250 AD2d 451, 451-452 [1d Dept 1998]; Siegel, NY Prac § 336 [4th ed])." Thus, the dismissal of the instant complaint must result in the mandatory cancellation of plaintiff DEUTSCHE BANKS's notice of pendency against the property "in the exercise of the inherent power of the court."

Conclusion

Accordingly, it is

ORDERED, that the instant action, Index Number 10441/09, is dismissed with prejudice; and it is further [*5]

ORDERED that the Notice of Pendency in this action, filed with the Kings

County Clerk on April 29, 2009, by plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF FEBRUARY 1, 2007, GSAMP TRUST 2007-FM2 , to foreclose on a mortgage for real property located at 2155 Troy Avenue, Brooklyn, New York (Block 7842, Lot 11, County of Kings), is cancelled.

This constitutes the Decision and Order of the Court.

ENTER

HON. ARTHUR M. SCHACK

J. S. C.

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