

Mathura v Deutsche Bank Natl. Trust Co.

2012 NY Slip Op 33431(U)

November 12, 2012

Sup Ct, Queens County

Docket Number: 7369/12

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Rose Mathura,

Plaintiff,

-against-

Index No.: 7369/12
Motion Date: 9/12/12
Motion Cal. No.: 20
Motion Seq. No.: 1, 2

Deutsche Bank National Trust Company, Merscorp Inc.,
Mortgage Electronic Registration Systems, Steven J.
Baum, P.C., Derrick Layton, Geraldine Johnson, Sean
Nix, Wells Fargo, N.A.,
Defendants.

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The following papers numbered 1 to 17 read on this motion for an order pursuant to CPLR 3211(a)(3), (5) and (8) dismissing with prejudice the claims against Defendants in Plaintiff's Complaint filed in this action.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits- Memo of Law.....	1 - 4
Notice of Motion- Exhibits- Memo of Law.....	5 - 10
Affidavit in Opposition.....	11 - 13
Reply Memorandum of Law.....	14 - 15
Reply Affirmation- Baum.....	16 - 17

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Deutsche Bank National Trust Company, Merscorp Inc.,Mortgage Electronic Registration Systems, Derrick Layton, Geraldine Johnson, Sean Nix, Wells Fargo, N.A. (collectively as “defendants”) move for an order pursuant to CPLR §3211(a) (3), (5), and (8) dismissing, with

prejudice, plaintiff's complaint.

Defendant, Steven J. Baum, PC ("Baum") also moves for an order dismissing plaintiff Rose Mathura's ("Mathura") cause of actions against defendant Steven J. Baum, PC pursuant to CPLR §3211(a)(1), (3), (4), (5), (7) and (8). Baum joins in and adopts the arguments set forth in co-defendants motion to dismiss.

Facts

On or about May 30, 2007, Deutsche Bank, as trustee for the HIS Asset Securitization Corporation Trust 2006-HE2 (the "Trust") commenced a foreclosure action with regard to real property located at 89-06 98th Street, Jamaica, NY 11421 ("property") under Index Number 13808/2007. The Trust then moved for an Order of Reference and a Judgment of Foreclosure and Sale. On January 23, 2009 the Trust became the lawful owner of the Property pursuant to a Refree's Deed. Deutsche Bank, as Trustee, served a Notice to Quit on all the occupants of the property, including Mathura and February 17, 2009 commenced an eviction proceeding.

On May 13, 2009, Mathura, obtained an Order to Show Cause ("OTSC") in Housing Court staying the eviction. On July 30, 2009, Mathura obtained an OTSC H from the Supreme Court in the underlying foreclosure action. On or about October 26, 2010, Justice Timothy Flaherty denied Mathura's motions to vacate the Judgment of Foreclosure.

On April 5, 2011, Mathura brought an additional OTSC that was ultimately denied by Justice Darrel Gavrin on August 3, 2011. Mathura subsequently notice an Appeal but failed to perfect the appeal.

On August 31, 2011 Mathura filed for Chapter 7 Bankruptcy, but that petition was dismissed on October 18, 2011.

Mathura brought the within action on April 2, 2012 for claims of fraud, conspiracy, emotional distress, violation of FDCPA, violation of RESPA and unjust enrichment. Defendants contend that Mathura has not filed any Affidavits of Service. Deutsche Bank only became aware of the within action when it received a copy of the Summons and Complaint by regular mail.

For the reasons set forth below, defendants' motion for an order pursuant to CPLR §3211(a) (3), (5), and (8) dismissing, with prejudice, plaintiff's complaint is granted and defendant, Baum's motion for an order dismissing plaintiff Mathura's cause of actions against defendant Baum is likewise granted.

Discussion

“On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Doe 1 v. Board of Educ. of Greenport Union Free School Dist*, 2012 WL 5503553 [2nd Dept 2012]; quoting *Fishberger v. Voss*, 51 A.D.3d 627, 628 [2nd Dept 2008].)

Personal Jurisdiction

“As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden on this issue” (*Doe v. McCormack*, 2012 WL 5503579 [2nd Dept 2012].) “However, in opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth ‘a sufficient start, and show their position not to be frivolous.’” (*Doe v.*

McCormack, 2012 WL 5503580 [2nd Dept 2012]; quoting *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623 [2nd Dept 2009]; *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463 [1974].)

CPLR §311(a)(1) provides that service of process may be made on a corporation by delivery to “to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.” As Mathura attempted service upon Deutsche Bank solely by mailing the Summons and Complaint to Deutsche Bank’s headquarters, service was improper. In addition, plaintiff also improperly attempted service upon Baum by simply mailing the Summons and Complaint to Baum’s office in New York. To date, plaintiff has failed to file any affidavits of service in the within action. The court also notes that plaintiff improperly delivered the summons and complaint to Deutsche Bank by institutional mail and the mailing failed to include the required statements of service and acknowledgments of receipt. (See CPLR §312-a(a); *Klein v. Educational Loan Servicing, LLC*, 71 A.D.3d 957 [2nd Dept 2010].)

Collateral Estoppel

CPLR §3211(a)(5) provides, in relevant part, that a party may move for judgment dismissing the cause of action on the ground that the “the cause of action may not be maintained because of... collateral estoppel.” “The doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling.” (*Capellupo v. Nassau Health Care Corp.*, 97 A.D.3d 619 [2nd Dept 2012]; *Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195 [2008].) “A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and all matters

of defense which were or which might have been litigated in the foreclosure action are concluded.” (83-17 Broadway Corp. v Debcon Fin. Servs., Inc., 39 A.D.3d 583, 585 [2nd Dept 2007]; quoting Gray v Bankers Trust Co. of Albany, N.A., 82 A.D.2d 168, 170-171 [2nd Dept 1981].) Here, the issues raised in the complaint were necessarily decided against the plaintiff in the underlying foreclosure action. (Chestnut v. Wells Fargo Bank, N.A., 2011 WL 838914 [E.D.N.Y.,2011][precluding plaintiff from bringing action for, among other things, claims for fraudulent inducement, unfair business practices, unjust enrichment, and violations of the Truth-In-Lending Act].) In addition, Mathura had a full and fair opportunity to litigate the Foreclosure Action based on proper service in the underlying foreclosure action and various motions to vacate her default. Accordingly, the within action is barred by collateral estoppel.

Standing

CPLR §3211(a)(3) provides for dismissal of an action based on a lack of standing to sue. Here, the documentation submitted by the movants in support of their motion to dismiss for lack of standing conclusively established that there was no privity of contract between the defendants and Mathura. The Note and Mortgage were signed by Alan Mahabir alone. As stated in the decision and order Dated October 26, 2010, “it is Mahabir, and not Ms. Mathura who has standing to interpose” a defense of a predatory lending scheme. Plaintiff’s opposition fails to show that Mathura has standing.

Conclusion

For the reasons set forth above, defendants’ motion for an order pursuant to CPLR §3211(a) (3), (5), and (8) dismissing, with prejudice, plaintiff’s complaint is granted.

Defendant, Baum’s motion for an order dismissing plaintiff Mathura’s causes of action

against defendant Baum is likewise granted.

Dated: November , 2012

Bernice D. Siegal, J. S. C.