

**4 Cosgrove 950 Corp. v Deutsche Bank Natl. Trust
Co.**

2016 NY Slip Op 32854(U)

May 10, 2016

Supreme Court, New York County

Docket Number: 152225/2015

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

4 COSGROVE 950 CORP.,

INDEX NO. 152225/2015
MOTION DATE 03-09-2016

Plaintiff,

MOTION SEQ. NO 001
MOTION CAL. NO _____

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY,
FIRST FRANKLIN, A DIVISION OF NATIONAL CITY BANK OF IN.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to Dismiss the Complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits _____

5

Replying Affidavits _____

6

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that this motion by Defendant Deutsche Bank National Trust Company (herein "DBNTC") dismissing the Complaint as against it, is granted.

Plaintiff commenced the instant action on March 5, 2015, to quiet title pursuant to Article 15 of the Real Property Actions and Proceedings Law (herein "RPAPL") seeking declaratory relief and an order discharging certain mortgages encumbering real property located at 4 Cosgrove Drive, Glen Cove, New York 11542 (herein "the subject property").

Non-party Christopher Perry (herein "Perry"), is the former owner and mortgagor of the subject property. On December 9, 2005, Perry executed and delivered a \$1,120,000.00 note (herein "the Note") for the subject property to First Franklin, a Division of National City Bank of IN (herein "First Franklin"). (Mot. Exh. B). On the same date, Perry executed and delivered a \$1,120,000.00 mortgage in favor of First Franklin (herein "the Mortgage") with Mortgage Electronic Registration Systems, Inc. (herein "MERS") as the nominee and mortgagee of record. (Mot. Exh. C). The Mortgage was recorded in the Nassau County Clerk's Office on January 6, 2006. (Id.)

The Note and Mortgage were assigned to Deutsche bank National Trust Company (herein "DBNTC") in its capacity as trustee for the First Franklin Mortgage Loan Trust 2006-FF5 by an assignment of mortgage (herein "the Assignment") on August 1, 2007. This Assignment was recorded in the Nassau County Clerk's Office on August 13, 2007. (Mot. Exh. D).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon Perry's default on his repayment obligations under the Note and Mortgage, DBNTC accelerated the payment of the Mortgage debt by commencing a foreclosure action and filing a Notice of Pendency in Nassau County Supreme Court under Index No. 14723/2007, on August 20, 2007. (Mot. Exh. E). Perry was served by substitute service of process at his residence in Florida (Mot. Exh. F), but did not appear in the Foreclosure action. DBNTC voluntarily withdrew the 2007 Notice of Pendency and Foreclosure action, and it was discontinued by Court Order on December 21, 2012. (Mot. Exh. G). Plaintiff acquired the subject property by deed from Perry on May 14, 2014. (Mot. Exh. A PP 2-3).

The Complaint in the instant action seeks (1) a declaratory judgment that the statute of limitations has expired for Defendant to commence a foreclosure action against Plaintiff; (2) an Order discharging the Mortgage, and; (3) a declaratory judgment as to the proper mortgagee of record. (Mot. Exh. A). The Complaint alleges that there was no assignment of the \$1,120,000.00 Note and Mortgage, that MERS is the mortgagee of record (Mot. Exh. A PP 9 & 12), and that over seven years ago DBNTC accelerated on a separate Mortgage for \$280,000.00, and First Franklin accelerated on the \$1,120,000.00 Mortgage (Mot. Exh. A PP 16 & 17).

DBNTC now moves to dismiss the Complaint as against it based on a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1), and for failure to state a cause of action pursuant to CPLR 3211(a)(7). Plaintiff opposes the motion.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (*Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]). "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668 [2nd Dept., 2010] citing to, *Fontanetta v. John Doe 1*, 73 AD3d 78, 84 [2010]). To qualify as documentary evidence, printed materials "must be unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1*, 73 AD3d 78, 86, 98 N.Y.S.2d 569, 575 [2nd Dept., 2010], see *Flushing Sav. Bank, FSB v. Siunyalimi*, 94 AD3d 807, 808, 941 N.Y.S.2d 719, 721 [2d Dept., 2012]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and if it is "...shown that a material fact as claimed by the pleader to be one is not a fact at all"... and no significant dispute exists regarding it, dismissal is warranted. (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 372 N.E.2d 17 [1977]).

DBNTC attaches to its motion (1) a copy of the Assignment for the \$1,120,000.00 Note and Mortgage from Perry to DBNTC, dated August 1, 2007, and Recorded in the Nassau County Clerk's Office on August 13, 2007, together with the Nassau County Clerk's Office Endorsement Cover Page (Mot. Exh. D), and; (2) the December 21, 2012 Order discontinuing the 2007 Foreclosure Action without prejudice, entered into the records of the Nassau County Clerk's Office on December 28, 2012 (Mot. Exh. G). DBNTC has provided authentic and unambiguous documentary evidence filed in the Nassau County Clerk's Office, that unequivocally contradicts Plaintiff's allegation that

DBNTC was not the assignee of the \$1,120,000.00 Assignment.

“The law is well settled that...once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.” (EMC Mortgage Corp. v. Patella, 279 A.D.2d 604, 720 N.Y.S.2d 161 [2nd Dept. 2001], citing Rols Capital Co., v. Craig Beeten, et al., 264 A.D.2d 724, 696 N.Y.S.2d 48 [2nd Dept. 1999]). “[A] lender may revoke its election to accelerate all sums due...provided that there is no change in the borrower’s position in reliance thereon...” (Federal Nat. Mortg. Ass’n v. Mebane, et al., 208 A.D.2d 892, 618 N.Y.S.2d 88 [2nd Dept. 1994]), and the revocation by the lender must be done by an affirmative act ... “within the six-year Statute of Limitations period subsequent to the service of the complaint in the prior foreclosure action, wherein the holder of the mortgage notified the borrowers of its election to accelerate.” (Federal Nat. Mortg., Supra, citing Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 476, 180 N.E. 176 [1932]). Withdrawing the prior foreclosure action is an affirmative act of revocation. (Federal Nat. Mortg, Supra).

Here, DBNTC elected to accelerate the sums due on the Mortgage by filing a foreclosure action on August 20, 2007. However, DBNTC subsequently revoked its election to accelerate by voluntarily discontinuing the action prior to Perry appearing on December 21, 2012, which was within the six-year Statute of Limitations.

Accordingly, it is ORDERED, that Deutsche Bank National Trust Company’s motion to dismiss the Complaint as against it, is granted, and it is further,

ORDERED, that the causes of action in the Complaint are Severed and Dismissed as to Deutsche Bank National Trust Company, and it is further,

ORDERED, that the causes of action in the Complaint against First Franklin, A Division of National City Bank of IN and Mortgage Electronic Registration Systems, Inc., remain in effect.

ENTER:



MANUEL J. MENDEZ

Dated: May 10, 2016

J.S.C. ~~MANUEL J. MENDEZ~~
~~J.S.C.~~

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE