

Douge v U.S. Bank Natl. Assoc.

2013 NY Slip Op 33475(U)

December 17, 2013

Supreme Court, Queens County

Docket Number: 17661/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

MANTOVANNY A. DOUGE,

Plaintiff,

-against-

U.S. BANK NATIONAL ASSOCIATION, et
al.,

Defendants.

Index No. 17661/11

Motion
Date May 1, 2012

Motion
Cal. Nos. 9 and 10

Motion
Sequence No. 2 and 3

After a traverse hearing held on May 21, 2013, the motion by defendants U.S. Bank National Association, as successor trustee to Bank of America, N.A., as successor by merger to La Salle Bank N.A., as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 s/h/a U.S. Bank National Association, Bank of America N.A., Merrill Lynch Mortgage Investors, Inc., Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1, Melissa Hively, Krystal Hall, Security Connections, Inc., Mortgage Electronic Registration Systems and defendant First Franklin Corp. for an order pursuant to CPLR 306-b, 3211(a)(1), 3211(a)(4), 3211(a)(7), 3211(a)(8) and 3211(a)(10) dismissing the Complaint of pro se plaintiff, Mantovanny A. Douge and motion by defendants, Steven J. Baum, P.C., Steven J. Baum, the individual so named, Prime Title and Pillar Processing, LLC to dismiss plaintiff's Complaint as against them with prejudice pursuant to CPLR 3211(a)(1), (a)(4), (a)(7) and (a)(10), and/or granting said defendants summary judgment pursuant to CPLR 3212 are hereby joined solely for purposes of disposition of the instant motions. After careful consideration of all of the testimonial evidence and the exhibits introduced at the hearing and having been afforded the opportunity to evaluate and access the demeanor and credibility of the witnesses who appeared herein, the court decides the motions as follows:

PROCEDURAL HISTORY

In an order dated August 1, 2012, the motion of the moving defendants was granted, solely to the extent that a traverse hearing was ordered to determine whether jurisdiction was properly obtained and the propriety of service pursuant to CPLR 308 over defendants, U.S. Bank National Association, as successor trustee to Bank of America, N.A., as successor by merger to La Salle Bank N.A., as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 s/h/a U.S. Bank National Association, Bank of America N.A., Merrill Lynch Mortgage Investors, Inc., Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1, Melissa Hively, Krystal Hall, Security Connections, Inc., and First Franklin Corp.

All of the remaining branches of their motions by moving defendants were held in abeyance pending disposition of the traverse hearing.

At the traverse hearing, plaintiff presented no credible evidence in the form of witness testimony by the process server of the alleged service. Instead, plaintiff tendered two documents purporting to be affidavits of service. The first affidavit of service upon "U.S. Bank National Association" states in pertinent part:

Christine A. Hafner, being duly sworn, on oath says: that on August 25, 2011, at 12:10 PM she served the attached: Summons, Verified Complaint With Jury Demand, Exhibits upon: U.S. Bank National Association, therein named, personally at: 800 Nicollet Mall #2100, Minneapolis, County of Hennepin, State of Minnesota, by handing to an leaving with Jenaye Razink, Agent for Legal Process, a true and correct copy thereof.

The second affidavit of service upon Federal National Mortgage Association states in pertinent part:

Case Number: 17661/11 d/o/f 7/20/2011
 Legal documents received by Same Day Process
 Service, Inc. on 08/23/2011 at 8:02 AM to be
 served upon Federal National Mortgage Association,
 at 3900 Wisconsin Ave NW, Washington, DC, 20016
 I, Andres Virgen, swear and affirm that on August 23,
 2011 at 11:36 AM, I did the following:

Served Government Agency by delivering a
 conformed copy of this Summons; Verified Complaint;
 Notice of Pendency; Exhibits to CELIA ASINOR as
 Paralegal & Authorized Agent at 3900 Wisconsin Ave
 NW, Washington, DC 20016 of the government agency

and informing that person of the contents of the documents.

Description of Person Accepting Service:

Sex: Female Age: 35 Height: 5'4"-5'8" Weight 100-130 lbs
Skin Color: Black Hair Color: Black

Supplemental Data Appropriate to this Service:

I declare under penalty of perjury that the foregoing information contained in this affidavit is true and correct and that I am a professional process server over the age of 18 and have no interest in the above legal matter.

CPLR 311(a)(1) provides that personal service upon a corporation shall be made by delivering the summons "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".

The court determines that plaintiff failed to establish a prima facie showing that plaintiff made service in compliance with CPLR 311(1) with respect to the three moving corporate defendants. With respect to all moving defendants, there is no evidence that the process server served anyone authorized by appointment or law to accept service on the corporation. Indeed, the affidavits of service on these two corporation are devoid of any statement as they do not even state a person to whom the legal papers were delivered. This deficiency was not cured by the testimony of any process server at the hearing. Moreover, with respect to the individual defendants, Melissa Hively and Krystal Hall and corporate defendants, Bank of America N.A., Merrill Lynch Mortgage Investors, Inc. Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1, Security Connections, Inc. and First Franklin Corp., plaintiff submitted no proof of service. Under these circumstances, the court finds that plaintiff has failed to meet his burden of establishing that moving defendants were properly served.

Accordingly, the court determines that plaintiff's Complaint against U.S. Bank National Association, as successor trustee to Bank of America, N.A., as successor by merger to La Salle Bank N.A., as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 s/h/a U.S. Bank National Association, Bank of America N.A., Merrill Lynch Mortgage Investors, Inc., Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1, Melissa Hively, Krystal Hall, Security Connections, Inc., Mortgage Electronic Registration Systems and First Franklin Corp., is dismissed. The remaining branches of the motion of these dismissed defendants are denied as moot.

The motion of defendants, Steven J. Baum, P.C., Steven J. Baum, the individual so named, Prime Title and Pillar Processing, LLC to dismiss plaintiff's Complaint as against them with prejudice pursuant to CPLR 3211(a)(1), (a)(4), (a)(7) and (a)(10), and/or granting said defendants summary judgment pursuant to CPLR 3212 is decided as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

The Baum defendants, who were retained as attorneys for co-defendant U.S. Bank National Association, as successor trustee to Bank of America, N.A. as successor by merger to LaSalle Bank, N.A. as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 established a prima facie case that there are no triable issues of fact pursuant to CPLR 3212. Plaintiff's complaint asserts three causes of action. Defendants established that plaintiff's first cause of action which seeks to quiet title to property located at 243-58 Mayda Road, Rosedale, New York 11422 pursuant to RPAPL Article 15 must be dismissed as against them because plaintiff has failed to establish that moving defendants have any interest whatsoever in the subject property and moreover, said defendants establish that they do not claim to have any personal interest in the subject property whatsoever. Said defendants established a prima facie case that

plaintiff's second cause of action seeking a declaratory judgment prohibiting the defendants from claiming any "estate, right, title or interest in the subject property" must also be dismissed as against them since said defendants maintain that they have no ownership interest in the subject property whatsoever. Finally, said defendants established a prima facie case that plaintiff's third cause of action seeking restitution in the amount of \$2,000,000 must be dismissed as against them in that there is no independent cause of action for monetary damages alone in New York. And there are no surviving causes of action against instantly moving defendants.

In opposition, plaintiff fails to raise any triable issues of fact. Plaintiff wholly fails to present any evidence rebutting moving defendants' assertion that they do not have an ownership interest in the subject property. The opposition papers solely contend that a mortgage on the subject property was not properly assigned and said papers concentrate on inapplicable case law involving the law of agency. As no issues of fact have been raised, a trial is unwarranted.

Accordingly, the motion is granted pursuant to CPLR 3212 and as such, the remaining branches of the motion are rendered academic.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to plaintiff, pro se and counsel for the defendants.

Pro se plaintiff's Exhibit is being returned to plaintiff with the courtesy copy of this order.

Dated: December 17, 2013

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Howard G. Lane, J.S.C.