

**Deutsche Bank Natl. Trust Co. v Board of Mgrs. of
the 225 E. 86th St. Condominium**

2017 NY Slip Op 31109(U)

May 17, 2017

Supreme Court, New York County

Docket Number: 850101/2016

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE FOR MORGAN STANLEY ABS CAPITAL I INC.
TRUST 2006-HE7 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-HE7,

Plaintiff,

INDEX NO. 850101/2016
MOTION SEQ. NO. 002 & 003

- v -

DECISION AND ORDER

THE BOARD OF MANAGERS OF THE 225 EAST 86TH
STREET CONDOMINIUM, DESERT EAGLE
MANAGEMENT INC., DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY
ABS CAPITAL I INC. TRUST 2006-HE7 MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2006-HE7, DR.
TERESITA MASCARDO, JOHN DOE 1 THROUGH12

Defendant.

-----X

Motion Sequence Numbers 002 and 003 are consolidated for disposition. Plaintiff moves for a default judgment (Mot. Seq. 002) and claims that it served the Board of Managers of the 225 East 86th Street Condominium (Board) via a “Maureen Doe” on May 6, 2016. The Board cross-moves to dismiss on the grounds that service was not properly completed and even if it was, pursuant to CPLR 205-a, this case is time barred. The Board argues that there was a prior foreclosure action in which the First Department dismissed plaintiff’s case on October 6, 2015.

The Board argues that the six-month period to complete service pursuant to CPLR 205-a ended on April 6, 2016 and that CPLR 306-b does not extend the statute of limitations.

Discussion

As an initial matter, the Board is correct that CPLR 205-a requires a plaintiff to commence and complete service of a new action within six months of a decision dismissing an earlier action (*see Pyne v 20 E. 35 Owners Corp.*, 267 AD2d 168, 169, 700 NYS2d 450 [1st Dept 1999]). However, the statute of limitations in a foreclosure action begins to run only when the mortgage debt is properly accelerated (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 943 NYS2d 540 [2d Dept 2012]). Here, the prior foreclosure proceeding was dismissed after the Court agreed with the Board and found that plaintiff lacked standing (*Deutsche Bank Nat. Trust Co. v Tanibajeva*, 132 AD3d 430, 17 NYS3d 399 [1st Dept 2015]). Because the plaintiff lacked standing in 2008 when the prior action was commenced, the mortgage was not properly accelerated at that time. Therefore, the instant action is not time barred and the Board's cross-motion to dismiss the complaint is denied.

Plaintiff's motion for a default judgment (Mot. Seq. 002) is denied because plaintiff now moves (Mot. Seq. 003) for leave to serve an amended affidavit of service or leave to serve process on the Board. Plaintiff's request to serve an amended affidavit of service is denied, but the Court grants plaintiff's request for leave to service process on the Board pursuant to CPLR 306-b.

"CPLR 306-b provides that service of a summons and complaint shall be made within 120 days of filing the complaint with the clerk of the court. If service is not made within that

time frame, a party's time to serve may be extended upon good cause shown or in the interest of justice" (*de Vries v Metro. Tr. Auth.*, 11 AD3d 312, 313, 783 NYS2d 540 [1st Dept 2004]). The CPLR has a different standard for extensions of time sought upon good cause than extensions sought in the interest of justice (*id.*). "The legislative history indicates that the interest of justice standard is a broader standard designed to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to defendant" (*id.*).

"The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105, 736 NYS2d 291 [2001]). The Court may consider any relevant factor including prejudice to defendant (*id.* at 106).

Here, the Court finds that plaintiff has met the interest of justice standard to permit plaintiff an extension of time to serve the summons and complaint. Although plaintiff's counsel erred by not noticing an incorrect address in the affidavit of service, that does not compel this Court to deny plaintiff's motion. That oversight does not outweigh the fact that plaintiff is seeking to collect on a mortgage, allegedly in default, with a principal worth \$455,200. The Court also finds that there is little or no prejudice to the Board, which purchased the unit knowing full well about the first mortgage and purchased it subject to the first mortgage. To give defendant a windfall of more than half a million dollars at plaintiff's expense because plaintiff's attorney did not notice an address error on an affidavit of service would be terribly unjust to plaintiff.

Rather than hold a traverse hearing regarding service on a 'Maureen Doe,' the Court finds that, in the interest of judicial economy, plaintiff should be afforded another opportunity to serve the Board.

Accordingly, it is hereby

ORDERED that plaintiff's motion (Mot. Seq 002) and the Board's cross-motion are denied; and it is further

ORDERED that plaintiff's motion (Mot. Seq. 003) is granted only to the extent that plaintiff is granted leave to serve the Board, provided that service is completed within 40 days of the date of this Order.

The parties are directed to appear for a status conference on September 12, 2017 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: May 17, 2017
New York, New York



ARLENE P. BLUTH, JSC