

<b>Deutsche Bank Natl. Trust Co. v Corteselli</b>
2018 NY Slip Op 31936(U)
August 3, 2018
Supreme Court, Suffolk County
Docket Number: 010128/2010
Judge: C. Randall Hinrichs
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SHORT FORM ORDER

INDEX NO. 010128/2010

SUPREME COURT - STATE OF NEW YORK  
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS  
Justice of the Supreme Court

Motion Date: 1-4-2017  
Motion Sequence: 001: MD; 002 MotD

\_\_\_\_\_  
DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS INDENTURE TRUSTEE FOR THE BENEFIT OF  
THE NOTEHOLDERS FOR ARGENT MORTGAGE  
LOAN TRUST 2005-W1 ASSET BACKED NOTES,  
SERIES 2005-W1,

LEOPOLD & ASSOCIATES  
Attorneys for Plaintiff  
80 Business Park Drive, Suite 110  
Armonk, NY 10504

Plaintiff,

IRWIN POPKIN, ESQ.  
Attorney for Defendant  
DIANE CORTESELLI  
445 Broad Hollow Road  
Suite 25  
Melville, NY 11747

-against-

DAVID CORTESELLI, DIANE CORTESELLI, JP  
MORGAN CHASE BANK, N.A., AS SUCCESSOR BY  
MERGER TO WASHINGTON MUTUAL BANK, FA,

DAVID CORTESELLI  
Defendant Pro Se  
37 Linden Lane  
Shirley, NY 11967

JOHN DOES "1" through "12" said persons of parties  
having or claimed to have a right, title or interest in the  
Mortgaged premises herein their respective names are  
presently unknown to the plaintiff,

Defendants.

\_\_\_\_\_  
Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion and  
supporting papers 1-3 ; 4-6 ; Answering Affidavits and supporting papers 7-8 ; and Replying Affidavits and supporting  
papers 9-10 ; it is,

**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order granting it summary  
judgment and other relief is denied, as same is superseded by a subsequent notice of motion, dated December  
6, 2016, and supporting papers, and thus, is now moot; and it is further

**ORDERED** that this motion (002) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR  
3212, awarding summary judgment in its favor and against the answering defendants David Corteselli and  
Diane Corteselli, striking their answer and dismissing the affirmative defenses set forth therein; (2) striking  
the names "JOHN DOE #1" through "JOHN DOE #12," and to amend the caption accordingly; (3) pursuant  
to CPLR 1018, substituting DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR  
ARGENT SECURITIES INC., ASSET-BACKED PASS THROUGH CERTIFICATES SERIES 2005-W1  
as plaintiff in the place and stead of DEUTSCHE BANK NATIONAL TRUST COMPANY, AS  
INDENTURE TRUSTEE FOR THE BENEFIT OF THE NOTEHOLDERS FOR ARGENT MORTGAGE

LOAN TRUST 2005-W1 ASSET BACKED NOTES, SERIES 2005-W1, and to amend the caption accordingly; (4) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (5) pursuant to RPAPL §1321, appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is granted in part and denied in part; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order striking the answering defendants' affirmative defense as to plaintiff's standing, numbered 3, that defense proven to be without merit, numbered 4, and those defenses deemed abandoned by the Court, numbered 1, 2, 7, and 8, respectively, is granted, and the motion for summary judgment and an order of reference is otherwise denied, with leave to renew within 120 days of the date of this order, not to be extended without leave of Court; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order striking the names "JOHN DOE #1" through "JOHN DOE #12," and to amend the caption accordingly, is granted; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order substituting DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR ARGENT SECURITIES INC., ASSET-BACKED PASS THROUGH CERTIFICATES SERIES 2005-W1 as plaintiff in the place and stead of DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR THE BENEFIT OF THE NOTEHOLDERS FOR ARGENT MORTGAGE LOAN TRUST 2005-W1 ASSET BACKED NOTES, SERIES 2005-W1, and to amend the caption accordingly, is granted; and it is further

**ORDERED**, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X  
DEUTSCHE BANK NATIONAL TRUST COMPANY,  
AS TRUSTEE FOR ARGENT SECURITIES INC.,  
ASSET-BACKED PASS THROUGH CERTIFICATES  
SERIES 2005-W1,

Plaintiff,

Index No. 10128-2010

-against-

DAVID CORTESELLI, DIANE CORTESELLI,  
JPMORGAN CHASE BANK, N.A., AS SUCCESSOR BY  
MERGER TO WASHINGTON MUTUAL BANK, FA,

Defendants.

-----X

and it is further,

**ORDERED** that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order fixing the defaults of all non-answering defendants is granted; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon the answering defendant within thirty (30) days of the date herein, and to promptly file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York, commenced March 16, 2010. On February 7, 2005, defendant David Corteselli executed a note in favor of Argent Mortgage Company, LLC ("Argent") in the amount of \$168,000.00. To secure said note, on the same date, defendants David Corteselli and Diane Corteselli gave a mortgage on the subject property to Argent. On January 26, 2010, Argent executed an Assignment of Mortgage in favor of plaintiff. On August 20, 2014, after the commencement of the instant action, plaintiff executed an Assignment of Mortgage in favor of Deutsche Bank National Trust Company, as Trustee for Argent Securities Inc., Asset-Backed Pass Through Certificates Series 2005-W1. The subject note was indorsed by Argent to Ameriquest Mortgage Company, LLC ("Ameriquest"), then again by Ameriquest in blank, though these indorsements are undated. By its complaint, plaintiff alleges that Mr. Corteselli defaulted in his payments on the note. By their answer, the Corteselli defendants generally deny the material allegations set forth in the complaint, and they assert 8 affirmative defenses, including lack of standing, and failure to comply with the notice requirements prescribed by Real Property Actions and Proceedings Law (RPAPL) §§1303 and 1304. No other defendants have answered the complaint or otherwise appeared in this action.

Plaintiff now moves for summary judgment. In support of its motion, plaintiff submits, among other things, copies of the note and mortgage, several duly executed affidavits of service, a copy of a duly executed Limited Power of Attorney, and an affidavit of Sergio Olmo, Vice President of Ocwen Loan Servicing, LLP ("Ocwen"), plaintiff's loan servicer and attorney-in-fact. Ms. Corteselli opposes the motion, arguing, inter alia, that plaintiff has failed to establish its standing to prosecute this action, and that it failed to demonstrate its compliance with the notice requirements prescribed by the subject mortgage, as well as its compliance with RPAPL §§1303 and 1304. In opposition, Ms. Corteselli submits an affirmation of her attorney and her own affidavit. Mr. Corteselli has not submitted any papers in response to plaintiff's motion.

Here, as the Corteselli defendants served an answer that included the affirmative defense of standing, plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Plaintiff established its standing as the holder of the note by Mr. Olmo's affidavit, by which he avers that plaintiff was in possession of the note at the commencement of the action, demonstrating that the subject mortgage passed to plaintiff with the note as an inseparable incident (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; *HSBC Bank USA, N.A. v Spitzer*, 131

AD3d 1206, 18 NYS3d 67 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). As plaintiff established standing via physical delivery of the note, the validity of the subsequent assignments of the subject mortgage irrelevant (*see Aurora Loan Servs., LLC v Taylor, supra; Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Plaintiff's submissions also establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and evidence of nonpayment (*see Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By his affidavit of merit, Mr. Olmo attests that, based on records kept during the regular course of Ocwen's business, Mr. Corteselli failed to make a payment on the note scheduled for May 1, 2009, and that he failed to make subsequent payments to bring the loan current (*see CPLR 4518[a]; American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]). In addition, plaintiff's submissions, namely a duly executed affidavit of service dated March 23, 2010, constitutes prima facie evidence of proper service of the notice required by RPAPL §1303, and Ms. Corteselli's bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of proper service (*see Deutsche Bank Nat. Trust Co. v Quinones*, 114 AD3d 719, 981 NYS2d 107 [2d Dept 2014]; *U.S. Bank, N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]).

However, plaintiff has not supplied the Court with adequate evidentiary proof of its compliance with RPAPL §1304 (*see Cenlar, FSB v Weisz*, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; *Hudson City Sav. Bank v DePasquale*, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). Although Mr. Olmo avers that 90-day pre-foreclosure notices were not required to be sent to the borrowers because they had filed a bankruptcy application prior to the commencement of the instant action (*see RPAPL §1304[3]*), this contention is without merit. The statute provides only that the "ninety-day period shall not apply, or cease to apply" if the borrower has filed for bankruptcy protection, and it does not relieve the lender of the obligation to send the notice before commencing legal action (*see RPAPL §1304[3]; M & T Bank v Rice*, 57 Misc 3d 1214[A], 2017 NY Slip Op 51427[U] [Sup Ct, Suffolk County 2017]). Further, although plaintiff submits copies of the notices purportedly sent to the Corteselli defendants with tracking numbers stamped on them, this is insufficient to establish that same was actually mailed to the borrowers in the manner required by RPAPL §1304, as Mr. Olmo failed to provide proof of a standard office mailing procedure or any independent proof of actual mailing (*see Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *CitiMortgage, Inc. v Pappas, supra; JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536, 537, 36 NYS3d 235 [2d Dept 2016]; *cf. HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). As plaintiff has failed to establish its compliance with this condition precedent (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106, 923 NYS2d 609, 616 [2d Dept 2011]), the motion is denied, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Notwithstanding the foregoing, plaintiff's submissions demonstrate that amendment of the caption to substitute Deutsche Bank National Trust Company, as Trustee for Argent Securities Inc., Asset-Backed Pass Through Certificates Series 2005-W1 as plaintiff is warranted (see CPLR 1018; *Aurora Loans Services, LLC v Mandel*, 148 AD3d 965, 50 NYS3d 154 [2d Dept 2017]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]; *Aurora Loan Serv., LLC v Lopa*, 130 AD3d 952, 15 NYS3d 105 [2d Dept 2015]).

Moreover, as the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (see *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]), the Court will strike defendants' remaining affirmative defenses from their answer, as the sole defenses raised in opposition to plaintiff's motion were its lack of standing, and its alleged failure to comply with RPAPL §§1303 and 1304. The Court notes that Ms. Corteselli improperly raises plaintiff's alleged failure to provide her with a 30-day notice of default in her opposition to the motion, as same was waived by her failure to interpose this affirmative defense in her answer to the complaint (see *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

Accordingly, plaintiff's motion for summary judgment is granted in part, and denied in part, with leave to renew within 120 days of the date of this order, and the proposed order of reference has been marked "not signed."

Dated: August 3, 2018

  
C. RANDALL HINRICHS, J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION