

<b>Deutsche Bank Natl. Trust Co. v Bolger</b>
2019 NY Slip Op 31663(U)
June 10, 2019
Supreme Court, Suffolk County
Docket Number: 29848/2007
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

**HON. HOWARD H. HECKMAN, JR., J.S.C.**

INDEX NO.: 29848/2007  
MOTION DATE: 5/21/2019  
MOTION SEQ. NO.: #003 MG  
#004 MD

-----X  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY,

Plaintiff,

-against-

CHRISTOPHER BOLGER, et al.,

Defendants.  
-----X

**PLAINTIFF'S ATTORNEY:**  
RAS BORISKIN, LLC  
900 MERCHANTS CONCOURSE  
WESTBURY, NY 11590

**DEFENDANTS' ATTORNEY:**  
MICHAEL G. MCAULIFFE, ESQ.  
68 SOUTH SERVICE RD., STE. 100  
MELVILLE, NY 11747

Upon the following papers numbered 1 to 30 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-11 (#003); Notice of Cross Motion and supporting papers 12-18 (#004); Answering Affidavits and supporting papers 19-20, 21-22; Replying Affidavits and supporting papers 23-27, 28-30; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Deutsche Bank National Trust Company seeking an order pursuant to CPLR 2221(d) & 5015(a) vacating the sua sponte Order (Mayer, J.) dated April 17, 2013 dismissing plaintiff's complaint is granted; and it is further

**ORDERED** that defendants' cross motion seeking an order denying plaintiff's motion or, in the alternative, granting defendants leave to serve a late answer is denied; and it is further

**ORDERED** that dispositive motions shall be served within ninety (90) days of the date of this order with notice of entry.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$437,400.00 executed by defendants Christopher Bolger and Tammy Bolger on December 13, 2006 in favor of First Lincoln Mortgage Corporation. On the same date both mortgagors executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were subsequently assigned to the plaintiff. Plaintiff claims that both mortgagors defaulted in making timely monthly mortgage payments beginning May 1, 2007 and the default has continued for the ensuing twelve (12) years. Plaintiff commenced this action by filing a summons, complaint, and notice of pendency in the Suffolk County Clerk's Office on September 19, 2007. Both mortgagors were served with the summons and complaint on September 20, 2007- defendant Tammy Bolger was personally served at the mortgaged premises pursuant to CPLR 308(1) and defendant Christopher Bolger was served at the mortgaged premises pursuant to CPLR 308(2) by substituted service by personal delivery of the summons and complaint to co-defendant Tammy Bolger, defendant Christopher Bolger's wife. Both defendants defaulted in serving an answer.

Court records indicate that plaintiff submitted a timely motion seeking an order granting a

default judgment on April 25, 2008 with an original return date of September 12, 2008. That initial motion was later withdrawn and denied as moot by Order (Mayer, J.) dated January 7, 2009. Plaintiff served a second motion seeking an order of reference on April 15, 2009 with an original return date of August 13, 2009. That motion was denied without prejudice by short form Order (Mayer, J.) dated February 18, 2011. The assigned court thereafter issued two sua sponte Orders dated March 1, 2013 and April 17, 2013. The second sua sponte Order (Mayer, J.) dismissed plaintiff's complaint on the basis of the mortgage lender's failure to submit "proofs" to demonstrate its standing and its jurisdiction in violation of the original March 1, 2013 sua sponte Order.

There was no further activity until plaintiff served the pending underlying motion on December 12, 2018 made returnable on January 15, 2019, seeking to vacate the April 17, 2013 Order, restoring this action as an active foreclosure case, and seeking leave to serve another default judgment motion. The defaulting mortgagors served a cross motion in response on January 29, 2019 made returnable on February 5, 2019, seeking an order denying plaintiff's motion or, in the alternative, granting leave for defendants to serve a late answer. Both motions were submitted on this IAS Part 18's motion calendar on March 19, 2019. By short form Order dated April 23, 2019 this court converted plaintiff's motion as one seeking leave to reargue Justice Mayer's April 17, 2013 Order on the basis that the time within which to serve a motion seeking leave to reargue had not expired since plaintiff was never served with a copy of the April 17, 2013 Order.

The trial court issued an initial sua sponte Order dated March 1, 2013 which, in essence, required a bank attorney to appear in court for a "foreclosure status conference" within forty five (45) days and be armed with concrete, unassailable evidentiary proof to make a prima facie showing of its entitlement to judgment. The sua sponte Order required not only documentary proof in the form of the note and mortgage, but also included affidavits from individuals with "personal knowledge" sufficient:

- 1) to prove standing (including affidavits based upon "personal knowledge" verifying assignee's note and mortgage possession and confirming the validity of an assignment);
- 2) to prove jurisdiction (including not only affidavits of personal service but also submission of proof concerning "nail and mail" to demonstrate a "genuine inquiry" of the defaulting mortgagor's whereabouts and proof of filing);
- 3) to prove compliance with mortgage requirements related to service of notice of default (including an affidavit from an individual with "personal knowledge" related to the notice content and timing of such service);
- 4) to prove compliance with service requirements of RPAPL 1303 notices (including verification that the notice served complied with "form, type size, type face, paper color and content requirements);
- 5) to prove compliance with service requirements of RPAPL 1304 notices (including affidavits from individuals with personal knowledge of proper service and verification of form requirements related to "type-size and content requirements"; and
- 6) to prove compliance with RPAPL 1306 filing requirements (including an affidavit from a



individual with “personal knowledge” confirming filing with the superintendent of banks).

The sua sponte Order contained a “warning” that the failure to “fully comply with the directives set forth in the Order, shall result in dismissal of plaintiff’s complaint.....”

On April 17, 2013 (forty-five days later) counsel for the plaintiff appeared for the conference and the sua sponte dismissal was issued on the same day based upon counsel’s failure to comply “with any of the directives”. Although the March 1, 2013 Order sets forth numerous directives, the April 17, 2013 Order recites two primary issues; 1) plaintiff’s failure to establish “proper jurisdiction”; and 2) plaintiff’s failure to have “proper standing” as the legal predicate leading to plaintiff’s default. The Order recites as legal grounds for dismissal a violation of CPLR 3126 reciting plaintiff’s “wilful failure to disclose information”.

Although this court directed the parties to further brief the legal issues based upon CPLR 2221(d), upon further review that statute is inapplicable to the record in this case since plaintiff was never afforded an opportunity to “argue” the merits of the sua sponte dismissal. Put another way, this motion cannot be one to “reargue” where the plaintiff was never permitted to “argue”. Therefore, the appropriate statutory grounds applicable to seek such relief is for plaintiff to move to vacate the sua sponte order pursuant to CPLR 5015.

CPLR 5015(a) (1) provides:

**R 5015. Relief from judgment or order.**

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.....

The first issue raised therefore on behalf of the plaintiff is whether the mortgage lender had a reasonable excuse for failing to comply with the initial sua sponte order within forty five (45) days and to appear in court with affidavits based upon “personal knowledge” for nearly every conceivable affirmative defense a defaulting mortgagor could possibly raise (assuming the defaulting borrowers had actually submitted an answer), together with copies of sufficient documentary proof relevant to this foreclosure action so as to be able to prove standing, personal jurisdiction, service of pre-action mortgage required default notices, service of pre-action RPAPL 1303 & 1304 notices, and statutorily required filing of RPAPL 1304 notices. In essence, the sua sponte order required production by the plaintiff of all admissible, relevant evidence to make a prima facie showing of its entitlement to judgment– which would ultimately be required to be submitted in a summary judgment motion where the defaulting borrowers have raised each (or any) of the defenses set forth in their answer and in opposition to plaintiff’s summary judgment motion. Strict compliance with the March 1, 2013 Order within a forty five day period was a near impossibility, particularly given the time period when it was issued when administrative orders (see AO/548/10 & AO/431/11) requiring attorney

certifications was the source of continuing delays in prosecution of foreclosure actions. Based upon this record plaintiff had a reasonable excuse for failing to comply with the March 1, 2013 Order and therefore, pursuant to CPLR 5015, plaintiff is entitled to relief in the form of an order vacating the April 17, 2013 Order which dismissed this action and restoring this action as an active case \*1

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\*1. Case law is legion that a court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see U.S. Bank, N.A. v. Emmanuel*, 83 AD3d 1047, 921 NyS2d 320 (2<sup>nd</sup> Dept., 2011); *HSBC Bank USA, N.A. v. Taher*, 104 AD3d 815, 962 NYS2d 301 (2<sup>nd</sup> Dept., 2013); *JPMorgan Chase Bank, N.A. v. Laszlo*, 169 AD3d 885, 94 NYS3d 343 (2<sup>nd</sup> Dept., 2019); *LaSalle Bank, N.A. v. Lopez*, 168 AD3d 697, 91 NYS3d 259 (2<sup>nd</sup> Dept., 2019) *HSBC Bank USA, N.A. v. Angeles*, 143 AD3d 671, 38 NYS3d 589 (2<sup>nd</sup> Dept., 2016)). While there is no explicit definition in the numerous appellate cases addressing this issue to describe what is exactly meant by "extraordinary circumstances" which would justify dismissal, the sua sponte Order granted in this case clearly did not warrant dismissal of plaintiff's complaint based upon the grounds set forth in the Order. Nor was there any justification for dismissal pursuant to CPLR 3126 based upon a "wilful failure to disclose" given this record of the underlying proceedings. Plaintiff was never afforded a reasonable opportunity to comply with the prior sua sponte order and therefore its default could not have been wilful disobedience. Moreover, at the time this action was dismissed, both defendant/mortgagors were in default in serving an answer and therefore plaintiff had no obligation to provide proof of standing (*see Wells Fargo Bank, N.A. v. Emma*, 161 AD3d 1131, 78 NYS3d 425 (2<sup>nd</sup> Dept., 2018); *Bank of America, N.A. v. Cudjoe*, 157 AD3d 653, 69 NYS3d 101 (2<sup>nd</sup> Dept., 2018); *Citibank, N.A. v. Gentile*, 156 AD3d 859, 65 NYS3d 778 (2<sup>nd</sup> Dept., 2017); *Bank of America, N.A. v. Gowrie*, 155 AD3d 995, 64 NYS3d 584 (2<sup>nd</sup> Dept., 2017); *Nationstar Mortgage, LLC. v. Kamil*, 155 AD3d 968, 63 NYS3d 890 (2<sup>nd</sup> Dept., 2017); *Bank of New York Mellon v. Izmirlgil*, 144 AD3d 1067, 44 NYS3d 44 (2<sup>nd</sup> Dept., 2017)) (or any of the other numerous directives in the March 1, 2013 sua sponte Order). With respect to the jurisdictional predicate used as a justification for dismissal, the record shows that plaintiff had previously made a prima facie showing of jurisdiction by submitting affidavits of service in support of two prior motions seeking an order of reference, and moreover the jurisdictional predicate had been waived by both defendants based upon counsel having appeared in this action on their behalf—which defendant Bolger concedes in his affidavit (CPLR 320; *see Bank of America, N.A. v. Rice*, 155 AD3d 593, 63 NYS3d 486 (2<sup>nd</sup> Dept., 2017)). Therefore no genuine issue of fact existed concerning personal jurisdiction.



With respect to defendants' cross motion seeking leave to serve a late answer, the law requires a showing of a reasonable excuse for the default in answering and a demonstration of a potentially meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Company v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2<sup>nd</sup> Dept., 2013)). While defendant Bolger makes reference to the fact that counsel failed to serve an answer on Bolger's behalf, there has been no showing of a reasonable excuse or an arguably meritorious defense sufficient to justify granting defendants' leave to serve an answer at this stage of this action.

Finally with respect to the issue of plaintiff's delay in prosecuting this action, while the question of "reasonable excuse" for default has been addressed as it relates to the merits of both parties' motions, the issue of unreasonable delay in seeking the relief sought by plaintiff is of concern given the court's duty as a court of equity. While plaintiff correctly points out that the issue of abandonment and/or failure to timely seek judgment within one year of the mortgagors' original default (CPLR 3215(c)) is not part of this record, the mortgage lender/assignee has significantly delayed prosecution of this action. Equitable considerations must come into play so as to be fair to both parties. On one side of the argument is the defaulting mortgagor, who claims that he was deceived by the original lender, signed mortgage documents he and his wife never read, determined that he could not afford the payments in those documents, made desperate attempts to become "current" with the mortgage payments, and was stonewalled and given the "run around" by the lender's representatives. On behalf of the mortgage lender/assignee the theory is much simpler- the original lender loaned the defaulting borrowers more than \$400,000.00 and hasn't received a payment in return in more than twelve (12) years. And unless Justice Mayer's Order was intended as a gift and/or the defaulting borrowers won the lottery on April 17, 2013, there is no fairness in law or equity justifying dismissing plaintiff's action.

While this court of equity has sympathy for the plight of the mortgagors, there is no relevant, admissible evidence submitted to deny the unalterable facts that they signed a note and mortgage promising to repay the amount of monies borrowed from the lender and, in return, the lender loaned the mortgagors in excess of \$400,000.00. Regardless of the fact that the mortgagors claim that they did not read what they signed, they remain legally responsible for the promises made in the agreement they signed, including the promise they made to repay the monies that were loaned to them. It would therefore be wholly inequitable to, in effect, gift more than \$400,000.00 to the defendants

However, clearly there has been a significant delay in the prosecution of this action and this court retains the right, upon submission of admissible and relevant evidence, to deny the mortgage lender future requests for relief including, but not limited to, the recovery of interest on the loan during the time period of delay, assuming the appropriate evidence is submitted to establish wrongful conduct on the part of the lender (*see BAC Home Loans Servicing, LP v. Jackson*, 159 AD3d 861, 74 NYS3d 59 (2<sup>nd</sup> Dept., 2018); *Greenport Mortgage Corp. v. Lamberti*, 155 AD3d 1004, 66 NYS3d 32 (2<sup>nd</sup> Dept., 2017); *Citicorp Trust Bank v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 (2<sup>nd</sup> Dept., 2017))

Accordingly, defendant's cross motion is denied and plaintiff's motion is granted. The parties shall serve dispositive motions within ninety (90) days of entry of this order.

Dated: June 10, 2019

**HON. HOWARD H. HECKMAN, JR.**

J.S.C.