

Deutsche Bank Natl. Trust Co. v Joseph
2021 NY Slip Op 32253(U)
November 9, 2021
Supreme Court, Kings County
Docket Number: Index No.: 514575/2015
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 9th day of November, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HOLDERS OF THE FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF9, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF9,
Plaintiff,

- against -

ANDRE JOSEPH; SEAN SIMON; MIDLAND FUNDING NCC-2 CORP.; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CRIMINAL COURT OF THE CITY OF NEW YORK; MORTGAGE ELECTRONIC SERVICES, INC. AS NOMINEE FOR NEW CENTURY MORTGAGE CORPORATION; DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE UNDER SAXON ASSET SECURITIES TRUST 2007-4; "JOHN DOE #1" through "JOHN DOE #10" inclusive the names of the ten last name Defendants being fictitious, real names unknown to Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the complaint,

Defendants.

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Motion Seq. # 8 & 9

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Memorandum of Law in Support of Motion	3
Plaintiff's Statement of Material Facts	4
Affirmation in Further Support of Motion	5
Counter Statement of Material Facts	6
Affirmation in Opposition to Cross-Motion	7

Upon the foregoing papers Plaintiff, Deutsche Bank National Trust Company, as Trustee for Holders of the First Franklin Mortgage Loan Trust 2006-FF9 Mortgage Pass-Through Certificates, Series 2006-FF9 ("Plaintiff"), moves this Court for an Order (a) pursuant to CPLR § 3215 granting a default judgment against all non-appearing defendants and pursuant to CPLR § 3212 granting summary judgment against the answering defendants; (b) pursuant to RPAPL § 1321 and CPLR § 3215 granting a default judgment against Defendant Andre Joseph and appointing a Referee and directing him/her to compute the amount due to Plaintiff; (c) vacating, cancelling, rescinding, and removing the fraudulent Satisfaction and Discharge of Mortgage recorded in the Office of the City Register on August 4, 2006 as City Register Filing Number 2006000442116; (d) subordinating the interests of Defendants Deutsche Bank National Trust Company, Trustee under Saxon Asset Securities Trust 2007-4, Midland Funding NCC-2 Corp., Mortgage Electronic Registration Systems, Inc. as nominee for New Century Mortgage Corporation, and Sean Simon in the subject property, and making said interest subject to Plaintiff's mortgage; (e) amending the caption; and (f) such other and further relief as this Court deems just and proper. Defendants Deutsche Bank National Trust Company, As Trustee for Morgan Stanley ABS Capital I Inc., Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC and Deutsche Bank National Trust Company, As Trustee for Securitized Asset Backed Receivable LLC Trust 2007-BRI, Mortgage Pass-Through Certificates, Series 2007-BRI ("Moving Defendants") cross-move this Court for an Order dismissing the complaint herein under CPLR § 3215(c) for failing to enter default judgments herein, together with such other relief deemed just and proper.

Background

This is a foreclosure action. On March 29, 2006 Defendant Andre Joseph mortgaged 324 East 59th Street, Brooklyn, NY 11203 ("the property") to the First Franklin Mortgage Loan Trust, a division of National Bank of Indiana., through a \$400,000 note. That mortgage was recorded with the Office of the New York City Register on April 13, 2006, under CFRN 200600205410. The note and the First Franklin mortgage were subsequently transferred to Plaintiff, by written assignment, on August 7, 2012 and recorded with the City Register on August 27, 2012, under 201200033813.

On or about July 19, 2006, a purported satisfaction and discharge of the First Franklin mortgage was executed. The purported Satisfaction of Mortgage was recorded with the City Register on August 4, 2006, under CFRN 2006000442116. Plaintiff alleges that the Satisfaction of Mortgage was a forgery and First Franklin never discharged the original mortgage. Plaintiff submitted affidavits to evidence its contention that the Satisfaction of Mortgage was forged, which Defendants do not dispute.

After the Satisfaction of Mortgage was recorded, on or about November 17, 2006 Defendant Joseph transferred the property to Defendant Sean Simon. The deed transfer was recorded with the City Register on January 4, 2007. On November 17, 2006, Defendant Simon executed two mortgages on the property in favor of New Century Mortgage Corporation, one for \$340,000 and another for \$85,000. The New Century Mortgage Corporation's mortgages were both recorded on January 4, 2007. The \$340,000 New Century Mortgage was assigned to Saxon Mortgage Services and then assigned to Defendant Deutsche Bank Trust Company, Trustee under Saxon Asset Securities Trust 2007-4. The \$85,000 New Century Mortgage was

assigned to Deutsche Bank National Trust Company, as Trustee for Securitized Asset Backed Receivables LLC Trust 2007-BR1 Mortgage Pass-Through Certificates, Series 2007-BR1.

Defendant Joseph defaulted in making monthly payment for his mortgage on June 1, 2006 and monthly thereafter. Plaintiff commenced this action on December 1, 2015.

Discussion

Pursuant to CPLR § 3215(a), “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” Under CPLR § 3215 (c), “[I]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned... unless sufficient cause is shown why the complaint should not be dismissed.”

In the case at bar, the non-appearing Defendants have not opposed this motion and have defaulted. Defendant Joseph has not filed any papers in this case since 2018. Defendant Simon opposed the entry of a default judgment on procedural grounds and brought a cross-motion, but has never answered the Amended Complaint or brought any other motion. Moving Defendants, and Defendants MERS and New Century Mortgage Corporation have appeared. None of the other Defendants have ever appeared in this action or opposed the entry of a default judgment. Accordingly, the motion for a default judgment is granted against Defendants, Midland Funding NCC-2 Corp., New York City Parking Violations Bureau, New York City Environmental Control Board, New York State Department of Taxation and Finance, Criminal Court of the City of New York, Saxon Mortgage Services, Inc. and John Doe #1 through John Doe #10. The motion for a default judgment is granted against Defendant Simon, if

Defendant Simon does not respond to the Amended Complaint within 30 days of this Decision and Order.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. **CPLR § 3212 (b); Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).** On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. **Spinelli v. Procassini, 258 A.D.2d 577 (2d Dep't 1999); Tassone v. Johannemann, 232 A.D.2d 627, 628 (2d Dep't 1996); Weiss v. Garfield, 21 A.D.2d 156, 158 (3d Dep't 1964).**

"It is settled that in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default." **Village Bank v. wild Oaks Holding, 196 A.D.2d 812 (2d Dep't 1993).** When a plaintiff does so, it is incumbent upon the defendant to assert any defenses which could properly raise a viable question of fact as to his default. **Id.** "A discharge or satisfaction of a mortgage is void at its inception when it is executed and recorded by one who has no interest in the mortgage." **JPMorgan Chase Bank, National Association v. Aspilaire, 188 A.D.3d 850, 853 (2d Dep't 2020).** Accordingly, a forged Satisfaction of Mortgage is not entitled to any legal effect, and an encumbrance based upon a forged Satisfaction of Mortgage is not protected as a bona fide encumbrancer for value. **Id.**

In the instant case, Plaintiff has provided evidence that the Satisfaction of Mortgage was forged. Specifically, Plaintiff provides an affidavit from individual who purportedly notarized the

Satisfaction of Mortgage – Krystal Hall – that states she never notarized the document. The purported notary further swore that she believed the purported Satisfaction to be a forgery. Moving Defendants do not submit any evidence to counter Ms. Hall’s contention. Moving Defendants merely argue that Security Connections, the entity Ms. Hall works for, would have presented the Satisfaction of Mortgage for recording, but would not have drafted it. Even if the Court credits Defendant’s argument, Defendant in no way challenges the contention that the Satisfaction of Mortgage was a forgery. Accordingly, the branch of the motion for summary judgment finding the purported Satisfaction of Mortgage a forgery is granted. The Court hereby vacates the Satisfaction of Mortgage. Furthermore, the property interests of Defendants Simon, Deutsche Bank Trust Company, Trustee under Saxon Asset Securities Trust 2007-4 and Deutsche Bank National Trust Company, as Trustee for Securitized Asset Backed Receivables LLC Trust 2007-BR1 Mortgage Pass-Through Certificates, Series 2007-BR1 are subordinated to the interest of Plaintiff.

Plaintiff moves for the appointment of a referee to compute the amount Defendant Joseph owes Plaintiff from the March 29, 2006. Defendants do not oppose the appointment of a referee. Accordingly, this relief is granted.

Moving Defendants cross-move to dismiss the Amended Complaint for failure to enter a default judgment within the one-year statutory window. As stated previously, the Court is not empowered to enter a default judgment if the plaintiff has failed to move for a default judgment within a year of default. **CPLR § 3215 (c)**. However, “[a] defendant may waive the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer or taking any other steps which may be viewed as a formal or informal appearance.” ***HSBC Bank USA, N.A. v.***

Grella, 145 A.D.3d 669, 670-671 (2d Dep't 2016) (internal citation omitted). In the present case Defendants Joseph and Simon appeared by their shared counsel in 2018 and thereby waived their right to dismiss on this ground.

Moving Defendants also oppose the motion for summary judgment, as it was filed more than 60 days after the Note of Issue. The rules of the King County Supreme Court, Civil Term and this Part make clear that motions for summary judgment must be made within 60 days of the Note of Issue. However, when the plaintiff shows good cause for delay, the Court may extend the time limit. In the instant case, Plaintiff has provided ample good cause for extending the time limit. Accordingly, the cross-motion is denied in its entirety. For the foregoing reasons it is HEREBY

ORDERED that the branch of the motion for default judgment against Defendants, Midland Funding NCC-2 Corp., New York City Parking Violations Bureau, New York City Environmental Control Board, New York State Department of Taxation and Finance, Criminal Court of the City of New York, Saxon Mortgage Services, Inc. and John Doe #1 through John Doe #10 is GRANTED; and it is further

ORDERED that the branch of the motion for default judgment against Defendant Simon is GRANTED, if Defendant Simon does not respond to the Amended Complaint within 30 days of this Decision and Order; and it is further

ORDERED that the branch of the motion for summary judgment is GRANTED foreclosing the March 29, 2006 mortgage upon 324 East 59th Street, Brooklyn, NY 11203; and it is further

ORDERED that the branch of the motion to appoint a Referee and directing him/her to compute the amount Defendant Andre Joseph owes to Plaintiff is GRANTED; Settle Order of Reference on notice; and it is further

ORDERED that the branch of the motion to vacate and discharge the July 19, 2006 Satisfaction of Mortgage, CFRN 2006000442116 is GRANTED; and it is further

ORDERED that the interest of Defendants Deutsche Bank National Trust Company, Trustee under Saxon Asset Securities Trust 2007-4, Midland Funding NCC-2 Corp., Mortgage Electronic Registration Systems, Inc. as nominee for New Century Mortgage Corporation, and Simon in the property are deemed subordinate to those of Plaintiff; and it is further

ORDERED that the cross-motion is DENIED in its entirety.

The Court has reviewed the parties' other contentions and requests for relief and finds them without merit.

This is the Decision and Order of the Court.

ENTER



HON. LOREN BAILY-SCHIFFMAN