

[*1]

Deutsche Bank Natl. Trust Co. v Tassone
2014 NY Slip Op 51372(U)
Decided on June 20, 2014
Supreme Court, Putnam County
Grossman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 20, 2014

Supreme Court, Putnam County

**Deutsche Bank National Trust Company, AS TRUSTEE
UNDER POOLING AND SERVICING AGREEMENT
DATED AS OF MAY 1, 2003 MORGAN STANLEY ABS
CAPITAL I INC. TRUST 2003-NC5, Plaintiff, -against -**

against

**Cosmo Tassone, CARMELA TASSONE, and "JOHN DOE"
No.1-10, "MARY DOE" #1-10, and "JANE DOE" #1-10, the
names being fictitious, their true names being unknown to the
plaintiff, persons intended being persons in possession of
portions of the premises herein described, Defendants.**

2480/2011

Bruce H. Ashbahian, Esq.

DeRose & Surico

Attorney for Plaintiff

213-44 38th Avenue

Bayside, New York 11361

Nicole M. Black, Esq.

Clair & Gjersten, Esqs.

Attorney for Defendant

720 White Plains Road

Scarsdale, New York 10583

Victor G. Grossman, J.

The following papers, numbered 1 to 28, were considered in connection with Plaintiff's motion to: (1) strike Defendant's answer and grant summary judgment in Plaintiff's favor; (2) change the name of plaintiff pursuant to an assignment of the mortgage; (3) amend the caption of the summons and complaint, notice of pendency, and

all other papers filed by discontinuing the action against "John Doe" #1-10, "Mary Doe" #1-10, and "Jane Doe" #1-10 without prejudice; (4) appoint a referee; and (5) grant Plaintiff such other and further relief as the Court may deem just and proper; and Defendant's Cross-Motion to Dismiss the Action in its Entirety.

PAPERSNUMBERED

Notice of Motion/Affirmation/Affidavit of Indebtedness/

Exhs. A-K1-14

Notice of Cross Motion/Affirmation in Opposition and In

Support of Cross Motion/Exhs. A-D15-20

Affirmation in Opposition/Exhs. A-G21-28

On February 18, 2003, Defendants Cosmo and Carmela Tassone executed an Adjustable Rate Note (the "Note") with New Century Mortgage Corporation, wherein Defendants promised to repay New Century Mortgage Corporation, the principal sum of \$280,000.00 with interest (Affirmation, Exh. A). At the same time, Defendants executed an Adjustable Rate Rider (Affirmation, Exh. A). To secure payment of the sum represented in the Note, Defendants duly executed and delivered to New Century Mortgage Corporation, a mortgage (the "Mortgage"), dated February 18, 2003, encumbering property located at 9 Fieldstone Road, Putnam Valley, New York 10579 (Affirmation, Exh. B). The Mortgage was recorded on April 2, 2003, in the Office of the Clerk of Putnam County at Liber 3552, Page 275 (Affirmation, Exh. B).

According to the documents presented to this Court, New Century Mortgage Corporation allegedly assigned the Mortgage and Note to Deutsche Bank National Trust Company f/k/a Bankers Trust Company of California, N.A., as Trustee (Affirmation, Exh.

C). However, it is unclear when this occurred because the date of this document is January 2, 2004, but the document was not notarized until May 6, 2005 (Affirmation, Exh. C).

On July 1, 2011, Deutsche Bank National Trust Company f/k/a Bankers Trust Company of California, N.A., apparently assigned the Mortgage to Deutsche Bank National Trust Company, as Trustee Under Pooling and Servicing Agreement Dated as of May 1, 2003 Morgan Stanley ABS Capital 1 Inc. Trust 2003-NC5 (Affirmation, Exh. C).

There appears to be another assignment of the Mortgage on May 20, 2013 by Plaintiff Deutsche Bank National Trust Company, as Trustee Under Pooling and Servicing Agreement Dated [*2] as of May 1, 2003 Morgan Stanley ABS Capital 1 Inc. Trust 2003-NC5, to Deutsche Bank National Trust Company, As Trustee For Morgan Stanley ABS Capital 1 Inc. Trust 2003-NC5, Mortgage Pass-Through Certificates, Series 2003-NC5 (Affirmation, Exh. C) — almost two years after this action for foreclosure was commenced (Affirmation, Exh. D).

According to Plaintiff, Defendants defaulted by failing to make the monthly payment that was due on December 1, 2009, and each successive month thereafter (Affirmation, Exh. D).

On March 24, 2011, Plaintiff allegedly sent Defendants their ninety (90) day notice (Cross-Motion, Exh. B). The next day, on March 25, 2011, Plaintiff allegedly sent Defendants a thirty (30) day notice of default. As a result of Defendants' failure to cure the default, Plaintiff declared the balance of the principal indebtedness immediately due and owing (Affirmation; Affidavit of Indebtedness; Exh. J).

On August 11, 2011, Plaintiff filed the Summons and Complaint and Notice of Pendency (Affirmation, Exhs. D-E). On August 24, 2011, Defendant Carmela Tassone was personally served the Summons and Complaint, along with RPAPL §1303 Notice (Affirmation, Exh. F).

Defendants interposed an Answer on September 6, 2011, denying the allegations in the complaint and alleging thirteen (13) affirmative defenses (Affirmation, Exh. G).

Settlement conferences were held on February 8, 2012, April 11, 2012, May 23, 2012, and July 25, 2012 (Report to Court, Exh. K). After the July 25, 2012 hearing, Court Attorney-Referee Albert J. DeGatano ruled that Plaintiff, by virtue of being under a pooling agreement, was not acting in bad faith for not offering a loan modification where that pooling agreement specifically prohibited Plaintiff from do so, the matter was released from the Foreclosure Settlement Part, and the instant motion was filed. Defendants are opposing, and cross moving for dismissal. RPAPL § 1304 provides that at least 90 days before a lender commences an action to foreclose on a mortgage, notice must be provided to the borrower that the loan is in default and that his or her home is at risk. The lender is required to send this notice "by registered or certified mail and also by first-class mail" *See* RPAPL § 1304. "[P]roper service of RPAPL notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition." *Aurora Loan Services, LLC v. Weisbaum*, 85 AD3d 95, 103 (2d Dept. 2011). Since satisfaction of a statutory condition precedent is an element of the claim itself which must be proved by plaintiff, the failure to show strict compliance would require dismissal. *Id.*

Here, the 90-day notice was sent to Defendant on March 24, 2011 (Affirmation, Exh. J). While there is a typed notation at the top of the document reflecting that it was sent "VIA First Class Mail," and "VIA Certified Mail (return receipt requested)," and noting the certified number, there is no affidavit of service submitted to establish proper service on the borrowers, thereby confirming these notations. *See Aurora Loan Services, LLC v. Weisblum*, 85 AD3d, *supra* at 106. As such, Plaintiff has failed to satisfy a "mandatory condition precedent," and the foreclosure action must be dismissed.

And to the extent Plaintiff submitted its opposition to Defendants' cross-motion and attached a printout from the USPS reflecting the same certified number, this Court will not accept it. First, this affirmation, dated February 28, 2014, was served over two months after Defendants' December 13, 2013 cross-motion was made, and there is no indication in the papers or the file that Plaintiff was granted an extension. Moreover, Plaintiff fails to explain why there was a delay. While this Court prefers to decide issues on their merits, this Court cannot ignore [*3]this excessive delay. And second, even if the Court were to consider this printout — which is arguably not even in admissible form — Plaintiff cannot rely on evidence submitted for the first time in its reply papers to remedy deficiencies in

its *prima facie* showing. See *Novita, LLC v. Hotel Times Square, LLC*, 2013 WL 5785929 (Sup.Ct. October 17, 2013), citing [Those Certain Underwriters at Lloyds, London v. Gray](#), 49 AD3d 1, 9 (1st Dept. 2007); see also *Gampero v. Mathai*, 105 AD3d 995 (2d Dept. 2013). As such, this Court will not consider the reply papers. In further support of their cross-motion, Defendants contest Plaintiff's standing to commence this action. Although the failure to properly serve RPAPL §1304 Notice is sufficient reason to grant Defendants' cross-motion and dismiss the complaint, this Court will address the standing issue in light of the possibility that the action may be recommenced after Plaintiff effects proper service of RPAPL §1304 Notice.

The plaintiff in a foreclosure action must establish the existence of the promissory note and a related mortgage referable to the subject property, its ownership of the mortgage and the defendant's default in payment. [Campaign v. Barba](#), 23 AD3d 327 (2d Dept. 2005). With respect to the issue of ownership, "[a]n assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it." [Deutsche Bank National Trust Co. v. Barnett](#), 88 AD3d 636, 637 (2d Dept. 2011). The foreclosing party, as plaintiff, must establish that it is "both the holder or assignee of the subject mortgage, and the holder of the underlying note, at the time the action is commenced." *Homecomings Financial, LLC v. Guldi*, 103 AD3d 506 (2d Dept. 2013), quoting *Bank of New York v. Silverberg*, 86 AD3d 274, 282-83 (2d Dept. 2011).

Here, in the documents provided, the initial assignment of the mortgage and note from New Century Mortgage Corporation to Deutsche Bank National Trust Company f/k/a Bankers Trust Company of California, N.A., is circumspect, thereby rendering any subsequent assignments questionable. Moreover, the subsequent assignment of the mortgage to the current Plaintiff fails to indicate whether the Note was assigned as well.

Moreover, putting aside the validity of the initial assignment, it is still unclear from the affidavit of Alexa Benincasa whether Plaintiff was in physical possession of the Note at the time the action was commenced. As a threshold matter, as Defendant correctly points out, there is no indication in the record or moving papers, what authority a "Contract Management Coordinator" has to attest to the facts that she has. Moreover, her blanket statement that Plaintiff possessed the Note at the time of the commencement of the action, without any facts to support this statement, is insufficient to establish that Plaintiff did in

fact have such possession. And the assignment of mortgage to the instant Plaintiff lends no further proof. As such, Plaintiff needs to be prepare to answer these questions at a future hearing, if one is ordered, as it has failed to establish a *prima facie* case. In light of the foregoing, this Court need not address the remaining issues, and it is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendant's cross-motion is granted, and the action is dismissed without prejudice. The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York

June 20, 2014

HON. VICTOR G. GROSSMAN, J.S.C.

[Return to Decision List](#)