

**Mortgage Elec. Registration Sys., Inc. v McDuffie**

2024 NY Slip Op 34352(U)

December 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 38567/2006

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9 day of December, 2024.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
ACTING SOLELY AS NOMINEE FOR AMERICAN HOME  
MORTGAGE C/O AMERICAN HOME MORTGAGE SERVICING,  
4600 REGENT BLVD., IRVING, TEXAS 75063,

Plaintiff(s),

-against-

EVELYN MCDUFFIE, GMAC MORTGAGE CORP., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC., et al.,

Defendant(s).

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affidavits (Affirmations) and Exhibits \_\_\_\_\_  
Opposing Affidavits (Affirmations) and Exhibits \_\_\_\_\_  
Reply Affidavits (Affirmations) and Exhibits \_\_\_\_\_

28-51 \_\_\_\_\_  
54-61 \_\_\_\_\_  
63-64 \_\_\_\_\_

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On December 15, 2006, named Plaintiff MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for AMERICAN HOME MORTGAGE c/o AMERICAN HOME MORTGAGE SERVICING, then represented by the Law Offices of Alan Weinreb, PLLC, commenced this action to foreclose on a mortgage encumbering the real property known as 737 Decatur Street, owned by defendant-mortgagor EVELYN MCDUFFIE. By order dated October 29, 2013, the Court (Lawrence Knipel, J.) directed that this action be dismissed, and the notice of pendency canceled, due to Plaintiff's failure to appear at a status conference on that day (*see* NYSCEF Doc. #46). This order was entered on February 11, 2014. On or about November 16, 2020, SRP 2013-9 Funding Trust ("SRP 2013-9"), as purported

**ORDER**

Motion Calendar: 11/16/2022  
Motion Cal. #(s): 32  
  
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successor-in-interest to defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., the holder of an allegedly junior mortgage lien against the subject premises, served a notice of settlement of a proposed judgment dismissing this action upon Justice Knipel's order of dismissal dated October 29, 2013. The Clerk of the Court entered judgment formally dismissing this action without prejudice on December 1, 2020; nine days later, SRP 2013-9 served Notice of Entry by mail upon Plaintiff's counsel of record, and defendant-mortgagor Evelyn McDuffie (*see* NYSCEF Doc. #s 24-25).

By notice of motion dated and e-filed on May 3, 2021, Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2007-SD1 ("Deutsche Bank"), as purported successor-by-assignment to the named Plaintiff, now moves for an order, *inter alia*, substituting itself into this action as the plaintiff of record pursuant to CPLR §§ 1018 and 1021; vacating the 2013 dismissal order and the 2020 judgment pursuant to CPLR 5015 (a)(1); granting leave to reargue the Court's July 24, 2012 decision and order denying Plaintiff's motion for a judgment of foreclosure and sale pursuant to CPLR 2221 (d); and upon reargument, that the Court award Deutsche Bank a judgment of foreclosure and sale.<sup>1</sup> SRP 2013-9 opposes on several grounds, only one of which is sufficient to dispose of the motion.

The Court finds that Deutsche Bank has not made an adequate showing to warrant vacating the dismissal of this action made upon Plaintiff's default. The Uniform Civil Rules for the Supreme Court and County Court provide, in pertinent part, that "[a]t any scheduled call of a calendar or at any conference," if parties do not appear and are ready to proceed, "the judge may make such order as appears just," and said remedies include dismissing the action (*see* 22 NYCRR § 202.27). As discussed, Justice Knipel issued the 2013 dismissal order upon Plaintiff's failure to appear at the Status Conference on October 29, 2013. Hence, the governing standard on Deutsche Bank's motion is as follows:

Generally, in order to vacate a default in appearing at a scheduled conference, the defaulting party must demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action or defense to the action. However, in the absence of actual notice of a conference date, a party could not have been in default for failing to appear at that conference. In that situation, the party's default is considered a nullity and vacatur of the default is required as a matter of law and

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<sup>1</sup> Deutsche Bank tried to move for similar relief by Order to Show Cause ("OSC") on April 23, 2021 (*see* NYSCEF Doc. #s 2-26). Justice Knipel declined to sign the proposed OSC because residential foreclosure proceedings were stayed due to the pandemic-related moratoria (*see* NYSCEF Doc. #27).

due process, and no showing of a potentially meritorious cause of action or defense is required (*Beneficial Homeowner Serv. Corp. v Horan*, 230 AD3d 1210, 1211 [2d Dept 2024]).

Although Deutsche Bank asserts that it never received notice of the October 29, 2013 Status Conference, it does not submit any evidence of same.<sup>2</sup> Deutsche Bank's reliance on the lack of an entry to that effect in the County Clerk's minutes is of no moment, particularly since this matter was not converted to e-filing until April 23, 2021, and, in any event, that does not establish proof of lack of actual notice. Moreover, this action was commenced on behalf of Plaintiff by a different law firm, and Deutsche Bank merely claims that its "attempts to contain a copy of [said firm's] file pertaining to this matter were unsuccessful" (*see* NYSCEF Doc. #29, p. 8). Deutsche Bank's contention that notice of the Status Conference was never provided to its servicing agent and attorney-in-fact is also unavailing, since Plaintiff was represented by that prior law firm and hence, any such notice would properly have been sent only to the attorney-of-record (*see* CPLR 2106 [b]). In failing to submit evidence from someone with personal knowledge as to whether notice of the conference was received, Deutsche Bank did not establish that it did not have actual notice of the conference date" (*Beneficial Homeowner Serv. Corp. v Horan*, 230 AD3d at 1211; *cf. U.S. Bank N.A. v Roberts*, 216 AD3d 1038, 1040 [2d Dept 2023] [standard met, where movant's attorney's affirmation denying receipt of notice of the status conference was uncontroverted]).

Alternatively, as a proffered reasonable excuse for defaulting at the October 29, 2013 Status Conference, Deutsche Bank asserts that approximately three months before the conference, its servicer, at the direction of an investor, sought to transfer Deutsche Bank's representation to a second law firm. Hence, Deutsche Bank appears to assert "law firm failure" as its excuse. However, Deutsche Bank still failed to proffer an affidavit based on personal knowledge from anyone at the first or second law firm, articulating a detailed and credible explanation for either firm's failure to attend the Status Conference, which is fatal to its reliance on this excuse (*see Hudson City Sav. Bank v Augustin*, 191 AD3d 774, 775-776 [2d Dept 2021]). Even accepting Deutsche Bank's assertion that both firms are now defunct, that merely underscores the inability to provide any evidence substantiating the excuse. To the extent that

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<sup>2</sup> Deutsche Bank advises that it purchased the subject mortgage loan in March of 2007, and continued to prosecute this action in Plaintiff's name from that point forward (*see* NYSCEF Doc. #29 [Memorandum of Law in Support of Motion], p. 4).

the passage of some eight years before making the instant motion has inhibited Deutsche Bank's ability to properly articulate sufficient grounds for the law office failure excuse, the Court notes that Deutsche Bank has also failed to proffer a reasonable excuse for this protracted delay. Since Deutsche Bank failed to proffer a reasonable excuse for defaulting at the Status Conference, this Court need not consider whether Deutsche Bank also demonstrated the existence of a potentially meritorious cause of action (*see id.* at 776; *see also Beneficial Homeowner Serv. Corp. v Horan*, 230 AD3d at 1212).

Accordingly, the above-referenced motion by successor-plaintiff Deutsche Bank for an order, *inter alia*, pursuant to CPLR 5015 (a)(1), vacating the 2013 dismissal order and the 2020 judgment, and restoring this matter to active status, is **DENIED in its entirety**.

The foregoing constitutes the Decision and Order of this Court.

**E N T E R,**



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**Hon. Cenceria P. Edwards, JSC, CPA**