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Deutsch National Bank Trust Company v. Smart

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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART E**

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**DEUTSCHE NATIONAL BANK TRUST COMPANY,
AS TRUSTEE FOR ARGENT SECURITIES INC.,
ASSET-BACKED PASS-THROUGH SECURITIES,
SERIES 2005-W4**

**L&T Index No 54610/20
Mot. Seq. No. 1**

Petitioner-Owner,

DECISION AND ORDER

-against-

DARREN A. SMART and CARLOS WILSON,

Respondent-Occupants

**“JOHN DOE” and/or “JANE DOE,” names of additional
Occupants being fictitious and unknown to petitioners,
persons intended being in possession of the Premises
described herein**

-----X
HONORABLE DAVID A. HARRIS, J.H.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent’s motion to dismiss, listed by NYSCEF number:

9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

After the service of a Ninety (90) Day Notice to Quit With Exhibition of Deed dated October 22, 2019 (Notice), petitioner commenced this summary proceeding seeking to recover possession of the property located at 976 Schenectady Avenue, in Brooklyn (Building). The proceeding was adjourned on its initial return date of March 4, 2020, and as a consequence of the ensuing COVID-19 pandemic was repeatedly adjourned. Respondent Darren Smart filed a hardship declaration on January 10, 2022 (NYSCEF No. 7). The resultant stay expired five days later, on January 15, 2022.

On March 15, 2022, respondent Lincia Thomas appeared (NYSCEF No. 8) and now moves to vacate any default and to dismiss pursuant to CPLR 3211, on the grounds that the petitioner lacks standing, and because petitioner failed to exercise due diligence to ascertain the name of Lincia Thomas before resorting to employment of “Jane Doe” pursuant to CPLR 1024.

In an action commenced in Supreme Court under index number 13359/08 against Darren A. Smart, Carlos Wilson and American Home Buyers Consulting Services Inc., among other defendants, petitioner acquired a judgment (NYSCEF No. 17) and referee’s deed in foreclosure dated August 26, 2019 (NYSCEF No. 12). However, by deed dated September 21, 2017, and recorded on September 25, 2017 at 9:43 AM, American Home Buyers Consulting Services Inc. conveyed the Building to 976 Schenectady Avenue Trust (NYSCEF No. 13). Later that day, at 11:06 AM, petitioner filed notice of pendency (NYSCEF No. 14). 976 Schenectady Avenue Trust was not named in the foreclosure proceeding or in the Notice.

Respondent Lincia Thomas produces a lease executed with 976 Schenectady Avenue Trust for a 3-year period commencing on January 1, 2020, at a monthly rent of \$1534. While petitioner disputes the authenticity of this lease, there is no affidavit of anyone with personal knowledge to refute its authenticity, but only the affirmation of petitioner’s counsel.

After the commencement of this proceeding, in April 2021, petitioner commenced a strict foreclosure against 976 Schenectady Avenue Trust (NYSCEF 14), obtaining a judgment in strict foreclosure on February 16, 2022 (NYSCEF No. 22).

The first branch of respondent’s motion seeks vacatur of any default. Here, however, petitioner has never moved for entry of a default judgment as required by various administrative orders (Administrative Order 34/22, January 16, 2022; Administrative Order 261/21, September 8, 2021) and Directives and Procedures Memoranda (DRP 217, August 16, 2021; DRP 219, November 23, 2021). Petitioner cites no date on which respondent failed to appear, and absent a motion for default judgment,

none could have been entered. An answer can be made "at the time when the petition is to be heard" (RPAPL 743) and adjournment of the proceeding has the effect of extending that time (*City v Candelario*, 156 Misc 2d 330 [2d, 11th and 13th Jud Dists], *aff'd in part and rev'd in part on other grounds*, 223 AD2d 617 [2d Dept 1996]). Respondent did not default in answering this proceeding. The branch of respondent's motion seeking to set aside any default is accordingly granted.

An eviction proceeding can be maintained when "the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him." (RPAPL 713[5]) by "The purchaser upon the execution or foreclosure sale" (RPAPL 721[3]). However, when, as here, a party in possession has been omitted from the foreclosure proceeding, the purchaser's remedies are limited. It has been held that "[t]he absence of a necessary party in a foreclosure action leaves that party's rights unaffected by the judgment and sale, and the foreclosure sale may be considered void as to the omitted party (*see, Polish Nat. Alliance v. White Eagle Hall Co.*, *supra*, at 406, 470 N.Y.S.2d 642; *see also, Marine Midland Bank v. Freedom Rd. Realty Assocs.*, 203 A.D.2d 538, 611 N.Y.S.2d 34).

Accordingly, a tenant in possession pursuant to a lease which is subordinate to the mortgage, but who was not made a party to the foreclosure action, cannot be dispossessed by the purchaser at the foreclosure sale" (*6820 Ridge Realty LLC v Goldman*, 263 AD2d 22, 26 [2d Dept 1999]). Petitioner has asserted in the complaint in the strict foreclosure action dated April 6, 2021, that "976 Schenectady Avenue Trust was not properly joined to Plaintiff's action commenced under Index Number 13359/2008; therefore Defendant 976 Schenectady Avenue Trust's interest in the Subject Property was not extinguished by the January 4, 2019 Judgment of Foreclosure and Sale." (NYSCEF No. 14). That statement constitutes a formal judicial admission (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403 [2014]).

Petitioner has acknowledged, during the pendency of this proceeding, that it had not

terminated the possessory rights of the party from whom respondent leased the premises. That petitioner's counsel, in an affirmation not based on personal knowledge, hypothesizes about the bona fides of the lease is speculative conjecture insufficient to raise an issue as to the authenticity of the document. Respondent Lincia Thomas executed a lease with a party that, at the time the lease was executed, had a possessory interest unaffected by the foreclosure. That petitioner, during the pendency of this proceeding, obtained a judgment in the strict foreclosure proceeding, does not alter the fact that the possessory interest of 976 Schenectady Avenue Trust, and by extension, the possessory interest of respondent derived from that interest, had not been terminated when contrary assertions were set forth in the petition. The foreclosure sale was a nullity as to 976 Schenectady Avenue Trust (*6820 Ridge Realty LLC v Goldman*, 263 AD2d at 26). Since the foreclosure sale was a nullity as to respondent's landlord, petitioner was not in the position of a purchaser in foreclosure when this proceeding commenced and did not become so until obtaining judgment in the strict foreclosure.

Respondent's motion is granted, and the proceeding is dismissed. The court does not reach the branch of respondent's motion seeking dismissal pursuant to CPLR 1024.

This is the decision and order of the court.

Dated: Brooklyn, New York
July 22, 2022



DAVID A. HARRIS, J.H.C.

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