

BANKING ALERT

July 2024

New York Second Department Affirms Denial of Motion for Summary Judgment in Foreclosure Action Due to Failure to Demonstrate Compliance with RPAPL 1304

In *Deutsche Bank Trust Co. Ams. v. Garcia*, Case No. 2022-07756 (N.Y. App. Div. 2d Dep't July 24, 2024), the Second Department affirmed a trial court's denial of a motion for summary judgment in favor of a lender in an action against two borrowers seeking to foreclose on residential property.

The plaintiff, Deutsch Bank Trust Company Americas ("Plaintiff"), commenced a foreclosure action against defendants Sonia E. Garcia and Jose F. Garcia (together, "Defendants") to foreclose a mortgage on Defendants' home in Orangeburg, New York. Defendants, in response to the foreclosure, filed an answer with six counterclaims and various affirmative defenses, which included, among others, a defense premised on Plaintiff's alleged failure to comply with RPAPL 1304. Plaintiff subsequently moved for summary judgment which Defendants opposed. The trial court denied the motion finding that Plaintiff had failed to demonstrate that it had mailed the RPAPL 1304 pre-foreclosure notice to Defendants.

On appeal, the Second Department outlined RPAPL 1304's requirements, namely that a lender seeking to foreclose a residential mortgage must send statutory notice to the borrower at least 90 days before commencing a foreclosure action, and that the notice must be sent by registered or certified mail and by first-class mail to the borrower's last known address and the residential property that is the subject of the mortgage.

The Second Department concurred in the trial court's analysis, finding that once Defendants raised Plaintiff's alleged failure to comply with RPAPL 1304 as an affirmative defense, it was Plaintiff's burden on summary judgment to demonstrate strict compliance with RPAPL 1304 as part of its prima facie case of foreclosure. Because Plaintiff was unable to provide evidence of the actual mailing or standard office procedures establishing that such a mailing is consistent with Plaintiff's patterns and practices, Plaintiff had not established its prima facie case and denial of the motion was warranted.

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New York Second Department Reverses Trial Court's Denial of Motion to Dismiss Third-Party Complaint Against Guarantor

In *SMG Automotive Holdings, LLC v. Kings Automotive Holdings, LLC*, Case No. 2022-01134 (N.Y. App. Div. 2d Dep't July 3, 2024), the Second Department reversed a trial court's decision denying a motion to dismiss brought by a third-party defendant in an action to determine who was entitled to the proceeds of a promissory note, and a related third-party action to recover on a personal guaranty.

By way of factual background, in February 2017, plaintiff SMG Automotive Holdings, LLC ("SMG"), through its operating manager, third-party defendant Zachary Schwebel ("Schwebel"), executed and delivered a promissory note in favor of defendant/third-party plaintiff Kings Automotive Holdings, LLC ("Kings") in the original principal amount of \$2,500,000 (the "Note"), which was to mature in February 2021. To further secure performance under the note, Schwebel executed and delivered to Kings a personal guaranty promising "full satisfaction of payment and performance of all obligations" owed by nonparty SMG Auto Enterprises LLC ("SMG Auto") under the Note (the "Guaranty").

SMG subsequently defaulted under the terms of the Note and filed an interpleader action to determine the various rights and claims of the parties to the Note. In response, Kings filed a third-party action against Schwebel seeking to enforce Kings' rights against Schwebel under the Guaranty and hold him personally liable for the total amount due and owing under the Note, approximately \$2,400,000. Schwebel moved to dismiss the third-party complaint on the grounds that the Guaranty referred to SMG Auto, not SMG, and, as such, Schwebel was not personally liable for SMG's default under the Note. The trial court denied the motion, finding that there was sufficient evidence to establish that "the parties were clearly aware that the guaranty referred to the correct entity...despite the misnomer."

On appeal, the Second Department reversed the trial court's determination, finding that Schwebel had submitted sufficient documentary evidence refuting the factual allegations of the third-party complaint. In particular, the Second Department noted that the Guaranty specifically stated that Schwebel was guaranteeing the obligations of SMG Auto and that there were no allegations in the third-party complaint stating that SMG Auto was an alter ego of SMG. The Second Department further noted that Kings failed to submit affidavits or other evidence in opposition to the motion that established that SMG was the party that the parties intended to be identified in the Guaranty and that the identification of SMG Auto in the Guaranty was a misnomer.

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