

**Mu-Min v Lee**

2010 NY Slip Op 31738(U)

June 1, 2010

Sup Ct, Queens County

Docket Number: 0001252/2008

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE  
Justice

IA Part 24

MARIAN TOWNES MU-MIN, as x  
Administrator for the Estate of WINNIE  
KILLETTE,

Index  
Number 1252 2008

Plaintiff,

Motion  
Date February 23, 2010

- against -

DAMASCUS LEE, SHANIKA HERNANDEZ,  
KECIA J. WEAVER, PREMIUM CAPITAL  
FUNDING LLC., HSBC BANK, USA, N.A., as  
Indenture Trustee for the Registered Noteholders  
of Renaissance Home Equity Loan Trust 2006-2,  
VISION ABSTRACT LLC., JACOB SOLOMON  
EQUITIES, INC., and "JOHN DOE" and "JANE  
DOE," the last two names being fictitious,

Motion  
Cal. Numbers 24, 25, 26 & 27

Motion Seq. Nos. 11, 12, 13 & 14

Defendants.

x

The following papers numbered 1 to 56 read on this motion by defendant HSBC Bank, USA, N.A. (HSBC) for leave to renew its prior motion for summary judgment in its favor on its counterclaim against plaintiff to impose an equitable lien, and upon renewal, for summary judgment in defendant HSBC's favor with respect to such counterclaim, and for leave to implead Shawn Pound and Leon Pound as additional party defendants and to serve an amended answer containing cross claims against them; this motion by defendant HSBC Bank, USA (HSBC) pursuant to CPLR 3212(a) for summary judgment dismissing the first, second, third, fifth, sixth and seventh causes of action in the amended complaint asserted against it; this motion by plaintiff pursuant to CPLR 3212 for partial summary judgment in her favor and against defendants on the first and third causes of action asserted in the amended complaint; and this motion by defendant Kecia J. Weaver pursuant to CPLR 3212 for summary judgment dismissing the amended complaint asserted against her.

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Upon the foregoing papers it is ordered that the motions numbered 24, 25, 26 and 27 on the motion calendar for February 23, 2010 are joined together for determination as follows:

Plaintiff's decedent, Winnie Kilette, died intestate on or about September 16, 2005, and was survived by Winnie's daughter, Marian Townes Mu-Min, and two grandchildren, Shawn Pound and Leon Pound. At the time of her death, Winnie Kilette owned the real property known as 140-14 116<sup>th</sup> Avenue, Jamaica, New York (Block 11998, Lot 0066), which was encumbered by a Home Equity Conversion Loan Agreement ("reverse mortgage") through the United States Secretary of Housing and Urban Development and the Financial Freedom Senior Funding Corporation in the approximate amount of \$200,000.00.

In her amended complaint, plaintiff Marian Mu-Min, the administrator de bonis non of the Estate of Winnie Kilette, alleges that after her mother's death, she became a victim of a "mortgage rescue" scheme perpetrated by defendants Damascus Lee, Shanika Hernandez and Kecia J. Weaver. Plaintiff allegedly believed that she needed to sell the property because she believed it was not possible to refinance the reverse mortgage. Plaintiff alleges defendant Lee represented to her that he would take steps to "establish" that she and Shawn Pound were the legal heirs of Winnie Kilette, and find an investor to pay off the reverse mortgage, whereby title would be transferred to Marian Townes Mu-Min, Shawn Pound and the investor. Plaintiff also alleges defendant Lee represented to her that under the

arrangement, “the family” would remain in possession of the property rent free for one year, and at the end of the year, it would “take over payments or sell the house,” with 60% of the total the sale proceeds being distributed to the family. Defendant Lee allegedly also represented that he would pay Marian Townes Mu-Min and Shawn Pound the sum of \$50,000.00, upon the transfer of title.

It is alleged that defendant Lee caused a petition for letters of administration for the Estate of Winnie Killeto to be forged, thus facilitating a fraudulent scheme whereby an imposter was issued letters of administration in the name of “Marian Townes Mumin” by the Surrogate’s Court, Queens County on February 2, 2006. In addition, plaintiff alleges defendant Lee advised her that she needed to sign certain documents to “save” the house and for tax purposes. One of the documents allegedly signed by plaintiff was a deed dated April 3, 2006, purportedly conveying title to the premises from plaintiff as administrator of the Estate of Winnie Killeto to defendant Lee in fee simple absolute. Plaintiff alleges that she executed the deed while under the undue influence of defendant Lee, and due to his fraudulent inducement. Plaintiff also alleges that sometime after plaintiff executed the deed, the name of “Shanika Hernandez” was added to the deed, as an additional named grantee.

Defendants Lee and Hernandez allegedly obtained a mortgage loan on May 4, 2006 in the principal amount of \$356,000.00 against the property from Premium Capital Funding, LLC (Premium), and the reverse mortgage was satisfied out of a portion of the proceeds of the Premium mortgage loan. Plaintiff alleges that the Premium mortgage was assigned to defendant HSBC by assignment dated February 27, 2007. Defendants Lee and Hernandez purportedly failed to make any mortgage payment on the Premium mortgage, resulting in the commencement of a foreclosure action, entitled *HSBC Bank, USA, N.A. v Lee* (Supreme Court, Queens County, Index No. 4948/2007), against Lee and Hernandez.

Plaintiff additionally alleges that she executed the April 3, 2006 deed at a time when, unbeknownst to her, she lacked legal authority to do so on behalf of the Estate of Winnie Killeto, because she did not have proper letters of administration since the underlying petition had been forged. In the amended complaint, she cites to the decision and order dated October 4, 2008, of the Surrogate’s Court, Queens County, rendered after a hearing, which revoked the letters of administration issued to one “Marian Townes Mu-Min” nunc pro tunc to February 2, 2006, based upon the Surrogate’s finding that Marian Townes Mu-Min did not sign the petition for the letters of administration, or authorize anyone else to do so on her behalf. Plaintiff also alleges that her execution of the April 3, 2006 deed was without the knowledge or consent of the other beneficiaries of the Estate of Winnie Killeto.

Plaintiff commenced this action in her representative capacity, after having obtained on November 15, 2007, limited letters of administration bonis non for the Estate of Winnie Killeto from the Surrogate’s Court, Queens County. Plaintiff seeks, pursuant to RPAPL

article 15, to compel the determination of claims to the property, and declare the April 3, 2006 deed and the Premium mortgage to be null and void, and to obtain an award of damages and costs, including reasonable attorneys' fees.

Plaintiff asserts nine causes of action in the complaint. She claims, as a first cause of action, that she is the lawful owner of the property, vested with absolute unencumbered title in fee simple, and that defendants Lee and Hernandez committed fraud in their acquisition of title. Plaintiff asserts a second cause of action, claiming although the April 3, 2006 deed appears to reflect a transfer of title to defendants Lee and Hernandez, it was intended to serve only as security for a debt, and constituted an equitable mortgage which is usurious. As a third cause of action, plaintiff claims the April 3, 2006 deed is void due to revocation of the letters of administration issued on February 2, 2006. The fourth cause of action is for punitive damages based upon alleged conversion of title to the property by defendants Lee and Hernandez. In the fifth cause of action, plaintiff asserts that she suffered damages and lost her ownership interest and equity in the property by virtue of the negligence committed by defendant Premium in underwriting the mortgage loan, and defendant Vision Abstract, LLC (Vision) in failing to ensure the validity of the April 3, 2006 deed. As a sixth cause of action, plaintiff asserts a claim for injunctive relief based upon the alleged gross negligence committed by defendant Premium in underwriting the mortgage loan, and by defendant Vision in failing to ensure the validity of the title of defendants Lee and Hernandez. By the seventh cause of action, plaintiff seeks to declare that defendant HSBC is not a "holder in due course," because HSBC had notice of defenses available to plaintiff regarding the Premium mortgage at the time of the assignment. The eighth and ninth causes of action are based upon plaintiff's claim that the forged petition for letters of administration bears the acknowledgment of defendant Kecia J. Weaver, an attorney and notary public, and that Weaver committed wilful or negligent misconduct in performing her notarial duties by certifying the forged signature of "Marian Townes Mumin" on the petition. The tenth cause of action is based upon the alleged violation of Executive Law § 135-a by defendant Weaver in acknowledging a forged signature.

Defendant HSBC served an answer to the first amended complaint, asserting various affirmative defenses and cross claims against defendants Weaver and Vision, and interposing two counterclaims for equitable subrogation and to impose an equitable lien. Defendant HSBC claims, among other things, that it is the holder of the Premium mortgage pursuant to an assignment, and that it is entitled to equitable subrogation to the extent a portion of the proceeds of the Premium mortgage loan were used to satisfy the Finance mortgage.

Defendant Premium served an answer admitting certain allegations of the amended complaint, denying others, asserting various affirmative defenses, interposing counterclaims, and cross claims against defendants Weaver and Vision.

Defendant Weaver served an amended answer denying various allegations of the amended complaint, admitting others, and asserting various affirmative defenses.

Defendant Lee, appearing pro se, served an answer to plaintiff's complaint, admitting certain allegations and denying others.

This action was assigned to Justice Satterfield, who recused herself on December 16, 2009. The action and those pending motions, including the ones herein, were reassigned to this court following the issuance of a directive of the Administrative Judge dated December 21, 2009.

Defendant HSBC seeks leave to renew its prior motion for summary judgment on its counterclaim to impose an equitable lien, asserting that it inadvertently failed to annex a copy of plaintiff's reply, and now offers a copy of such reply in support of the motion.

A motion for leave to renew or to reargue a prior motion, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it (*see* CPLR 2221[a]). It is proper, however, to bring the motion before a different justice where the justice who signed the order subsequently recused himself or herself (*cf. Friends of Keuka Lake, Inc. v DeMay*, 206 AD2d 850 [1994]; *Spahn v Griffith*, 101 AD2d 1011 [1984]; *see Ferdinand v Ferdinand*, 56 AD3d 604 [2008]). It is proper, therefore, for this court to determine the branch of the motion by defendant HSBC for leave to renew the prior motion for summary judgment on the counterclaim to impose an equitable lien.

The reply offered by defendant HSBC is dated January 19, 2008. Such date is before the January 14, 2009 date of the answer which was presented by defendant HSBC, as the answer served in response to plaintiff's first amended complaint. Under such circumstances, it is unclear whether a reply to the counterclaim to impose an equitable lien asserted in the amended answer has been served by plaintiff. That branch of the motion by defendant HSBC for leave to renew is denied.

With respect to that branch of the motion by defendant HSBC to join Shawn Pound and Leon Pound as additional party defendants, CPLR 1001 (a) defines parties who should be joined as: (1) persons who ought to be parties if complete relief is to be accorded between those who are parties, or (2) persons "who might be inequitably affected by a judgment in the action." RPAPL 1511(2), in relevant part, provides that:

"Where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected

by the judgment, the court, upon application of ... any party to the action ... may direct that such person be made a party.”

Shawn Pound and Leon Pound are alleged to have ownership interests in the subject property (*see* EPTL 4-1.1[a][3]; *Waxson Realty Corp. v Rothschild*, 255 NY 332 [1931]; *Kraker v Roll*, 100 AD2d 429 [1984]; *see* order of August 3, 2009, *Mu-Min v Lee* (Supreme Court, Index No. 1252/2008), which may be subject to an equitable lien held by defendant HSBC (*see* *Great Eastern Bank v Chang*, 227 AD2d 589 [1996]). Under such circumstances, Shawn Pound and Leon Pound should be joined as party defendants (CPLR 1001, RPAPL 1511). Plaintiff is directed to serve and file a supplemental summons and amended complaint naming Shawn Pound and Leon Pound as additional party defendants, upon Shawn Pound and Leon Pound within 60 days of service of a copy of this order with notice of entry (*see* CPLR 1001, 3025; RPAPL 1501, 1511).

With respect to the motions by plaintiff for partial summary judgment and the motions by defendants HSBC and Weaver for summary judgment, it is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see* *Zuckerman v City of New York*, 49 NY2d 557, *supra*).

That branch of the motion by plaintiff for partial summary judgment in her favor on the first and third causes of action as against defendants Hernandez, Vision, Jacob Solomon Equities, Inc., John Doe and Jane Doe is denied. Plaintiff has failed to demonstrate issue has been joined in relation to those defendants (*see* CPLR 3212[a]). No copy of the answers of any of those defendants have been provided to the court.

That branch of the motion by plaintiff for partial summary judgment on the first and third causes of action as against defendant Lee, under CPLR 3025, whenever an amended pleading is served, whether as of course under subdivision (a) or by leave under subdivision (b), and it is one which would have required a responsive pleading if originally used, the amended one requires a responsive pleading. Plaintiff’s amended complaint would have required a fresh answer by defendant Lee (*see* *Aeromar C. Por A. v Port Authority of New York and New Jersey*, 145 AD2d 584 [1988]). Because plaintiff has failed to present a copy of any such amended answer by defendant Lee, she has failed to demonstrate issue has been

joined as against defendant Lee relative to the amended complaint (*see State University Const. Fund v Aetna Cas. & Sur. Co.*, 169 AD2d 52 [1991]). That branch of the motion by plaintiff for partial summary judgment in her favor on the first and third causes of action as against defendant Lee is denied.

With respect to that branch of the motion by plaintiff for partial summary judgment in her favor on the first and third causes of action as against defendants HSBC, Premium, and Weaver, plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *supra*). Plaintiff contends that she is the true owner of the property, with title free and clear of any interest, easement or lien claimed by or through defendants, and that the revocation of the letters of administration by the Surrogate renders the deed dated April 3, 2006, and any interest or lien appearing in the chain of title proceeding therefrom, to be void. Plaintiff, however, has failed to allege or prove that defendants Weaver and Premium make any claim of ownership of, or easement or lien against the subject property. Defendant Premium's only interest in the property, as mortgagee, was assigned to defendant HSBC prior to the commencement of this action (*see Jean v Joseph*, 41 AD3d 657 [2007]).

With respect to that branch of the motion by plaintiff for partial summary judgment in her favor on the first and third causes of action of action as against defendant HSBC, plaintiff has brought suit in her representative capacity, asserting that she was issued limited letters of administration de bonis non "for the purpose of commencing this action." According to the certificate of appointment of administrator, dated November 16, 2007, the limited letters of administration de bonis non are subject to the restrictions and limitations contained in the decree dated November 15, 2007 (*see SCPA 702*). In the absence of a copy of the decree, the court cannot determine the precise nature and extent of plaintiff's authority in bringing this suit. It is unclear whether plaintiff is authorized to bring this suit for any purpose beyond setting aside the April 3, 2006 deed, which she executed in her representative capacity (*see SCPA 702*). When Winnie Kilette, died intestate, title to the property automatically vested, by operation of law, in her distributees, as tenants in common (*see Waxson Realty Corp. v Rothschild*, 255 NY 332; *Kraker v Roll*, 100 AD2d 429 [1984], *supra*; *In re Fry's Estate*, 28 Misc 2d 949 [1961]; *Singer v Levine*, 15 Misc 2d 785 [1958]; *see also US v Comparato*, 850 F Supp 153 [ED NY 1993]). Therefore, plaintiff has failed to demonstrate, even assuming for the purpose of this motion she was fraudulent induced to execute the April 3, 2006 deed, that she is entitled to title in her representative capacity (*see generally Kraker v Roll*, 100 AD2d 429 [1984], *supra*; *In re Fry's Estate*, 28 Misc 2d 949 [1961], *supra*; *Singer v Levine*, 15 Misc 2d 785 [1958], *supra*; *see also US v Comparato*, 850 F Supp 153 [ED NY 1993], *supra*).

Defendant HSBC asserts it is entitled to summary judgment dismissing the first, second, third, fifth, sixth and seventh causes of action asserted against it in the amended



complaint because defendant Premium, its assignor, was a bona fide encumbrancer for value, and protected in its interest pursuant to the recording statute (*see* Real Property Law § 291). Defendant HSBC alternatively asserts that plaintiff should be estopped from challenging the validity of the April 3, 2006 deed. Defendant HSBC contends that plaintiff was involved in the obtaining of the letters of administration which were subsequently revoked nunc pro tunc, and accepted money from defendant Lee in connection with the conveyance of the property. Defendant HSBC argues that plaintiff hence ratified the validity of the conveyance.

A bona fide encumbrancer for value is protected in its title unless it had previous notice of the fraudulent intent of its immediate grantor (Real Property Law § 266). The title search obtained by defendant Premium reveals that the mortgagors, defendants Lee and Hernandez, were the record owners of the subject property and there was no recorded interest of plaintiff, either in her capacity as the administrator of the Estate of Winnie Kilette, or as an intestate distributee of Winnie Kilette, affecting Lee's and Hernandez's title (*see Fleming-Jackson v Fleming*, 41 AD3d 175 [2007]).

Plaintiff asserts defendant HSBC cannot rely upon the April 3, 2006 deed, as having conveyed valid title to defendants Lee and Hernandez because the letters of administration authorizing her to act were revoked nunc pro tunc by the Surrogate Court.

“Collateral estoppel, or issue preclusion, operates to preclude a party to a prior action or proceeding (or a person or entity in privity with such a party) from relitigating in a subsequent action or proceeding an issue that previously was decided against it in the prior action or proceeding (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002], citing *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984])” (*Pouncy v Dudley*, 27 AD3d 633, 634 [2006]). Here, neither defendant HSBC, nor its predecessor in interest, defendant Premium, were parties to the Surrogate's Court proceeding, and thus defendant HSBC cannot be bound by the doctrine of collateral estoppel with respect to the determination of the issues therein (*see id.*).

Moreover, plaintiff testified at her deposition in this action that she entered into an agreement with defendant Lee, whereby defendant Lee would arrange for plaintiff and defendant Hernandez to be in title to the property for one year and would pay plaintiff the amount of \$57,000.00, to be shared with her nephews. She also testified that defendant Lee agreed that defendant Hernandez would obtain a mortgage to payoff the reverse mortgage, and at the end of the year, defendant Hernandez's name would be removed (from the deed), and plaintiff alone would own the property. Plaintiff admitted that she understood defendant Lee was to go to the Surrogate's Court and handle the paper work there for her, including filing for letters of administration. Plaintiff also admitted she did not object to defendant Lee's plan to “get everything through Surrogate's Court,” and accepted a total of \$320.00 from defendant Lee as a partial payment towards the promised \$57,000.00 amount. Plaintiff,

furthermore, makes no claim that at the time of her execution of the April 3, 2006 deed, she objected to the explicit reference in the April 3, 2006 deed to her having been issued letters of administration, or to the conveyance of title to defendant Lee, as opposed to Marian Townes Mu-Min, Shawn Pound and Shanika Hernandez. Under the circumstances herein, plaintiff is estopped from claiming a lack of authority on her part to execute the April 3, 2006 deed with respect to her own individual interest in the property (*see Kraker v Roll*, 100 AD2d 424, 431 [1984]). As a consequence, the deed effectively transferred the individual ownership interest of Marian Townes Mu-Min in the property to defendants Lee and Hernandez (*see id.*).

Plaintiff alternatively asserts that to the degree the April 3, 2006 deed is effective to transfer her individual ownership interest in the property to defendants Lee and Hernandez, it is the product of fraudulent inducement. The elements of a cause of action alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance, and injury (*see Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Heaven v McGowan*, 40 AD3d 583 [2007]). Plaintiff makes no allegation of any misrepresentation made by defendant HSBC or defendant Premium. In addition, she makes no allegation which would support a finding of vicarious liability on the part of defendant HSBC or defendant Premium for the alleged misrepresentations and fraud perpetrated by defendants Lee and Hernandez. Nor does plaintiff allege that defendant HSBC or defendant Premium was aware of, or on notice of facts tending to show, the alleged fraudulent intent of defendants Lee and Hernandez (Real Property Law § 266; *see Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617 [2009]; *Merritt v Merritt*, 47 AD3d 689 [2008]; *Fleming-Jackson v Fleming*, 41 AD3d 175, 176 [2007], *supra*; *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600 [2007]; *Fischer v Sadov Realty Corp.*, 34 AD3d 630, 631 [2006]). Plaintiff, furthermore, makes no allegation that either defendant HSBC or defendant Premium was aware the transfer of the property was intended to serve only as security for a debt, and constituted an equitable mortgage.

To the extent plaintiff alleges that defendant HSBC or defendant Premium engaged in negligent lending practices causing her to lose the ownership interest in the property, she has failed to allege a basis for finding a duty of care was owed to her by defendant HSBC or defendant Premium in effect, to prevent a “mortgage rescue” scam (*see Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617 [2009], *supra*; *Tenenbaum v Gibbs*, 27 AD3d 722 [2006]; *Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 360 [1995]). Defendants HSBC and Premium are not alleged to have been in any contractual or fiduciary relationship with plaintiff, which would have required them to subordinate their interests on behalf, or for the benefit, of plaintiff.

To the degree plaintiff asserts that defendant HSBC is not a “holder in due course,” defendant HSBC, as the assignee of defendant Premium, stands in the same shoes as

Premium, and is entitled to those rights and defenses defendant Premium had at the time of the making of the mortgage loan (*see Madison Liquidity Investors 119, LLC v Griffith*, 57 AD3d 438 [2008]; *American Exp. Travel Related Services Co., Inc. v SM Zako, Inc.*, 22 Misc 3d 1126[A] [2009]). Insofar as plaintiff is not an obligor under the note underlying the Premium mortgage, and has failed to establish any wrongdoing on the part of defendant Premium in making the mortgage loan, plaintiff has no claim against defendant HSBC regarding the note or her individual interest in the property (*see Skilled Investors, Inc. v Bank Julius Baer & Co., Ltd.*, 62 AD3d 424 [2009]).

A deed can be valid in part and invalid in part (*see Kraker v Roll*, 100 AD2d 424, 431 [1984]). Thus, to the extent the amended complaint can be read to include a claim by plaintiff that the April 3, 2006 deed is void as to the transfer of the ownership interests of Sean Pound and Leon Pound, defendant HSBC is not entitled to summary judgment dismissing such claim at this juncture in the absence of the joinder of Sean Pound and Leon Pound as party defendants.

The motion by defendant HSBC for summary judgment dismissing the first, second, third, fifth, sixth and seventh causes of action is granted only to the extent of dismissing those causes of action asserted by plaintiff in relation to her claims regarding her individual interest in the subject property (RPAPL 1511).

With respect to the motion by defendant Weaver for summary judgment dismissing the amended complaint asserted against her, plaintiff makes no claim that defendant Weaver has any interest in the subject property, or made any mortgage loan to anyone. The first, second, third, fifth, sixth, and seventh causes of action fail to state a claim against her.

With respect to the fourth, eighth, ninth and tenth causes of action, defendant Weaver has established that plaintiff, in effect, authorized defendant Lee to obtain the original letters of administration on her behalf. Plaintiff, furthermore, has failed to establish injury to the Estate of Winnie Kilette or to plaintiff in her individual capacity, by means of the alleged forged petition or the issuance of the original letters of administration (*see Plemmenou v Anninos*, 12 AD3d 657 [2004]). Under such circumstances, defendant Weaver is entitled to summary judgment dismissing the amended complaint asserted against her.

Dated: June 1, 2010

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AUGUSTUS C. AGATE, J.S.C.