INDEX NO. 15731-2007

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001-**MotD**

Return Date: 12/14/07

Present:
Hon SANDRA L. SGROI

CENTRAL MORTGAGE COMPANY,
Plaintiff,

-against-

ALANA WALTER, WASHINGTON MUTUAL BANK, N.A.; "JOHN DOE #1" through "JOHN DOE # 12", the last twelve names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,
Defendants.

BERKMAN, HENOCH, PETERSON & PEDDY, P.C.
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, New York 11530

Upon the following papers numbered 1 to 7 read on this motion for an order of publication

the appointment of a guardian and for other relief: Notice of Motion and supporting papers 1-7 ; it is,

***ORDERED*** that the motion of the Plaintiff for an order of publication and the appointment of a guardian is denied, and it is further

***ORDERED*** that the motion to add the People of the State of New York and the United States of America as parties is granted and the Plaintiff is directed to serve the proposed Defendants with process.

The Plaintiff herein is seeking to foreclose a mortgage that was given by the Defendant, Alana Walter, to secure a note in the amount of $204,250.00. Walter defaulted in payments on or about November 1, 2006, by failing to make a monthly payment in the amount of $1,410.70.

According to the affirmation submitted by the attorney for the Plaintiff, the Plaintiff is aware that the Defendant Alana Walter has died and Alana Walter was not served before with process in this action before she died. Since the Plaintiff is unable to serve the deceased Defendant, Plaintiff seeks to appoint a guardian ad litem to protect the interests of the Defendant's Estate and to serve Roger Walter as distributee to the Estate of Alana Walter. In addition, the attorney for the Plaintiff, who does not explain how Plaintiff determined that Roger Walter is the only distributee of the Estate of Alana Walter, wishes to serve Roger Walter pursuant to CPLR 308(5) because this proposed Defendant cannot be found.

While appointment of a distributee may be permissible in a situation where the Court has already acquired jurisdiction over the Defendant Mortgagor while the mortgagor was alive and then, after jurisdiction has been acquired, the Defendant Mortgagor dies (see, ***Alaska Seaboard Partners Ltd. Partnership v. Grant***, 20 AD3d 436, 799 N.Y.S.2d 117; ***Campbell v. Goldome Realty Credit Corp.***, 209 A.D.2d 991, 622 N.Y.S.2d 161; but see ***Silver v. Tucks Enterprises, Inc.***, 65 A.D.2d 591, 409 N.Y.S.2d 259), it is not proper to use this procedure to avoid the appointment of an Executor or other Fiduciary by Surrogates Court for the limited purpose of commencing a law suit for the foreclosure of a mortgage given by the deceased mortgagor (see, ***Salomon Bros. Realty Corp. v. Alvarez***, 2005 WL 2439179, *1, 2005 N.Y. Slip Op. 07360, 07360 (N.Y.A.D. 2 Dept. Oct 03, 2005); ***First Union Nat. Bank v. Estate of Bailey***, 7 Misc.3d 1027(A), 801 N.Y.S.2d 233). Generally, an administrator or an executor must be served for the Court to acquire jurisdiction (see, ***GMAC Mortgage Corp. v. Tuck***, 299 A.D.2d 315, 750 N.Y.S.2d 93).

The Court recognizes that when an owner of real property dies intestate, that property devolves directly to the statutory distributees or heirs at law at the moment of death without necessity for any act by the administrator (see, ***Kraker v. Roll***, 100 A.D.2d 424, 474 N.Y.S.2d 527; ***Estate of Dreyer v. Commissioner***, 68 T.C. 275, 1977 U.S. Tax Ct. LEXIS 101). It is axiomatic, however, that if the deceased did not die intestate, the property would pass according to the dictates of the will. There is no way for this Court to ascertain whether there is either a will in existence or whether a proper search for the heirs of the deceased has been made.

It is not proper for the Plaintiff to obtain jurisdiction over the deceased's Estate by the expedited procedure of the appointment of a guardian ad litem and the publication of the summons and complaint. Neither is it proper to cursorily name five individual defendants in the caption as possible heirs, devisees, distributees or

successors in interest without any explanation of the investigation done to ascertain the interest of these people and the possible interest of others.

There is no way that on the basis of the papers before it that the Court can ascertain whether the proper persons have been named as parties, whether the investigation of the Plaintiff was adequate, and whether other individuals not named in the caption may be entitled to notice. Another issue presented by the motion and the relief requested concerns the substantial likelihood that no person with an interest in the real property will receive notice of this action if the Court grants the relief requested.

As noted above, the Court is especially concerned that an individual entitled to notice will not receive notice and will be prejudiced by the foreclosure. Entry of a judgment of foreclosure and sale results in the extinguishing of the title or interest of the distributees or testamentary beneficiaries in the mortgaged premises and it is an expensive method of satisfying a mortgage debt that could be avoided if a person with an interest in the property has the opportunity to sell the property privately (see generally, ***Jemzura v. Jemzura***, 36 N.Y.2d 496, 369 N.Y.S.2d 400, 330 N.E.2d 414; ***Buckley v. Beaver***, 99 Misc 643, 645, 166 NYS 131, 132, affd. 182 App. Div. 888, 168 NYS 1103).

There is a possibility that either the real property could be sold prior to foreclosure if the proper parties receive notice or that if the property is sold in foreclosure a surplus of monies would result from the sale and those monies would have to be distributed to the appropriate persons. Simply appointing a guardian ad litem would not facilitate this process or ensure that all individuals entitled to notice would receive notice.

While these practical concerns, valid as they are, militate against an appointment of a guardian ad litem for the purpose of representing the deceased's Estate or the interests of the distributees or the legatees, more importantly, it is not proper to commence an action and obtain jurisdiction over the Defendants by the process suggested by the Plaintiff. If the mortgagor had died after jurisdiction had been obtained, there is some precedent for allowing the action to continue with just the appointment of a guardian (see generally, ***East Flatbush Dev. Corp. v. Donovan***, 3 Misc.2d 551, 152 N.Y.S.2d 232 (Sup. Ct. Kings County), *aff'd*, 2 A.D.2d 895, 157 N.Y.S.2d 908). However, that is not the situation before this Court.

In ***Warren's Weed New York Real Property*** § 96.15 it states:

> If a mortgagor is deceased, his duly qualified executor is a proper party in a foreclosure action, and when a trust has been created under a will, by deed or by declaration of trust, the trustee is a necessary party. Accordingly, when trustees and executors under a will were made parties defendant in a foreclosure action, it was unnecessary to make the legatees and contingent remainderman parties defendant and the purchaser at a foreclosure sale was required to complete his purchase. However, the distributees, rather than the legal representative of the estate, are necessary parties when the deceased grantee was not personally liable on the mortgage, ***and*** no deficiency judgment is sought in the foreclosure action (emphasis provided by the Court). In such a case, the parties are being joined merely to cut off and extinguish their subordinate interests. A deficiency judgment, moreover, may be enforced only against the estate

> of a deceased mortgagor if the deceased is the only person personally liable on the mortgage, although the mortgage debt may be enforced, pursuant to Estates, Powers and Trusts Law (EPTL) section 12-1.1 (former section 170 of Decedent Estate Law) against the deceased mortgagor's heirs, devises and legatees to the extent of assets distributed to them.

The Court of Appeals has held that "[t]he decree made and entered before the death of the mortgagors could be executed notwithstanding their death, and binds all persons claiming any interest under them" ( ***Hays v. Thomae***, 56 NY 521, 522; accord, ***Whiting v Bank of U.S.***, 38 US 6, 15; ***Brovender v. Williams***, 3 AD2d 841, 161 N.Y.S.2d 439 *lv dismissed* 3 NY2d 903, 167 N.Y.S.2d 922, 145 N.E.2d 868). However, there is no binding precedent that a Plaintiff in a foreclosure action can name as a Defendant the deceased mortgagor when the Plaintiff knows that the mortgagor is deceased prior to the commencement of the foreclosure action.

In summary, if the death of defendant occurs after a verdict or decision is rendered, CPLR 5016(d) provides that judgment may be entered in the names of the original parties. But there is no provision in the CPLR or the RPAPL that a deceased person may be named as a Defendant in an action for foreclosure and that additional persons who may be his distributees be served pursuant to an order of publication. In light of the concerns addressed in this decision, the Court directs that the Plaintiff apply to Surrogates Court for the appointment of a person for the purpose of representing the interests of the deceased mortgagor Alana Walter (see, ***Surrogate's Court Procedure Act*** §§ 702, 1001 et. seq.).

The Court will permit the Plaintiff to add the United States and New York State as parties to this foreclosure action.

Dated: 1/16/08

SANDRA L. SGROI, J. S. C.