

Bank of Am., N.A. v Engelbert
2010 NY Slip Op 31020(U)
April 6, 2010
Sup Ct, Suffolk County
Docket Number: 33885/08
Judge: Peter Fox Cohalan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
001 - MD

-----X
BANK OF AMERICA, NA AS SUCCESSOR BY
MERGER WITH SEATTLE MORTGAGE
COMPANY,

ROSICKI, ROSICKI & ASSOCIATES,
P.C.
Attorneys for Plaintiff
51 E. Bethpage Road
Plainview, New York 11803

Plaintiff,

- against -

EVA J. ENGELBERT; BARBARA J.
ENGELBERT; COLD SPRING HILLS CENTER
NURSING AND REHABILITATION; UNITED
STATES OF AMERICA-INTERNAL REVENUE
SERVICE; NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE; "JOHN DOES
and "JANE DOES"; said names being fictitious,
parties intended being possible tenants or
occupants of said premises, and corporations,
other entities or persons who claim, or may
claim, a lien against the premises,

Defendants.

-----X

Upon the following papers numbered 1 to 4 read on this ex parte motion by the plaintiff for an order of reference: Proposed order and supporting papers 1 - 14; Answering Affidavits and supporting papers 0 Replying Affidavits and supporting papers 0, and the aforesaid having been submitted to the undersigned, and with due consideration and deliberation it is,

ORDERED that in this residential mortgage foreclosure action, the *ex-parte* motion (motion sequence No. # 001) of the plaintiff for an order, pursuant to RPAPL §1321, in effect, fixing the default of the defendants, appointing a referee to compute the amount due to plaintiff under the terms of the note and mortgage which are the subjects of this foreclosure action, is considered under CPLR §3215 and RPAPL Article 13 and is denied without prejudice to the timely commencement of any action against the appropriate party; and it is further

ORDERED that the complaint is dismissed as against Barbara J. Engelbert based upon plaintiff's failure to comply with the due diligence requirements of CPLR §308 (4).

This action was commenced by the filing of a summons and complaint on August 8, 2008, concerning a foreclosure action as against Eva J. Engelbert who was the mortgagor and sole obligor under the reverse mortgage note held by plaintiff on 212 Cedar Road, East Northport, New York 11731. The record before the Court clearly indicates that Eva J. Engelbert died before this action was commenced and that plaintiff was aware of her demise before this action was commenced. This is evidenced by a letter, dated November 29, 2007, on plaintiff's stationary from its Default Department. It is addressed to Barbara J. Engelbert. The letter states in pertinent part as follows:

" We would like to extend our condolences on the passing of Eva J. Engelbert. Please forward a copy of the death certificate if you have not already done so".

This letter is annexed as Exhibit "C" to the order of reference motion.

Counsel for the plaintiff in her attorney's affirmation, dated January 12, 2009, in paragraph number 8, states:

" That subsequent to the commencement of the action herein, Plaintiff ascertained that defendant, EVA J. ENGELBERT is Deceased. Said defendant is therefore no longer a necessary Party to the action herein. Therefore, plaintiff respectfully Requests that the caption be amended by striking said defendant from all the proceedings and papers heretofore had and filed herein".

In her affidavit in support of the order of reference, dated December 15, 2008, Tiffy Linnes (hereinafter Linnes), an officer of Bank of America, N.A., in paragraph number 7 states:

"On or about October 4, 2007, one of the events enumerated in paragraph 5 above occurred, entitling the mortgagee to demand payment in full in accordance with the terms of the mortgage. the outstanding payments were duly demanded by sending demand letters as required by the aforesaid instruments. The mortgagors(s), their successors, assigns and/or transferees, having failed to pay the amount which became due and payable, although duly demanded. By reason of the aforesaid default, plaintiff (sic) elected to accelerate the mortgage debt and declared all sums secured thereby due and payable. A copy of the demand letter is attached here to as Exhibit "

Linnes's affidavit does not indicate the Exhibit's alphabetical letter designation, but it is ostensibly referencing the demand letter, dated November 29, 2007, sent to Barbara J. Engelbert (hereinafter Engelbert).

Paragraph 5 to which Linnes refers to in her affidavit states that the "note provided for repayment in full upon the occurrence of the following events" Subparagraph (a) specifically states

" The Borrower dies and the Property is not the principal residence of one surviving borrower".

Although the plaintiff possessed the knowledge from its own records that Eva J. Engelbert was deceased, plaintiff unaccountably commenced this foreclosure action. No jurisdiction can be asserted against the dead as there is no way to enforce a judgment against the deceased. "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce the judgment or decree" (*Riggs v Johnson County*, 73 U.S. 166, 187, 18 L. Ed. 768, 6 Wall. 166 [Sup. Ct. 1867]; *citation omitted*). The plaintiff ignored the overwhelming legal precedent that no action may be commenced against a person subsequent to her death and prior to the appointment of a personal representative (see *Jordan v City of New York*, 23 AD 3d 436, 807 NYS 2d 595 [2d Dept 2005]; *Arbulaez v Chun Kuei Wu*, 18 AD 3d 583, 795 NYS 2d 327 [2d Dept 2005]; *Outing v Mathis*, 304 AD 2d 670, 757 NYS 2d 483 [2d Dept 2003]; *Dime Savings Bank of NY v Luna*, 302 AD 2d 558, 755 NYS 2d 300 [2d Dept 2003]; *Laurenti v Teatom*, 210 AD 2d 300, 619 NYS 2D 754 [2d Dept 1994]; 100 West 72 Assoc. v Murphy, 144 Misc. 2d 1036, 545 NYS 2d 901[Civ. Ct. New York Cty. 1989]; Beware of Service Upon the Dead; A Trap for the Unwary ; Albert M. Rizzo ; 12/10/04 NYLJ 4 (col. 4). This rule also applies to mortgage foreclosure actions (see *Dime Savings Bank of NY v Luna*, 302 AD 2d 588, *supra*).

However, some courts have held that the personal representative of the estate of a deceased mortgagor, who died intestate, is not a necessary party to a mortgage foreclosure action and that such action may be commenced or continued against the distributees of any such intestate mortgagor (see *Winter v Kram*, 3 AD 2d 175, 159 NYS 2d 417 [2d Dept 1957]; see also *Salamon Bros. Realty Corp. v Alvarez*, 22 AD 3d 482, 802 NYS 2d 705 [2d Dept 2005]; cf *Dime Savings Bank of NY v Luna*, 302 AD 2d 588, *supra*; *GMAT Mtg. Corp. v Tuck*, 299 AD 2d 315, 750 NYS 2d 93 [2d Dept 2002]). The legal maxim is that real property owned by an intestate decedent devolves directly to his or her statutory distributees without the necessity of any act by an administrator of his or her estate (see *Kraker v Roll*, 100 AD 2d 424, 474 NYS 2d 527 [2d Dept 1984]; *Matter of Roberts*; 214 NY 369, 108 NE 562 [1915]). What investigation , if any, was performed by the plaintiff to ascertain if a personal representative was appointed is unknown to this Court.

The foregoing rule is inapplicable to decedents who die testate, rather than intestate, as the property of a decedent passes under the terms of the will, which is effective only upon its probate and the appointment of a of a personal representative of the estate. The rule is equally inapplicable where, as in the instant matter, the deceased was personally liable on the note. Under this fact pattern, the personal representative is a necessary defendant in a mortgage foreclosure action (*ee Countrywide Homes v Keys*, 27 AD 3d 247, 811 NYS 2d 362 [1st Dept 2006]; *In re Lust's Estate*, 140 Misc 600, 251 NYS 556 [Surrogate's Ct, Bronx Cty 1931]; *Graham v Lawyers Title Ins. Co. of New York*, 20 AD 440, 46 NY 1055 [1st Dept 1897]).

Here, the plaintiff has not established its entitlement to an order appointing a referee to compute pursuant to CPLR §3215 and RPAPL §1321, as the Court is unable to ascertain whether the plaintiff has viable claims for relief against the defendant(s) herein. The absence of any allegations regarding the relationships and distributee status joining the named defendant(s) to the defendant mortgagor, whether said defendant mortgagor died testate or intestate, and whether a personal representative of her estate has been appointed and joined herein warrants a denial of the application for an order of reference. Therefore, the application for an order of reference is denied without prejudice to the timely commencement of any action against the appropriate party.

The plaintiff also named and served Engelbert. The affidavits of service annexed to the motion reflect that Engelbert was allegedly served pursuant to CPLR 308 (4) with the summons and complaint at the mortgaged premises address. Engelbert's relationship to the defendant mortgagor has not been established in the documents submitted to the Court on the order of reference

"Nail and mail" service pursuant to CPLR §308(4) may be resorted to only upon a showing that either personal service or substituted service pursuant to CPLR §308(1) or (2) cannot be made with "due diligence." "The due diligence requirement of CPLR §308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*Gurevitch v Goodman*, 269 AD2d 355, 704 NYS 2d 634 [2d Dept 2000]). The affidavit of service by the process server Daniel Quigley (hereinafter Quigley) sworn to on September 23, 2008 reflects that four [4] attempts at personal delivery were made repeatedly at the Northport address at different times of the day, i.e. Tuesday, September 9, 2008 at 7:00 a.m., Wednesday, September 10, 2008 at 12:30 p.m., Thursday September 11, 2008 at 3:30 p.m. and on Saturday, September 20, 2008 at 3:00 p.m., at which time the summons was allegedly affixed to the door and thereafter the summons and complaint were mailed to Engelbert on September 23, 2008. There is also a sworn affidavit from Douglas Carollo (hereinafter Carollo) stating that he attempted to serve Engelbert at the exact same time and on exact same days as Quigley. However, he did not mail a copy of the summons and complaint. Furthermore, no attempts at service were undertaken after 3:30 p.m. There is no record that either process server ever attempted to ascertain if Engelbert was employed for purposes of serving her at her place of employment.

The Court finds that this manner of service [i.e., nail and mail] by two process servers fails to comport with the "due diligence" standard of CPLR §308. Accordingly, under the circumstances presented herein, the attempted service of the summons and complaint pursuant to CPLR §308 (4) was defective as a matter of law (see **Earle v Valente** 302 AD2d 353, 754 NYS 2d 864 [2d Dept 2003]). The plaintiff thus has failed to establish that jurisdiction over Engelbert has been obtained (see **McSorley v Spear**, 50 AD 3d 652, 854 NYS 2d 759 [2d Dept 2008]; **Earle v Valente** 302 AD2d 353, *supra*).

Accordingly, the application for the order of reference is denied without prejudice to the timely commencement of any action against the appropriate party and the complaint is dismissed as against Barbara J. Engelbert. A copy of this Order shall be submitted with any future application (s) for an order of reference. The order of reference is marked unsigned .

Dated: April 6, 2010



PETER FOX COHALAN J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION