

<b>NYCTL 2008-A Trust v Rohde</b>
2010 NY Slip Op 31872(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 114542/2009
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

Index Number : 114542/2009

**NYCTL 2008-A TRUST**

VS.

**ROHDE, ERLING**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 114542/09

MOTION DATE 4/9/10

MOTION SEQ. NO. 001

MOTION CAL. NO. 16

The following papers, numbered 1 to 6 were read on this motion for summary judgment and other relief

Notice of Motion— Affirmation — Exhibits A-F

Answering Affidavit — Exhibits A-F;  
Affirmation—Exhibit A-B

Replying Affirmation

Cross-Motion:  Yes  No

**FILED**  
JUN 28 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Papers Numbered

1-3

4; 5

6

Upon the foregoing papers, it is hereby ordered that plaintiff's motion for summary judgment and other relief is decided in accordance with the annexed memorandum decision and order.

Dated: 6/21/10  
New York, New York

[Signature], J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21**

-----X  
NYCTL 2008-A TRUST and THE BANK OF NEW YORK, as  
Collateral Agent and Custodian for the NYCTL2008-A Trust,

Plaintiffs,

Index No. 114542/2009

- against -

ERLING ROHDE, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, ILDAURA MURILLO-ROHDE and  
"JOHN DOE No. 1" through "JOHN DOE No. 100" inclusive,  
the names of last 100 defendants being fictitious, the true names  
of said defendants being unknown to plaintiff, it being intended  
to designate fee owners, tenants or occupants of the liened  
premises and/or persons or parties having or claiming an interest  
in or a lien upon the liened premises, if the aforesaid individual  
defendants are living, and if any or all of said individual  
defendants be dead, their heirs at law, next of kin, distributees,  
executors, administrators, trustees, committees, devisees,  
legatees, and the assignees, lienors, creditors and successors in  
interest of them, and generally all persons having or claiming  
under, by, through or against the said defendants named as a  
class, of any right, title or interest in or lien upon the premises  
described in the complaint herein,

**Decision and Order**

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Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

In this tax lien foreclosure action, plaintiffs move for summary judgment in their favor against defendants and for the appointment of a referee to compute the amounts due, for an order of substitution of defendant Erling Rohde, and for an order discontinuing the action as against the John Doe defendants.

Patrocinia Ibanez-Murillo, the alleged niece of defendant Erling Rohde, opposes the motion. She confirms plaintiffs' contention that defendant Erling Rohde died on December 14, 2002, as per

a death certificate. *See* Ibanez-Murillo Aff., Ex B. It appears that Patrocinia Ibanez-Murillo has been appointed administratrix of Rohde, pursuant to letters of administration issued to her by the Surrogate’s Court.<sup>1</sup> *Id.*, Ex A. Because it is undisputed that defendant Erling Rohde has died, and given the proof of the letters of administration, the branch of plaintiffs’ motion for an order of substitution is granted.

In her opposition papers, Ibanez-Murillo alleges that title to the property at issue, known as Block 1753 Lot 63 on the Tax Map of New York County, also known as 18 East 129<sup>th</sup> Street, New York, New York, was apparently transferred to Willie Glasgow, who subsequently transferred title to Robert Cowan. The bargain and sale deed purporting to transfer title from Erling Rohde to Glasgow purportedly made October 27, 2008 was apparently recorded on November 10, 2008. *Id.*, Ex D. The bargain and sale deed purporting to transfer title from Erling Rohde to Glasgow purportedly made November 26, 2008 was apparently recorded on December 15, 2008. *Id.* Ibanez-Murillo alleges that the transfers were fraudulent, and that she is seeking to having them set aside.<sup>2</sup>

“In an action to foreclose a mortgage, all parties having an interest, including persons holding title to the subject premises, must be made a ‘party defendant to the action.’” *Home Sav. of America, F.A. v Gkanios*, 233 AD2d 422 (2d Dept 1996), citing RPAPL 1311. “Where a deed is delivered to a subsequent owner and recorded, the new owner is, of course, a necessary party to the foreclosure.” 1-12 Bergman on New York Mortgage Foreclosures § 12.04. Because Cowan apparently holds title

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<sup>1</sup> The letters of administration contain a restriction, not relevant here, authorizing Patrocinia Ibanez Murillo to collect only a total of \$1,000 dollars, and that collection of any amount over \$1,000 must be authorized by further order of the Surrogate.

<sup>2</sup> Whether Ibanez-Murillo would prevail in setting aside the alleged forged deeds is a matter not before this court. Such a claim would require a separate plenary action. *See e.g.* Real Property Law § 329; *see also* Real Property Actions and Proceedings Law § 1501 *et seq.*

to the property, he must be made a party defendant to the action. Because the Court would apparently have, at least, long-arm jurisdiction over Cowan because of his purported ownership of real property in New York (CPLR 302 [a] [4]),<sup>3</sup> the Court directs that Cowan be summoned to the action. CPLR 1001 (b).

Plaintiffs are correct that the action need not be dismissed for failure to join Cowan as a necessary party. As plaintiffs point out, “[t]he absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale.” *Marine Midland Bank, N.A. v Freedom Road Realty Assoc.*, 203 AD2d 538, 539 (2d Dept 1994). However, because a recorded deed lists Cowan as the current title holder and because the judgment and sale would adversely affect Cowan, he must be made a party. The Court does not agree with plaintiffs that summary judgment may be granted while the current title holder is not a party to the action. The cases that plaintiffs cite do not hold otherwise. Therefore, the branch of plaintiffs’ motion seeking summary judgment against defendants is denied.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that the branch of plaintiffs’ motion for an order of substitution is granted, and that Patrocinia Ibanez-Murillo, as administratrix of the estate of Erling Rohde, deceased, be substituted as defendant in the above-entitled action in the place and stead of the defendant, Erling Rohde, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Patrocinia Ibanez-Murillo, as administratrix of the estate of

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<sup>3</sup> The deed also indicates that Cowan then had an address in Freeport, New York.

Erling Rohde, deceased, as defendant in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the branch of plaintiffs' motion to discontinue the action as against defendants John Doe No.1 through John Doe No. 100 is granted; and it is further

ORDERED that the caption is amended to read as follows:

NYCTL 2008-A TRUST and THE BANK OF NEW YORK, as Collateral Agent and Custodian for the NYCTL2008-A Trust, Index No. 114542/2009

Plaintiffs,

- v -

PATROCINIA IBANEZ-MURILLO, as Administratrix of the Estate of Erling Rohde, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, ILDAURA MURILLO-ROHDE,

Defendants.

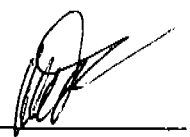
and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that plaintiffs are directed join Robert Cowan as a defendant to this action within 20 days of service of a copy of this order with notice of entry.

Dated: *June 21, 2010*  
New York, New York

ENTER:   
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J.S.C.

~~HON. MICHAEL D. STALLMAN~~  
**HON. MICHAEL D. STALLMAN**

**FILED**  
JUN 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE