

**Pizzuto v Soriano**

2011 NY Slip Op 31287(U)

May 5, 2011

Sup Ct, Richmond County

Docket Number: 101892/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:101892/09  
Motion No.: 2**

**ANTHONY PIZZUTO**

*Plaintiff*

*against*

**DECISION & ORDER**

**ALLAN SORIANO;  
WELLS FARGO BANK, NATIONAL ASSOCIATION;  
BENEFICIAL HOMEOWNER SERVICE CORPORATION;  
CHASE HOME FINANCE, L.L.C.;  
VIRGINIA ADAMS; and  
RICHARD ADAMS**

**HON. JOSEPH J. MALTESE**

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*Defendants*

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The following items were considered in the review of an Order to Show Cause.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause	1
Answering Affidavits	2
Replying Affidavits	3
Notice of Motion and attached affidavits	4
Exhibits	Attached to Papers
Memoranda of Law	5, 6 & 7

**Upon the foregoing cited papers, the Decisions and Orders on these Motions made by an Order to Show Cause are as follows:**

By an order to show cause, the defendants, Wells Fargo Bank, National Association [“Wells Fargo”] and Chase Home Finance, L.L.C. [“Chase”], move to vacate the default judgment granted to Anthony Pizzuto. Wells Fargo and Chase also move to reargue the court’s settlement order following the default judgment. As an alternative to the foregoing, Wells Fargo and Chase move to defer determination against the defaulting parties subject to the default judgment. Wells Fargo and Chase additionally move for summary judgment in their favor. Wells Fargo and Chase also move for dismissal. All motions are denied in the entirety.

## Facts

Anthony T. Pizzuto and Agnes Pizzuto, husband and wife, acquired title as tenants by the entirety to property located at 82 Kemball Avenue, Staten Island, New York 10314-2937. The deed was recorded in the Richmond County Clerk's Office on June 26, 1954. Anthony T. Pizzuto died on September 22, 1977 and the deed passed to Agnes Pizzuto, as sole owner of the whole of the realty. No executor or administrator was appointed for the estate. Agnes Pizzuto died intestate on February 2, 1993. She was survived by a son, the plaintiff, and by a daughter, Helena Soriano née Pizzuto ("Helena Soriano"). On June 17, 1996, Helena Soriano, using her maiden name Helena Pizzuto, recorded a deed to herself as sole owner of the whole of the subject real property. The plaintiff's name was not noted on the deed. Helena Pizzuto purported to be the sole heir at law and next of kin to her mother, Agnes Pizzuto. Anthony Pizzuto, the plaintiff and brother of Helena Pizzuto, asserts that she married the defendant Allan Soriano. Helena (Pizzuto) Soriano died on June 19, 2009 allegedly leaving her husband as sole heir and next of kin. No executor or administrator has been appointed for the estate of Helena (Pizzuto) Soriano.

Helena Soriano first encumbered the subject property in the amount of \$20,000.00 on August 26, 1999. This first mortgage was made to Beneficial Homeowner Service, Corp. ["Beneficial"]. On April 11, 2007, Helena Soriano obtained a second mortgage of \$289,000.00 from Ameripath Mortgage Corporation {"Ameripath"} with the Mortgage Electronic Registration Systems, Inc ("MERS") acting as the servicer of the mortgage. On August 28, 2008, this mortgage was assigned to Wells Fargo. Chase is either servicing Wells Fargo's mortgage, or has acquired unrecorded assignment of the mortgage.

The plaintiff asserts the defendants Virginia Adams and Richard Adams are tenants, occupying part or all of the subject property at 82 Kemball Avenue, Staten Island, New York.

## Procedural History

Service of a summons and complaint was made upon Beneficial on August 18, 2009. On October 14, 2009, service of summons and complaint was attempted upon Allan Soriano at 82 Kemball Avenue, Staten Island, NY 10314. At that time, no service was made upon Allan Soriano at any other address. Service was made on Virginia Adams and Richard Adams on October 14, 2009. Service was made against Chase and was recorded on August 20, 2009. Allan Soriano, Beneficial, Virginia Adams and Richard Adams have not answered in this action and on January 4, 2010, a motion was made by the plaintiff for a default judgment against Allan Soriano, Beneficial, Virginia Adams and Richard Adams. The unopposed default judgment was granted on February 5, 2010. The plaintiff then submitted a proposed order of settlement. Wells Fargo and Chase submitted a counter proposal to the order of settlement. The Supreme Court, Richmond County Order Department composed an order that was signed on July 6, 2010 and registered on July 13, 2010.

Notice to Allan Soriano was attempted at 628 4<sup>th</sup> Street, #2, Bridgewater, NJ 08807 by certified mail, but the receipt was returned unsigned. Personal service upon Allan Soriano at the preceding address was finally made on January 11, 2011. No answer or notice of counsel has been forthcoming from Allan Soriano as a result of that service.

## Discussion

The non-defaulting defendants Wells Fargo and Chase move by an order to show cause to vacate the order of default judgment and the order of settlement issued by the court. They assert that the relief granted in the order is overly broad and prejudicial to them. “The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in [the summons and notice].”<sup>1</sup> Relying upon the preceding, the non-defaulting defendants assert the court was without jurisdiction because the order was more favorable to the plaintiff than the relief demanded.

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<sup>1</sup>CPLR § 3215 (b).

Subsequent to the default, the court's settlement order sent the action to a court appointed referee. A court may enter an *ex parte* order directing that such a reference may be conducted at the time of or following the trial of an answering defendant.<sup>2</sup> Here, the non-defaulting defendants request delay of the referral directed by the settlement order until after disposition is completed between the plaintiff and the non-defaulting defendants.

Wells Fargo and Chase request leave to reargue the court's settlement order in the belief that the plaintiff violated 22 NYCRR 202.48 by serving a different settlement order than the ones proposed by either the plaintiff or the defendants.

Additionally, Wells Fargo and Chase request dismissal of the plaintiff's complaint under CPLR § 3211 (a)(1) for the failure to state a cause of action. They assert that the plaintiff does not allege fraud by Helena Soriano when recording the deed unto herself, and that an assertion of fraud is a necessary condition precedent to the plaintiff's action. However, the plaintiff asserts that fraud is not the only possible explanation for the deed being recorded in Helena Soriano's name. According to the plaintiff, eliminating fraud as a cause of action has not eliminated all of the possible claims and causes of action that may be available. The plaintiff states that scrivener's error or an incorrect belief held by Helena Soriano are other possibilities that may explain Helena Soriano's recording of the deed in the name of Helena Pizzuto alone.

Further, Wells Fargo and Chase further request summary judgment based upon the plaintiff's failure to commence the action within the time limits of CPLR §§ 212 and 213.

**The settlement order is not overly broad.**

The settlement order does not address the claims of Wells Fargo or Chase against the plaintiff; of these non-defaulting parties against Allan Soriano and the other defaulting parties; or of Wells Fargo and Chase against the subject property.

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<sup>2</sup>CPLR § 3215 (d).

However, the settlement order does address other issues. The settlement order specifically defines the facts upon which the court based its decisions. The settlement order delineates the underlying rationale for its segments and is consistent with the decisions of the court. Because the orders do not extend to Wells Fargo and Chase, the overall settlement order is not unfairly prejudicial to them. The settlement order is not more favorable to the plaintiff than the relief demanded. Rather the settlement order appropriately conformed to the decision itself.<sup>3</sup> Therefore, the settlement order is not overly broad.

Under 22 NYCRR 202.48, proposed orders and proposed counter orders for an order on notice must be submitted to the court.<sup>4</sup> If a successful movant fails without good cause to propose an order within the requisite time, the order is deemed abandoned.<sup>5</sup> However, the courts do have discretion in applying 22 NYCRR 202.28.<sup>6</sup> “When relief other than for money or costs only is granted, the court ... shall, on motion, determine the form of the judgment.”<sup>7</sup> Clearly, the plain wording of 22 NYCRR 202.48 is that while parties may propose orders, the authority falls upon the court to settle the differences between a proposed order and a proposed counter order.<sup>8</sup> Therefore, the non-defaulting defendants may not object to the settlement order that was issued because it did not conform to either the proposed order with which they were served by the plaintiff, nor to the proposed counter order submitted by Wells Fargo and Chase.

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<sup>3</sup>*RKO Props., Ltd. vs. Boymelgreen*, 77 AD 3d 721 [2d Dept. 2010].

<sup>4</sup>22 NYCRR 202.48 (a) and (c).

<sup>5</sup>22 NYCRR 202.48 (b); *Farkas vs. Farkas*, 11 NY 3d 300, 307 [2008].

<sup>6</sup>*Matter of Granite Assoc., Inc. vs. Rolon*, 69 AD 3d 854, 855 [2d Dept. 2010]; *Neris’ Land Improvement, LLC vs. J. J. Cassone Bakery, Inc.*, 65 AD 3d 1312, 1314 [2d Dept 2009].

<sup>7</sup>CPLR § 5016 ©.

<sup>8</sup>*Funk vs. Barry*, 89 NY 2d 364, 367 [1996].

**The order of settlement will not be vacated.**

The courts distinguish between a motion, the decision that decides that motion, and an order that implements the decision.<sup>9</sup> Here, the plaintiff moved to find and the court did find that Allan Soriano, Beneficial, Virginia Adams and Richard Adams were in default. As required, non-binding proposals and counter proposals for a subsequent settlement order were sought from the plaintiff and from Wells Fargo and Chase.<sup>10</sup> These were submitted. Finally, the court determined the actual contents of the settlement order that would correctly implement the court's decision. It is the court that determined the actual order of settlement that was finally issued.

Wells Fargo and Chase assert that the court's settlement order does not accord with the plaintiff's proposed order nor with the suggested counter-order made by them. The requirement for a settlement order consequent to a judgment or decision is that the written order must conform to a court's decision, and when there is conflict, then the decision is determinative.<sup>11</sup> An inconsistency may be corrected by a motion for resettlement or by an appeal.<sup>12</sup>

Here, the decision rendered by the court is that the defaulting defendant parties each failed to submit their answers, or to make their required appearances. Those parties have defaulted. The settlement order is not a final determination of proportionate liabilities against the remaining non-defaulting parties. The order apportions between the plaintiff and the defaulting defendants. Therefore, the settlement order is congruent to the default judgment against Allan Soriano, when it vests the plaintiff with a one-half interest in common fee simple for the real property in dispute. The

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<sup>9</sup>*Hurrel-Harring vs. State of New York*, 15 NY 3d 8, 16 [2010]; and *Hargett vs. Town of Ticonderoga*, 13 NY 3d 325, 328 [2009].

<sup>10</sup>22 New York Codes Rules and Regulations ("NYCRR") 202.48 (a) and (c).

<sup>11</sup>*RKO Props., Ltd. vs. Boymelgreen*, 77 AD 3d at 721; and see *Di Propsero vs. Ford Motor Co.*, 105 AD 2d 479, 480 [3d Dept. 1984].

<sup>12</sup>*RKO Props., Ltd. vs. Boymelgreen*, 77 AD 3d at 722; CPLR 2221; and CPLR 5019 (a).

settlement order fulfills its objective by finding the plaintiff's damages with reference only to the defaulting parties and is without unfair prejudice to the non-defaulting defendants, Wells Fargo and Chase. The settlement order is partly an order in equity with regard to the claims of the plaintiff on the subject property.

The order of settlement also appointed a referee to ascertain and report on the rights, shares and interests of the several parties with regard to partition or sale of the subject property. The order does not establish the shares and interests but merely seeks a report. The order recites findings of fact and history of occurrences with regard to the property. The order is addressed and is applicable only to the named defaulting defendants. When addressing the interests in the subject property, the term "several parties" in the order of default include the plaintiff and Allan Soriano, each of whom might be determined to have an interest in the subject real property. The order also refers to Virginia Adams and Richard Adams in so far as their relationship to the subject real property in which they are said to be tenants. The referee was ordered to ascertain and report whether the Kemball Avenue property could be partitioned without great prejudice or could be sold, and whether a non-party creditor had a lien on the property.

The order of July 13, 2010 equitably vests the plaintiff with an undivided one-half interest with title in fee simple, held in common with Allan Soriano. The land and premises are described within the body of the order. The order further required that the deed to the property that conveyed the property solely to Helena Pizzuto [Helena Soriano] was null, void and cancelled, and requires the Richmond County Clerk's Office to record the court's determination. Further, the order requires that the deed be amended so that the plaintiff and the defendant Allan Soriano each have an undivided one-half share in the property, held in common. The order also stated that Beneficial's credit line mortgage in the amount of \$20,000.00 does not and has never attached to the interest of the plaintiff. Finally, the order requires the Referee to report whether it is possible to dispense with publication pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 913.

It is undisputed that Allan Soriano, Beneficial, Virginia Adams and Richard Adams defaulted. The order of settlement against those parties is specific to them, and does not extend

beyond them. The settlement order is not overly broad. Nor is the order unfairly prejudicial in favor of any party or against any party. Therefore, neither the order of default judgment nor the order of settlement should be vacated.

### **Implementation of the default judgment will not be delayed.**

“Whenever a defendant has answered and one or more other defendants have failed to appear, plead, or proceed to trial ... upon application to the court within one year after the default of any such defendant, the court may enter an ex parte order directing that proceeding for the entry of a judgment or the making of an assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the defendant who has answered.<sup>13</sup>

The court has the discretion to direct that a reference be conducted at or after the trial of an answering defendant.<sup>14</sup> When an order directed at defaulting defendants may be unfairly prejudicial to the remaining non-defaulting defendants, the court may be persuaded that implementation should be delayed for a trial or other disposition.<sup>15</sup> Where partners are sued, judgment should not be rendered against the defaulting partners until the issues raised by the non-defaulting partner has been disposed of.<sup>16</sup> Undue delay may substantially prejudice the rights of parties.<sup>17</sup>

Prejudice may be seen when a party is incorrectly deprived of judicial recourse. If a default judgment against a defaulting defendant effectively resolves the merits of a non-defaulting defendant’s judgment, the court may be persuaded to defer a default judgment or referral.<sup>18</sup> Where

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<sup>13</sup>CPLR § 3215 (d).

<sup>14</sup>*Koslowski vs. Koslowski*, 251 AD 2d 294, 295 [2d Dept. 1998].

<sup>15</sup>*Revankar vs. Tzabar*, 16 Misc. 3d 1127A [Supr. Ct. Kings Cty 2007].

<sup>16</sup>*Grossman Steel Chair Corp. vs. Steinberg*, 54 N.Y.S. 2d 275, 276 [City Ct. of NY, Bronx Cty. 1944].

<sup>17</sup>*Fasso vs. Doerr*, 12 NY 3d 80, 85 [2009].

<sup>18</sup>*276 Skillman St., LLV vs. Ralph Constr.*, 18 Misc. 3d 1136 A [Supr Ct. Kings Cty. 2008].

a court's resolution of an issue is not based upon its merits, it is regarded as a harsh measure.<sup>19</sup> Therefore if the settlement order were to impose a judgment against Wells Fargo and Chase based on other than the merits, the court should consider delaying the implementation of the order. "The word 'merits', as a legal term, has acquired no precise technical meaning and admits to some latitude of interpretation, but is to be regarded as referring to the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court."<sup>20</sup> As pertains to the instant action, had the settlement order resolved the merits of Wells Fargo's and Chase's issues, then the settlement order would have been unfairly prejudicial against them, and the implementation of the default order should have been delayed.

Here, the order of settlement is effective only against the defaulting defendants. The non-defaulting defendants are not named in or affected by the settlement order. Thus, the default judgment and the subsequent settlement order do not apportion liability or damages among the non-defaulting parties. The non-defaulting defendants are still free to argue that fair consideration given by a good faith mortgager binds possessors who have not been defrauded by the grantor of a mortgage.<sup>21</sup> The duties, obligations, rights and responsibilities of the non-defaulting defendants and the plaintiff have not been addressed by the settlement order. Any actions by the referee are to be directed only to matters affecting the defaulting defendants, the plaintiff, and non-party claimants.

Here, Wells Fargo asserts that it did not oppose the plaintiff's motion for a default judgment against the defaulting parties because the relief requested did not appear to affect Wells Fargo's interest. Wells Fargo now represents that the proposed counter order tendered by Wells Fargo was

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<sup>19</sup>*Cruzatti vs. Saint Mary's Hosp.*, 193 AD 2d 579, 580 [2d Dept 1993].

<sup>20</sup>*Mink vs. Keim*, 266 AD 184, 186 [1st Dept. 1943]; *reversed on other grounds by Mink vs. Keim*, 291 NY 300 [1943]; *and see also Rosen vs. Kessler*, 15 Misc. 3d 1139A [Supr. Ct. Suffolk Cty 2007].

<sup>21</sup>Real Property Law § 266; *Phillips vs. Isaiah Owens Funeral Service, Inc.*, 69 AD 3d 822, 823 [2d Dept. 2010]; *Merritt vs. Merritt*, 47 AD 3d 689, 690 [2d Dept. 2008]; *and Fischer vs. Sadov Realty Corp.*, 34 AD 3d 630, 631 [2d Dept. 2006].

submitted in opposition to the default order. Because the order signed by the court resolves ambiguities previously associated with the title to the subject property, Wells Fargo asserts the final order improperly affects the rights of the non-defaulting defendants. In support of this contention, the non-defaulting defendants now submit what they term as being a model order.<sup>22</sup> That model order was rendered where adverse possessors themselves asserted the defense of adverse possession imposing a statute of limitations. In contrast to the action forming the basis of the so-called model order, Wells Fargo and Chase are not themselves adverse possessors. Allan Soriano has not interposed adverse possession as a defense. Wells Fargo and Chase are nowhere represented as agents for Allan Soriano in the matter of adverse possession. The facts underlying the model order offered by the non-defaulting defendants are not congruent to the instant action, and the default order in this action is inapposite to the so-called model order submitted by the non-defaulting defendants.

**The settlement order should not be reargued.**

Two courts have contemplated rearguing settlement orders.<sup>23</sup> However, “[p]ursuant to CPLR § 2221 (d)(2), a motion to reargue must ‘be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion.’”<sup>24</sup> Here, the motion to reargue does not pertain to rearguing the determination of a prior motion. Rather, Wells Fargo and Chase are moving to “reargue” a settlement order under 22 NYCRR 202.48, and not a motion *per se*. Next, the non-defaulting defendants fail to particularize and recite the matters of fact or law that were allegedly overlooked or misapprehended in the formulation of the settlement order.

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<sup>22</sup>*Lackey as Executor of DeVivo et al vs. Romano et al*, \_\_\_\_ Misc. 3d \_\_\_\_ [Supr. Ct. Kings Cty. 2000].

<sup>23</sup>*Custom Topsoil, Inc. vs. City of Buffalo*, 12 AD 3d 1162, 1163 [4 th Dept 2004]; and *Wieland vs. Moss*; 151 Misc. 2d 468, 469 [Rensselaer Cty. Ct. 1991].

<sup>24</sup>*People vs. D’Alessandro*, 13 NY 3d 216, 219 [2009]; CPLR 2221 (d)(2).

**The failure of the plaintiff to plead fraud by the non-defaulting defendants is not sufficient to dismiss the action.**

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the pleading fails to state a cause of action.”<sup>25</sup> Here, the non-defaulting defendants assert that the plaintiff’s action against them should be dismissed because no notice of fraud is alleged against them. To assert fraud, a party must be deceived or induced into acting to its detriment, in reliance upon representations made by another party.<sup>26</sup> Further, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known by the defrauding entity to be false, that was made for the purpose of the other party to depend upon it, that there was justifiable reliance upon the falsity, and that injury resulted to the party because of that reliance.<sup>27</sup> The circumstances must be set forth in detail.<sup>28</sup> All the elements including material representations by the defrauding party must be set forth.<sup>29</sup>

Here, the plaintiff discusses fraud in a memorandum of law, but also concedes there may have been non-fraudulent bases for the deed executed by Helena Soriano. In any event, the plaintiff has not yet plead fraud as a defense by the plaintiff. However, “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.”<sup>30</sup> Where an amended pleading lacks merit

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<sup>25</sup>CPLR § 3211 (a) 7.

<sup>26</sup>*Escoett & Co. vs. Alexander & Alexander, Inc.*, 31 AD 2d 791 [1st Dept 1969].

<sup>27</sup>*Mandarin Trading Ltd. vs. Wildenstein*, \_\_\_\_ NY 3d \_\_\_\_, 2011 NY Slip Op 741 [2011].

<sup>28</sup>CPLR 3016 (b).

<sup>29</sup>*Mandarin Trading Ltd. vs. Wildenstein*, 2011 NY Slip Op 741.

<sup>30</sup>CPLR § 3025 (b).

it should be denied.<sup>31</sup> The merits of possible future arguments, if they are to be made by the plaintiff, are not addressed here.

A cause of action may proceed without alleging fraud. In contrast to the implications of Wells Fargo and Chase, it is not an absolute pre-condition that all causes of action be based on fraud. Therefore, dismissal of this action may be denied to the non-defaulting defendants.

**Here, lapse of time does not allow for dismissal.**

Properly, a statute of limitations applies to dismissal. An action may be dismissed when it is time-barred by a statute of limitations.<sup>32</sup> “An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.”<sup>33</sup> Wells Fargo and Chase assert that the previous decision in this action and its resulting settlement order should be dismissed because the plaintiff has not been in possession of the subject property for over ten years. They assert the plaintiff has been the subject of an ouster by Helena Soriano. Accordingly, Wells Fargo and Chase assert that Helena Soriano and Allan Soriano (Helena Soriano’s successor in interest), have been in adverse possession of the subject property for which Wells Fargo and Chase have a mortgage security interest. Consequently, Wells Fargo and Chase undertake to dispossess the plaintiff from his interest in the property.

The principle of ouster is a venerable one. “An ouster is an actual deprivation of the possession of a part of the land, or what is equivalent, a title which is capable of being used to deprive the grantee of his possession of a portion of the land covered by his deed.”<sup>34</sup> However, since 1990, an ouster has no longer been necessary to define adverse possession.<sup>35</sup>

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<sup>31</sup>*Thomas Crimmins Contracting Co. vs. New York*, 74 NY 2d 166, 170 [1989]; and *Matter of Xander Corp. vs. Haberman*, 41 AD 3d 489, 491 [2d Dept. 2007].

<sup>32</sup>CPLR § 3211 (a) (5).

<sup>33</sup>CPLR § 212 (a).

<sup>34</sup>*McMullin v. Wooley*, 2 Lans. (NY) 394, 395.

<sup>35</sup>*Kolb vs. Anisis*, 109 AD 2d 399, 400 [Second Department 1984].

Where the relation of tenants in common has existed, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.<sup>36</sup>

“Absent ouster, a cotenant may begin to hold adversely only *after* [italics in original] 10 years of exclusive possession. RPAPL 541's statutory presumption, therefore, effectively requires 20 years – or two consecutive 10-year periods – of exclusive possession before a cotenant may be said to have adversely possessed a property owned by tenants-in-common.”<sup>37</sup> Here, Helena Soriano and the plaintiff became co-tenants upon the death of their mother by the process of intestate inheritance, notwithstanding the claim to title acquired by Helena Soriano when she registered a deed in the office of the Clerk of Richmond County. Here also, it could be said that the registry of the deed could serve as express communication of an ouster to the plaintiff by Helena Soriano.<sup>38</sup> Added to an ouster, the proof of each of the elements adverse possession over the subsequent ten years may then enable a quit claim to be sought by the adverse possessor. The ouster is a counter and an alternative to the presumption that a cotenant shares the possession of property in common with another tenant.<sup>39</sup> An ouster may be used by a party to assert exclusive use as a step toward establishing adverse possession, allowing the statute of limitation to run.<sup>40</sup> The ouster by itself serves only as a condition predicate to a claim of

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<sup>36</sup>RPAPL § 541

<sup>37</sup>*Myers vs. Bartholomew*, 91 NY 2d 630, 634 - 635 [1998].

<sup>38</sup>*Myers vs. Bartholomew*, 91 NY 2d at 633.

<sup>39</sup>*Provato vs. M.E.F. Builders*, 217 AD 2d 654 [2d Dept. 1995].

<sup>40</sup>*Provato vs. M.E.F. Builders*, 217 AD 2d at 655.

adverse possession when parties have been co-tenants.<sup>41</sup> It is clear the claim of an ouster must be asserted by the one claiming exclusive use, not by any uninterested or disinterested party to the process of adverse possession. For Wells Fargo and Chase to claim that Helena Soriano intended an ouster against the plaintiff is to read the mind of Helena Soriano.

Wells Fargo and Chase may not assert the time limitation associated with adverse possession. “To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period.”<sup>42</sup> Title to the property subject to adverse possession is granted by a court.<sup>43</sup> Here, no proofs are presented of each and every element of adverse possession. Additionally, Wells Fargo and Chase are not themselves the adverse possessors. Next, the standard of clear and convincing evidence has not been proved to the court. Finally, there is no showing that title to the subject property was granted to Helena Soriano or her successors by a court. Therefore, neither Helena Soriano nor Allan Soriano have dispossessed the plaintiff of his inherited interest in the subject property.

The results of a proper claim of adverse possession are beyond our consideration. However, the appropriate statute of limitations would clearly apply to an attempt by one previously in possession to recover property from another in current possession.<sup>44</sup> “An owner in possession has the right to invoke the aid of a court of equity at any time while he is so the owner and in possession, to have an apparent, though not in fact a real incumbrance discharged from the

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<sup>41</sup>*Myers vs. Bartholomew*, 91 NY 2d 633 - 634.

<sup>42</sup>*Walling vs. Przbylo*, 7 NY 3d 228, 232 [2006], *superceded in other, not pertinent particulars*.

<sup>43</sup>*Walling vs. Przbylo*, 7 NY 3d at 233.

<sup>44</sup>*Piedra vs. Vanover*, 174 AD 2d 191, 194 - 195 [2d Dept. 1992].

record and such a right is never barred by the Statute of Limitations.”<sup>45</sup> Wells Fargo and Chase are not in the position of one in possession to the subject property. It is extraordinary that Wells Fargo and Chase essentially attempt to claim adverse possession for Allan Soriano when Helena Soriano and Allan Soriano have not made the claim for themselves.

The adverse possessor must prove each of element of adverse possession by clear and convincing evidence.<sup>46</sup> Thus the burden is on the adverse possessor. Neither Helena Soriano nor Allan Soriano have shouldered the burden of proof enabling a claim of adverse possession. For Wells Fargo and Chase to claim Allan Soriano has adverse possession would be to read the mind of Helena Soriano, now deceased, as well as that of Allan Soriano himself, neither of whom have actually asserted a claim to be an adverse possessor on their own part. Further Wells Fargo and Chase have not been invited to represent Helena Soriano or Allan Soriano as agents. Consequently, the plaintiff remains in possession of an undivided one-half share of the property by inheritance from his mother. This interest in property is held in fee simple by the plaintiff in common with Allan Soriano.

Therefore, the default judgment and the order of settlement may not be dismissed on the grounds of statute of limitations, on the basis of ouster, or because of adverse possession by Helena Soriano or by Allan Soriano. Summary judgment is denied to Wells Fargo and Chase for the plaintiff’s supposed failure to commence this action within the statutory ten year period of time for recovery of real property.

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<sup>45</sup>*Piedra vs. Vanover*, 174 AD 2d at 196; quoting *Ford vs. Clendenin*, 215 NY 10, 16 [1915].

<sup>46</sup>*Walling vs. Przybylo*, 7 NY 3d at 232.

The principle of laches may be an affirmative legal defense against a party seeking to assert a claim of right.<sup>47</sup>

Generally, neglect to assert promptly a claim for relief, if such neglect causes prejudice to the adverse party, operates as a bar to the remedy and as a basis for invoking the doctrine of laches. The four basic elements of laches are, (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant. All four elements are necessary for the proper invocation of the doctrine, including "the essential element ... delay prejudicial to the opposing party [citations omitted]."<sup>48</sup>

Here, Wells Fargo asserts that the plaintiff failed to assert his rights to the subject property for sixteen years after the death of his mother. Further, Wells Fargo was unaware that the plaintiff had any rights to the subject property. Wells Fargo asserts that the passage of time has prejudiced the defendants in that the plaintiff's delay resulted in the death of Helena Soriano and her unavailability of to provide testimony. Consequently, laches would be available to the non-defaulting defendants as an affirmative defense. However, laches is not identified as one of the grounds for dismissal of a cause of action.<sup>49</sup>

Laches is also be an equitable defense.<sup>50</sup> "[L]aches does not apply unless the facts are sufficient to constitute equitable estoppel. Equitable estoppel arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property

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<sup>47</sup>*Bank of Am., N.A. vs. 414 Midland Ave. Assoc., LLC*, 78 AD 3d 746, 748 [2d Dept. 2010].

<sup>48</sup>*Dwyer vs. Mazzola*, 171 AD 2d 726 [2d Dept. 1991].

<sup>49</sup>CPLR § 3211 (a) 1 - 11.

<sup>50</sup>*Kraker vs. Roll*, 100 AD 2d 424, 432 [2d Dept 1994].

and incurs expense on that belief [citations omitted].”<sup>51</sup> Here, the plaintiff made no objection while Helena Soriano executed a deed in her own name alone and then obtained mortgages based upon the sole ownership of the subject property. Wells Fargo incurred expenses based upon its belief that Helena Soriano was capable of granting the mortgages on her property. However, laches as equitable estoppel is not among the grounds that may support a motion for dismissal.<sup>52</sup>

Thus, laches may be either an affirmative defense or equitable estoppel. However, laches is not available as grounds for dismissal of an action. In so far as the non-defaulting defendants seek dismissal of the plaintiff’s action on the grounds of laches, this may not be granted. Nonetheless, laches remain to the non-defaulting defendants as a potential defense.

This action may not be dismissed on the basis of being time-barred by laches nor on the basis of the statute of limitations.

### **Summary judgment is inapplicable in this action.**

The New York Civil Practice Law and Rules (CPLR) states “Any party may move for summary judgment in any action, after issue has been joined; provided that the court may set a date after which no such motion may be made ...”<sup>53</sup> Summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”<sup>54</sup> Thus, it is the burden of Wells Fargo and Chase, as the movant for summary judgment, to present proofs or papers supporting their motion for summary judgment.

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<sup>51</sup>*Bank of Am. N.A. vs. 414 Midland Ave. Assoc.*, 78 AD 3d at 749 - 750 [2d Dept. 2010].

<sup>52</sup>*Stassa vs. Stassa*, 73 AD 3d 1157, 1158 [2d Dept. 2010].

<sup>53</sup>CPLR § 3212 (a).

<sup>54</sup>CPLR § 3212 (b).

Here, Wells Fargo and Chase move for summary judgment on the basis of statutes of limitations. Considerations of timeliness have been considered above as questions regarding dismissal. Further, the defense of statutes of limitations applies to dismissal rather than to summary judgment.<sup>55</sup> Consequently, grounds for summary judgment must be sought outside of the statute of limitations.

Summary judgment is always regarded as a “drastic remedy,” that should be sparingly applied.<sup>56</sup> The non-defaulting defendants must demonstrate the absence of all disputed issues of fact to be resolved.<sup>57</sup> “Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”<sup>58</sup> Here, it is asserted by the plaintiff that Wells Fargo and Chase had agreed they would not oppose the default judgment. That is precisely one of the motives of the order to show cause. Therefore, among other disputes of fact is whether there was an agreement that there would be no opposition to the default order.

Therefore, summary judgment must not be granted to the non-defaulting defendants.

Accordingly, it is hereby:

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause that seeks to vacate the default judgment granted in favor of the plaintiff, Anthony Pizzuto, is denied; and it is further

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<sup>55</sup>CPLR § 3211 (a) 5.

<sup>56</sup>*Warder vs. Board of Regents*, 53 NY 2d 186, 199 (1981), *Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978], quoting *Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; *Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; and *American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994]

<sup>57</sup>*White House Manor, Ltd. vs. Benjamin*, 11 NY 3d 393, 402 [2008].

<sup>58</sup>CPLR § 3212 (f); see also *Groves v Land's End Housing Co., Inc.*, 80 NY 2d 978 [1992].

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause that seeks to vacate the settlement order granted to Anthony Pizzuto on July 13, 2010 is denied; and it is further

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause that seeks to reargue the default judgment granted in favor of the plaintiff, Anthony Pizzuto, is denied; and it is further

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause that seeks to defer the referral specified in the settlement order granted to Anthony Pizzuto on July 13, 2010 is denied; and it is further

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause that seeks to dismiss the complaint by Anthony Pizzuto is denied; and it is further

ORDERED, that the motion made by Wells Fargo Bank, National Association and Chase Home Finance L.L.C. in their order to show cause seeking summary judgment against Anthony Pizzuto is denied; and it is further

ORDERED, that the reference to the previously appointed Referee proceed as directed in the settlement order of July 13, 2010.

ENTER,

DATED: May 5, 2011

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Joseph J. Maltese  
Justice of the Supreme Court