

Citigroup Global Mkts. Real Corp. v Weiss
2011 NY Slip Op 33067(U)
November 18, 2011
Sup Ct, Nassau County
Docket Number: 7399/08
Judge: Thomas A. Adams
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. THOMAS A. ADAMS,
Supreme Court Justice

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 CITIGROUP GLOBAL MARKETS REALTY
 CORP.
 3476 Stateview Boulevard
 Ft. Mill, SC 29715,

Plaintiff,

FORECLOSURE PART
NASSAU COUNTY

INDEX NO.: 7399/08

MOTION SEQ. NO.: 2

- against-

MOTION DATE: September 19, 2011

MOSHE WEISS, HEIR TO THE ESTATE OF
 WILLIAM WEISS, PAULETTE WEISS,
 INDIVIDUALLY AND AS HEIR TO THE
 ESTATE OF WILLIAM WEISS, REBECCA
 NOVAK, HEIR TO THE ESTATE OF WILLIAM
 WEISS, RENEE ITZKOWITZ, HEIR TO THE
 ESTATE OF WILLIAM WEISS, et al

Defendants.

-----X

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....1
 Opposition.....2
 Reply.....3

IT IS ORDERED THAT

Motion by defendant, Moshe Weiss a/k/a Mitchell Weiss, and by the Estate of the

late Paulette Weiss through the estate's fiduciary, is determined as hereinafter set forth.

Through this application the movants seek vacatur of the Order of the Hon. Jeffrey Goodstein, dated August 16, 2010, restoration of the matter to the Residential Foreclosure Conference Part and leave to interpose an answer.

A review of the action's litigative history will serve to place the instant application in proper perspective.

The above-captioned action, a proceeding directed toward the foreclosure of a residential mortgage executed by the late William and Paulette Weiss, was commenced by the filing of process and acquisition of an Index number on April 22, 2008. It appears that William Weiss passed away in close temporal proximity to the action's initiation and that his death catalyzed the preparation and filing of a Supplemental Summons and Amended Complaint, naming Moshe Weiss a/k/a Mitchell Weiss, as *heir* to the subject decedent's estate.

Presumably, notwithstanding the construction of the caption herein, Moshe Weiss is not only an heir to the estate of William Weiss, but also the duly appointed representative of the subject decedent's estate. (see, CPLR 1015; EPTL §11-3.1; *Laurenti v Teatom*, 210 AD2d 300; see also, *Grosso v Estate of Gershenson*, 33 AD3d 587; but see, RPAPL § 1311) The papers filed in connection with the instant application provide insufficient illumination on point.

As gleaned from a review of the corresponding affidavit of service (π's G), the Supplemental Summons and Amended Complaint, filed on July 29, 2008, were personally served upon Moshe Weiss under CPLR 308 (1) on August 18, 2008. The Court notes the presence of unexplained irregularities on the face of the subject affidavit which relate to the notary who took the affiant's signature and the date of the latter's oath.

An Answer was not interposed within the twenty (20) day period following service of process (see, CPLR 320 [a]; CPLR 3012 [a]), and there is no indication that the time to do so was extended by formal stipulation or Court Order. Consequently, Moshe Weiss defaulted.

Jurisdiction over co-defendant, Paulette Weiss, appears to have been first acquired through the two (2) stage process contemplated by CPLR 308 (2) with the delivery of the Supplemental Summons and Amended Complaint on August 23, 2008 to a person of suitable age and discretion at the target's dwelling place and the transmission of an additional copy thereof by first class mail directed to her at the service situs on August 25, 2008.

Oddly, there are variant affidavits of service which purport to memorialize the subject jurisdictional acts. The first, annexed as exhibit "D" to the moving papers, was filed on September 9, 2008; the second, annexed as part of exhibit "G" to the opposing

submission, was filed on September 8, 2008. Curiously, the notaries before whom the process server took his oaths differed, as did the dates on which the respective oaths were administered.

“Leave and mail” service, such as effectuated upon named defendant, Paulette Weiss, is deemed complete ten (10) days after the filing of the corresponding affidavit of service (see, CPLR 308 [2]), and the temporal parameters within which issue is to be joined in that context extends for an additional thirty (30) days thereafter. (see, CPLR 320 [a])

Assuming *arguendo* that the affidavit of service reflecting service upon Ms. Weiss was filed on September 8, 2008, service upon her was deemed complete on September 18, 2008. (see, CPLR 308 [2] and GCL § 20) While the deadline for joinder of issue, ordinarily, would have expired thirty (30) days later on October 18, 2008, where, as here, the thirtieth day fell on a Saturday, General Construction Law § 25-a (1) applied and served to extend the period to the next succeeding business day, here, Monday, October 20, 2008.

As gleaned from a review of the exhibited death certificate, annexed as part of exhibit “C” to the moving papers, co-defendant, Paulette Weiss, passed away on October 3, 2008. Significantly, she was not in default at the time of her passing, as the deadline for joinder of issue, though approaching, had not expired.

“Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent (see *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1323; *Manto v Cerbone*, 71 AD3d 1099, 1100; *Wood v Dolloff*, 52 AD3d 1190; *Abley Props., Inc. v Reid*, 52 AD3d 442, 443; *Singer v Riskin*, 32 AD3d 839, 840; *Giroux v Dunlop Tire Corp.*, 16 AD3d 1068, 1069; *Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220, 221; *Gonzalez v Ford Motor Co.*, 295 AD2d 474, 475).” (*Neuman v Neumann*, 85 AD3d 1138, 1139)

It is also well settled that any determination rendered prior to the substitution of the decedent’s personal representative, and, thus, during the pendency of the stay, is a nullity. (see, *Commerce Commercial Leasing, LLC v PIO Enterprises, Inc.*, 78 AD3d 1105; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323; *Manto v Cerbone*, 71 AD3d 1099)

“‘A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction’ over the deceased party’s personal representative, and such a motion ‘is not a mere technicality’ (*Bossert v Ford Motor Co.*, 140 AD2d 480).” (*Singer v Riskin*, 32 AD3d 839, 840)

While as gleaned from a review of exhibited letters testamentary, annexed as part of Exhibit “C” to the moving papers, Mitchell Weiss was appointed personal representative of the Estate of Paulette Weiss on February 5, 2010. No application for substitution of the

duly appointed personal representative has been made to date, and the instant application is not directed to the extension of such relief.

It follows therefrom that the Order of Reference dated March 30, 2009 (McCabe, J.) and the Order dated August 16, 2010 (Goodstein, S.R.) which permitted the plaintiff to resume prosecution of its action, are nullities, as same were issued during the pendency of the stay which arose by operation of law as a consequence of the decedent's death while the bulk of the Court's jurisdiction to act was suspended.

By parity of reasoning, the Court is without jurisdiction to entertain the instant application on its merits pending an application for substitution pursuant to CPLR 1021. (see, *Kelly v Methodist Hospital*, 276 AD2d 672; *Anderson v Gilliland*, 245 AD2d 654 [3d Dept.])

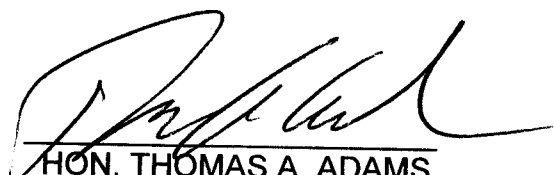
Pursuant to CPLR 1015 (a), which provides "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties", the plaintiff is directed to apply for substitution of the duly appointed estate fiduciary as a party defendant. Such application shall be made promptly and shall be served on the decedent's personal representative with all the formalities that CPLR Article 3 prescribes for service of process. (see, *Gonzalez v Ford Motor Co.*, 295 AD2d 474) An additional copy thereof shall be served upon moving counsel.

Upon substitution of the duly appointed estate fiduciary as a party defendant, the action's caption shall be amendment to reflect the substitution. By statute, the substituted party shall then be afforded fifteen (15) days in which to interpose an answer to the plaintiff's Amended Complaint, as the deadline for joinder of issue had not expired prior to the decedent's demise. (see, CPLR 1022)

Based on the foregoing, the instant application is dismissed on jurisdictional grounds. Parenthetically, the Court notes that CPLR 1022 has no application to Moshe Weiss, individually, or as an heir of William Weiss (see, RPAPL § 1311 [1]). Thus, vacatur of his default would be a prerequisite to the service of a belated answer on his behalf.

ENTER:

Dated: NOV 18 2011


HON. THOMAS A. ADAMS
Supreme Court Justice

ENTERED
NOV 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE