

<b>TD Bank, N.A. v JMA Realty Holding Corp.</b>
2012 NY Slip Op 31280(U)
May 1, 2012
Sup Ct, Nassau County
Docket Number: 6568/11
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

TD BANK, N.A. successor by merger to COMMERCE  
BANK, N.A.,

Plaintiff,

- against -

TRIAL/IAS PART 31  
NASSAU COUNTY

Index No.: 6568/11  
Motion Seq. No.: 02  
Motion Date: 11/17/11

JMA REALTY HOLDING CORP., SHANALI, INC.,  
ESTATE OF AZAM INSHANALLY a/k/a ASAM  
INSHANALLY, NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, COUNTY OF NASSAU,

-and-

JOHN DOES "1" - "10" AND XYZ CORPORATION  
"1" - "10", said names being fictitious, it being the  
intention of plaintiff to designate any and all occupants,  
tenants, persons or corporations, if any, having or claiming  
an interest in or lien upon the premises being foreclosed  
herein,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmations, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition, Affidavit in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 305 and 3025, for an order amending the caption in this action to delete defendants John Does “1-10” and XYZ Corporation “1-10.” as parties; and moves, pursuant to CPLR § 3212, for an order granting it summary judgment against defendants JMA Realty Holding Corp. (“JMA”), Shanali, Inc. (“Shanali”) and the Estate of Azam Inshanally a/k/a Asam Inshanally (“Estate of Inshanally”); and moves for the appointment of a Referee to compute and report the amount due plaintiff for principal and interest. Defendant the Estate of Inshanally opposes the motion. No other opposition was submitted.

On or about July 27, 2006, defendants JMA and Shanali obtained a loan in the amount of \$1,200,000.00 through the U.S. Small Business Association. The loan, evidenced by a promissory note dated July 27, 2006, was personally guaranteed by Azam Inshanally who died intestate on January 15, 2007, prior to commencement of this action.

In this action, plaintiff seeks to foreclose two mortgages: a commercial mortgage security agreement and assignment of leases and rents, executed as of July 27, 2006, by Commerce Bank, N.A. and decedent Azam Inshanally, as president of defendant JMA, encumbering properties known as 158 and 170 Merrick Road, Lynbrook, New York (referred to as the “Hempstead Mortgage” in plaintiff’s papers) and a commercial mortgage for residential property executed as of July 27, 2006 by Azam Inshanally, individually encumbering property known as 399 Emerson Place, Valley Stream, New York. Plaintiff also seeks to recover a deficiency judgment against defendants JMA, Shanali and the Estate of Inshanally.

According to the loan documents, the borrowers (defendants JMA and Shanali) and the individual guarantor, were obligated to repay the loan in monthly installments of principal and interest with a balloon payment of all outstanding principal, accrued interest and other applicable fees and expenses due and payable on July 27, 2031, *i.e.*, the maturity date. Beginning on or about April 28, 2010, and thereafter, defendants JMA and Shanali defaulted under the terms of the Note by failing to make the required payments.

By letter dated May 13, 2010, defendants JMA and Shanali were advised that “if full payment of the debt is not received by the deadline set forth above, TD Bank intends to avail itself of any and all remedies under the law or in equity, including commencement of litigation against all responsible parties, including and/or the foreclosure of the July 27, 2006 Commercial Mortgages.”

In moving for summary judgment in this foreclosure action, plaintiff has established its case as a matter of law with respect to the “Hempstead Mortgage” through the production of the mortgage, the unpaid Note and evidence of defendants JMA, Shanali and the Estate of Inshanally’s default. *See Rossrock Fund II, L.P. v. Osborne*, 82 A.D.3d 737, 918 N.Y.S.2d 514 (2d Dept. 2011). In opposition, defendants JMA, Shanali and the Estate of Inshanally have failed to raise a triable issue of fact as to the existence of a *bona fide* defense to the Complaint such as waiver, estoppel, bad faith, fraud or oppressive or unconscionable conduct on the part of the plaintiff. *See Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC*, 70 A.D.3d 882, 895 N.Y.S.2d 199 (2d Dept. 2010).

According to the Affidavit of decedent’s wife, Azam Inshanally died unexpectedly of a brain aneurysm. While she was unable to continue running her husband’s business and making the payments on the “Hempstead Mortgage,” she was able to refinance the Valley Stream mortgage on the family’s residence under the Home Affordable Refinance Program and is currently up-to-date on the revised payment schedule. She further states that she wishes to transfer the Lynbrook commercial property to plaintiff in exchange for vacatur of the foreclosure action.

There being no defense offered *vis-v-vis* plaintiff’s motion for summary judgment of foreclosure on the “Hempstead Mortgage,” the motion must be granted.

With respect to the deceased mortgagor, Azam Inshanally, it is well established that no action may be commenced against a person subsequent to his or her death and prior to the appointment of a personal representative of his or her Estate. *See* EPTL § 11-3.1; *Marte v.*

*Graber*, 58 A.D.3d 1, 867 N.Y.S.2d 71 (1<sup>st</sup> Dept. 2008); *Jordan v. City of New York*, 23 A.D.3d 436, 807 N.Y.S.2d 595 (2d Dept. 2005); *Dime Savings Bank of New York FSB v. Luna*, 302 A.D.2d 558, 755 N.Y.S.2d 300 (2d Dept. 2003). Here, the instant action was commenced subsequent to decedent's death and after the appointment of his wife as Administratrix of his Estate. As such, the action should have been properly commenced against the Administratrix as representative of decedent's Estate. According to the Affidavit of Service, the defendant Estate of Inshanally was purportedly served with the Summons and Complaint and Notice of Pendency pursuant to CPLR § 308(4) on May 9, 2011.

While 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 an intestate mortgagor (*see Citimortgage, Inc. v. Balbi*, 22 Misc.3d 1102(A), 875 N.Y.S.2d 819 (Sup. Ct. Suffolk County, 2009)), here plaintiff has improperly attempted to sue defendant Estate of Inshanally. Since this is a case in which the Complaint seeks a deficiency judgment against the Estate of Inshanally, the need to join the Estate of a deceased mortgagor is not obviated. (*see Financial Freedom Senior Funding Corp. v. Rose*, 64 A.D.3d 539, 883 N.Y.S.2d 546 (2d Dept. 2009)), and, as noted, plaintiff is required to proceed against the personal representation of decedent's Estate.

Although decedent's wife, Monika Inshanally, was appointed Administratrix of his Estate on February 16, 2006, plaintiff has erroneously named the Estate of Azam Inshanally a/k/a Asam Inshanally as defendant rather than the duly appointed representative of the Estate. The Estate of Azam Inshanally a/k/a Asam Inshanally is not a proper party to this action as it is not a legal entity. An action for or against the decedent's Estate must be brought against the Administratrix of his Estate in her representative capacity. *See Grosso v. Estate of Gershenson*, 33 A.D.3d 587, 822 N.Y.S.2d 150 (2d Dept. 2006); *100 West 72<sup>nd</sup> Street Assoc. v. Murphy*, 144 Misc.2d 1036, 545 N.Y.S.2d 901 (Civ. Ct. City of New York, 1989). The purported service of process on the defendant Estate of Azam Inshanally a/k/a Asam Inshanally of was a nullity. As

such, the Court lacks jurisdiction over said Estate.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for a order granting summary judgment of foreclosure against defendants JMA and Shanali on the Hempstead Mortgage is hereby **GRANTED**. And it is further

**ORDERED** the plaintiff's motion, pursuant to CPLR §§ 305 and 3025, for an order amending the caption in this action to delete defendants John Does "1-10" and XYZ Corporation "1-10" as parties is hereby **GRANTED**. And it is further

**ORDERED** that the caption of this action, as amended, shall read as follows:

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TD BANK, N.A. successor by merger to COMMERCE  
BANK, N.A.,

Plaintiff,

- against -

JMA REALTY HOLDING CORP., SHANALI, INC.,  
ESTATE OF AZAM INSHANALLY a/k/a ASAM  
INSHANALLY, NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE and COUNTY OF NASSAU,

Defendants.

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**ORDERED** the plaintiff's motion for the appointment of a Referee to compute and report the amount due plaintiff as and for principal and interest *vis-a-vis* the Hempstead Mortgage is also hereby **GRANTED**. Accordingly it is

**ORDERED** that this action be and the same hereby is referred to Dominic Villoni, Esq., Fiduciary # 140397, having an office at 80 Brook Street, Garden City, New York 11530, telephone number (516) 741-2644, as Referee, to ascertain and compute the amount due to plaintiff herein, except for attorney's fees, for principal, interest and other disbursements advanced as provided for in the Hempstead Mortgage upon which this action was brought and to

report to the Court with all convenient speed. And it is further

**ORDERED** that, pursuant to CPLR § 8003(a), in the discretion of the Court, a fee of \$350.00 shall be paid to the Referee for the computation stage and upon the filing of his report. And it is further

**ORDERED** that, by accepting this appointment, the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith. And it is further

**ORDERED** that, by accepting this appointment, the Referee certifies that he is in compliance with Part 36 Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, Section 36.2(c) (“Disqualifications from appointment”) and Section 36.2(d) (“Limitations on appointments based upon compensation”). And it is further

**ORDERED** that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Judge. And it is further

**ORDERED** that, on filing the Referee’s report, plaintiff may move for confirmation of said report and for judgment of foreclosure and sale as prayed for in the Complaint.

The branch of plaintiff’s motion for summary judgment of foreclosure against the Estate of Azam Inshanally a/k/a Asam Inshanally is hereby **DENIED** and plaintiff’s claims for foreclosure against defendant Estate of Azam Inshanally a/k/a Asam Inshanally *vis-a-vis* the Valley Stream mortgage which encumbers the family residence located at 399 Emerson Place, Valley Stream, New York are **DISMISSED without prejudice**.

Since Monika Inshanally, as Administratrix of decedent’s Estate was not properly named

as party to the action, the Complaint fails to assert a viable cause of action against the Estate.

To the extent that Administratrix Monika Inshanally asserts that plaintiff has improperly failed to name decedent's two minor children as defendants, they are not necessary parties. The Court notes that where the administratrix is named as a party defendant, a deceased mortgagor's heirs are not necessary parties to a mortgage foreclosure action. *See Glass v. Estate of Gold*, 48 A.D.3d 746, 853 N.Y.S.2d 159 (2d Dept. 2008).

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
May 1, 2012

**ENTERED**  
MAY 03 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE