

Bank of New York Mellon v Roman
2012 NY Slip Op 31687(U)
June 14, 2012
Supreme Court, Queens County
Docket Number: 18895/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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The Bank of New York Mellon f/k/a The
 Bank of New York, as Trustee for the
 Certificate Holders of CWABS, Inc.,
 Asset-Backed Certificates, Series
 2007-1,

Index No.: 18895/2011

Motion Date: 04/19/12

Motion No.: 4

Plaintiff,

Motion Seq.: 2

- against -

Ana Roman as Executor of the Estate of
 Pablo Roman, Aracelis Taylor as
 Executor of the Estate of Pablo Roman,
 Midland Funding LLC dba in New York as
 Midland Funding of Delaware LLC,
 New York State Department of Taxation
 and Finance, United States of America,
 New York City Environmental Control
 Board, New York City Parking
 Violations Bureau, New York City
 Transit Adjudication Bureau and "JOHN
 DOE #1" through "JOHN DOE #10," the
 last ten names being fictitious and
 unknown to the Plaintiff, the person
 or parties intended being the persons
 or parties, if any, having or claiming
 an interest in or lien upon the
 Mortgage premises described in the
 complaint,

Defendants.

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The following papers numbered 1 to 13 were read on this motion by
 the defendants for an order pursuant to CPLR 3211(a)(10) and CPLR
 3211(a)(1) dismissing the complaint against defendants Ana Roman
 and Aracelis Taylor on the ground that the plaintiff failed to
 join necessary parties and on the ground that defendants were not
 served with a 90 day pre-foreclosure notice:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 9
Reply affirmation.....	10 - 13

This is an action to foreclose a mortgage on premises located at 979 Seneca Avenue, Ridgewood, New York. On December 9, 2005, Pablo Roman, individually, executed a note and mortgage to secure payment in the principal sum of \$250,000. The original holder of the note and mortgage was Global Home Loans and Finance Inc.

On December 17, 2006, Pablo Roman died. On February 6, 2009, defendants Ana Roman, the borrower's surviving spouse, and Aracelis Taylor, the borrower's daughter, were appointed co-executors of the estate. On August 9, 2010, Mr. Roman's estate was distributed by a deed giving his surviving spouse, Ana Roman, a life estate interest in the premises and the remainder interest was given to his children, Aracelis Taylor, Edwin Roman and Jacqueline Roman-Dice in equal 1/3 shares. There is no evidence in the record that the deed was recorded.

The mortgage and note were assigned to the plaintiff herein on May 3, 2010. On August 10, 2011, the plaintiff commenced this proceeding seeking to foreclose on the mortgage alleging that the mortgagor defaulted on the mortgage payments beginning on May 1, 2009. On August 13, 2011, a copy of the summons and complaint was served personally on Ana Roman, as Executor of the Estate of Pablo Roman. On August 23, 2011, a copy of the summons and complaint was served personally on Aracelis Taylor, as Executor of the Estate of Pablo Roman. Pursuant to a stipulation dated October 3, 2011, the defendants time to answer was extended to October 18, 2011. Defendants agreed to submit to the jurisdiction of the court and waive jurisdictional defenses. The motion papers do not contain a copy of the defendants' answer.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(10) and RPAPL 1311 on the ground that the plaintiff failed to name necessary parties to the action, to wit: Edwin Roman and Jacqueline Roman-Dice who acquired an interest in the premises prior to the commencement of the within action by deed dated August 9, 2010. Defendants submit that because the plaintiff failed to name said necessary parties to the foreclosure action, as required by RPAPL 1311, this Court should dismiss the instant action in its entirety.

Defendants also move to dismiss the complaint pursuant to CPLR 3211(a)(1) on the ground that the plaintiff failed to serve a 90 day pre-foreclosure notice on the defendant Ana Roman as required by RPAPL 1304 prior to commencing the action. Defendant Ana Roman submits an affidavit, dated December 1, 2011 stating that a copy of the 90 day notice was not included with the plaintiff's pleadings and moreover no 90 day notice of default was ever served on her or on defendant Aracelis Taylor prior to the commencement of the action. Citing Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011], which states that "proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action," defendants contend that the action must be dismissed for failure to comply with this mandatory condition precedent.

In opposition, plaintiff contends that on August 17, 2009 a notice of intent to accelerate after 30 days was mailed to Pablo Roman. Counsel contends that pursuant to RPAPL § 1304 and New York Banking Law § 6-1, a 90 day pre-foreclosure notice was not required to be served on the defendants as the mortgagor, who was the sole obligor/mortgagor on the note and mortgage, was deceased at the time the action was commenced. Plaintiff states that it acknowledges that a 90 day pre-foreclosure notice is a condition precedent to commencing the foreclosure action pursuant to RPAPL § 1304, however, plaintiff argues that pursuant to RPAPL § 1304(5) a notice must be sent only where the subject premises is or will be occupied by the borrower. Plaintiff argues that as the borrower is deceased and as the present owners of the premises have not executed a note or mortgage that RPAPL 1304 does not apply.

With respect to the defendants' claim that certain owners of the premises were not joined as necessary parties, plaintiff argues that the proper remedy is not dismissal of the complaint but rather an order directing that the necessary parties be joined (citing Dime Sav. Bank, FSB v Johneas, 172 AD2d 1082 [4th Dept. 1991]).

Upon review and consideration of the defendants' motion to dismiss the complaint, plaintiff's affirmation in opposition and defendants' reply thereto, this Court finds that the motion to dismiss the complaint is denied.

Pursuant to RPAPL § 1311[1], necessary parties to a foreclosure action include "every person entitled to the reversion, remainder, or inheritance of the real property." Here it is clear that two of the children of the decedent who were given a one-third interest in the property, subject to the mother's life estate, were not joined as parties to the action.

However, the Courts have held that "dismissal for nonjoinder should occur only when the third party cannot be joined, where, for example, he is not subject to the jurisdiction of the court" (Dime Sav. Bank, FSB v Johneas, 172 AD2d 1082 [4th Dept. 1991]).

This court finds that the two children of the decedent Edwin Roman and Jacqueline Roman-Dice who were not made parties to this action are necessary parties whose rights in the property cannot be foreclosed without their being named as defendants. However, the proper remedy for nonjoinder is not dismissal of the action. but rather, a direction that the plaintiff be granted leave to serve an amended summons and complaint joining said parties to the action. The plaintiff has not alleged that the additional parties are not subject to the jurisdiction of the court or that their joinder cannot be accomplished (see Sorbello v Birchez Assoc., LLC, 61 AD3d 1225 [3rd Dept. 2009]; Dunkin Donuts of N.Y., Inc. v Mid-Valley Oil Co., 14 AD3d 590 [2d Dept. 2004]).

With regard to that branch of the motion seeking dismissal for failure to serve the defendants with a 90 day pre-foreclosure notice pursuant to RPAPL § 1304, this Court agrees with the plaintiff that the mortgage at issue is not subject to the requirements of RPAPL § 1304.

RPAPL § 1304 provides, inter alia, with regard to a home loan, that at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage the lender must provide notice to the borrower that the loan is in default and his home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "Proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action" (Aurora Loan Services, LLC v Weisblum, supra, p. 103).

However, pursuant to RPAPL §1304[2], the notice is to be sent to the borrower by registered or certified mail and by first class mail to the last known address of the borrower. Here, the borrower, Pablo Roman, who signed both the note and mortgage individually, was deceased 90 days prior to the commencement of the foreclosure action. Neither Ana Roman nor Aracelis Roman, who have a present interest in the property, assumed the mortgage or obtained a new mortgage in their own names. Accordingly, as the statute requires only that the borrower be given notice and as the borrower, Mr. Pablo Roman died more than four years prior to the commencement of the action, this Court finds that the provisions of RPAPL § 1304 are not applicable herein.

Accordingly, for all of the above-stated reasons, it is hereby,

ORDERED, that the defendant's motion to dismiss the complaint is denied, and it is further,

ORDERED, that the plaintiffs are granted leave to serve and file an amended complaint joining the additional parties. Said amended summons and complaint shall be served no later than 30 days from service of a copy of this order with notice of entry thereof.

Dated: June 14, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.