

Citibank, NA v Leone
2015 NY Slip Op 31607(U)
April 2, 2015
Supreme Court, Suffolk County
Docket Number: 31216/10
Judge: Thomas F. Whelan
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COPY SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/30/14
SUBMIT DATE: 3/20/15
Mot. Seq. # 001 - Mot D
CDISP: No

-----X
CITIBANK, NA, as Trustee for Bear Stearns Asset :
Backed Securities I Trust 2006-H3, :
 :
 :
 Plaintiff, :
 :
 -against- :
 :
 FRANK LEONE, LOUISE E. FALVEY, :
 MAUREEN LEONE, BENEFICIAL HOME- :
 OWNER SERVICE CORPORATION, MILL HILL :
 CORP., assignee from and successor in interest to :
 Elizabeth Difiore, Esq., NEW YORK STATE :
 DEPARTMENT OF TAXATION AND FINANCE, :
 PEOPLE OF THE STATE OF NEW YORK, JOHN :
 DOE, said name being fictitious it being the :
 intention of plaintiff to designate any and all :
 occupants of premises being foreclosed herein, and :
 any parties, corporations or entities, if any, having :
 or claiming an interest or lien upon the mortgaged :
 premises, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 5 read on this motion by the plaintiff for an order appointing a referee, among other things; Notice of motion and supporting papers 1 - 5; Notice of Cross Motion & Supporting papers _____; Opposing papers; _____; Reply papers _____; Other _____; it is,

ORDERED that this motion (#001) by the plaintiff for an order of reference on default, an order substituting as subsequent transferee for the named plaintiff and other incidental relief including a substitution of the plaintiff by its successor, is considered under CPLR 1018, 3215 and RPAPL 1321, and is granted only with respect to the First cause of action set forth in the complaint; and it is further

ORDERED that the Third and Fourth causes of action advanced in the complaint, being jurisdictionally infirm due to the death of the named defendant, Louise E. Falvey, who died prior to the commencement of this action, are dismissed; and it is further

ORDERED that to the extent that the First cause of action for foreclosure and sale as asserted against defendant, Louise E. Falvey, she being deceased at the time of the commencement of this action, is dismissed as to this defendant and her name is deleted as a party defendant to this action; and it is further

ORDERED that the plaintiff's request for default judgments on the Second cause of action set forth in the complaint, in which the plaintiff seeks declaratory relief pursuant to Article 15 of the Real Property Actions and Proceedings Law only against defendants, Mill Hill Corporation and the New York State Department of Taxation of Finance, is denied and the Second cause of action is severed from the First cause of action, which alone shall continue herein, and any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second and Third causes of action directed herein.

The plaintiff commenced this action in August of 2010 seeking to foreclose the lien of a November 9, 2005 mortgage given by defendants, Frank and Maureen Leone, to secure a mortgage note of the same date executed by Frank Leone. In the Second cause of action advanced in the complaint, the plaintiff seeks a judgment declaring that the prior in time and thus facially senior recorded liens of defendants, Mill Hill Corporation and the New York State Department of Taxation of Finance, to be invalid due to "adversity". In the Third cause of action advanced in the complaint, the plaintiff seeks declaratory relief in the form of a judicial reformation of the recorded mortgage so as to add the predeceased defendant, Louise E. Falvey, as a mortgagor. The plaintiff also demands declaratory relief in the form of an equitable mortgage declaration against the mortgagor defendants and the predeceased defendant, Louise E. Falvey, in the Fourth cause of action set forth in the complaint. However, this Fourth cause of action was withdrawn by the plaintiff in its moving papers.

The record reveals that the named defendant, Louise E. Falvey, held a life estate in the mortgaged premises and that she died prior to the commencement of this action. She thus was never joined as a party defendant to this action by service of process under the well established legal precept that "the dead cannot be sued" (*see Marte v Graber*, 58 AD3d 1, 867 NYS2d 71 [1st Dept 2008]; *Arbalez v Chun Kuei Wu*, 18 AD3d 583, 795 NYS2d 327 [2d Dept 2005]). These circumstances render the plaintiff's claims against the predeceased defendant nullities and thus academic. Accordingly, the Third cause of action and the Fourth cause of action, both for declaratory relief, are dismissed. Also dismissed is the First cause of action to the extent it is asserted against the predeceased defendant, Louise E. Falvey.

In the motion papers before the court, all persons served with process are alleged to have defaulted in answering the summons and complaint. A default judgment on the complaint against those served, including two persons who were served as unknown defendants, "John Doe", and the identification of such defendants in the caption pursuant to CPLR 1024, is thus requested as is an order substituting the successor trustee to the named plaintiff as plaintiff in this action pursuant to CPLR 1018. Amendments to the caption to reflect these party changes and an order appointing a referee pursuant to RPAPL § 1321 is also requested.

For the reasons stated, the motion is granted only to the limited extent set forth below.

Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215[f]; *Citimortgage, Inc. v Chow Ming Tung*, ___ AD3d ___, 2015 WL 1213591 [2d Dept 2015]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 941 NYS2d 663 [2d Dept 2012]; *Triangle Prop. #2, LLC v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). In addition, the plaintiff must advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint (*see McGee v. Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept. 2006]; *Beaton v Transit Fac. Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept. 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]). Where these elements are established, a motion for entry of a default judgment should be granted (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Csaszar v County of Dutchess*, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; *King v King*, 99AD3d 672, 951 NYS2d 565 [2d Dept 2012]; *Tarrytown Professional Ctr., Inc. v Family Medicine of Tarrytown*, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]).

In the mortgage foreclosure arena, a claim for foreclosure is further governed by RPAPL § 1321 and appellate case authorities. Pursuant thereto, the claim is established by the plaintiff's production of the note and mortgage together with evidence of default in payment or a default in other obligations giving right to the remedy of foreclosure and sale which the mortgagor willingly conferred upon the lender in exchange for the advancement of the mortgage loan monies (*see One West Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *U.S. Bank Natl. Assn. v Razon*, 115 AD3d 739, *supra*). The plaintiff's standing is not an element of the plaintiff's claim in the first instance as a lack of standing is merely an affirmative defense which must be asserted by a defendant possessed of such defense in a timely served pre-answer motion or answer (*see Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Midfirst Bank v Agho*, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; *supra*; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, the issue of standing has not been raised in such fashion by the mortgagor defendants nor by any others, as none of the persons served with process appeared herein by answer or pre-answer motion to dismiss. A review of the submissions of the plaintiff reveals the plaintiff's possession of cognizable claims for a judgment of foreclosure and sale against the mortgagor defendants and against all defendants joined herein as necessary parties to the plaintiff's First cause of action wherein it

demands such relief, except against defendant, Louise E. Falvey, whose life estate interest in the mortgaged premises terminated upon her death prior to the commencement of this action. The moving papers also established a default in answering on the part of all defendants served with process. The plaintiff thus demonstrated its entitlement to default judgments against all the defendants joined herein as necessary party defendants to the plaintiff's First cause of action for foreclosure and sale, including those served as John Does. By virtue of this demonstration, the plaintiff is entitled to the appointment of referee to compute amounts due under the subject note and mortgage as contemplated by RPAPL § 1321 (*see* CPLR 3215; RPAPL § 1321; *Citimortgage, Inc. v Chow Ming Tung*, ___ AD3d ___, 2015 WL 1213591 [2d Dept 2015], *supra*; *One West Bank, FSB v DiPilato*, 124 AD3d 735, *supra*; *U.S. Bank Natl. Assn. v Razon*, 115 AD3d 739, *supra*).

The incidental relief regarding the identification of John Does numbered 1-2 as Frank Leone, Jr. and Nicholas Leone pursuant to CPLR 1024 and the substitution of Wilmington Trust National Association, as Successor Trustee to Citibank, N.A. as Trustee for Bear Stearns Asset Backed Securities I Trust 2006-HE3 for the plaintiff named in the caption pursuant to CPLR 1018 is also granted. The caption is amended to reflect these changes and to reflect the deletion of predeceased defendant, Louise E. Falvey, as the plaintiff's claims against her were rendered academic and thus dismissed herein.

The plaintiff is not, however, entitled to accelerated judgments against any of the defendants joined as such to the plaintiff's Second cause of action for declaratory relief. As indicated above, this claim is aimed at extinguishing, by judicial declaration, the superior and prior liens of defendants, Mill Hill Corporation and the New York State Department of Taxation of Finance, pursuant to RPAPL § 1501. As indicated above, entitlement to a default judgment rests upon a satisfaction of the factors enumerated in CPLR 3215(f) and the plaintiff's possession of a cognizable claim against the defaulting defendants (*see McGee v Dunn*, 75 AD3d 624, *supra*; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, *supra*).

Claims for declaratory relief of the type advanced in the plaintiff's Second cause of action, which sound in quiet title or adverse claim determination, are governed by RPAPL Article 15. Specific pleading and party joinder requirements are imposed by various provisions thereof under which plaintiffs are required to state their interests in the premises and the source of such interest and its nature. Due to the in rem nature of an action brought pursuant to RPAPL § 1501, the plaintiffs must identify and join all persons having claims and interests in the premises that may be adversely affected by the judgment rendered in the action and state whether such persons are known and/or unknown and, if known, whether they suffer from any of the legal disabilities described in RPAPL § 1515.

Here the moving papers failed to address, let alone establish, the plaintiff's possession of cognizable claims for relief pursuant to RPAPL Article § 1501 declaring the invalidity and extinguishment of the liens and interests of the defendants, Mill Hill Corporation and the New York State Department of Taxation of Finance, who alone are targeted by the plaintiff's second cause of action (*see* CPLR 3215[f]; RPAPL §§ 1515; 1519). The complaint is devoid of any allegations of fact from which grounds for the extinguishment of the prior and facially superior recorded liens and/or interest

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belonging to these defendants are apparent. Nor does the complaint adequately identify and name as party defendants all persons having recorded claims and interests that might be affected by the granting of such relief or allege that no such persons exist and the basis for such allegation (*see* RPAPL § 1511). Accordingly, the plaintiff is not entitled to default judgments against defendants Mill Hill Corporation and the New York State Department of Taxation of Finance, each of whom were joined as party defendants with respect to the plaintiff's Second cause of action to extinguish said defendants' prior and superior liens of record, since the plaintiff failed to assert facts which constitute cognizable claims for the declaratory relief demanded against them (*see* CPLR 3215[f]; *LIUS Group Intern. Endwell, LLC v HFS Intern., Inc.*, 92 AD3d 918, 939 NYS2d 525 [2d Dept 2012]).

The Second cause of action is thus severed from the First cause of action, which alone shall continue herein. Any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second cause of action directed herein and the dismissal of the Third and Fourth causes of action under the terms of this memorandum decision and order.

Proposed Order of Reference, as modified by the court to reflect the terms of this order, has issued with this decision.

Dated: April 2, 2015



THOMAS F. WHELAN, J.S.C.