

Nationstar Mtge., LLC v Wright
2015 NY Slip Op 32496(U)
December 4, 2015
Supreme Court, Suffolk County
Docket Number: 31224/09
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: 9/30/15
SUBMIT DATE: 11/13/15
Mot. Seq. # 002 - MD
CDISP: NO

-----X
NATIONSTAR MORTGAGE, LLC, :
 :
 : Plaintiff, :
 :
 : -against- :
 :
 SABRINA WRIGHT, proposed administrator and :
 heir to the Estate of Faye M. Goode, surviving :
 spouse of Walter L. Goode, PEOPLE OF THE :
 STATE OF NEW YORK, UNITED STATES OF :
 AMERICA acting through the IRS, and "JOHN :
 DOE" and "MARY DOE", 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 fore- :
 closed herein, :
 :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 6 read on this motion by the plaintiff for accelerated judgments, party deletion and the appointment of a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers _____; Answering papers _____; Reply papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#002) by the plaintiff for "an order of reference" is considered under CPLR 3212, 3215, EPTL §11-3.1, SCPA Article 13 and RPAPL§ 1321 and is denied.

On August 12, 2009, the plaintiff commenced this action for a judgment of foreclosure and sale of real property encumbered with an October 25, 2006 mortgage given by Faye M. Goode, to

Nationstar Mortgage, LLC v Wright

Index No. 31224/2009

Page 2

secure a mortgage note of the same date and a deficiency judgment against her, in the event the sales price fails to make the plaintiff whole. In a second cause of action set forth in the complaint, the plaintiff seeks a judicial reformation of the description of the mortgaged property set forth in the mortgage indenture which appears to enlarge the premises now described therein.

The complaint recites in paragraph Five that the sole obligor/mortgagor, Faye M. Goode, was deceased at the time of the commencement of this action. No other persons are named in the body of the complaint. There are no allegations as to the ownership of the mortgaged premises, whether the deceased mortgagor died testate or intestate or whether a personal representative of her estate had been appointed. Nor did the plaintiff set forth in the body of the complaint any description of the distributees [heirs at law] of the deceased obligor/mortgagor as known or unknown to the plaintiff. Instead, the wherefore of the complaint refers to paragraph Five thereof which identifies the deceased obligor/mortgagor as the defendant against whom the plaintiff's claims for foreclosure, sale and deficiency judgment are posited.

In the caption, however, the plaintiff lists Sabrina Wright as a defendant in her capacity as the proposed administrator of the estate of the deceased obligor/mortgagor and as an heir of such obligor/mortgagor who is further described as the surviving spouse of Walter L. Goode. Two creditors are also named as party defendants in the caption, as well as, John and Mary Doe who are described as occupants, tenants and other unknowns having or claiming an interest in the mortgaged premises.

Sabrina Wright, the two named creditors and three persons allegedly residing at the mortgaged premises, one of whom was identified as a family member, were served with the summons and complaint. In response, Sabrina Wright, who had been appointed as Voluntary Administrator of the Estate of the deceased mortgagor, served an answer. That answer was, however, rejected by the plaintiff's former counsel in October of 2009. In July of 2013, the plaintiff first moved (#001) for an order of reference on default. For reasons not known to this court nor apparent from the record, the motion was adjourned to December 12, 2013 and marked submitted to the Justice then assigned thereto. The motion was thereafter denied by order dated April 28, 2014 [Emerson, J.]. Therein, eleven deficiencies in the moving papers were listed, only one of which suggested that jurisdiction over the decedent's estate had not been obtained.

By the instant motion (#002), the plaintiff moves again for an order of reference upon the default in answering of the persons served with process. For the reasons set forth below, the motion is denied.

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]; *U.S. Bank Natl. Ass'n v Alba*, 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *U.S.*

Nationstar Mortgage, LLC v Wright

Index No. 31224/2009

Page 3

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]; *Triangle Prop. #2, LLC v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). To satisfy the “facts constituting the claim” element of CLR 3215, the plaintiff must advance, in a complaint that is verified or supported by an affidavit by a person with knowledge, facts from which, the court may discern the plaintiff’s possession of one or more cognizable claims for relief against the defaulting defendant (see *Jacobsen v S&F Serv. Ctr.*, 131AD3d 450, 15 NYS2d 149 [2d Dept 2015]; *HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736, 888 NYS2d 203 [2d Dept 2009]; *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]). 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]; *Todd v Green*, 122 AD3d 831, *supra*; *U.S. Bank, Natl. Assn. v Razon*, 115 AD3d 739, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*; *Csaszar v County of Dutchess*, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; *Tarrytown Professional Ctr., Inc. v Family Medicine of Tarrytown*, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]). If not, the motion should be denied (see *DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; *Venturella–Ferretti v Ferretti*, 74 AD3d 792, 793, 901 NYS2d 551 [2d Dept 2010]; *McGee v Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; *Resnick v Lebovitz*, 28 AD2d 533, 534, 813 NYS2d 480 [2d Dept 2006]; *Dyno v Rose*, 260 AD2d 694, 698, 687 NYS2d 497 [2d Dept 1999]; *Hazim v Winter*, 234 AD2d 422, 651 NYS2d 149 [2d Dept 1996]; *Green v Dolphy Constr. Co.*, 187 AD2d 635, 590 NYS2d 238 [2d Dept 1992]).

That “the dead cannot be sued” is a well established principle of the jurisprudence of this state (see *Marte v Graber*, 58 AD3d 1, 867 NYS2d 71 [1st Dept 2008]). It gives rise to the rule that a claimant may not bring a legal action against a person already deceased at the time of the commencement of such action, but instead, must proceed against the personal representative of the decedent’s estate (see *Jordan v City of New York*, 23 AD3d 436, 807 NYS2d 595 [2d Dept 2005]; see also *Outing v Mathis*, 304 AD2d 670, 757 NYS2d 483 [2d Dept 2003]) or against those who have succeeded, by operation of law, to the interests of the decedent in the property that is subject to the judgment of foreclosure and sale (see *HSBC Bank USA v Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013]; *DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857, 859 NYS2d 221 [2d Dept 2008]; *Deutsche Bank Natl. Trust v Torres*, 24 Misc3d 1216[A], 2009 WL 2005599 [Suffolk County, Sup. Ct. 2009]).

Distilled from these concepts is the rule that no action may effectively be commenced against a deceased person subsequent to his or her death and prior to the appointment of a personal representative (see *Arbalez v Chun Kuei Wu*, 18 AD3d 583, 795 NYS2d 327 [2d Dept 2005]; *Laurenti v Teatom*, 210 AD2d 300, 619 NYS2d 754 [2d Dept 1994]; *Dime Sav. Bank of New York FSB v Luna*, 302 AD2d 558, 755 NYS2d 300 [2d Dept. 2003]). The death of a named defendant prior to the commencement of an action has thus been held to render the action, insofar as asserted

Nationstar Mortgage, LLC v Wright

Index No. 31224/2009

Page 4

against a deceased defendant, a legal nullity from its inception which leaves the Court without jurisdiction to grant any requested relief (*see Rivera v Bruchim*, 103 AD3d 700, 959 NYS2d 448 [2d Dept 2013]; *Wendover Fin. Serv. v Ridgeway*, 93 AD3d 1156, 940 NYS2d 391 [4th Dept 2012]; *Marte v Graber*, 58 AD3d 1, *supra*; *Deutsche Bank Natl. Trust v Torres*, 24 Misc3d 1216 [A], 2009 WL 2005599 [Suffolk County, Sup. Ct. 2009]; *cf.*, *GMAC Mtge. Corp. v Tuck*, 299 AD2d 315, 750 NYS2d 93 [2d Dept 2002]).

That the foregoing rules are applicable to mortgage foreclosure actions is clear (*see Wendover Fin. Serv. v Ridgeway*, 93 AD3d 1156, *supra*; *JP Morgan Chase Bank, N.A. v Roseberg*, 90 AD3d 713, 934 NYS2d 346 [2d Dept 2011]; *Dime Sav. Bank of NY, FSB v Luna*, 302 AD2d 558, *supra*). Due, however, to the unique nature of such actions (*see Jo Ann Homes v Dworetz*, 25 NY2d 112, 302 NYS2d 799 [1969]), courts have held that the personal representative of the estate of a deceased mortgagor, *who died intestate and against whom no deficiency judgment is sought*, is not a necessary party to a mortgage foreclosure action and that such action may be commenced or continued against the distributees of any such intestate mortgagor (*see Winter v Kram*, 3 AD2d 175, 159 NYS2d 417 [2d Dept 1957]; *see also Salamon Bros. Realty Corp. v Alvarez*, 22 AD3d 482, 802 NYS2d 705 [2d Dept 2005]). Accordingly, a foreclosing plaintiff may prosecute its claims against the distributees of a deceased mortgagor only where said mortgagor died intestate and no deficiency judgment is sought by the plaintiff in such action (*see Financial Freedom Senior Funding Corp. v Rose*, 64 AD3d 539, 883 NYS2d 546 [2d Dept 2009]; *Salamon Bros. Realty Corp. v Alvarez*, 22 AD2d 482, *supra*; *Winter v Kram*, 3 AD2d 175, *supra*). Where the deceased mortgagor died testate, or where he or she was personally liable on the mortgage note or bond and the plaintiff seeks a deficiency judgment against him or her in its mortgage foreclosure complaint, the plaintiff cannot proceed against the distributees of the deceased mortgagor, but instead, must proceed against the personal representative of the estate of the deceased mortgagor (*see Jordan v City of New York*, 23 AD3d 436, *supra*; *Countrywide Home Loans, Inc. v Keys*, 27 AD2d 247, 811 NYS2d 362 [1st Dept 2006]; *Dime Sav. Bank of NY, FSB v Luna*, 302 AD2d 558, *supra*).

It is equally well settled law that “a mortgagor who has made an absolute conveyance of all his or interest in the mortgaged premises, including his equity of redemption, is not a necessary party to a foreclosure action, *unless a deficiency judgment is sought*” (*DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857, *supra* [emphasis added]; *Federal Natl. Mtge. Assn. v Connelly*, 84 AD2d 805, 444 NYS2d 147 [2d Dept 1981]). Accordingly, where a deceased mortgagor owned the encumbered property jointly with right of survivorship in one or more other persons, such mortgagor, to the extent he or she predeceases his or her joint tenant, is not a necessary party to a foreclosure action. In those cases wherein such mortgagor was joined as a defendant to a foreclosure action, the death of such mortgagor defendant during the pendency of the action will not effect a stay and the action may be continued against the surviving property owners alone, upon the withdrawal by discontinuance or otherwise of the claims interposed against the deceased defendant (*see HSBC Bank USA v Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013]; *Waterfall Victoria Master Fund, Ltd. v Dingilian*, 92 AD3d 593, 939 NYS2d 40 [1st Dept 2012]).

It is only where the deceased mortgagor, who made a lifetime gift of the property to another, was also an obligor under the mortgage note or any guaranty thereof and a deficiency judgment against such deceased obligor/mortgagor is demanded, will the joinder of the estate representative of such obligor/mortgagor be required (*see Jordan v City of New York*, 23 AD3d 436, *supra*; *Countrywide Home Loans, Inc. v Keys*, 27 AD2d 247, *supra*; *Dime Sav. Bank of New York FSB v Luna*, 302 AD2d 558, *supra*).

Here, the plaintiff, who seeks a judgment of foreclosure and sale and a deficiency judgment against the deceased obligor/mortgagor, Faye M. Goode, failed in its complaint to allege the following facts necessary to state a claim for foreclosure and sale and deficiency judgment: 1) whether title to the subject premises at the time of her death was solely in her name or whether it devolved to one or more other persons by operation of law; 2) whether the deceased obligor/mortgagor died testate or intestate; 3) whether a personal representative of the estate of such decedent has been appointed and if so, they're names, addresses and the nature of such appointment; and 4) the names and addresses of the distributees of those known and, if some or all are unknown, a sufficiently specific and appropriate description of them for purposes of serving them by publication in a jurisdictionally proficient manner. In addition to a complaint containing such allegations, some proof by way of its verification or an affidavit by a person with knowledge of these facts or some documentary proof thereof would be required under CPLR 3215(f) to support an application for an order of reference upon default, none of which are before the court on this application. Due to these failures, the court finds that the plaintiff failed to allege sufficient facts from which the court might discern its possession of cognizable claims for foreclosure and sale and a deficiency judgment against the estate of the deceased obligor/mortgagor and that jurisdiction over the personal representative of such estate, is lacking.

Nor may the answer served by Sabrina Wright, in part in her capacity as Voluntary Administrator of the Estate of Faye M. Goode, the deceased obligor/mortgagor under the subject note and mortgage, be viewed as a waiver of the jurisdictional infirmities outlined above. First of all, the plaintiff rejected the answer and relies upon that rejection and the absence of any motion practice with respect thereto. Even if it were otherwise, the appointment of Sabrina Wright as Voluntary Administrator is insufficient to confer upon her the authority to appear herein as personal representative of the estate of the deceased obligor/mortgagor, Faye M. Goode (*see* EPTL 1-2.13; 11-3.1).

Voluntary administration of estates is governed by SCPA Article 13 and is aimed at streamlining the appointments of fiduciaries of small estates containing personal property in need of administration. A voluntary administrator may act only with respect to personalty, including certain claims belonging to the decedent, in amounts not exceeding \$30,000.00 and is thus without authority to act with respect to real property (*see* SCPA §§ 1301; 1306). Although a voluntary administrator is considered a "fiduciary" as defined in EPTL 1-2.7 and SCPA 103(2) until another is appointed (*see* SCPA § 1306), a personal representative is more narrowly defined in EPTL 1-2.7 as one to whom letters to administer the estate have issued. Since a voluntary administrator is not issued letters to administer the estate of his or her decedent, such voluntary administrator is not

Nationstar Mortgage, LLC v Wright
Index No. 31224/2009
Page 6

qualified to appear on behalf of the estate in actions except those listed in SCPA § 1306(3) (*see Graham v Henderson*, 224 FRD 59 [ND NY 2003]). This foreclosure action is not among those listed as it is “one in the nature of a proceeding in rem to appropriate the land” (*see Jo Ann Homes v Dworetz*, 25 NY2d 112, *supra*), which, if successful, will effect an extinguishment of the decedent’s ownership interests in the premises absent a timely exercise of his right of redemption. Accordingly, Sabrina Wright, in her capacity as voluntary administrator of the estate of the deceased, testate, defendant mortgagor is without authority to appear herein on behalf of such estate.

Finally, the court notes that the plaintiff failed to address, let alone establish, any entitlement to a default judgment on its second cause of action for a judicial reformation of the description of the mortgaged premises now set forth in the mortgage indenture (*see Citimortgage, Inc. v Akil*, 2015 WL 5704551 [Sup. Ct. Suffolk County 2015]).

In view of the foregoing, the instant motion (#002) by the plaintiff is denied. The proposed order appointing a referee to compute, has been marked “not signed”.

DATED: 12/4/15



THOMAS F. WHELAN, J.S.C.