

The Bank of N.Y. Mellon v Cascio

2016 NY Slip Op 31499(U)

August 9, 2016

Supreme Court, Tioga County

Docket Number: 42786

Judge: Eugene D. Faughnan

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This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 10TH day of JUNE, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWABS, Inc., Asset-Backed Certificates, Series 2005-17,

Plaintiff,

DECISION AND ORDER

-vs-

Index No. 42786
RJI No. 2016-0084-C

Lincoln J. Cascio, 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.

COUNSEL FOR PLAINTIFF:

Frenkel, Lambert, Weiss, Weisman
& Gordon, LLP
20 West Main Street
Bay Shore, NY 11706

EUGENE D. FAUGHNAN, J.S.C.

On November 25, 2005, Lincoln Cascio (“Cascio”) executed a note and mortgage relative to certain real property located in the Village of Waverly, Tioga County. Mr. Cascio passed away in 2009. The payments on the mortgage went into default, and Plaintiff commenced the instant foreclosure action in April, 2012 (hereinafter “Action #1). Apparently, Plaintiff was unaware that Mr. Cascio was deceased when Action #1 was commenced. Thereafter, Plaintiff brought a proceeding in Tioga County Surrogate Court to issue Letters of Administration to the County Public Administrator, which was granted on June 21, 2013. Plaintiff then commenced a second action on April, 2014, bearing Tioga County Index Number 44717 (hereinafter “Action #2), which is to foreclose the same mortgage. Action #2 was commenced against the Public Administrator for the Estate, as well as heirs of Mr. Cascio.

In March, 2016, Plaintiff then made the instant Motion in connection with Action #1, seeking to dismiss the Action #2 and consolidate it into Action #1. Although the Court is unaware of a specific corresponding Motion being made in Action #2, Notice of the Motion was given to the Defendants of Action #2, and in fact, at oral argument the Public Administrator did appear. Regardless of whether the Motion was made in both files, the Court determines that the Motion to consolidate must be denied.

Plaintiff fails to appreciate that Action #1 “from its inception was a nullity since it is well established that the dead cannot be sued.” *Marte v. Graber*, 58 AD3d 1 (1st Dept. 2008) (citations omitted); see *Wendover Financial Services v. Ridgeway*, 93 AD3d 1156 (4th Dept. 2012); *Rivera v. Bruchim*, 103 AD3d 700 (2nd Dept. 2013). Mr. Cascio was deceased at the time Action #1 was commenced. As such, the Court has no jurisdiction to grant the requested relief in Action #1. *Rivera, supra*; see also *Wendover, supra*. Moreover, there could be no substitution of parties since decedent was never a party to the action. *Id.* Plaintiff essentially seeks to do that by having Action #2 replace Action #1, *nunc pro tunc*. This Court is without power to grant that relief.

To the extent that Plaintiff seeks to serve the potential heirs in Action #2 by publication, the Court denies that Motion, without prejudice, and with leave to file such a Motion in Action #2. The current record before the Court does not establish that a Motion actually was made in

Action #2, since the moving papers received by the Court use the caption of Action #1. Accordingly, the Court will permit the Plaintiff to file a clear Motion in Action #2, if so desired.

Based upon the foregoing, Plaintiff's Motion to consolidate, or make any other directions in Action #1 is hereby **DENIED**.

The original, signed Decision and Order of the Court, and Plaintiff's moving papers¹ are being sent directly to the Tioga County Clerk, for filing.

This constitutes the Decision and Order of the Court.

Dated: August 9, 2016
Owego, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

¹The following Motion papers were received and reviewed by the Court, and are being filed with the County Clerk's Office.

- 1) Notice of Motion dated January 29, 2016 and affidavit of service dated March 16, 2016
- 2) Affirmation of Linda P. Manfredi, dated January 29, 2016
- 3) Affirmation of Linda P. Manfredi, dated January 29, 2016, with Exhibits A-G.

cc:

Andrea L. Klett (originals)
Tioga County Clerk
Court Annex Building
20 Court St., P.O. Box 307
Owego, NY 13827

James P. McFadden
Tioga County Treasurer, as Administrator of the Estate of Lincoln J. Cascio
56 Main Street
Room 210
Owego, NY 13827

Kristin Cascio, as heir to the Estate of Lincoln Cascio
14 Orchard Street
Waverly, NY 14892

Elizabeth Cascio, Heir to the Estate of Lincoln Cascio
14 Orchard Street
Waverly, NY 14892

Anaka Casco a/k/a Anaka Cascio, Heir to the Estate of Lincoln Cascio
14 Orchard Street
Waverly, NY 14892

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