

Aurora Bank, FSB v Cavis

2016 NY Slip Op 32519(U)

October 7, 2016

Supreme Court, Suffolk County

Docket Number: 14588/12

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

ORDERED that the defendants' s request for oral argument on this motion is considered under 22 NYCRR 202.8 and is denied; and it is further

ORDERED that those portions of the instant motion (#001) by the plaintiff for leave to file and serve a supplemental summons and amended complaint so as to add a new party defendant is considered under CPLR 305, 3025 and 1003 and is denied; and it is further

ORDERED that those portions of the instant motion (#001) wherein the plaintiff seeks to amend the caption to replace the original named plaintiff for its purported assignee is considered under CPLR 1018 and is denied; and it is further

ORDERED that those portions of the instant motion (#001) wherein the plaintiff seeks leave to add Mary Cavaris and Peter Cavaris as party defendants in their capacities as co-executors of the estate of Costas Cavaris, a pre-deceased co-borrower and co-mortgagor, is considered under CPLR 1003 and is denied; and it is further

ORDERED that the remaining portions of the instant motion in which the plaintiff seeks leave to drop as party defendants, the unknown defendants, is denied.

In December of 1982, defendant Mary Cavaris and her husband, Costas Cavaris, took title to the premises at issue in this mortgage foreclosure action as tenants by the entirety. On August 12, 2003, they conveyed title to themselves as tenants in common and in December of 2007, they obtained a mortgaged loan in the amount of \$315,000.00 from Lehman Brothers Bank, FSB. The note and mortgage dated December 21, 2007 was executed by Mary Cavaris and by Argyro Cavaris, as attorney in fact for Costas Cavaris.

Costas Cavaris died testate in February of 2008 and Mary Cavaris and Peter Cavaris were appointed co-executors of the estate of Costas Cavaris and co-trustees of a testamentary trust under a decree of probate issued by the Surrogate of Suffolk County on November 10, 2008. In their capacities as co-executors, Mary Cavaris and Peter Cavaris conveyed the subject premises to themselves by a deed dated May 20, 2010.

Notwithstanding the status of Mary Cavaris as a co-borrower and mortgagor under the loan documents and the appointments of Mary Cavaris and Peter Cavaris as co-executors of the estate of the deceased borrower/mortgagor well before of the commencement of this action in May of 2012, they were neither named as party defendants in such capacities nor joined as such in a jurisdictionally proficient manner. Instead, they were joined in their capacities as trustees of a testamentary trust created under the probated will of Costas Cavaris. Nevertheless, Mary and Peter Cavaris and the other known defendants named in the caption appeared herein by answer in which no jurisdictional defenses were asserted.

By the instant motion (#001), the plaintiff seeks leave to serve a supplemental summons and amended complaint so as to add the State of New York, as opposed to its Division of Taxation and Finance, to this action as a party defendant due to a purported non-payment of estate taxes allegedly due from the estate of the deceased co-borrower and mortgagor, Costas Cavaris. In addition, the plaintiff seeks to amend the caption to add Mary Cavaris and Peter Cavaris as party defendants, solely in their capacities as co-executors of the estate of Costas Cavaris. For the reasons stated, the motion is denied without prejudice.

To join a person or entity not named or joined in an action as a party defendant, a plaintiff must comply with the provisions of CPLR 1003 and effect the jurisdictional joinder of such person or entity by the filing and service of supplemental summons and amended or supplemental complaint (*see* CPLR 305:3012[a]). The supplemental summons must indicate the pleading to which the new party defendant must respond and the amended or supplemental complaint must list the new party as a defendant in the action and assert one or more legally sufficient claims against such defendant (*see* CPLR 305:3025). Failure to comply with these statutory mandates renders the court without subject matter jurisdiction (*see Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 921 NYS2d 619 [2011]; *O'Brien v Contreras*, 126 AD3d 958, 6 NYS3d 273 [2d Dept 2015]; *Fox v City of Utica*, 133 AD3d 1229, 18 NYS3d 918 [4th Dept 2015]; *Matter of Miller v Waters*, 51 AD3d 113, 853 NYS2d 183 [3d Dept 2008]; *Benn v Losquadro Ice Co., Inc.*, 65 AD3d 655, 886 NYS2d 32 [2d Dept 2009]).

The standard for determining a party's right for leave to amend its pleading is simply whether the amendment is palpably improper or patently insufficient as a matter of law (*see HSBC Bank v Picarelli*, 110 AD3d 1031, 974 NYS2d 90 [2d Dept 2013]; *Carroll v Motola*, 109 AD3d 629, 970 NYS2d 820 [2d Dept 2013]; *Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). If it is neither, leave to amend should be granted unless it is apparent that surprise or prejudice will directly result from the amendment (*see Maldonado v Newport Gardens, Inc.*, 91AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Degregorio v American Mfrs. Mut. Ins. Co.*, 90 AD3d 694, 934 NYS2d 457 [2d Dept 2011]; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676 [2d Dept 2007]).

Here, the proposed supplemental summons which targets "New York State" as the only new defendant does not identify the pleading to which this proposed new party defendant must respond and the amended complaint fails to give notice of the transactions and occurrence which form the basis of the plaintiff's claims against the newly proposed municipal defendant. Those portions of the instant motion wherein the plaintiff seeks to add New York State as a party defendant is denied, but such denial is without prejudice to a new application upon proper papers.

The plaintiff's request to amend the caption by removing the originally named plaintiff and replacing it with its purported assignee of the mortgage is denied. The true nature of this application

is the substitution of a successor-in-interest and is governed by the provisions of CPLR 1018, which are permissive, rather than mandatory in nature.

It is well settled that a plaintiff may continue to prosecute an action notwithstanding its transfer by assignment or otherwise of its interest in the subject matter of the action as the provisions of CPLR 1018, which govern substitution upon transfer of interests, are permissive rather than mandatory (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 935 NYS2d 664 [3d Dept 2011]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *Tarr v Delsener*, 70 AD3d 774, 895 NYS2d 168 [2d Dept 2010]; *Buywise Holding, LLC v Harris*, 31 AD3d 681, 821 NYS2d 213 [2d Dept 2006]). Accordingly, where a note and mortgage “are validly assigned to a third party subsequent to the commencement of a foreclosure action”, the assignee can continue the action in the name of the original plaintiff even in the absence of a formal substitution (*see U.S. Bank Natl. Ass’n v Akande*, 136 AD3d 887, 626 NYS3d 164 [2d Dept 2106]; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760, 776 NYS2d 908 [2d Dept 2004]), or it can undertake the steps necessary to obtain its formal substitution (*see Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]; *cf. Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 12 NYS3d 118 [2d Dept 2015]).

It is equally clear that a substitution of a plaintiff’s transferee may not be accomplished by a mere caption amendment because a non-party may not be substituted nor otherwise made a party plaintiff to a pending action without its submission to the jurisdiction of the court by its consent and declared willingness to take up the prosecution of the claims of its predecessor-in-interest. This result is rooted in notions of due process and legal maxims that prohibit litigation by compulsion and are reflected in CPLR 1001(a) which provides, among other things, that an unwilling, indispensable party plaintiff shall be joined as a defendant to the action.

Here, the application is made by newly substituted counsel for the original plaintiff and it is not supported by any allegations that the plaintiff’s purported assignee consents to this substitution and the jurisdiction of the court and is willing to take up the prosecution of the cause or causes of action set forth in the complaint. That leaves the court without any indication that Nationstar Mortgage, LLC has knowledge of and consents to the application, that it willingly appears in this action by counsel of its choosing and thereby submits to the jurisdiction of the court. Moreover, the relied upon assignment of the subject mortgage does not contain an assignment of the subject mortgage note. These circumstances warrant a denial of the plaintiff’s application for the substitution of its purported assignee as the plaintiff in this action. Such denial is without prejudice to a new application upon proper papers

The remaining portions of the instant motion are also denied. The attempt to add as party defendants, Mary Caviris and Peter Caviris, in their capacities as co-executors of the estate of the

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deceased co-borrower and mortgagor, Costas Cavaris, by a mere caption amendment is interdicted by long standing statutory and case authorities which require that the addition of persons as party defendants be accomplished only in conformity with the provisions of CPLR 305 and 3025 and that the supplemental summons and amended or supplemental complaint targeting the proposed new party defendants give notice of the transactions and occurrences that form one or more legally sufficient claims against them. For these reasons, and in view of the opposition interposed by the defendants who appeared herein by answer, the court denies the plaintiff's procedurally infirm attempt to person not previously joined in the capacities now sought, as party defendants by a mere caption amendment. Such denial is, however, without prejudice to a new application for the same relief upon proper papers. The court further denies, without prejudice, the plaintiff's application to drop as party defendants, the unknown defendants listed in the caption.

The defendants' demands for further settlement conferences is also denied.

DATED: 10/7/16


THOMAS F. WHELAN, J.S.C.