

JPMorgan Chase Bank, N.A. v Nicolau
2017 NY Slip Op 30882(U)
May 4, 2017
Supreme Court, Queens County
Docket Number: 3321/13
Judge: Allan B. Weiss
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

HON. ALLAN B. WEISS

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

-against-

COSTAS NICOLAU, ANTONIOS TZIVAS, ERIC
BRADLEY, CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION PARKING VIOLATIONS BUREAU,
ALOISIO G. MACHADO, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, MIDLAND
FUNDING, LLC, AND

"JOHN DOE" and "JANE DOE 1-7", the last seven names
being fictitious and unknown to plaintiff, the persons
or parties intended being the tenants, occupants, persons
or corporations, if any, having or claiming an interest, in or
lien upon the premises described in the complaint,

Defendants.

Index No: 3321/13

Motion Date: 1/9/17

Motion Seq. No.: 4

Plaintiff commenced this action on February 20, 2013 to foreclose the mortgage dated October 15, 2007 given to it by defendant Costas Nicolau, encumbering the real property known as 21-29 23rd St., Astoria, New York to secure repayment of a note evidencing a loan in the original principal amount of \$720,000.00. Defendant Antonio Tzivas was named as a party defendant insofar as on the date of commencement, he was the owner of the subject property by means of a deed dated November 7, 2008 and recorded on

November 18, 2008. Plaintiff alleged that defendant Nicolau defaulted in payment of the monthly mortgage installment due on May 1, 2008, and thereafter.

Defendant Antonio Tzivas died on July 30, 2014 (after commencement of the action) following his joinder as a party defendant. The death of defendant Antonio Tzivas stayed the action until the substitution of the personal representative of the decedent's estate (*see* CPLR 1021). Notwithstanding that no substitution had occurred, plaintiff moved (motion Seq. No. 1) on January 15, 2015 for, among other things, the appointment of a referee and a default judgment against the non-appearing defendants. In response, Eleftheria Tzivas, the widow of Antonio Tzivas, cross moved to vacate her husband's default in answering. By order dated June 12, 2015, the motion by plaintiff was denied without prejudice to renewal upon a determination as to whether Eleftheria Tzivas, or any other person, had an interest in the property, and was a necessary party defendant who should be joined in the action. The cross motion was denied.

In July 2015, plaintiff moved (mot. Seq. No. 2) for leave to appoint a temporary receiver. By order dated September 4, 2015, the motion was denied. The court determined that the stay of the action continued inasmuch there had been no substitution of the personal representative for the estate of Antonios Tzivas for defendant Antonios Tzivas,

Meanwhile, plaintiff moved (mot. Seq. No. 3) on August 12, 2015 for leave to renew its prior motion for an order of reference. By order dated September 25, 2015, the motion (mot. Seq. No. 3) was denied because the action was (still) stayed due to the death of

defendant Antonios Tzivas, who had been the sole owner of the subject property at the time of his death, and there had been no substitution (*see* CPLR 1015).

Plaintiff moves (1) pursuant to CPLR 2221(e) for leave to renew its prior motion for an order of reference, and upon renewal, for leave to enter judgment against defendants, leave to appoint a referee to ascertain and compute the amount due plaintiff, and to examine and report whether the mortgaged premises can be sold in one parcel, (2) for leave to substitute (a) Wilmington Savings Fund Society, FSB, as Trustee for Stanwich Mortgage Loan Trust, Series 2014-3 (Wilmington), in place and stead of plaintiff, (b) Eleftheria Tzivas, as Administrator to the Estate of Antonios Tzivas, in place and stead of defendant Antonios Tzivas, (c) RAB Performance Recoveries, LLC in place and stead of “John Doe #1,” (d) Alex Columbus in place and stead of “John Doe #2,” and (e) Sophia Columbus in place and stead of “John Doe #3,” and to amend the caption accordingly, and (3) for leave to amend the caption deleting reference to defendants “John Doe and Jane Doe #4 through #7.” Defendant Eleftheria Tzivas, as the Administratrix for the Estate of Antonios Tzivas, cross moves for leave to vacate the default in answering of her decedent, Antonios Tzivas, for leave to serve a late answer as proposed, and conduct discovery.

After the making of the instant motion on August 31, 2016, and prior to its final submission on January 9, 2017, plaintiff separately moved, by notice of motion dated September 6, 2016 (mot. Seq. No. 5), to renew the prior motion (mot. Seq. No. 2) for leave to appoint a temporary receiver. By order dated October 19, 2016, the motion (mot. Seq.

No. 5) for leave to renew the prior motion to appoint a temporary receiver was denied because it was made before substitution and hence, at a time when the stay of the action was in effect due to Antonios's death. However, because the court was apprised that Eleftheria Tzivas, the widow of the decedent, had been issued letters of administration dated June 3, 2016, it, sua sponte, directed that Eleftheria Tzivas, in her representative capacity, be substituted in place and stead of defendant Antonios Tzivas, and the caption be amended accordingly. The court noted that joinder of Eleftheria Tzivas as a party defendant in such capacity, required service of process upon her in accordance with Article 3 of the CPLR.

While the instant motion and cross motion were sub judice, plaintiff moved, by separate notice of motion dated February 13, 2017 (mot. Seq. No. 6), for leave to file opposition papers, as proposed, to the instant cross motion. By order dated March 22, 2017, the motion (mot. Seq. No. 6) was granted without opposition and plaintiff's opposition papers, as proposed, were deemed served. The instant motion and cross motion were held in abeyance, so as to provide defendant Eleftheria Tzivas, as Administratrix of the Estate of Antonios Tzivas, with an opportunity to serve a reply papers to the instant cross motion on or before April 12, 2017.

No reply papers in relation to the instant cross motion have been received by the court. In determining the instant cross motion, the court has considered the opposition papers of plaintiff to the cross motion (*see* order dated March 22, 2017).

That branch of the motion by plaintiff for leave to substitute Eleftheria Tzivas, as Administrator to the Estate of Antonios Tzivas, in place and stead of defendant Antonios Tzivas, and amend the caption accordingly, is denied as moot (*see* order dated October 19, 2016).

At the time of the making of the instant motion by plaintiff, defendant Eleftheria Tzivas, as the Administratrix of the Estate of Antonios Tzivas, had not yet been substituted as a party defendant for defendant Antonios Tzivas. Ordinarily, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a legal representative for the decedent pursuant to CPLR 1015(a) (*see* CPLR 1015, 1021; *NYCTL 2004-A Trust v Archer*, 131 AD3d 1213, 1214 [2d Dept 2015]). However, the jurisdictional issue can be waived under special circumstances, where there has been active participation in the litigation by the personal representative who would have been substituted for the decedent under CPLR 1021 (*see Durrant v Kelly*, 186 AD2d 237 [2d Dept 1992]; *see also Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1422 [4th Dept 2011]; *Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; *Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820-821 [1st Dept 1985]).

In this instance, defendant Eleftheria Tzivas, in her representative capacity, was substituted for defendant Antonios Tzivas before she made the instant cross motion, and prior to the final submission of the motion and cross motion now under consideration. Although no proof has been offered that defendant Eleftheria Tzivas, as the personal

representative of the estate of Antonios Tzivas, has been served with process,¹ defendant Eleftheria Tzivas raises no jurisdictional or procedural objection to consideration of plaintiff's motion based upon its having been made before the substitution, or its having been served upon counsel purportedly representing defendant Antonios Tzivas rather than herself. Defendant Eleftheria Tzivas instead addresses the merits of plaintiff's motion in her papers submitted in opposition thereto and in support of her cross motion, and therefore, has waived any objection that the motion by plaintiff was made before the substitution or in violation of the stay. Furthermore, defendant Eleftheria Tzivas has subjected herself to the court's jurisdiction by seeking affirmative relief by means of her cross motion. Under such circumstances, the court shall address the motion by plaintiff on its merits, notwithstanding it was made prior to the formal substitution of the estate as a party defendant (*see Kilmer v Moseman*, 124 AD3d 1195 [3d Dept]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985], *amended* 112 AD2d 825 [1985]; *see McDonough v Bonnie Heights Realty Corp.*, 249 AD2d 520, 521 [2d Dept 1998]; *cf. Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1422, 1423–1424 [4th Dept 2011]). The court also shall consider the cross motion by defendant Eleftheria Tzivas, as Administratrix of the Estate of Antonios Tzivas on its merits.

With respect to the cross motion by defendant Eleftheria Tzivas, defendant Eleftheria Tzivas makes no claim that her decedent was not properly served with process.

1

A review of the records on file with the County Clerk does not reveal any affidavit of service of process upon defendant Eleftheria Tzivas, as Administratrix of the Estate of Antonios Tzivas.

Rather, she seeks to vacate her decedent's default in answering based upon excusable default (*see* CPLR 5015[a][1]), and for leave to serve and file her proposed answer, with affirmative defenses based upon lack of subject matter jurisdiction, standing and capacity, failure to state a cause of action, that there was no agreement or contract between plaintiff and her decedent, and that the alleged damages sustained by plaintiff were due to the culpable conduct of parties other than her decedent, and over whom her decedent had no control. She also seeks to interpose counterclaims.

Defendant Eleftheria Tzivas asserts that after her decedent was served with process, he immediately contacted an attorney who had previously facilitated her decedent's purchase of the subject property. According to defendant Eleftheria Tzivas, the attorney advised her decedent that because Costas Nicolau was Antonios Tzivas's "agent" regarding the property, Nicolau would answer or otherwise respond to the complaint, which thereby would preserve her decedent's rights, and her decedent did not need to "independently" answer or otherwise respond to the complaint. Defendant Eleftheria Tzivas asserts that in reliance upon such legal advice, her decedent did not answer or otherwise respond to the complaint. Defendant Eleftheria Tzivas states that when she later learned that defendant Nicolau and her decedent had defaulted in answering, she retained counsel, who filed a notice of appearance on February 9, 2015, purportedly on behalf of her decedent.

“ ‘A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable

excuse for the default and the existence of a potentially meritorious defense’ ” (*Emigrant Bank v Wiseman*, 127 AD3d 1013, 1014 [2d Dept 2015], quoting *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 634 [2d Dept 2014]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (*see BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790 [2d Dept 2015]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890 [2d Dept 2010]; *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904 [2d Dept 2008]).

Here, the assertion by defendant Eleftheria Tzivas that her decedent consulted with an attorney, who advised her decedent that he did not need to answer the complaint, is unsubstantiated. Furthermore, her claim that her decedent’s attorney made an erroneous assumption that defendant Costas Nicolau would serve a joint answer on behalf of Nicolau and Antonios Tzivas, or regarding her decedent’s need to answer the complaint does not constitute a valid excuse (*see Bank of New York Mellon v Colucci*, 138 AD3d 1047, 1048 [2d Dept 2016]; *White v Daimler Chrysler Corp.*, 44 AD3d 651, 652 [2d Dept 2007]). At most, the purported advice given to her decedent, and her decedent’s decision to follow it, constitutes a “misguided strategy,” not law office failure (*see Bank of New York Mellon v Colucci*, 138 AD3d at 1048; *OCE Bus. Sys. v Sopher & Co.*, 186 AD2d 464, 464 [1st Dept 1992]).

Because defendant Eleftheria Tzivas has failed to establish a reasonable excuse for the default by her decedent in answering, it is unnecessary to determine whether

she has demonstrated a potentially meritorious defense to the action (*see Bank of New York Mellon v Colucci*, 138 AD3d at 1048; *Morgan Stanley Mtge. Loan Trust 2006–17XS v Waldman*, 131 AD3d 1140, 1141 [2d Dept 2015]; *SDF8 CBK, LLC v 689 St. Marks Ave., Inc.*, 131 AD3d 1037, 1038 [2d Dept 2015]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 648 [2d Dept 2014]). In any event, the court has subject matter jurisdiction over mortgage foreclosure actions (*see Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006]). To the extent defendant Eleftheria Tzivas claims plaintiff lacked standing to bring the action, lack of standing is not a defect that deprives a court of subject matter jurisdiction (*see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). Furthermore, since defendant Anthony Tzivas defaulted in answering the complaint and defendant Eleftheria Tzivas has failed to demonstrate any grounds for vacating her decedent's default, she is precluded from asserting plaintiff's purported lack of standing as a defense (*see US Bank Nat. Assn. v Dorestant*, 131 AD3d 467 [2d Dept 2015]). Consequently, it is unnecessary for plaintiff to demonstrate that it had standing to commence this action in order to establish its entitlement to a default judgment (*see id.*; *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v. Hussain*, 78 AD3d 989, 990 [2d Dept 2010]).

To the extent defendant Eleftheria Tzivas claims plaintiff lacked capacity to sue, in doing so, defendant Eleftheria Tzivas does not allege plaintiff lacked power to appear

and bring its claim to the court (*see e.g. Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]), but rather that it lacked an interest in the mortgage sufficient to serve as a predicate for determining whether plaintiff is entitled to foreclosure (*see Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239).

To the extent defendant Eleftheria Tzivas claims plaintiff and her decedent had no contractual relationship, it is undisputed that the subject mortgage appeared as of record when her decedent obtained title to the property. Defendant Eleftheria Tzivas makes no claim that the subject mortgage was satisfied at the time of the transfer of title into her decedent, and therefore, the ownership interest of her decedent was subject to the mortgage lien sought to be foreclosed herein (*see Real Property Law § 291*).

The proposed affirmative defense based upon the allegation that the damages purportedly sustained by plaintiff were due to the culpable conduct of other parties is patently devoid of merit. The concept of culpable conduct is related to tort. The claim asserted by plaintiff herein relates to a default under a mortgage, as opposed to tortious conduct and thus, any affirmative defense based upon a notion of culpable conduct is unavailable herein (*see CPLR 1401; Pilweski v Solymosy*, 266 AD2d 83 [1st Dept 1999]; *Nastro Contracting Inc. v Agusta*, 217 AD2d 874 [3d Dept 1995]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [3d Dept 1991]; *Castleton Holding Corp. v Forde*, 15 Misc 3d 1111[A] [Sup Ct, Kings County 2007]).

Under such circumstances, defendant Eleftheria Tzivas has failed to demonstrate a potentially meritorious defense to the action.

The cross motion by defendant Eleftheria Tzivas is denied.

With respect to the motion by plaintiff pursuant to CPLR 1018 to substitute Wilmington as party plaintiff and pursuant to CPLR 3025 for leave to amend the caption accordingly, the determination to substitute a party pursuant to CPLR 1018 is within the court's discretion (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1174 [2d Dept 2012]; *NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564 [2d Dept 2005]). Plaintiff assigned its interest in the subject mortgage, by assignment of mortgage dated September 18, 2013 to Ventures Trust 2013-I-H-R, that Ventures Trust 2013-I-H-R assigned its interest in the mortgage to OHA Newbury Ventures, L.P. by assignment of mortgage dated May 7, 2014, and that OHA Newbury Ventures, L.P. assigned its interest in the mortgage to Wilmington. According to Elizabeth A. Ostermann, a vice president for Carrington Mortgage Services, LLC, the servicer and attorney-in-fact for Wilmington, Wilmington purchased the note on May 22, 2014, and the note was delivered to Wilmington by MCM Capital Partners on May 22, 2014.

The assignment of mortgage dated September 18, 2013 transferred only the mortgage and, thus, is inadequate to demonstrate that the note also was assigned to Ventures Trust 2013-I-H-R at that time (*see Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704 [2d Dept 2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 666 [2d Dept 2015]; *Wells*

Fargo Bank, NA v Burke, 125 AD3d 765, 767 [2d Dept 2015]; *US Bank N.A. v Faruque*, 120 AD3d 575, 577 [2d Dept 2014]). The copy of the note annexed to the motion papers and which was annexed to the complaint upon its filing, is made payable to plaintiff but does not bear any special or blank endorsement thereon. Plaintiff has failed to present sufficient evidence that it transferred its interest in the note to Wilmington, and therefore that Wilmington, the party sought to be substituted, is the real party plaintiff in interest (*see Aurora Loans Services, LLC v Mandel*, 148 AD3d 965 [2d Dept 2017]; *Aurora Loan Services, LLC v Lopa*, 130 AD3d 952 [2d Dept 2015]). Under such circumstances, that branch of the motion by plaintiff to substitute Wilmington as the party plaintiff, and amend the caption accordingly is denied.²

The branch of the motion by plaintiff to substitute RAB Performance Recoveries, LLC in place and stead of “John Doe #1,” Alex Columbus in place and stead of “John Doe #2,” Sophia Columbus in place and stead of “John Doe #3,” and amend the caption accordingly, and for leave to amend the caption deleting reference to defendants “John Doe and Jane Doe #4 through #7” is granted. Plaintiff has determined that defendants “John Doe and Jane Doe #4 through #7” are unnecessary party defendants.

That branch of the motion by plaintiff for leave to renew its prior motion for an order of reference and leave to enter a default judgment against defendants is granted, and

²

Pursuant to CPLR 1018, an action may be continued by the original parties unless the court directs the person to whom the interest is transferred to be substituted in the action.

upon renewal, the branches of the motion for leave to appoint a referee to ascertain and compute the amount due plaintiff, and to examine and report whether the mortgaged premises can be sold in one parcel, and for leave to enter a default judgment against defendants are granted. Plaintiff has demonstrated defendants failed to appear or answer the complaint within the time allowed. In addition, it has offered a copy of the mortgage and note, an affirmation of regularity, and the affidavit of Ms. Ostermann, setting forth the facts establishing the claim, and evidence of the mortgagor's default (*see Bank of New York v Alderazi*, 99 AD3d 837 [2d Dept 2012]; *Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823, 824 [2d Dept 2011]; RPAPL 1321).

Settle order.

Dated: May 4, 2017

J.S.C.