

Wells Fargo Bank, NA v Dreyfuss

2017 NY Slip Op 33555(U)

April 7, 2017

Supreme Court, Bronx County

Docket Number: Index No. 380973/2009

Judge: Kenneth L. Thompson Jr.

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This opinion is uncorrected and not selected for official publication.

*Motion Granted
Foreclosure Order
Vacated*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

Wells Fargo Bank, NA.,

Index No: 380973/2009

Plaintiff,

-against-

DECISION AND ORDER

Alyssa Dreyfuss, Heir to the Estate of Joseph N. Genovese; Deborah Genovese, Co-Executrix of the Estate of Joseph N. Genovese and Heir to the Estate of Joseph N. Genovese; Joseph N. Genovese, Jr., Heir to the Estate of Joseph N. Genovese; New York City Environmental Control Board; New York City Transit Adjudication Bureau; People of the State of New York; United States of America acting through the IRS,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants.

_____ X

The following papers numbered 1 to 3 read on this to reargue

No	On Calendar of December 19, 2016	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		1
Answering Affidavit and Exhibits-----		2
Replying Affidavit and Exhibits-----		3
Affidavit-----		
Pleadings -- Exhibit-----		
Memorandum of Law-----		
Stipulation -- Referee's Report --Minutes-----		
Filed papers-----		

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Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Estate of Joseph N. Genovese, (Genovese), moves pursuant to CPLR 2221 to reargue the Estate's prior motion to vacate the Judgment of Foreclosure and Sale and dismiss the complaint pursuant to CPLR 5015(a)(4), for lack of personal jurisdiction.

This action was commenced on May 14, 2009, after the death of Joseph N. Genovese. The action was commenced against three heirs to the estate, defendants, Alyssa Dreyfuss, Deborah Genovese and Joseph Genovese, Jr., as heirs to the estate. Deborah Genovese and Ginger Rogers Behner were co-executors in

Letters Testamentary dated December 2, 2009. While Deborah Genovese was an original defendant, she was named and served with process as an heir to the estate. Deborah Genovese was served with process as an heir on May 23, 2009, over five months before she represented the estate as a co-executor.

“[A] plaintiff is unable to commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate” (*Laurenti v Teatom*, 210 AD2d 300, 301 [1994]; see *100 W. 72nd St. Assoc. v Murphy*, 144 Misc 2d 1036, 1040 [1989]; *Stephens v Victory Mem. Hosp.*, 142 Misc 2d 61, 65-66 [1988]; 21A Carmody-Wait 2d, NY Prac § 129:24, at 276; 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 210.04). Here, it is undisputed that no personal representative had been appointed for the decedent's estate at the time that the plaintiff attempted to commence this action to foreclose on the mortgage on the decedent's property.

Dime Sav. Bank of N.Y. FSB v. Luna, 302 A.D.2d 558 [2nd Dept 2003]).

The same flawed premature service of process that was employed in *Luna* occurred in the action at bar rendering this Court without jurisdiction in this action, as proper service of process was never made.

Accordingly, defendant's motion is granted and the Judgment of Foreclosure and Sale is hereby vacated and the complaint dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 4/7/2017


KENNETH L. THOMPSON JR. J.S.C.

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