

HSBC Bank, USA, N.A. v Parente

2019 NY Slip Op 33904(U)

July 18, 2019

Supreme Court, Albany County

Docket Number: 904265-17

Judge: Margaret T. Walsh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

HSBC BANK, USA, N.A., AS TRUSTEE ON BEHALF OF
ACE SECURITIES CORP. HOME EQUITY LOAN TRUST
AND FOR THE REGISTERED HOLDERS OF ACE
SECURITIES CORP. HOME EQUITY LOAN TRUST,
SERIES 2005-SD3, ASSET BACKED PASS-THROUGH
CERTIFICATES,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 904265-17

MICHAEL A. PARENTE, ROBIN M. PARENTE,
RESIDENTIAL MONEY CENTERS, INC.,
"JOHN DOE #1" through "JOHN DOE #12,"
the last twelve 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,

Assigned Justice:
Hon. Margaret Walsh, S.C.J.

Defendants.

ROBIN M. PARENTE,

Third-Party Plaintiff,

-against-

MICHAEL A. PARENTE,

Third-Party Defendant.

Appearances:

Jackee Missick, Esq.
Locke Lord LLP
Attorneys for Plaintiff
200 Vesey Street, 20th Floor
New York, New York 10281

Wayne A. Smith, Esq.
Smith Hoke, PLLC
Attorneys for Defendant Robin M. Parente
16 Wade Road
Latham, New York 12110

WALSH, J.:

By notice of motion dated January 30, 2019 and originally returnable on February 21, 2019, the defendant Robin M. Parente, moves for an order dismissing the plaintiff HSBC Bank USA, N.A.'s action as abandoned pursuant to CPLR §3216. By stipulation the return date was thereafter adjourned to March 13, 2019. Counsel for Plaintiff filed an affirmation in opposition on March 24, 2019, requesting denial of the motion. Counsel on behalf of Ms. Parente filed a *Reply Memorandum* on March 27, 2019. The Court, by letter dated March 29, 2019, requested additional information including a copy of the death certificate for Mr. Parente. Ms. Parente's attorney responded by letter dated April 19, 2019. The Court makes the following determination.

Background

This action to foreclose a mortgage was commenced with the filing of a summons and complaint on July 6, 2017 via the NYSECF system. According to the complaint, the defendants Michael A. Parente and Robin M. Parente owned a residence together in Watervliet, Albany County (hereinafter "the property"). On or about June 11, 1998, the Parentes signed and delivered to Residential Money Centers, Inc. a note and mortgage on the property securing the loan of approximately \$73,600.00. The complaint alleges that the mortgage thereafter "was transferred to the Plaintiff via an Assignment of Mortgage, thereby memorializing delivery of the Subject Note" (*Complaint*, ¶11). On or about December 19, 2011, the Parentes allegedly failed to pay and cure their default. The Plaintiff alleges that it is now owed the principal sum of \$89,621.56 plus interest, taxes, and other costs and assessments. In a second cause of action, the Plaintiff alleges that the note was indorsed to it by Residential Money Centers, Inc. but that the assignment of mortgage was lost. The Plaintiff therefore also seeks an order directing the Albany County Clerk to record an order reflecting an assignment of mortgage pursuant to article 15 of the Real Property Actions and Proceedings Law (RPAPL).

On August 24, 2017, counsel for Robin M. Parente filed a verified answer and cross-claims with third party summons against Michael A. Parente. In her answer, Ms. Parente denied the material allegations made by the Plaintiff and raised a number of affirmative defenses to the foreclosure action including standing and lack of privity. Additionally, Ms. Parente asserted three cross-claims against Mr. Parente, including breach of contract arising out of a separation agreement dated January 17, 2000 wherein he agreed to pay the mortgage debt. Ms. Parente seeks dismissal of the Plaintiff's complaint and judgment granting her exclusive possession of the property for the purpose of listing it for sale, together with an award of fees, costs and expenses pursuant to the terms of the separation agreement.

The matter proceeded briefly through the foreclosure conference part but was released on condition that a motion be filed on or before April 6, 2018.

No motion was filed by the April deadline. Months later, a consent to change attorney was filed on November 13, 2018 indicating new counsel for the Plaintiff. On January 17, 2019, new counsel for the Plaintiff moved for, *inter alia*, default judgment against non-answering or non-appearing parties and for an order of reference. One week later, by letter dated January 24, 2019, the Plaintiff voluntarily withdrew its motion and indicated that it would instead move for summary judgment.

On January 30, 2019, Ms. Parente through counsel moved for an order dismissing the action pursuant to CPLR §3216. According to the moving papers, on October 2, 2018, a demand to resume prosecution was served on the Plaintiff via certified mail but no further action was taken within ninety days of the demand, warranting dismissal of the proceedings (*Smith Aff.*, ¶¶10-12; Exh. B). The supporting attorney affirmation further alleges, among other things, that Mr. Parente passed away during the pendency of the action but does not set forth a date of death (*Smith Aff.*, ¶7).¹

¹It appears that this was the first time the Court was made aware of Mr. Parente's death.

Thereafter, a second substitution of counsel was filed indicating another new attorney for the Plaintiff. The Plaintiff opposed the instant motion; additionally, counsel requests an extension of time to file a note of issue, although no cross-motion is before the Court. That Mr. Parente is now deceased was not controverted in the Plaintiff's opposition.

By letter dated March 29, 2019, the Court requested from Ms. Parente's attorney a copy of the death certificate for Mr. Parente as well as a copy of the current deed. On April 19, 2019, counsel indicated by letter that he was not in possession of the death certificate; however, he did provide his client's affidavit regarding additional circumstances concerning the property pursuant to the parties' separation agreement.

In the absence of any information concerning Mr. Parente's date of death, the Court undertook an online search of local obituaries. Such search yielded an obituary for Mr. Parente in the *Albany Times Union*, showing a date of death of May 18, 2018. The Court proposes to take judicial notice of Mr. Parente's date of death of May 18, 2018 as stated in the obituary, a copy of which is annexed hereto as appendix 1 (see CPLR 4511; *Sleasman v. Sherwood*, 212 AD2d 868, 870 [3d Dept. 1995][trial court retains discretion to take judicial notice of a fact]). The parties are granted leave to move to renew and/or reargue in the event the date of death is erroneous.

Discussion

The demand to resume prosecution served upon the Plaintiff by counsel for Ms. Parente was, in effect, a nullity. This is because, pursuant to CPLR §1015(a), upon the death of a party, the proceedings are automatically stayed pending the substitution of a legal representative, and the court is divested of jurisdiction to act (*Aurora Bank FSB v. Albright*, 137 AD3d 1177, 1178 [2d Dept. 2016]; *Anderson v. Gilliland*, 245 AD2d 654, 655 [3d Dept. 1997][“upon the death of a party, all proceedings are automatically stayed”]). Here, Mr. Parente died on May 18, 2018, which effectively

automatically stayed the proceedings from that point forward. Moreover, even assuming arguendo that the demand was proper, the Court is unable to render any determination until a substitution for Mr. Parente's estate is made (*Aurora Bank FSB v. Albright*, 137 AD3d at 1178; *American Airlines Fed. Credit Union v. Costello*, 161 AD3d 819, 820 [2d Dept. 2018]; *NYCTL 2004-A Trust v. Archer*, 131 AD3d 1213, 1214 [2d Dept. 2015]; *see also Reed v. Grossi*, 59 AD3d 509, 511-512 [2d Dept. 2009]).

"[W]here a party's demise does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" (*U.S. Bank Natl. Assn. v. Esses*, 132 AD3d 847, 848 [2d Dept. 2015]). "In the context of a mortgage foreclosure action, where a deceased defendant made an absolute conveyance of all his or her interest in the mortgaged premises to another defendant, including his or her equity of redemption, and the plaintiff either discontinued the action as against the deceased defendant or elected not to seek a deficiency judgment against the deceased defendant's estate, then the deceased defendant is not a necessary party to the action" (*id.*, citing *HSBC Bank USA v. Ungar Family Realty Corp.*, 111 AD3d 673 [2013] and *Bank of N.Y. Mellon Trust Co. v. Ungar Family Realty Corp.*, 111 AD3d 657, 658-659 [2d Dept. 2013]). At this juncture, it is not possible to determine whether Mr. Parente's estate is not a necessary party to render the automatic stay inapplicable, where, among other things it appears that the Plaintiff has not discontinued its claim against Mr. Parente for a deficiency judgment and co-defendant Ms. Parente has not discontinued any of her cross-claims against him.

Accordingly, it is hereby

ORDERED, that the *Motion to Dismiss* filed by Defendant and Third-Party Plaintiff Robin M. Parente is DENIED; and it is further

ORDERED, that the request by the Plaintiff HSBC Bank, USA, N.A., as Trustee, for an extension of time to file a note of issue is DENIED; and it is further

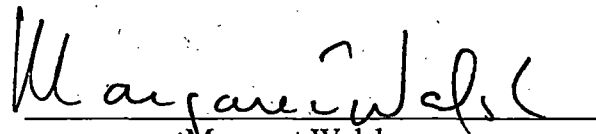
ORDERED, that all proceedings in this action are stayed pending substitution within a reasonable period of time (CPLR §1021) of an appropriate personal representative appointed for decedent Michael A. Parente's estate.

The original *Decision and Order* and any other original papers submitted on this motion are being delivered by the Court to the Albany County Clerk's Office for filing and uploading onto NYSCEF (E-Filing). The signing of this *Decision and Order* shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry, and/or service with notice of entry.

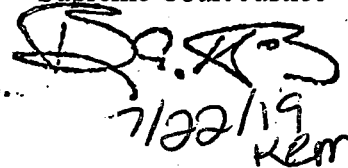
SO ORDERED.

ENTER.

Dated: July 18, 2019
Albany, New York



(Margaret Walsh
Supreme Court Justice


7/22/19
kem

Papers Considered:

1. *Notice of Motion for Failure to Prosecute* filed on behalf of Robin M. Parente by Smith Hoke, PLLC (Wayne A. Smith, Jr., Esq., of counsel) dated January 30, 2019, with *Attorney Affirmation* of Wayne A. Smith, Jr., Esq., affirmed on January 30, 2019, with exhibits A through C annexed; *Memorandum of Law*;
2. *Affirmation in Opposition to Motion to Dismiss & [Request for] Extension of Time to File Note of Issue* filed on behalf of the Plaintiff by Locke Lord LLP (Jackee Missick, Esq., of counsel), filed March 24, 2019;
3. *Reply Memorandum of Law* filed by Smith Hoke, PLLC (Wayne A. Smith, Jr., Esq.), on March 27, 2019;
4. *Letter* to Counsel from Court dated March 29, 2019;
5. *Letter* from Wayne A. Smith, Jr., Esq., dated April 19, 2019, with Affidavit of Robin M. Parente, sworn to on April 11, 2019 with exhibits A and B annexed.

Appendix 1 annexed:

Obituary Notice for Michael A. Parente published in the Albany Times Union and online at www.legacy.com