

Djurasevic v Boucher
2020 NY Slip Op 30725(U)
March 6, 2020
Supreme Court, New York County
Docket Number: 850143/2018
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

MARY DJURASEVIC, AS EXECUTOR OF THE ESTATE OF STANLEY WALKER, DECEASED

Plaintiff,

INDEX NO. 850143/2018

MOTION DATE N/A

MOTION SEQ. NO. 007

- v -

MARCY ELLIN BOUCHER, I C BUSINESS MANAGMENT, LLC A/K/A I.C. BUSINESS MANAGMENT LLC, CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE 1 THROUGH JOHN DOE 100,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 264, 265

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The motion by plaintiff to amend the complaint is denied and the cross-motion by defendants Marcy Ellin Boucher and I C Business Management LLC aka I.C. Business Management LLC ("Defendants") for leave to amend and to dismiss the complaint is granted.

Background

In this commercial foreclosure action, plaintiff seeks to recover based on a series of balloon notes secured by a property located at 406 West 25th Street in Manhattan. Starting in 1999 and continuing until 2015, defendant Boucher and Stanley Walker formed a "unique personal relationship" that included a series of loans from Walker to Boucher for \$280,000,

\$499,900, \$400,100 and \$644,800 (the later loans went to defendant I.C. Business Management, LLC). Plaintiff claims that the loans were never paid and seeks to foreclose on the mortgage secured on the property. Plaintiff also claims that Walker suffered a stroke in Fall 2012 and that Boucher traveled to Florida in 2013 (where Walker was staying) and fraudulently extended the loans. Plaintiff complains that Boucher was supposed to communicate with Walker's attorney (Mr. Joseph Fox) and that Boucher ignored this demand.

Defendants deny that there was any fraud. They claim that when the fourth loan was entered into (in April 2013), the first three loans were redrafted so that all the loans were between Mr. Walker and defendant I.C. Business Management. Mr. Walker passed away in September 2015. Defendants contend that the rider to each mortgage and note requires that no default could occur until 180 days had passed from the mailing of a written notice detailing an event of default. Defendants claim that no such notice was ever sent.

After the Court permitted plaintiff to file an amended complaint (NYSCEF Doc. No. 244), plaintiff claims that it discovered that "the subject mortgages had been purportedly assigned on June 12, 2015, during Mr. Walker's life, and prior to the commencement of the action, to a revocable trust" (NYSCEF Doc. No. 247, ¶ 9). Plaintiff wants leave to amend to the caption to reflect Ms. Djurasevic's role as trustee of the revocable trust of Mr. Walker. She characterizes the instant motion as a ministerial technicality.

Defendants disagree. They claim that plaintiff has admitted it lacks standing to prosecute this action—it did not possess the note—and the Court must therefore dismiss this case. Defendants emphasize that plaintiff's roles as an executor of Mr. Walker's estate and as trustee are legally distinct.

In reply, plaintiff contends that a change of title involving a different status is permitted when it involves the same person. Plaintiff also argues that there is no prejudice or surprise to the opposing party and she merely wants to add her additional status as trustee.

Discussion

“Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450, 946 NYS2d 134 [1st Dept 2012] [internal quotations and citations omitted]). In a mortgage foreclosure action, a plaintiff must establish that it possessed the note prior to the commencement of the foreclosure action (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-61, 12 NYS3d 612 [2015]).

Here, plaintiff admits that the estate does not possess the note and therefore the named plaintiff in this action did not possess the note when it started this case. Plaintiff attaches the assignment by Mr. Walker, in which he assigns “of all of my mortgages and accompanying promissory notes for which I am a mortgagee, including extensions thereto” to “Stanley Walker and Mary Djurasevic, as Co-Trustees of the Revocable Trust of Stanley Walker” (NYSCEF Doc. No. 254). This document is dated in June 2015, long before the instant action was commenced.

Although plaintiff attempts to characterize the instant motion as merely procedural, the Court disagrees. Plaintiff started a case as executor of Mr. Walker’s estate. An estate is obviously a distinct legal entity from a trust. That Ms. Djurasevic is both the executor and a trustee might be convenient but it does not change the fact that the entity which started the case—Ms. Djurasevic, as executor of Mr. Walker’s estate—did not possess the note when this case began. This is not a case where plaintiff misspelled or omitted a word of the named party.

Rather, she seeks leave to amend to add a completely different party that possessed the note, an element required to establish a prima facie case in a foreclosure action.

Plaintiff relies upon a series of cases in support of her claim that a mere change of title or status involving a different status is permitted, all of which are readily distinguishable. For instance, in one case cited by plaintiff, the Court of Appeals permitted a change in the caption to recognize a plaintiff in her individual capacity rather than as an administratrix (*Johnson v Phoenix Bridge Co.*, 197 NY 316, 321-22, 90 NE 953 [1910]). However, the Court of Appeals in *Johnson* emphasized that amendment was permissible “where the amendment does not change substantially the claim or defense” (*id.* at 323). That is clearly not the case here, where the proposed amendment substantially alters the nature of the instant case—plaintiff essentially admits that it cannot maintain the action as executor of the estate (because the estate does not possess the note).

As stated above, an essential component of successfully prosecuting a foreclosure action is possession of the note. And plaintiff apparently did not know that there was an assignment in which the notes were transferred to a trust (*of which she is a trustee*) until after she brought the instant action. That justifies permitting Defendants to amend their answer and the dismissal of this action based on plaintiff’s admitted lack of standing to prosecute this action. Contrary to plaintiff’s contention, this is not an advisory opinion. This action cannot be maintained where plaintiff lacks the capacity to pursue its claim.

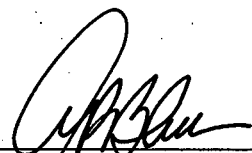
Accordingly, it is hereby

ORDERED that the motion by plaintiff to amend the caption and to file and serve a Second Amended Complaint is denied; and it is further

ORDERED that the cross-motion by defendants Marcy Ellin Boucher and I C Business Management LLC aka I.C. Business Management LLC for leave to amend and to dismiss the complaint is granted and the clerk is directed to enter judgment accordingly, with costs and disbursements upon presentation of proper papers therefor.

3/6/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE