

HCNP 1, LLC v Baines
2022 NY Slip Op 33667(U)
August 16, 2022
Supreme Court, Kings County
Docket Number: Index No. 503861/2014
Judge: Larry D. Martin
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At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of August 2022.

P R E S E N T:

HON. LARRY D. MARTIN,
J.S.C.

Index No.: 503861/2014

_____ x

HCNP 1, LLC,

MS# 5,6

Plaintiff,

DECISION AND ORDER

-against-

GWEN BAINES, et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion	<u>1, 2</u>
Opposition/Cross	<u>3</u>
Reply/Opp to Cross	<u>4</u>

Plaintiff moves for 1) a judgment of foreclosure and sale; 2) to amend the caption; and 3) to Confirm the Referee Report in this foreclosure action. The subject property is located at 27 Pleasant Place, Brooklyn, New York 11223. Co-Defendant Gwen Bains opposes the motion and cross-moves to dismiss the action as a legal nullity. Additionally, the Co-Defendant moves for this Court to reject the Referee’s Report as it is based on inadmissible hearsay. Plaintiff opposes the cross-motion.

PROCEDURAL HISTORY

The instant action was commenced on or about May 1, 2014, by the filing of the summons and complaint against Alexander Everette and several other defendants including his daughter Co-Defendant Gwen Bains. On or about July 23, 2014, co-defendant Gwen Bains by counsel made a pre-answer motion to dismiss the action pursuant to CPLR §3211(a)(1) and (3) for Plaintiff's alleged lack of standing. Plaintiff opposed the motion, and the Hon. Kathy King issued an order dated February 23, 2015, granting Co-Defendant's motion to dismiss stating that the Plaintiff failed to establish it had standing.

Plaintiff filed a notice to appeal the decision dated February 23, 2015, and moved on or about May 6, 2015, to renew and reargue the decision. Defendant Bains opposed the motion to renew and reargue. By a decision dated November 24, 2015, Plaintiff's motion to reargue was denied as untimely and Plaintiff's motion to renew was denied for failure to establish a reasonable justification for not submitting the affidavit of Ronald Miller on the original motion.

On January 20, 2017, this matter was argued in front of the Appellate Division. On April 6, 2017, Defendant Gwen Bains filed an answer to the summons and complaint. On or about April 19, 2017, the Appellate Division rendered a decision reversing the court's February 23, 2015 order, stating that Defendant's motion to dismiss should not have been granted. As such, this matter was restored to the active calendar.

On or about October 5, 2017, Plaintiff moved for summary judgment and an order of reference. Defendant Gwen Bains opposed the motion and cross-moved to dismiss the action. The motion for summary judgment was granted and the cross-motion to dismiss was denied by an order dated May 9, 2018.

By a letter filed with the Court dated July 9, 2018, counsel for Co-Defendant Gwen Bains stated that, “Upon further consultation with our client, we have learned that co-defendant Alexander Everette – the alleged borrower – passed away several years prior to the commencement of this action, to wit, on May 6, 2010. A redacted copy of the death certificate is submitted herewith.” Plaintiff responded by filing a letter with the Court dated July 10, 2018. Plaintiff argues that Bains’ request is without merit because, “Borrower [Alexander Everette] is no longer a necessary party as Plaintiff will not seek a deficiency judgment. As such, Plaintiff will seek to amend the caption accordingly to remove Borrower as a defendant in its forthcoming application for Judgment of Foreclosure and Sale.”

DEFENDANT’S ARGUMENT

The instant foreclosure action was commenced on or about May 1, 2014, against Alexander Everette and others. However, Mr. Everette passed away on May 6, 2010, approximately four years prior to Plaintiff starting this action. Defendant Bains argues that “A claimant may not bring a legal action against a person already deceased at the time of the commencement of such action, but instead, must proceed against the personal representative of the decedent’s estate.” See *Jordan v. City of New York*, 23 A.D.3d 436, 807 N.Y.S.2d 595 (2d Dep’t 2005). Additionally, Defendant argues that if the action is not dismissed Plaintiff’s motion to confirm the report must be denied because the Referee Report is not supported by the record and his findings are based upon inadmissible hearsay.

PLAINTIFF’S ARGUMENT

Plaintiff argues that where a deceased defendant makes an effective and absolute conveyance of all interests in a property, including his or her equity of redemption, to another

defendant duly joined in the action, and the plaintiff either discontinues the action as against the deceased defendant or makes no claim of deficiency judgment against the deceased, the deceased defendant is not a necessary party to the action. In response to Defendant's allegations that the Referee Report is improper, Plaintiff states that Defendant failed to raise any of these issues following the referee's hearing. Plaintiff argues that Defendant's claims regarding the identical computations of both the Referee Philip Kamaras and the affiant Stacey Callahan are nonsensical and Plaintiff has submitted supplemental affidavits attesting to the documents relied upon in the report.

COURT ANALYSIS

Defendant Bains acquired title from Alexander Everette ("Borrower") by a deed dated November 21, 2007. This transfer resulted in Mr. Everette transferring one hundred percent (100%) of his interest in the property to his daughter Gwen Bains. Mr. Everette passed away on May 6, 2010. This foreclosure action was commenced as against Alexander Everette and Gwen Bains as co-defendants on or about May 1, 2014. An action commenced against a deceased defendant is a nullity only insofar as asserted against that defendant, not insofar as asserted against other defendants. See *Rocha v. Figueiredo*, 50 A.D.3d 876, 855 N.Y.S.2d 903 (2d Dep't 2008).

In *HSBC Bank USA v. Ungar Family Realty Corp.*, 111 A.D.3d 673, 974 N.Y.S.2d 583 (2d Dep't 2013), the Court specifically states that in a situation in which the deceased defendant made an effective and absolute conveyance of all interest in the mortgaged premises, including his or her equity of redemption, to another defendant duly joined in the action, and the plaintiff has either discontinued the action as against the deceased defendant or has no claim for a deficiency judgment against him or her, the deceased defendant is not a necessary party to the action as the merits of the foreclosure claim by the plaintiff are unaffected by the death. Contrary to Defendant's

objection, this case is directly applicable to the instant case at hand. All parties agree that Defendant Bains is in fact the sole owner of the premises and that the premises were transferred prior to Mr. Everette's death. It is also undisputed that the action was commenced against both Mr. Everette and Ms. Bains as the legal title holder therefore the case would survive as against Defendant Bains. In recent appellate division cases, *Wells Fargo Bank, N.A., v. Dhanani*, 201 A.D.3d 1005, 157 N.Y.S. 3d 780 (2d Dep't 2022) and *Citimortgage, Inc. v. Brederhorn*, 160 A.D.3d 803, 76 N.Y.S.3d 88 (2d Dep't 2018), it has been determined that a case may continue where the mortgagor dies intestate, or the Plaintiff moves to discontinue the action as it was asserted against the deceased borrower, or the Plaintiff is not seeking a deficiency judgment against the Estate. Here, plaintiff is not seeking a deficiency judgment, thus effectively discontinuing the action as against the decedent.

Defendant argues that the Court's decision in *Ungar* is predicated on "when a party's death does not affect the merits of the case". This Court agrees, but Defendant fails to establish or identify how the merits of the case were affected. Defendant Bains makes a vague general assertion that she was prevented from raising certain defenses which would have affected the merits of the case referring to a May 9, 2018 court order wherein the Court did not allow her to raise issues of the default and/or RPAPL §1304 notices. However, even had she been the sole defendant at the commencement of this action, she is still neither a signatory of the mortgage nor a "borrower." Thus, this argument is without merit.

In order to establish prima facie entitlement to judgment as a matter of law, as required to support summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default. *JP Morgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 36 N.Y.S.3d 235 (2d Dep't 2016). Defendant has not provided this Court with any

objection as to the submission of the note and mortgage or the default. Moreover, this matter was heavily litigated, and Defendant Bains had an opportunity at that time to bring any and all defenses in her initial answer.

As it pertains to the Referee Report, the Court finds that the report and the Callahan Affidavit submitted in support of the amount due do not substantially support the computation. Defendant correctly notes that the affiant testified based upon unproduced business records. Plaintiff's argument that the provision of the records was unnecessary is unavailing. While the two cases, *Aquino v. Ventures Trust*, 172 A.D.3d 663, 100 N.Y.S.3d 386 (2d Dep't 2019) and *Bank of NY Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 (2d Dep't 2019) cited by Defendant both post-date the report, that is irrelevant. *Gordon* notes that in response to "consistent and repeated confusion about some of the most fundamental aspects of the procedural, substantive, and evidentiary law," the Appellate Division "deem[ed] it appropriate to collect and reiterate some of these foundational principles" (*Gordon*, 171 AD3d at 199-200). In other words, it merely restated the already extant requirements rather than imposing new ones. Further, documentation supporting the calculations is required in support of granting a JFS motion and for the Referee report to be confirmed clearly predates the referee's report herein (see, for example, *Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768-1769 [2d Dept 2017][“as the defendant contended in opposition to the plaintiff's submissions, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records”]).

Plaintiff provided a Supplemental Affidavit from its client in an effort to address any potential outstanding issues, but this information should have been included in the original report and still doesn't completely substantiate the calculations.

Lastly, the Referee apparently failed to acknowledge this Court's May 9, 2018 order explicitly stating that Plaintiff would be barred from claiming installments due more than six years prior to the commencement of the action. The action was commenced in 2014, yet Plaintiff's calculations begin as early as 2007.

As such, Plaintiff's motion for judgment of foreclosure and sale, to amend the caption and confirm the Referee Report is **GRANTED** in part ONLY TO THE EXTENT that the caption is hereby amended and shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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HCNP 1, LLC,

Plaintiff,

Index No. 503861/2014

-against

GWEN BAINS; BAYVIEW MANOR LLC D/B/A BAYVIEW NURSING/REHABILITATION CENTER; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CRIMINAL COURT OF THE CITY OF NEW YORK (KINGS); UNITED STATES OF AMERICA (EASTERN DISTRICT); SOUTH NASSAU COMMUNITIES HOSPITAL; ROSEMARIE FIORITO; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; DOMINIQUE BAINS,

Defendants.

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That part of the Plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale is **DENIED** without prejudice, the referee's report is rejected with leave to renew with the issuance of a new report computing the amount due to the Plaintiff with affidavits and documentation substantially supported by the record.

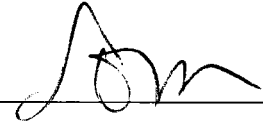
Defendant's cross-motion to dismiss the action as a nullity is **DENIED**.

The foregoing constitutes the decision and order of the Court.

KINGS COUNTY CLERK
FILED

ENTER:

2022 OCT 24 AM 10:14



Hon. Larry D. Martin JSC

**HON. LARRY D. MARTIN
JUSTICE OF THE SUPREME COURT**