

Mortgage Assets Mgt., LLC v Patti

2025 NY Slip Op 30468(U)

February 5, 2025

Supreme Court, Nassau County

Docket Number: Index No. 008220/2013

Judge: Edmund M. Dane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT :
Hon. Edmund M. Dane, J.S.C.

MORTGAGE ASSETS MANAGEMENT, LLC,

Plaintiff,

-against-

STEVEN C. PATTI, AS HEIR, DEVISEE, DISTRIBUTE OF THE ESTATE OF MAMIE PATTIE AKA MAY PATTI, LYNN CORDINGLEY AKA LYNN ANN PATTI, AS HEIR, DEVISEE DISTRIBUTE OF THE ESTATE OF MAMIE PATTI AKA MAY PATTI; DONNA POUPIS AKA DONNA PATTI, AS HEIR, DEVISEE, DISTRIBUTE OF THE ESTATE OF MAMIE PATTI AKA MAY PATTI; JOANNE STASI, AS HEIR, DEVISEE, DISTRIBUTE OF THE ESTATE OF MAMIE PATTI AKA MAY PATTI; UNITED STATES OF AMERICA, ACTING ON BEHALF OF THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT; UNITED STATES OF AMERICA, ACTING ON BEHALF OF DEPARTMENT OF TREASURE-INTERNAL REVENUE SERVICE; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE #1" through "JOHN DOE #10", said names being fictitious and unknown to plaintiff, intended to be possible tenants or occupants of the premises, or corporations, persons, or other entitles having or claiming a lien upon the mortgaged premises,

Defendants.

Index No.: 008220/2013

FORECLOSURE PART

TRIAL/IAS PART 10

Submission Date: 11/15/2024

Motion Sequence Nos.: 008 & 009

DECISION & ORDER

The following papers have been read on these motions:

Plaintiff's Notice of Motion for Summary Judgment, Order of Reference, and Related Relief dated September 19, 20241X
Defendant's Notice of Cross-Motion dated October 18, 20242X
Plaintiff's Opposition & Reply dated November 14, 20243X
Defendant's Reply dated November 15, 20244X

1 NYSCEF Document Nos.: 76-95.

2 NYSCEF Document Nos.: 97-117.

3 NYSCEF Document No.: 119.

4 NYSCEF Document No.: 120.

Preliminary Statement

The Plaintiff (hereinafter “Mortgage Assets”) moves by Notice of Motion for Summary Judgment, Order of Reference, and Related Relief dated September 19, 2024 (Motion Sequence No.: 008) seeking an Order: (1) granting summary judgment against the Heirs of the Estate of Mamie Patti, decedent who filed an Answer on August 21, 2023, pursuant to CPLR 3212, striking their answer with prejudice, inclusive of all defenses and counterclaims therein; (2) granting default judgment as against the non-appearing defendants; (3) appointing a referee to ascertain damages due and owing to Plaintiff and to issue a report pursuant to RPAPL 1321; (4) amending the caption; and (5) granting such other and further relief in favor of Plaintiff as the court deems just, proper and equitable.

The Defendant (hereinafter “Steven”) cross-moves by Notice of Cross-Motion dated October 18, 2024 (Motion Sequence No.: 007) seeking an Order: dismissing the instant action under CPLR 3211 (a) (7), (8), and/or CPLR 3212(b), awarding attorneys fees in the amount of \$19,317.75, cancelling the notice of pendency against the premises located at 32 Woodside Avenue, Malverne, NY (hereinafter “Premises”).

Background

This case has a substantial litigation history. This action was commenced on or about July 8, 2013, by the filing of a Summons and Complaint with the Nassau County Clerk’s Office. This action concerns the premises located at 32 Woodside Avenue, Malverne, New York 11565 (hereinafter the “Premises”). The original Plaintiff in this action was Generation Mortgage Company (hereinafter “Generation”).

On August 21, 2013, Mamie Patti (hereinafter “Mamie”) interposed a Verified Answer. On October 2, 2014, the Court (Hon. Michelle M. Woodard, J.S.C.) issued a Short Form Order (hereinafter the “October 2014 Order”) which, *inter alia*, granted summary judgment, struck Mamie’s Answer, and granted an Order of Reference. On February 9, 2015, the Court (Hon. Anthony L. Parga, J.S.C.) issued a Decision and Order (hereinafter the “February 2015 Order”) which, *inter alia*, granted Mamie’s motion to vacate the October 2014 Order and permitted Mamie to file opposition to the motion for summary judgment. On November 5, 2015, the Court (Hon. Anthony L. Parga, J.S.C.) issued a Decision and Order (hereinafter the “November 2015 Order”) which, *inter alia*, denied, without prejudice, the plaintiff’s motion for summary judgment. On February 8, 2017, the Court (Hon. Anthony L. Parga, J.S.C.) issued a Decision and Order (hereinafter the “February 2017 Order”) which, *inter alia*, again denied, without prejudice, the plaintiff’s motion for summary judgment.

On April 10, 2019, an “At-Risk” approval letter was issued, which stayed the within action until April 5, 2020.

On June 14, 2019, however, Mamie died.

In March, 2020, due to the onset of the COVID-19 global health pandemic, residential foreclosure actions, as a result of various Administrative Orders of the Court and Executive Orders of the Governor, were suspended.

On May 15, 2023, the Court (Hon. David P. Sullivan, J.S.C.) issued an Order Substituting Party Defendants and Related Relief (hereinafter the May 2023 Order). The May 2023 Order, *inter alia* and in sum and substance, substituted Mortgage Assets in place and stead of Generation, and, among other defendants, substituted Steven in place and stead of Mamie. The caption was amended accordingly and to the effect set forth in the May 2023 Order.

On June 10, 2024, this Court issued a Decision and Order (hereinafter the “June 2024 Order”) which, *inter alia*, denied, without prejudice, Mortgage Assets motion for summary judgment and denied, without prejudice, Steven’s motion seeking dismissal of this action.

The Parties’ Contentions

In support of their application, Mortgage Assets sets forth that Mamie executed a Fixed Rate Note (hereinafter the “Note”) and a Home Equity Conversion Loan Agreement (hereinafter the Reverse Mortgage”) on May 25, 2010. Mortgage Assets sets forth that Mamie executed a Mortgage securing the Note up to the maximum principal amount of \$600,000.00. Mortgage Assets sets forth that the mortgage loan is in default, as Mamie failed to perform by failing to maintain taxes, insurance, or both, and the total amount due on the loan is \$831,538.53.

In opposition to the motion of Mortgage Assets and in support of the cross-motion, Steven sets forth that he is Mamie’s son and he resides at the Premises, and he has so resided at the Premises since 2012. Steven sets forth that he was never served with a summons and complaint in this action, nor did he receive a mailing of a supplemental summons and complaint. Steven argues, therefore, that the Court does not have jurisdiction over him.

In opposition to Steven’s cross-motion and in reply, Mortgage Assets argues that they established its prima facie case for foreclosure, as they submitted a copy of the recorded Mortgage, the Note and evidence of default. Mortgage Assets argues that Steven was properly substituted as a party in place and stead of Mamie, and that it is “untrue” that Steven was not served with the Summons and Complaint.

In reply, Steven claims that the opposition and reply of Mortgage Assets is untimely.⁵ Steven argues that Mortgage Assets did not take the appropriate steps to gain jurisdiction over Steven in his capacity as heir after Mamie died.

DISCUSSION + ANALYSIS

Inasmuch as Steven seeks dismissal of this action, the Court elects, *in the exercise of discretion*, to first address Steven’s motion.⁶

Dismissal

If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties (CPLR § 101(a)). *Nationstar Mtge., LLC v Azcona*, 186 A.D.3d 614 (2d Dept. 2020). Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent. *Azcona*, 186 A.D.3d at 615-616. However, if a party’s death 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. *Id.* at 616. Here, the Court ordered the substitution of Steven for Mamie upon Mamie’s death (*see* May 2023 Order). Steven alleges that the Court, in effect, lacks jurisdiction over him because he was never served with a Supplemental Summons or Amended Complaint.

⁵ The Court rejects Steven’s argument and considers the papers of Mortgage Assets.

⁶ That is, of course, before *if* the Court grants Steven’s motion to dismiss, the summary judgment motion of Mortgage Assets becomes moot.

A motion for substitution pursuant to CPLR § 1021 is the method by which the court *acquires jurisdiction* over a deceased party's successors in interest, and such motion is not a mere technicality. *Green v. Maimonides Med. Ctr.*, 172 A.D.3d 824 (2d Dept. 2019) (emphasis added); *see also Linyard v. Long Is. Coll. Hosp.*, 2025 NY Slip Op 00085 (2d Dept. 2025); *see also Bossert v. Ford Motor Co.*, 140 A.D.2d 480 (2d Dept. 1988). As the Second Department explained in *Topal v. BFG Corp.*:

Where the personal representative is not yet a party to the action, service of the notice of motion of substitution (or the order to show cause) must be made in the manner prescribed for service of a summons under CPLR article 3. The procedure for revival of an action by substitution of the personal representative, far from being a mere technical formality, is, rather, the recognized means by which a court obtains jurisdiction over the personal representative, and it is therefore necessary that the representative be served with process and accorded all the procedural safeguards required by due process of law before the court may enter a binding judgment against him.

Topal v. BFG Corp., 108 A.D.2d 849 (2d Dept. 1985) (internal citations omitted).

Initially speaking, the Court disagrees with Steven that the Court lacks jurisdiction over him *because of the failure to serve upon him a Supplemental Summons or Amended Complaint*. Contrary to Steven's contentions, this is not a case, as he argues, dealing with the *joinder* of a party. Nor has Steven provided this Court with any controlling case-law or statutory authority which provides, in sum, that after a party is *substituted* pursuant to CPLR § 1021, they must, thereafter, file and serve a Supplemental Summons and Amended Complaint upon the substituted party. In fact, the *method* by which the Court *acquires jurisdiction* over a deceased party's successor in interest is by a *motion for substitution*. *See Green v. Maimonides Med. Ctr., supra.*

However, the Court is constrained to dismiss the action, albeit based upon the failure to properly effectuate service of Mortgage Assets motion seeking party substitution. Mortgage Assets Notice of Motion dated April 10, 2023 (hereinafter the "Substitution Motion") seeking, *inter alia*, substitution of Steven in place and stead of Mamie was filed on April 12, 2023. The Affidavit of Service (hereinafter the "Mejia Affidavit of Service") filed with that motion reflects, *inter alia*, that:

I, Maria Mejia, being duly sworn, deposes and says:

* * *

On April 12, 2023, I served a copy of the NOTICE OF MOTION, ATTORNEY AFFIRMATION WITH ANNEXED EXHIBITS, PROPOSED ORDER SUBSTITUTING PARTY DEFENDANTS AND RELATED RELIEF relative to the above matter in a sealed envelope, with postage prepaid thereon, in a post office or depository of the United States Postal Service within the State of New York addressed to the last known address of the individuals indicated below.

The Mejia Affidavit of Service thereafter lists Steven Patti, Lynn Cordingley, Donna Poupis, Joanne Stasi, the United States of America, the New York State Department of Taxation and Finance, and John Doe Nos. 1 through 10 as the purported recipients of said motion. The Substitution Motion was required to be served "...in the manner prescribed for service of a summons under CPLR article 3..." A court lacks personal jurisdiction over a defendant who is not properly served with process, and service of process upon a natural person must be made in strict compliance with the methods of service set forth in CPLR § 308. *Citimortgage, Inc. v. Goldstein*, 230 A.D.3d 1219 (2d Dept. 2024). The failure to serve process in an action leaves the court

without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void. *HSBC Bank USA, N.A. v. Sanderson*, 231 A.D.3d 1126 (2d Dept. 2024).

Here, there is no evidence in this Record that the Substitution Motion was served upon any of the Defendants in accordance with CPLR §§ 308(1), (2), (3) or (4). The Substitution Motion was interposed on April 12, 2023. The Affidavit of Due Diligence appended to the Substitution Motion reflects purported efforts of the deponent of the Affidavit of Due Diligence in April and May of 2022, *approximately one year* prior to the filing of the Substitution Motion. No Affidavit of Due Diligence was filed reflecting what efforts, if any, were made approximately one (1) year later in 2023 prior to the filing of the Substitution Motion, to serve the Substitution Motion on the proposed substituted defendants. Finally, the Record is devoid of any evidence that the Court, at any time, authorized service in an alternative manner pursuant to CPLR § 308(5), and, in addition, the May 2023 Order did not dispense with service requirements on the substituted defendants. Those substituted defendants are, at a bare minimum, entitled to the procedural safeguards of due process. *Topal v. BFG Corp., supra*. For the aforesaid reasons, the Court is constrained to dismiss this action. The Court wishes to make a final point: this Decision and Order should not be read as countenancing default(s) under the terms of a mortgage or note. But the procedural safeguards of due process are sacrosanct in litigation, which this Court declines to dispense with.

This action in foreclosure is dismissed. The Clerk of the Court is directed to cancel the Notice of Pendency with all due speed.

Attorney's Fees

The text of Real Property Law § 282(1) provides, *inter alia*:

1. Whenever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage, or that amounts paid by the mortgagee therefor shall be paid by the mortgagor as additional payment, there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor as the result of the failure of the mortgagee to perform any covenant or agreement on its part to be performed under the mortgage or in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the mortgagee or by way of counterclaim in any action or proceeding commenced by the mortgagee against the mortgagor. Any waiver of this section shall be void as against public policy.

Steven, in his Affidavit in opposition to Mortgage Assets motion for summary judgment, does not dispute the alleged default. This Court dismissed this action (*see supra*) because of a defect in the failure to properly effectuate service of process of the Substitution Motion. The Court did not reach the substantive merits of the foreclosure cause of action. This Court simply cannot espouse a position that when a mortgagor defaults under the terms of the note and mortgage, the mortgagor should be entitled to recover attorney's fees. A foreclosure action is equitable in nature and triggers the equitable powers of the court. In an action of an equitable nature. *Bank of N.Y. Mellon v George*, 186 A.D.3d 661 (2d Dept. 2020). To permit Steven to recover attorney's fees would be inequitable. The application for attorney's fees is denied.

Mortgage Assets Summary Judgment Motion

In light of the dismissal of this action, the Court need not reach the merits of the motion of Mortgage Assets, and the motion is denied as academic.

Conclusion

Accordingly, it is hereby:

ORDERED, that so much of Steven's Notice of Cross-Motion dated October 18, 2024 which seeks dismissal for lack of jurisdiction be and the same is hereby GRANTED and this action be and the same is hereby DISMISSED; and it is further

ORDERED, that so much of Steven's Notice of Cross-Motion dated October 18, 2024 which seeks cancellation of the Notice of Pendency be and the same is hereby GRANTED, the Notice of Pendency is hereby VACATED, and the Clerk of the Court is directed to cancel the Notice of Pendency; and it is further

ORDERED, that so much of Steven's Notice of Cross-Motion dated October 18, 2024 which seeks attorney's fees be and the same is hereby DENIED; and it is further

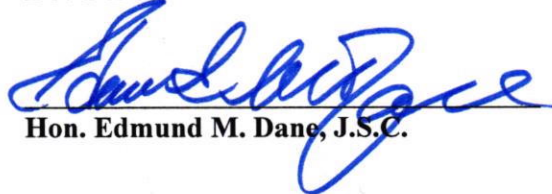
ORDERED, that Mortgage Assets Notice of Motion dated September 19, 2024 be and the same is hereby DENIED as ACADEMIC.

Any other relief requested not specifically addressed herewith is hereby DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 5, 2025

ENTER:



Hon. Edmund M. Dane, J.S.C.