

Wells Fargo Bank, N.A. v Carreno

2014 NY Slip Op 33394(U)

December 23, 2014

Supreme Court, Suffolk County

Docket Number: 0013678/2012

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T :

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-7-14

ADJ. DATE

Mot. Seq. # 001 - MotD

-----X

WELLS FARGO BANK, NA dba AMERICAS
SERVICING COMPANY,

Plaintiff,

- against -

VIRGINIA CARRENO, MARK CARRENO,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR
CONTINENTAL MORTGAGE BANKERS,
INC. dba FINANCIAL EQUITIES, PEOPLE OF
THE STATE OF NEW YORK-COHALAN
COURT COMPLEX,
"JOHN DOE", "RICHARD ROE", "JANE
DOE", "CORA COE", "DICK MOE" and
"RUBY POE", the six defendants last named in
quotation marks being intended to designate
tenants or occupants in possession of the herein
described premises or portions thereof, if any
there be, said names being fictitious, their true
name being unknown to Plaintiff,

Defendant.

-----X

STEIN, WIENER & ROTH, LLP
Attorney for Plaintiff
One Old Country Road, Suite 113
Carle Place, New York 11514

MARK CARRENO
Defendant - Pro Se
15 Victoria Place
Mastic Beach, New York 11951

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.- CONTINENTAL
MORTGAGE BANKERS, INC.
Defendant
C/O C T Corporation System
111 Eighth Avenue
New York, New York 10011

PEOPLE OF THE STATE OF NEW YORK
Defendant
Cohalan Court Complex
400 Carleton Avenue
Central Islip, New York 11722

Upon the following papers numbered 1 to 14 read on this motion for summary judgment and order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers
; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after~~
~~hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of the motion (001) for summary judgment against defendant Mark Carreno, to amend the caption, and for an order of reference is denied without prejudice to resubmit upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application, a copy of this order, a copy of the loan modification agreement dated December 2, 2010; and a copy the notice pursuant to RPAPL § 1303; and the appointment of a personal representative of defendant/decedent Virginia Carreno’s estate, if deemed necessary under these circumstances, and is granted to the extent provided below; and it is further

ORDERED that the branch of the motion to amend caption by substituting Mariette Turso in the place and stead of “Jane Doe” and striking “John Doe, Richard Roe, Cora Coe, Dick Moe, and Ruby Poe” therefrom is granted; and it is further

ORDERED that the complaint is dismissed *sua sponte* as against defendant/decedent Virginia Carreno, and the caption is amended accordingly; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----	X
WELLS FARGO BANK, NA dba AMERICAS SERVICING COMPANY,	
Plaintiff,	
- against -	
MARK CARRENO, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR CONTINENTAL MORTGAGE BANKERS, INC. dba FINANCIAL EQUITIES, PEOPLE OF THE STATE OF NEW YORK-COHALAN COURT COMPLEX, and MARIETTE TURSO,	
Defendants.	X

This is an action to foreclose a mortgage on premises known as 15 Victoria Place, Mastic Beach, New York. On March 24, 2005, defendant Virginia Carreno executed a note in favor of Continental Mortgage Bankers, Inc., d/b/a Financial Equities ("Continental"), agreeing to pay the sum of \$196,800 at the starting yearly interest rate at 6.750 percent. On the same day, defendants Virginia Carreno and Mark Carreno executed a first mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Continental in the principal sum of \$196,800 on the subject property. The mortgage was recorded on April 25, 2004 with the Suffolk County Clerk's Office. Subsequently, on August 15, 2006, MERS, as nominee for Continental assigned the mortgage to the plaintiff. The assignment was recorded on October 3, 2006 with the Suffolk County Clerk's Office. The defendants Virginia Carreno and Mark Carreno purportedly obtained a loan modification on February 26, 2011 in favor of the plaintiff agreeing to pay the principal sum of \$218,111.41.

A notice of default dated July 17, 2011 was sent to defendant Virginia Carreno stating that she had defaulted on her note and mortgage loan and that the amount past due was \$3,283.44. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on May 2, 2012. In its complaint plaintiff alleges, in pertinent part, that defendants Virginia Carreno and Mark Carreno breached their obligations under the terms and conditions of the note and mortgage by failing to make monthly payments. The complaint seeks, among other things, the sale of the premises, that the plaintiff be paid the amount due upon the note and mortgage, and that the defendants be adjudged to pay any deficiency remaining after the application of the proceeds of the sale. Defendant Mark Carreno served an answer containing general denials.

The Court's computerized records indicate that this matter was eligible for foreclosure settlement conferences, which were held on February 1, 2013 and May 1, 2013, however, no settlement was reached. As a result, this matter was referred as an IAS case. Thus, the plaintiff has complied with CPLR 3408.

Plaintiff now moves for summary judgment on its complaint contending that defendants Virginia Carreno and Mark Carreno failed to comply with the terms of the note and mortgage, and that defendant Mark Carreno's general denials raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavit of Myron D. Keyes, VP Loan Documentation for Wells Fargo Bank, NA, d/b/a America's Servicing Company; the pleadings; the note, mortgage and assignment of mortgage; notice of default; notices pursuant to Real Property Actions and Proceedings Law ("RPAPL") §§ 1320, and 1304; and affidavits of service of the summons and complaint upon defendants Mark Carreno and Mariette Turso.

The defendants purportedly served opposition papers upon the plaintiff, however, the court's computer does not reveal submission of same to the court. In any event, the plaintiff submitted reply papers wherein it is stated that plaintiff learned through the process server that Virginia Carreno died on February 26, 2012 and was unable to effectuate service upon her. Plaintiff's counsel affirms that this defendant/decedent is not a necessary party defendant, inasmuch as the deed to the premises names both Virginia Carreno and Mark Carreno as joint tenants with rights of survivorship.

It is well settled 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 AD3d 436, 807 NYS2d 595 [2d Dept 2005]; see also *Outing v Mathis*, 304 AD2d 670, 757 NYS2d 483 [2d Dept 2003]). Consequently, no action may effectively be commenced against a dead person subsequent to his or her death and prior to the appointment of a personal representative (see *Arbelaez v Chun Kuei Wu*, 18 AD3d 583, 795 NYS2d 327 [2d Dept 2005]). A complaint must be dismissed as a nullity in cases wherein the named defendant died before the filing of the summons and complaint (see *Marte v Graber*, 58 AD3d 1, 867 NYS2d 71 [1st Dept 2008]).

With regard to mortgage foreclosure actions, courts have held that the personal representative of the estate of a deceased mortgagor, who died intestate, is not a necessary party to a mortgage foreclosure action and that such action may be commenced or continued against the distributees of any such intestate mortgagor (see *Winter v Kram*, 3 AD2d 175, 159 NYS2d 417 [2d Dept 1957]; *Deutsche Bank National Trust Co. v Torres*, 24 Misc3d 1216 (A), 897 NYS2d 669 [SCt Suffolk 2009]). However, this rule is inapplicable to decedents who die testate, rather than intestate, as the property of a testator or testatrix passes under the terms of the will, which is effective only upon its probate and the appointment of a personal representative of the estate. The rule is equally inapplicable where, as here, the decedent was personally liable on the mortgage note and the plaintiff in a foreclosure action demands a deficiency judgment. In such cases, the personal representative of the decedent's estate is a necessary defendant in a mortgage foreclosure action (see *Countrywide Home Loans, Inc. v Keys*, 27 AD3d 247, 811 NYS2d 362 [1st Dept 2006]).

To bring a foreclosure action, the plaintiff must name in the action all persons having an estate or interest in possession of the property, as necessary parties, to protect those person's rights (see *1426 46 St., LLC v Klein*, 60 AD3d 740, 876 NYS2d 425 [2d Dept 2009])[holding that even tenants are necessary parties to a foreclosure action]). Necessary parties to a foreclosure action include heirs of deceased mortgagors (see RPAPL 1311; *Salomon Bros. Realty Corp. v Alvarez*, 22 AD3d 482, 802 NYS2d 705 [2d Dept 2005]; see however *Glass v Estate of Gold*, 48 AD3d 746, 853 NYS2d 159 [2d Dept 2008] [finding heirs necessary parties but not indispensable if the estate administrator is a named party]). If a necessary and indispensable party is absent from a foreclosure action any judgment rendered may be considered void (see *1426 46 St., LLC v Klein*, 60 AD3d 740, 876 NYS2d 425 [2d Dept 2009]; *Ridge Realty LLC v Goldman*, 263 AD2d 22, 701 NYS2d 69 [2d Dept 1999]; *Glass v Estate of Gold*, 48 AD3d 746, *supra*).

Here, it is not disputed that the defendant, Virginia Carreno, the sole obligor under the note and a co-mortgagor with defendant, Mark Carreno, died on February 26, 2012, nearly three months prior to the commencement of this action. It is also undisputed that the plaintiff has interposed a pleaded demand for a deficiency judgment against the deceased defendant, Virginia Carreno. Therefore, contrary to plaintiff's claims, a personal representative of Virginia Carreno's estate would be a necessary party. Since this action was commenced against the deceased defendant, Virginia Carreno, subsequent to her death, it is a nullity with respect to the plaintiff's claims against the pre-deceased defendant. The court thus dismisses the plaintiff's claims for foreclosure and sale and for recovery of any deficiency following the public sale of the premises against Virginia Carreno. To reflect such dismissal, the court hereby amends the caption to drop Virginia Carreno as a party defendant. Also dropped as party defendants are the unknown defendants and the caption is likewise amended to reflect same. The court further grants the branch of the motion

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seeking to substitute Mariette Turso in the place and stead of "Jane Doe."

The remaining portions of the plaintiff's motion, wherein it seeks the appointment of a referee, and to fix the defaults of the non appearing defendants are denied as the plaintiff has not established its entitlement to such relief due to the unresolved issues surrounding the death of Virginia Carreno, obligor on the note. The absence of allegations regarding purported distributees of the decedent, whether said mortgagor died testate or intestate, and whether a personal representative of her estate has been appointed warrants a denial of this application. In addition, plaintiff has failed to demonstrate that it provided notification to the defendants pursuant to RPAPL 1303, or to submit evidence of the purported mortgage modification dated December 2, 2010.

Accordingly, the aforementioned remaining portions of the motion are denied with leave to renew upon submission of proper papers as stated above.

Dated: Dec. 23, 2014

W. Gerard Allen
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION