

**Flushing Bank v Executor of the Estate of David
Diamond**

2015 NY Slip Op 31655(U)

September 1, 2015

Supreme Court, Richmond County

Docket Number: 130239/14

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X TP-12

FLUSHING BANK F/K/A FLUSHING SAVINGS
BANK, FSB,

Plaintiff,

-against-

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

EXECUTOR OF THE ESTATE OF DAVID DIAMOND,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, "JOHN DOE NO. 1" to JOHN DOE
NO. XXX," inclusive, the last thirty
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,

Index No: 130239/14

Motion Nos: 1679-002
2264-003

Defendants.

-----X

The following papers numbered 1 to 3 were fully submitted on
the 17th day of June, 2015:

	Papers Numbered
Order to Show Cause by Plaintiff (Affirmation in Support of Motion to Appoint Temporary Administrator; Emergency Affirmation in Support of Order to Show Cause) (Dated: April 10, 2015).....	1
Notice of Cross Motion to Dismiss Plaintiff's Action (Affirmation in Support of Cross Motion and Opposition to the Motion) (Dated: June 9, 2015).....	2
Affirmation in Opposition to Defendants' Cross Motion and in Further Support of Motion to Appoint Temporary Administrator (Dated: June 15, 2015).....	3

Upon the foregoing papers, (1) the application of plaintiff,
Flushing Bank, f/k/a Flushing Savings Bank, FSB (Motion No. 1679-
002), for an order, *inter alia*, substituting the "Estate of David

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

Diamond" in the place and stead of the named defendant, "Executor of the Estate of David Diamond," and for the appointment of a Temporary Administrator for the Estate of David Diamond; and (2) the cross motion (Motion No. 2264-003) of defendant "Executor of the Estate of David Diamond," for dismissal of the complaint for lack of personal jurisdiction is decided as follows.

This matter arises out of plaintiff's action to foreclose a commercial mortgage on the premises known as 1298 Forest Avenue, Staten Island, New York. It appears undisputed that on or about August 5, 2008, David Diamond, now deceased, borrowed the sum of \$310,00.00 from Flushing Bank, f/k/a Flushing Savings Bank, FSB ("Flushing"), securing the loan with a mortgage on the aforementioned premises (see Flushing's Exhibit A). Insofar as it appears, Diamond tendered regular monthly mortgage payments to Flushing until the date of his death, February 25, 2014. However, when the March 1, 2014 payment was not received, Flushing allegedly accelerated the loan and demanded payment in full of the outstanding balance of \$278,343.55. There is no question that at the time of his death, David Diamond was a resident of Middlesex County, New Jersey (see Flushing's Exhibit B).

On March 13, 2014, Diamond's surviving spouse, Erin McGowan-Diamond, petitioned the Surrogate of Middlesex County for and was awarded Letters of Administration for her late husband's estate (see Plaintiff's Exhibit B).

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

On June 25, 2014, four months after Diamond's death, plaintiff commenced the within foreclosure action (see Flushing's Exhibit A) against, *inter alia*, the "Executor of the Estate of David Diamond". It appears from the Affidavit of Service filed with the Court that the "Executor of the Estate of David Diamond" was purportedly served on August 4, 2014, by leaving a copy of the summons and complaint with one, Tabitha Hann, a person of suitable age and discretion, at the "Executor's" purported dwelling house at 1298 Forest Avenue, Staten Island, and by mailing a copy of the summons and complaint to "Erin McGowan-Diamond, A [sic] Executor of the Estate of David Diamond" at the same address.

Presently before the Court is plaintiff's motion for an order substituting the "Estate of David Diamond" for the presently-named "Executor of the Estate of David Diamond" or, in the alternative, amending the caption of the action by substituting the "Estate of David Diamond" for the fictitious defendant "John Doe No. 1". In either event, Flushing asks that a temporary administrator be appointed for the Diamond Estate in order that the foreclosure action might continue. In response, the "Estate of David Diamond" has cross-moved for dismissal of the foreclosure action based on the lack of personal jurisdiction (CPLR 3211[a][8]).

Pursuant to CPLR 1015(a), "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Similarly, case law provides that the death of a party divests the court of jurisdiction and

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

automatically stays all proceedings pending the substitution of a personal representative for the decedent (see Matter of Vita V. [Cara B.], 100 AD3d 913, 914; Neuman v. Neuman, 85 AD3d 1138, 1139). If no substitution occurs within a reasonable time, CPLR 1021 states that upon such notice as the court directs, the estate may be ordered to show cause why the action should not be dismissed. In the alternative, if a substitution is not made within a reasonable period, the court may appoint a temporary administrator in order to avoid undue prejudice or delay (see Lambert v. Estren, 126 AD3d 942; Dieye v. Royal Blue Servs., Inc., 104 AD3d 724).

In the case at bar, there was no action pending as of the date of the mortgagor's death. Hence, the statutes and case law which would stay a pending action until a personal representative is appointed are per se inapplicable (*cf.* CPLR 1024). However, the surviving spouse had been awarded Letters of Administration in New Jersey and, if present in New York, was amenable to personal service pursuant to CPLR 308(2) as the personal representative of the decedent's estate regardless of her misidentification as the Estate's "Executor" rather than "Administrator" (see CPLR 2001). In this regard, it is not without significance that the Affidavit of Service explicitly provides that the service memorialized therein was upon "**Erin McGowan-Diamond**, a [sic] Executor of the Estate of David Diamond". Accordingly, assuming that the (uncontested) residence address for Ms. McGowan-Diamond is correct, it is the opinion of this Court that the personal representative of the Estate

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

of David Diamond was properly served in New York, and that personal jurisdiction was thereby acquired over the named Estate (see DiBuono v. Abbey LLC, 71 AD3d 720).

The Supreme Court being a court of general jurisdiction (see Lambert v. Estern, 126 AD3d 943), it has no less authority than the Surrogate's Court over the estate of any non-domiciliary who dies leaving property in New York (see SCPA §206), or "over any non-domiciliary or his fiduciary arising from any act or omission of the non-domiciliary within the state, either in person or through an agent" (Matter of Re v. Truck-A-Tune, 191 AD2d 327, 327 quoting SCPA 210 [2][a] [ancillary administrator appointed in New York can direct a non-domiciliary to turn over an automobile located in another jurisdiction]).

Accordingly, it is

ORDERED, that plaintiff's motion to substitute the "Estate of David Diamond" for the "Executor of the Estate of David Diamond" as a party-defendant and in the caption of the action is granted; and it is further

ORDERED, that the caption be amended accordingly, and it is further

ORDERED, that Erin McGowan-Diamond be appointed temporary administrator of the Estate of David Diamond with limited ancillary letters of administration for the sole purpose of defending this action; and it is further

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

ORDERED, that the cross motion to dismiss is denied; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order upon Erin McGowan-Diamond or her attorney, Orin

FLUSHING BANK v. EXECUTOR OF THE ESTATE OF DAVID DIAMOND, et. al.,

J. Cohen, Esq., by first class mail at his office address: 1162
Victory Boulevard, Staten Island, New York 10301.

E N T E R,

Dated: September 1, 2015

/s/_____

Hon. Thomas P. Aliotta

J. S. C.