U & Me Homes, LLC v County of Suffolk
2017 NY Slip Op 31966(U)
August 23, 2017
Supreme Court, Suffolk County
Docket Number: 11760/14
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11760/14

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/31/17
SUBMIT DATE 8/4/17
Mot. Seq. # 003 - MotD
CDISP: NO

U & ME HOMES, LLC,

Plaintiff,

-against-

COUNTY OF SUFFOLK, TOWN OF SOUTHAMPTON, AMUND EDWARDS, LAWRENCE M. CLARK, JR., JENNIFER GRANT: MICHAEL T. ESCUE, SCOTT N. WIMBUSH, CITIBANK, NA, TOWN OF SOUTHAMPTON PLANNING BOARD, OLIVER & CLARK, INC., SOUTHAMPTON HILLS III, LLC, WINDENMERE SOUTHAMPTON HILLS LTD., VERIZON NEW YORK, INC., PSEG LONG ISLAND, LLC, STEVEN D. HURD, DAYNA FIELD, Trustee, JOEL ORGLER, Trustee, ROBERT BRENNAN, 90 LAUREL VALLEY, LLC, MATTHEW ROSENBLUM, JENNIFER ROSENBLUM, EMILY SQUIRES, WILLIAM B. PLATT, JR., NOYAC HILLS ESTATES ASSOCIATION, INC., MIDLAND FUNDING NCC-2 CORPORATION, MIDLAND FUNDING LLC, FEDELE T. BAUCCIO, STEPHEN R. BERTINI, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, SABADELL UNITED BANK, NA, JPMORGAN CHASE BANK, NA, SYNCHRONY BANK, DENNIS LANG, CAPITAL ONE BANK (USA), NA, UNITED STATES OF AMERICA DEPT. OF THE TREASURY - IRS, PHILLIP REISIG, JACQUELINE REISIG, THE BRIDGEHAMPTON NATIONAL BANK, EVERET A. REISIG, GAYLE A. REISIG, CLERK OF THE COUNTY OF SUFFOLK and "JOHN DOES 1-10" : said names being fictitious and unknown to plaintiff :

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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,	:	JAMES M. BURKE, ESQ. Atty. For Def. Town of Southampton 116 Hampton Rd. Southampton, NY 11968
Defendants.	:	DAVID EPSTEIN Defendant Pro Se 100 Riverside Dr. - #18D New York, NY 10024

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Upon the following papers numbered 1 to 7 read on this Motion by the plaintiff to substitute parties by caption amendments and for default judgments on the amended complaint ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers: ____; Opposing papers: 4-5 ; Reply papers: 6-7 ; Other _________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#003) by the plaintiff, U & Me Homes, LLC, in which it seeks, in effect, an order amending the caption of this action, nunc pro tunc, to reflect the true and complete name of defendant, Jennifer Rosenblum, as "Jennifer Rosenblum a/k/a Jennifer Schaffer" are considered under CPLR 305 and 3025(b), and are granted only to the extent that the caption is so amended and all future proceedings shall be captioned accordingly with respect to this defendant's name; and it is further

ORDERED that those portions of this motion (#003) by the plaintiff for, in effect, an order dropping as party defendants to this action known defendants, Emily Squires, William B. Platt, Jr., and Amund Edwards and unknown defendants John Doe #4-10 are considered under CPLR 1003, 1015 and 1021 and are granted only to the extent that defendant, Emily Squires, is hereby dropped as a party defendant to this action pursuant to CPLR 1003 and the caption amended to reflect this change; and it is further

ORDERED that those portions of this motion (#003) wherein the plaintiff seeks, in effect, to identify the true name of a person served as unknown defendant, John Doe, namely, David Epstein, are considered under CPLR 1024 and are granted, prospectively, together with a caption amendment to reflect this identification of John Doe #1 as David Epstein; and it is further

ORDERED that those portions of this motion (#003) wherein the plaintiff seeks to drop as party defendants the purported personal representatives of the estates of two named defendants who are now deceased, namely, William B. Platt, Jr., and Amund Edwards, and said representatives' "substitution" in the place of unknown defendants John Doe # 1 and #2 pursuant to CPLR 1024, are considered under CPLR 1024, 1015 and 1021 and are denied as is the request to delete John Doe defendants #4 - #10; and it is further

ORDERED that the remaining portions of this motion (#003) wherein the plaintiff seeks default judgments against all newly added defendants served with the supplemental summons and

amended complaint who failed to answer said amended complaint are considered thereunder and under CPLR 3215 and are denied.

The plaintiff commenced this action against defendant, County of Suffolk, for declaratory relief of the type contemplated by RPAPL § 1951 which permits the extinguishment covenants and restrictions recorded against real property under the circumstances enumerated therein. Other additional causes of action for the same or similar relief under common law principles were advanced in the original complaint.

The plaintiff's premises consist of a six acre parcel of residentially zoned, vacant land in the Town of Southampton, against which, there is a recorded covenant and restriction. This parcel has twice come into ownership by the defendant, County of Suffolk, due to the non-payment of taxes and has been the subject of intergovernmental conversations and plans for its preservation. In fact, the first time it came into ownership by the defendant, County of Suffolk, it was conveyed to a predecessor- in-title with the following restrictive covenant: "There shall be no development rights as to this parcel other than the right to construct a 50' westward extension of Laurel Valley Drive, subject to approval by the Town of Southampton." By the commencement of this declaratory judgment action, the plaintiff seeks to have this duly recorded covenant and restriction judicially extinguished.

By order dated February 17, 2017, this court denied a motion (#001) by the County of Suffolk to dismiss the complaint served herein and granted a cross motion (#002) by the plaintiff for an order granting it leave to file and serve a supplemental summons and amended complaint. The granting of this relief afforded the plaintiff the opportunity to add, and jurisdictionally join as new party defendants to this action, the numerous individuals, corporate entities and unknown defendants whose names now appear in the caption set forth above following the first named defendant, County of Suffolk. It further afforded the plaintiff the opportunity to add additional causes of action for common law declaratory relief.

In its proposed amended complaint, the plaintiff separately described each of these new party defendants as having ownership interests in neighboring premises or having liens or judgments against said premises which may be adversely affected by the granting of the relief sought by the plaintiff. The record reflects that on March 20, 2017, the action was commenced against the new defendants who were the targets of the plaintiff's cross motion (#002), by the filing of the supplemental summons and amended complaint together with the February 17, 2017 order of this court with notice of its entry.

On the instant motion (#003), the plaintiff asserts that it served the supplemental summons and amended complaint upon all known defendants except Emily Squires, William Platt, Jr., and Amund Edwards. Plaintiff also served those papers upon three of the ten unknown "John Doe" defendants. The plaintiff further asserts that each of the three named defendants who were not served with the supplemental summons and complaint be dropped or "stricken" as they are not necessary parties to this action. Though not expressly stated, it appears from the moving papers that known defendant, Emily Squires, sold her interest in certain neighboring real property to David

Epstein, who was served with the supplemental summons and amended complaint as an unknown defendant, thereby relieving Ms. Squires of her need to be joined as a party defendant to this action. With these contentions the court agrees and has thus granted those portions of this motion (#003) wherein the plaintiff seeks, in effect, an order pursuant to CPLR 1003, dropping Ms. Squires as a party defendant and an order identifying the true name of an unknown John Doe defendant as David Epstein, pursuant to CPLR 1024, together with caption amendments to reflect this change.

In contrast, the court denies the plaintiff's demands for an order dropping as party defendants, the other newly added defendants who were not joined to this action by service of the supplemental summons and amended complaint, namely, William Platt, Jr. and Amund Edwards. In its moving papers, the plaintiff asserts that these persons are dead but neither the dates of their respective deaths nor the dates and other particulars regarding the appointment of personal representatives of the estates of these two deceased defendants were put before the court. Upon allegations that the plaintiff it served "Jonathan James Platt as Executor of the Estate of William B. Platt, Jr, and Lois A. Oliver as Executor of the Estate of Amund Edwards", as unknown defendants, the plaintiff requests that the court issue an order "substituting" these executors for the two known deceased defendants under the provisions of CPLR 1024. The court finds, however, that such relief is not available to the plaintiff for the reasons set forth below.

That "the dead cannot be sued" is a well established principle of the jurisprudence of this state (*see* ***Marte v Graber***, 58 AD3d 1, 867 NYS2d 71 [1st Dept 2008]). It gives rise to the rule 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 generally 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]), or against those who have succeeded, by operation of law, to the interests of the decedent in the property that is subject to the judgment of foreclosure and sale (*see* ***HSBC Bank USA v Ungar Family Realty Corp***., 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013]; ***DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.***, 51 AD3d 857, 859 NYS2d 221 [2d Dept 2008]; ***Deutsche Bank Natl. Trust v Torres,*** 24 Misc3d 1216[A], 2009 WL 2005599 [Suffolk County, Sup. Ct. 2009]).

Distilled from these concepts is the well established rule that no action may effectively be commenced against a deceased person subsequent to his or her death and prior to the appointment of a personal representative (*see* ***Arbalez v Chun Kuei Wu***, 18 AD3d 583, 795 NYS2d 327 [2d Dept 2005]; ***Laurenti v Teatom***, 210 AD2d 300, 619 NYS2d 754 [2d Dept 1994]; ***Dime Sav. Bank of New York FSB v Luna***, 302 AD2d 558, 755 NYS2d 300 [2d Dept 2003]). The death of a named defendant prior to the commencement of an action has thus been held to render the action, insofar as asserted against a deceased defendant, a legal nullity from its inception which leaves the Court without jurisdiction to grant any requested relief (*see* ***Rivera v Bruchim***, 103 AD3d 700, 959 NYS2d 448 [2d Dept. 2013]; ***Wendover Fin. Serv. v Ridgeway***, 93 AD3d 1156, 940 NYS2d 391 [4th Dept 2012]; ***Marte v Graber***, 58 AD3d 1, *supra*; ***Deutsche Bank Natl. Trust v Torres,*** 24 Misc3d 1216 [A], 2009 WL 2005599 [Suffolk County, Sup. Ct. 2009]; *cf.*, ***GMAC Mtge. Corp. v Tuck***, 299 AD2d 315, 750 NYS2d 93 [2d Dept 2002]). In cases wherein the filing of a summons and complaint follows the death of a person named therein as a party defendant, there can be no substitution of the

deceased defendant by his or her personal representative or immediate successors-in-interest, since the action was never commenced against the deceased defendant (*see* ***Wendover Fin. Serv. v Ridgeway***, 93 AD3d 1156, *supra*; ***Marte v Graber***, 58 AD3d 1, *supra*).

It is also well established that the death of a party duly joined to a *pending* action divests the court of jurisdiction to render judgment or to otherwise proceed until a proper substitution is made (*see* ***Gonzalez v Ford Motor Co.***, 295 AD2d 474, 744 NYS2d 468 [2d Dept 2002]; ***Brogan v Mary Immaculate Hosp.***, 209 AD2d 663, 619 NYS2d 325 [2d Dept 1994]). Such a stay generally continues until a substitution of the personal representative of the estate of the deceased defendant is effected by motion of the type contemplated by CPLR 1021 [1]. CPLR 1015 thus mandates that if a party dies and the claim by or against him or her is not thereby extinguished, the court shall order substitution of the proper parties.

In cases involving in personam claims against a defendant who dies testate during the pendency of an action whose will is duly admitted to probate, the duly appointed Executor or Administrator C.T.A. of the estate of the deceased testator/testatrix defendant is the proper party to be substituted in the action for his or her decedent. Similarly, in actions involving in personam claims against a defendant who dies intestate, his or her administrator is the proper party to substitute. However, the rules are different if the action to which the deceased defendant was joined is an action purely in rem, as such actions do not include claims for personal liability against the deceased defendant that may be collected from his or her estate (*see* ***Kraker v Roll***, 100 AD2d 424, 474 NYS2d 527 [2d Dept 1984]; ***Winter v Kram***, 3 AD2d 175, 159 NYS2d 417 [2d Dept 1957]; *see also* ***Salamon Bros. Realty Corp. v Alvarez***, 22 AD3d 482, 802 NYS2d 705 [2d Dept 2005]. In these in rem actions, the persons to whom the property devolved by operation of law, such as the distributees of the a deceased defendant who died intestate or a specific devisee named in the duly probated will of a deceased defendant to whom the premises have been conveyed by the estate fiduciary are the proper parties to be substituted in the place of the deceased defendant.

The procedural requirements for the substitution of proper parties mandated by CPLR 1015 in cases in which a joined defendant dies during the pendency of the action are set forth in CPLR 1021. It provides that a motion for substitution may be made by the successors or representatives of a party or by any party. The motion must be served, jurisdictionally, upon the persons whose substitution is sought, unless such person or persons voluntarily appear and consent to their substitution thereby submitting to the jurisdiction of the court (*see* ***Horseman Antiques, Inc. v Huch***, 50 AD3d 963, 856 NYS2d 663 [2d Dept 2008]; ***Macomber v Cipollina***, 226 AD2d 435, 641 NYS2d 64 [2d Dept 1996]; ***Topal v B.F.G Corp.***, 108 AD2d 849, 485 NYS2d 352 [2d Dept 1985]).

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[1] Where the interests of the deceased defendant in the property that is the subject of the action devolve by operation of law to other individuals such as joint tenants, those surviving joint tenants are the sole parties interests and no substitution of the deceased defendant is necessary, provided that the joint tenants were previously joined in the action (*see* ***HSBC Bank USA v Ungar Family Realty Corp.***, 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013]; ***DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.***, 51 AD3d 857, 859 NYS2d 221 [2d Dept 2008]; ***Paterno v CYC, LLC***, 46 AD3d 788, 850 NYS2d 131 [2d Dept 2007]).

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Where these conditions are not met, the court is without jurisdiction to substitute the immediate successors to the decedent's interest in the subject of the action or the personal representative of the estate of the deceased defendant (*see* ***Macomber v Cipollina***, 226 AD2d 435, *supra*).

An action is commenced by filing a "summons and complaint or summons with notice in accordance with [CPLR 2102]" (CPLR 304[a]; *see* ***Goldenberg v Westchester County Health Care Corp***, 16 NY3d 323, 921 NYS2d 619[ ]; ***O'Brien v Contreras***, 126 AD3d 958, 6 NYS3d 273 [2d Dept 2015]; ***Fox v Utica***, 133 AD3d 1229, 18 NYS3d 918 [4th Dept 2015]). In cases wherein new parties are added after the initial commencement of the action in accordance with the dictates of CPLR 1003 which are mandatory (*see* ***Jaramillo v Asconcio***, 151 AD3d 947, ___ NYS3d ___ [2d Dept 2017]), the action is commenced against those newly added parties when the supplemental summons is filed with the clerk (*see* ***Marte v Graber***, 58 AD3d 1, at 4, *supra*). The failure to file the papers required to commence an action constitutes a nonwaivable, jurisdictional defect (*see* ***Goldenberg v Westchester County Health Care Corp***., 16 NY3d 323, *supra*; ***O'Brien v Contreras***, 126 AD3d 958, *supra*; ***Fox v City of Utica***, 133 AD3d 1229, 18 NYS3d 918 [4th Dept 2015]; ***Matter of Miller v Waters***, 51 AD3d 113, 853 NYS2d 183 [3d Dept 2008]; ***Benn v Losquadro Ice Co., Inc***., 65 AD3d 655, 886 NYS2d 32 [2d Dept 2009]).

Here, the in rem claims of the plaintiff against the now deceased defendants, William Platt, Jr. and Amund Edwards, who were added as party defendants by leave granted by the order of this court dated February 17, 2016, were commenced on March 20, 2017, the date on which the plaintiff filed its supplemental summons and amended complaint with the Clerk. The plaintiff's supporting papers are devoid of factual averments regarding whether such commencement predated or post-dated the deaths of these now deceased defendants. It is clear under the above cited case authorities that if these defendants died prior to commencement of the action against them on March 20, 2017, such action is a nullity with respect to them and the provisions of CPLR 1003 must be complied with to add their proper successors or estate representatives as party defendants. If, however, the deceased defendants died subsequent to March 20, 2017, then the substitution requirements imposed by CPLR 1015 and 1021 must be observed (*see* ***Jaramillo v Asconcio***, 151 AD3d 947, *supra*). While the plaintiff asserts in its moving papers that "all defendants have been served with the supplemental and amended summons and amended complaint" (*see* ¶ 7 of the affirmation of Helmut Borchert, Esq., in support of motion #003), no proof of service upon William Platt, Jr. or Amund Edwards was attached to the moving papers.

Nor did the plaintiff's moving papers contain necessary particulars regarding the appointments of the personal representatives of the estates of the deceased defendants and whether they are indeed "proper parties" to be substituted as required by CPLR 1015. The court declines the plaintiff's invitation to "substitute" Jonathan James Platt and Lois A. Oliver, in their capacities as personal representatives of the estates of their respective decedents pursuant to CPLR 1024 [2], as it views such invitation as a means of avoiding the requirements for the joinder of new parties and/or the substitution of deceased parties imposed by the provisions of CPLR 1003, 1015 and 1021 (*see* ***Wendover Fin. Serv. v Ridgeway***, 93 AD3d, 1156, 1157 -1158, *supra*). Those portions of the

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[2] CPLR 1024 makes no provision for the substitution of parties.

plaintiff's motion (#003) wherein it seeks to drop the now deceased defendants as parties to this action are denied as are those seeking the substitution of Jonathan James Platt and Lois A. Oliver, in their capacities as personal representatives of the estates of their respective defendants, for unknown defendants John Doe #1-2.

Also denied are the plaintiff's demands for default judgments against all defendants served with the supplemental summons and amended complaint, except those whose answers to said supplemental summons and amended complaint are attached to the moving papers. Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party in answering or appearing (*see* CPLR 3215[f]; ***U.S. Bank Natl. Ass'n v Alba***, 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012]; ***Triangle Prop. #2, LLC. v Narang*** 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). While the quantum of proof necessary to support an application for a default judgment is not nearly as exacting as the proof required on a motion for summary judgment, some firsthand confirmation of the facts forming the basis for the claim must be presented (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 760 NYS2d 727 [2003]; ***Feffer v Malpeso***, 210 AD2d 60, 619 NYS2d 46 [2d Dept 1994]). Accordingly, the plaintiff must advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint (*see* ***CPS Group, Inc. v Gastro Enter. Corp.***, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; ***Resnick v Lebovitz***, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]; ***Beaton v Transit Fac. Corp.***, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]).

Where these elements are established, a motion for entry of a default judgment should be granted (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 760 NYS2d 727 [2003]; ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 2015 WL 1213591 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014], *supra*; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014], *supra*; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013] *supra*). Where they are not so established, the motion must be denied (*see* ***Cardo v Board of Mgrs. Jefferson Vil. Condo 3***, 29 AD3d 930, 932, 817 NYS2d 315 [2d Dept 2006], *quoting* ***Green v Dolphy Constr. Co.***, 187 AD2d 635, 636, 590 NYS2d 238 [2d Dept 1992]; *see also* ***Venturella-Ferretti v Ferretti***, 74 AD3d 792, 793, 901 NYS2d 551[2d Dept 2010]).

RPAPL §§ 1951(1) and (2) provide that a negative easement can be declared or determined to be unenforceable and a court may adjudge that the restriction "shall be completely extinguished" in the event that the court finds that, "at the time the enforceability of the restriction is brought in question [,] ... the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment" (*see* ***Orange & Rockland Util. v Philwold Estates***, 52 NY2d 253, 265, 437 NYS2d 291 [1981]). "As the Court of Appeals has made clear, the

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Legislature intended for RPAPL § 1951(2) to make 'available to owners of parcels burdened with outmoded restrictions an economical and efficient means of getting rid of them'" (***Ferguson v Hart***, 151 AD3d 1242, 56 NYS3d 624 [2d Dept 2017], *quoting* ***Orange & Rockland Util. v Philwold Estates***, 52 NY2d 253 at 265, *supra*).

Here, the plaintiff failed to establish the existence of facts constituting cognizable claims for relief pursuant to RPAPL § 1951. As this court previously indicated, this case presents numerous issues of fact and law that do not lend themselves to a resolution of the issue of whether or not the restriction in question is even subject to the "stranger to the deed" rule, as expressed in ***Estate of Thomson v Wade***, 69 NY2d 570, 516 NYS2d 614 (1987) or simply constitutes the agreement negotiated between the grantor and grantee of the March 21, 2000 deed (*see* Order dated February 17, 2017). The moving papers failed to establish the plaintiff's entitlement to a declaration that the subject covenant and restriction are unenforceable because there is "no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason" (RPAPL §1951[1]; *see generally* ***Nature Conservancy v Congel***, 296 AD3d 840, 744 NYS2d 281 [4th Dept 2002]).

Nor did the plaintiff establish facts constituting cognizable claims for the relief demanded in the alternate causes of action that are set forth in the other causes of action in the complaint. These causes of action sound in common law declaratory relief that will extinguish or otherwise render the subject covenant and restrictions unenforceable. In this regard, the court notes that the granting of declaratory relief is a matter left to the court's discretion, as it may decline to hear the matter if other adequate remedies are available (*see* ***Morgenthau v Erlbaum***, 59 NY2d 143, 464 NYS2d 392 [1983]; ***Woollard v Shaffer Stores Co.***, 272 NY 304 [1936]). Specific pleading requirements are imposed upon those seeking this discretionary remedy by the provisions of CPLR 3017(b). Pursuant thereto, the pleader must specify the rights and other legal relations on which the declaration is requested and state what further or consequential relief is or could be claimed and the nature and extent of any relief which is claimed. The discretionary nature of the remedy afforded in declaratory judgments is further reflected in the provisions of its governing statute. CPLR 3001 thus provides that "[t]he supreme court *may* render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy" (emphasis added).

The term "justiciable controversy" as employed in CPLR 3001 has been defined by appellate case authorities as one which involves "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (***Chanos v MADAD, LLC***, 74 AD3d 1007, 903 NYS2d 503 [2d Dept 2010]). A controversy is said to exist where the plaintiff asserts rights which are actually challenged by the defendant (*see* ***Chanos v MADAD, LLC.***, 74 AD3d 1007, *supra*). A concrete, actual controversy presented to the court for adjudication as an abstract, hypothetical issue is insufficient (*see* ***Fragaso v Romano***, 268 AD2d 457, 702 NYS2d 333 [2d Dept 2000]). Because the remedy afforded by a declaratory judgment provides only a judicial declaration of rights between parties that is aimed at forestalling further litigation, such remedy does not entail coercive relief (*see* ***Morgenthau v Erlbaum***, 59 NY2d 143, *supra*). Consequently, the

declaration set forth in the judgment itself cannot be executed upon so as to compel a party to perform an act or to surrender property (*id.*, at 59 NY2d 148). Here, the plaintiff's moving papers failed to demonstrate facts constituting the elements of its claims for the common law declaratory relief set forth in its complaint.

All other relief demanded is denied except to the extent set forth above. The proposed order attached to the moving papers has been marked "not signed" by this court.

DATED: August 23 2017

THOMAS F. WHELAN, J.S.C.