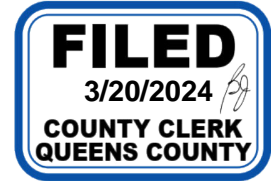


Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

Bank of New York Mellon Trust Company, N.A. Index
as trustee for Mortgage Assets Management Number: 704253/17
Series I Trust,

Plaintiff,

- against -

Motion
Date: 3/11/24

Frederick A. Bayer, et.al.,

Motion Seq. No.: 3

Defendants.

The following papers numbered E113-E114 & E127-E128 read on
this motion by Defendant, Frederick A. Bayer, for an order to
dismiss.

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion-Affirmation (E113-114), Affirmation in Opposition (E127), and Reply (E128).

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by Defendant, Frederick A. Bayer, for an order to
dismiss pursuant to CPLR 3211(a)(8), 306-b, and 3215(c) is granted.

The instant foreclosure action was commenced by the Plaintiff
on March 29, 2017 to foreclose on the property located at 59-89 59th
Place in Queens County. The original Borrower, Theresa Bayer,
passed away on March 9, 2010. Plaintiff originally commenced this
action and filed a notice of pendency against the known and unknown
heirs of the estate, including "Frederick A. Bayer as heir at law,
next of kin and distribute of the Estate of Theresa Bayer..."
Several other heirs of Theresa Bayer were named in the original
complaint as well. On December 16, 2019, Plaintiff moved to extend
time to serve Frederick Bayer, grandson of Frederick A. Bayer and
the unknown heirs of Theresa Bayer, to allow service by
publication, and to appoint a Guardian At Litem. The motion was

granted by order issued January 6, 2020. Plaintiff subsequently filed a motion to amend the pleadings, which was granted without opposition by order issued September 20, 2023.

Counsel for Defendant, Frederick A. Bayer, avers that he is entitled to dismissal because the Plaintiff never obtained personal jurisdiction, insofar as it sued a deceased individual. Bayer passed away on May 26, 2012, five years prior to the commencement of this action.

The death of a named defendant prior to the commencement of an action has been held to render an action a "legal nullity" from its inception, insofar as it is asserted against the deceased defendant (see Citigroup Global Mkts. Realty Corp. v. LaGreca, 167 A.D.3d 842 [2d Dept. 2018]; Rivera v. Bruchim, 103 A.D.3d 700 [2d Dept. 2013]; Jordan v. City of New York, 23 A.D.3d 436 [2d Dept. 2005]; Maldonado v. Law Off. of Mary A. Bjork, 64 A.D.3d 325 [1st Dept. 2009]). Accordingly, since Bayer was deceased prior to commencement of this action and because no representative of her estate was appointed at the time pursuant to CPLR §1015(a), this matter must be dismissed against him as a matter of law for lack of personal jurisdiction. In opposition, Plaintiff failed to cite to any authority, and this Court is unaware of any, which establishes that the forgoing legal framework does not apply where the heir of an estate is named as a defendant. Nor does Plaintiff cite to any authority for the contention that the argument may only apply if Bayer was the only heir named in the caption. It is this Court's opinion that the action is a legal nullity as against Frederick A. Bayer based on his death prior to the commencement of this action. The fact that he was named as an heir and distributee of Theresa Bayer does not alter that conclusion.

Accordingly, the motion is granted and the complaint is dismissed as against Frederick Augustus Bayer, as Heir, Devisee, Distributee of the Estate of Theresa Bayer, pursuant to CPLR 3211(a)(8). The remaining portions of the motion to dismiss are moot.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: March 18, 2024

  
\_\_\_\_\_  
KEVIN J. KERRIGAN, J.S.C.

