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FIRST JUDICIAL
DISTRICT COURT
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STATE OF NEW MEXICO
COUNTY OF RIO ARriba
FIRST JUDICIAL DISTRICT COURT

U.S. Bank Trust National Association, As
Trustee of the Chalet Series IV Trust,

Plaintiff,

v.

D-117-CV-2015-00345

ESTATE OF ROSE R. MARTINEZ, et al.,

Defendants

**Verified Motion to Supplement Motion to Dismiss
Amended Complaint for Foreclosure for Failure to State a Claim
Upon Which Relief Could Be Granted or In the Alternative if the Motion to
Supplement is Denied: New Motion to Dismiss For Failure to State a Claim Upon
Which Relief Could be Granted and for Insufficiency of Process and Service of Process**

Marcelina Yolanda (Martinez) "Marcelina", not a corporate entity, hereby makes this special appearance *in propria persona*, without waiving any rights, remedies, or defenses, statutory, procedural, or otherwise, to move this court for an order to supplement her motion to dismiss the amended complaint for foreclosure for failure to state a claim upon which relief could be granted, "Complaint". The motion to dismiss was fully briefed, with the Motion filed on 4/26/2021, a response filed on 5/14/2021 and a reply filed on 6/1/2021.

Rule 1-012 NMRA allows a defense or objection to be presented via a motion to dismiss. The motion to dismiss was filed pre-emptively, within the time allowed and actually prior to alleged service of process and therefore complies with Section A. The alleged plaintiff ("Plaintiff") had not yet served process upon Marcelina at the time of the motion and Marcelina currently denies that service of process was ever properly made. The alleged plaintiff filed a motion for publication on 6/4/2021 and an order was granted on 7/8/2021. Marcelina has not requested a hearing on her motion to dismiss, as she was giving the alleged plaintiff an

opportunity to properly serve her; however, this did not happen despite the certificates of service filed into the court claiming service of process.

Rule 1-015 NMRA governs the procedure for Amendments and Supplemental Proceedings. According to 1-015D,

On motion of a party, the court may, on reasonable notice and on terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

The purpose of this supplement is to inform the court of additional arguments supporting dismissal of this action pursuant to 1-012B. If this Verified Motion to Supplement her previous Motion to Dismiss is denied then Marcelina directs the court to treat this motion as a brand new motion. As such Marcelina references her Motion to Dismiss Amended Complaint for Foreclosure for Failure to State a Claim Upon Which Relief Could Be Granted filed on 4/26/2021 and its supporting reply filed on June 1, 2021 as if fully incorporated herein. Marcelina specifically denies each and every allegation made in the Plaintiff's amended complaint, and requires strict proof thereof.

INTRODUCTION

This action was initiated on 10/8/2015 as an *in personam* foreclosure action against Marcelina's late mother Rose. Upon her passing, on 11/11/2020 she could no longer be named a party and the alleged plaintiff then sought an amendment to add additional parties. In the course of this amendment the plaintiff also changed the nature of the case and the causes of action also changed.

In her Motion to Dismiss the Amended Complaint, Marcelina argued that the plaintiff failed to state a claim upon which relief could be granted, namely due to the expiration of the statute of

limitations to file its action. Since the completion of briefing on her motion, Marcelina has identified additional defenses warranting dismissal for insufficiency of process, insufficiency of service of process, and failure to state a claim.

Amended Complaint Should be Dismissed for Insufficiency of Process and Insufficiency of Service of Process

The method(s) used by the plaintiff to purportedly effect service of process upon Marcelina and the others named in the action do not conform to the requirements and the motion seeking service by publication and alternate service did not trigger the court's authority to grant the order. As to Marcelina, no attempt was made to personally serve her despite the Plaintiff's counsel being fully informed of the location of Marcelina's domicile. The Motion for Leave to Serve Via Publication and For Alternate Service does not conform to court rules allowing an order for such service. Additionally, the Motion failed to provide the requisite affidavit that service could not reasonably be made as provided by rule 1-004 NMRA. The affidavit would trigger the court's authority to grant the motion; however, it was not provided and therefore the Order Granting Motion for Leave to Serve via Publication and for Alternate Service is void for lack of jurisdiction.

The Notice of Filing Affidavit of Publication and its attached affidavit showing a Notice of Pendency of Action, purportedly filed in the County of Bernalillo on 7/14/2021, 7/21/2021, and 7/28/2021 does not conform to Rule 1-004K NMRA. A Motion to Strike "Certificate of Service as to Defendant Marcelina Martinez", "Exhibit B Affidavit of Due Diligence", and "Notice of Filing Affidavit of Publication" is filed herewith, as well as a Motion to Set Aside Void Order Granting Motion for Leave to Serve Via Publication and for Alternate Service.

Due to the failure to meet affidavit requirements for alternative service under 1-004 NMRA the Amended Complaint should be dismissed for insufficiency of process and insufficiency of service of process as well as for a failure to state a claim for which relief could be granted.

Marcelina should have been substituted as a party if the Amended Complaint related back to the original Complaint

The Amended Complaint must be dismissed for failure to state a claim upon which relief could be granted because the statute of limitations expired in June of 2019. If the Amended Complaint were not subject to Relation Back requirements of Rule 1-015C NMRA, as the Plaintiff argues, then the action must be dismissed for the Plaintiff's failure to substitute Marcelina as a party after the death of her mother pursuant to Rule 1-025 NMRA.

Marcelina disagrees that the Amended Complaint is not subject to relation back requirements according to Rule 1-015C(3) and in its response to Marcelina's motion to dismiss, the Plaintiff failed to provide argument as to how its Amended Complaint either conforms to the rule or how the statute of limitations has not expired therefore it is deemed admitted. However, regardless of the Plaintiff's contention that its amended complaint is not bound by the requirements of 1-015C(3)(b) then it should have filed a Motion to Substitute Marcelina as a party pursuant to Rule 1-025A and it should have joined other "persons needed for just adjudication" pursuant to Rule 1-019. Not only did the Plaintiff fail to file a motion to substitute Marcelina while her mother was still alive, it also failed to file a Motion to Substitute after her death in order to preserve its claims beyond the statute of limitations. It also failed to join parties it now deems necessary to adjudicate its claims.

Moreover, the rule allows for substitution within the same action upon other persons who were not parties; however, the Plaintiff failed to invoke this Rule as required and the action is no longer pending thus the action should be dismissed on these grounds as well. The Plaintiff's

failure to substitute Marcelina as well as non-parties is further admission that the amended complaint is materially different as to allege an entirely different cause of action in order to justify adding the new parties. The only way an amendment could relate back to the original complaint is if the new parties should have been named in the original complaint in the first place. If that were the case the plaintiff should have also invoked Rule 1-019 NMRA, "Joinder of persons needed for just adjudication."

ARGUMENT

Pursuant to Rule 1-015D,

On motion of a party, the court may, on reasonable notice and on terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

The "occurrences and events which have happened since the date" of the Motion to Dismiss filed by Marcelina were the Motion for Leave to Serve Via Publication and for Alternate Service as well as its Order and alleged service made under that order. Additionally, the time has expired for a party to be substituted into the action founded upon the original complaint and that action is no longer active.

Rule 1-012B provides, "A motion making any of these defenses shall be made before pleading if a further pleading is permitted" The defenses include, in part, "(4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 1-019 NMRA." An amendment is no longer available, as the Motion was fully briefed as of June 1, 2021. The Motion to Dismiss, although filed prior to any alleged proper service of process, tolls the time to provide a responsive pleading to the Amended Complaint. Marcelina continues to make a special appearance in this

action, without waiving any rights, remedies, or defenses, statutory or procedural, including the defense of insufficiency of process and service of process.

Marcelina moves the court to dismiss the action for insufficiency of process and insufficiency of service of process

According to Rule 1-004J and 1-004K NMRA,

J. Process; service in manner approved by court. Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. Process; service by publication. Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the defendant notice of the pendency of the action, the court shall also order that a notice of pendency of the action be published in a newspaper of general circulation in the county which reasonably appears is most likely to give the defendant notice of the action.

(2) The notice of pendency of action shall contain:

(a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested;

(b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought;

(c) the name, address and telephone number of plaintiff's attorney; and

(d) a statement that a default judgment may be entered if a response is not filed.

(3) If the cause of action involves real property, the notice shall describe the property as follows:

(a) If the property has a street address, the name of the municipality or county address and the street address of the property.

(b) If the property is located in a Spanish or Mexican grant, the name of the grant.

(c) If the property has been subdivided, the subdivision description or if the property has not been subdivided the metes and bounds of the property.

(4) In actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the "unknown heirs of the following named deceased persons" followed by the names of the deceased persons whose unknown heirs are sought to be served. As to parties named in the alternative, the notice shall be given to "the following

named defendants by name, if living; if deceased, their unknown heirs" followed by the names of the defendants. As to parties named as "unknown claimants", notice shall be given to the "unknown persons who may claim a lien, interest or title adverse to the plaintiff" followed by the names of the deceased persons whose unknown claimants are sought to be served.

The "Certificate of Service as to Defendant Marcelina Martinez" is invalid due to the void "Order Granting Motion for Leave to Serve Via Publication and for Alternate Service", as the motion for leave failed to provide the affidavit required by Rule 1-004J. According to that rule, "Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods." An "Affidavit of Due Diligence" ("Affidavit") is attached to that motion purportedly signed by "Victoria Villalobos" from Los Angeles, CA who claims to have attempted service at "737 State Road 76, Chimayo, NM 87522 stating, "This is a gated and locked property and no vehicles seen..." Affidavit ¶ 1. She continues to claim in ¶2, "I attempted service again, still gated and locked", and ¶3, "I attempted service and was able to get in unlocked property. There was no answer at the door and no vehicles in driveway" and, finally, ¶4, "I attempted service and the gate is still locked, unable to get onto the property..." Marcelina specifically denies these statements and moves the court to strike this affidavit in her separate filing. This property has two entrances and while one entrance is gated, it is not locked. The other entrance has no gate, although it is posted "No Trespass". Marcelina declares under penalty of perjury that this is true and correct (see verification below).

This service makes no mention of the party or parties this woman was purportedly attempting to serve. This does not conform to the rule requiring an affidavit that service cannot be reasonably made as provided by this rule. Furthermore, as Mr. Krotzer, the alleged attorney for the plaintiff is currently active in another case involving Marcelina he is fully aware of the

location of her permanent domicile yet he failed to attempt, and admits as much, to personally serve her at her property. The affidavit also makes no mention of any attempts to serve Marcelina or the remaining parties.

Additionally, the Notice of Pendency of Action fails to comply with provisions of Rule 1-004K, both because the Motion is not in compliance with Rule 1-004K and because the Notice does not conform to requirements. First, according to the Affidavit of Publication, the notice was apparently filed in the Albuquerque Journal. The property is in Rio Arriba County, not in Bernalillo County. Since there is no affidavit or other argument as to why the Notice was published almost 100 miles from the property the publication does not conform to the rule. See subparagraph (1), "Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending." There is one newspaper of general circulation in Rio Arriba County and another, which is not in general circulation in the county, but is more appropriate than a publication in Albuquerque, or Bernalillo County.

The notice is also in violation of subparagraph (2)(a), "including a statement which describes the action or relief requested". According to the Notice, "...a civil action against you in the above-entitled Court and cause, to enforce judgment and foreclosure sale as to the real property located in Rio Arriba County..." As much as Mr. Krotzer is salivating to steal this property, along with the hundreds of others he has stolen, there is hardly a foreclosure judgment or sale in the present action. This notice is *void* for this reason alone. Exhibit D to the Motion for Leave is a document titled, "Notice of Pendency of Action", which provides the same language.

Further, the caption names "unknown heirs, devisees, or legatees of Rose R. Martinez", publication of a notice of pendency of action with such named defendants are only allowed in

“actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the “unknown heirs of the following named deceased persons” followed by the names of the deceased persons whose unknown heirs are sought to be served.” However, the Plaintiff insists the action has not materially changed from an *in personam* action against the maker of the note, such that it believes its amended complaint is not subject to dismissal for expiration of the statute of limitations. The Plaintiff cannot have it both ways. Either the complaint relates back to the original complaint as an *in personam* action or it is now a quiet title or “other proceedings” (e.g. probate) and therefore the amended complaint does not relate back as the statute of limitations has expired.

Marcelina moves the court to dismiss the Amended Complaint for failure to join a party under Rule 1-019 and failure to substitute under Rule 1-025

Rule 1-012B(7) NMRA specifically provides that a motion can be made for dismissal for failure to join a party under rule 1-019. Rule 1-019 NMRA provides,

A. Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if:

- (1) in his absence complete relief cannot be accorded among those already parties; or
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
 - (a) as a practical matter impair or impede his ability to protect that interest; or
 - (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

B. Determination by court whenever joinder not feasible. If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Plaintiff's contention is that the amended complaint conforms to relation back requirements because it is not materially different than the original complaint, thus the parties added via the amendment should have been parties in the first case; however, if this were true he should have joined the proper parties under Rule 1-019 prior to the passing of Rose or he should have substituted the proper party under Rule 1-025 upon her passing. "Rule 1-019 has been synthesized into a three-part analysis: (1) whether a party is necessary to the litigation; (2) whether a necessary party can be joined; and (3) whether the litigation can proceed if a necessary party cannot be joined." *Little v. Gill*, 2003-NMCA-103, 134 N.M. 321, 76 P.3d 639 at {4} citing *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 39, 132 N.M. 207, 46 P.3d 668, cert. dismissed, 536 U.S. 990 (2002) ("If the litigation cannot proceed without a necessary party, the party is considered indispensable, and the case must be dismissed"). The similarities between the present case and *Little v. Gill*, speak to the contract in each case. In *Little*, the plaintiff made a presumption that the insurance company was automatically liable even though the defendant had passed away. The court determined that this would only have been the case if the insurance contract spelled out that provision and there was "no question that the insurance contract [did] not provide a direct claim against the [insurance company]." In the present case the contract, i.e. the Note, also does provide a direct claim against Marcelina or any other party. If the original complaint had contemplated a *quasi in rem* action or an action to obtain property then Marcelina would have been an indispensable party, as she is on the deed of the party. The Plaintiff failed to substitute her as a defendant and therefore that action should have been dismissed and a separate action initiated against Marcelina under a different theory. Thus the amendment is voidable.

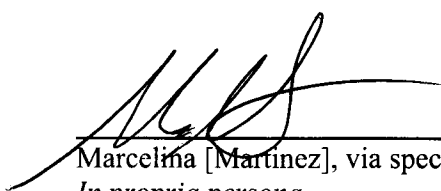
According to Rule 1-025A(1) NMRA,

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 1-005 NMRA and upon persons not parties in the manner provided in Rule 1-004 NMRA for the service of a summons. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

The Plaintiff had ample opportunity to substitute the proper party under this rule had the claims related back to the original complaint; however, because the claims had to be amended to apply to the new parties, this did not happen. The time to substitute would have expired had the original complaint continued anyway. It is clear the case is subject to dismissal for expiration of the statute of limitations.

CONCLUSION

Based on the foregoing, in addition to the arguments raised in the fully briefed Motion to Dismiss Amended complaint, this action should be dismissed with prejudice, as the statute of limitations has expired and the Plaintiff failed to properly substitute parties within time allotted by the rules. Additionally, the Amended Complaint should also be dismissed for insufficiency of process and insufficiency of service of process. Marcelina respectfully moves this court for an order granting this supplement to her Motion to Dismiss filed on 4/26/2021. If the court denies this motion, Marcelina directs the court to treat this Motion as a new Motion to Dismiss, referencing the original Motion to Dismiss as if fully incorporated herein. A Motion to Set Aside Void Order Granting Motion for Leave to Serve via Publication and for Alternate Service and a Motion to Strike "Certificate of Service As to Defendant Marcelina Martinez", "Affidavit of Due Diligence", and "Notice of Filing Affidavit of Publication" is filed concurrently herewith. I declare under penalty of perjury that the foregoing is true and complete to the best of my knowledge.



Marcelina [Martinez], via special appearance

In propria persona

c/o PO Box 2077

Santa Cruz, New Mexico

505.672.8497

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2021, I sent a copy of the foregoing Verified Motion to Supplement Motion to Dismiss Amended Complaint for Foreclosure for Failure to State a Claim Upon Which Relief Could Be Granted or In the Alternative if the Motion to Supplement is Denied: New Motion to Dismiss For Failure to State a Claim Upon Which Relief Could be Granted and for Insufficiency of Process and Service of Process to Solomon Krotzer via USPS mail at 100 Sun Ave. NE Suite 650, Albuquerque, NM 87109 By 