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

Motion to Dismiss Amended Complaint for Foreclosure for Failure to State a Claim Upon Which Relief Could Be Granted

Marcelina Martinez, "Marcelina", hereby makes this special appearance, without waiving any rights, remedies, or defenses, statutory, procedural, or otherwise, to move this court to dismiss the alleged plaintiff's amended Complaint, "Complaint", for Foreclosure for failure to state a claim upon which relief could be granted. In support of her motion, Marcelina provides the following:

INTRODUCTION

1. The predecessor of the alleged plaintiff filed an action of foreclosure on 10/8/2015 as an *in personam* action against the maker of the Note it alleges to be at issue in this case.

2. Marcelina intervened in this case via an unopposed motion, as the offspring of the woman who used the name "Rose Martinez", known by her friends and family as "Rose", and as a named titleholder over the land claimed to be subject to the action.

3. Rose Martinez was the named maker of the Note allegedly subject to that action.

4. Rose passed away on 11/11/2020 leaving the land she used in usufruct for the benefit of her offspring.

5. The alleged plaintiff filed a motion to amend its complaint on 2/26/2021, to which Marcelina opposed.

6. This court granted the amendment on 4/1/2021.

7. According to the amended Complaint "the loan is in default and is due for the January 1, 2013". ¶ 19

8. The amended Complaint added the following parties as defendants: ESTATE OF ROSE R. MARTINEZ AKA ROSE MARTINEZ, DECEASED; FELIX J. MARTINEZ A/K/A FELIX JOE MARTINEZ; MARCELINA MARTINEZ; UNKNOWN HEIRS, DEVISEES OR LEGATEES OF ROSE R. MARTINEZ, DECEASED; AND OCCUPANTS OF THE PROPERTY, IF ANY.

9. The Complaint claims, "any interest of [each defendant] is subordinate to the interest of the Plaintiff".

10. The Complaint alleges that the plaintiff is a lien holder of the alleged mortgage by virtue of a Note endorsed in blank.

11. The plaintiff claims it is currently in possession of the original "wet ink" promissory Note, which purportedly gives it a right to enforce the Note.

ARGUMENT

As a preliminary matter, the named plaintiff's capacity to sue is challenged. On information and belief the plaintiff lacks capacity to sue in this action. See the attached affidavit of Negative Averment. Exhibit A. Pursuant to 1-009 NMRA,

> A. **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, <u>*that party shall do so*</u>

> *by specific negative averment*, which shall include such supporting particulars as are peculiarly within the pleader's knowledge. Emphasis added.

Marcelina provided a specific negative averment as to the capacity of the plaintiff due to questions regarding the authority of Houser LLP to act in the original action and due to the fact that the affidavit provided by Solomon Krotzer amounted to hearsay, without providing any proof that the named plaintiff is actually represented by Houser LLP, the issue remains challenged. The affidavit of specific negative averment was never rebutted and therefore it is deemed admitted by the plaintiff. See Rule 1-008D NMRA. *See also Valencia v. Lundgren*, 129 N.M. 57 1 P. 3d 975; and *Pharmaseal Lab., Inc. v. Goffe,* 90 N.M. 753, 756, 568 P.2d 589, 592 (1977).

The allegations in the complaint fail to allege a claim against any of the named Defendants or to invoke the court's jurisdiction to grant the relief sought in the WHEREFORE section of the complaint. The Complaint appears to attempt to invoke the Court's jurisdiction under the Uniform Probate Code, "UPC", NMSA 1978 §§ 45-1-101 et seq. but fails to do so through the allegations of the complaint or through procedure. Moreover, the amended Complaint does not relate back to the original complaint and thus is barred by the Statute of Limitations for actions founded upon a written instrument, which is six (6) years. See NMSA 1978 § 37-1-3.

I. THE COMPLAINT FAILS TO INVOKE THE COURT'S JURISDICTION

The original complaint against "Rose Martinez", as the maker of the note purportedly invoked the court's jurisdiction over an *In Personam* action to enforce the Note of which Rose Martinez was apparently the maker. At no point did the complaint invoke any other jurisdiction, including *In Rem*, with any property as the *Res* or under the Quiet Title statute. Notwithstanding the fact that an action for foreclosure *could be* brought as an action *Quasi In Rem*, in this case it was not. The amended Complaint purports to change the nature of the claim in order to allow the plaintiff to add certain parties, which would not have initially been proper to join as defendants in the original *In Personam* action.

A. Plaintiff admits probate jurisdiction is necessary to add "Estate of Rose Martinez"

In its reply to the motion to amend the complaint, "Reply", the plaintiff cites NMSA § 45-3-104(B) (sic) as reasoning for failing to invoke the court's Probate jurisdiction claiming it is not necessary to do so if it is asserting a claim as a secured creditor. See Section I ¶ 2 of Reply. However, it fails to provide the provision in its entirety. NMSA 1978 § 45-3-104 applies to the Probate of Wills and Administration and states,

> A. No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by Sections 3-101 through 3-1204 [45-3-101 to 45-3-1204 NMSA 1978]. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-1004 [45-3-1004 NMSA 1978] or from a personal representative individually liable as provided in Section 3-1005 [45-3-1005NMSA 1978].
>
> B. Subsection A of this section shall have no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Nowhere in this section does it state it is not necessary to properly invoke the Court's Probate Jurisdiction to make a claim against the estate of a decedent testate, intestate, or otherwise. Additionally, the plaintiff admits the UPC is applicable in this case, as it also cites NMSA § 45-3-814 (sic) ("If any assets of the estate are encumbered by mortgage, pledge, lien or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate"). Thus, adding "Estate of Rose Martinez" as a party necessarily requires the Court's Probate jurisdiction to first be properly invoked. "District courts "have original jurisdiction in all matters and causes not excepted in this [Constitution of the State of New Mexico], and such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const. art. VI, § 13. Probate proceedings are special proceedings and, as a result, district courts sitting in probate possess only the jurisdiction conferred upon them by statute." *In Re Estate of Harrington*, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070 at {14} citing *In re Hickok's Will*, 61 N.M. 204, 216, 297 P.2d 866, 874 (1956). The statute itself prescribes whom, when, and how a party can invoke the court's Probate jurisdiction.

The only way this Court could acquire jurisdiction over any of the parties purportedly added is by invoking the court's Probate jurisdiction, which has not happened and, if it were properly invoked it would change the nature of the claim thus rendering it a new action under a separate statutory jurisdiction. Actions under the probate jurisdiction are subject to the specific statutory requirements set forth in the UPC. "The jurisdiction enjoyed by district courts sitting in probate is set forth in the New Mexico Uniform Probate Code at NMSA 1978, § 45-1-302(1978) and at NMSA 1978, § 45-1-303 (1975). Section 45-1-302(A) & (B) defines the district courts' jurisdiction in formal probate proceedings, while Section 45-1-302(C) and NMSA 1978, § 45-1-302.1 (1977) define the district courts' and the probate courts' jurisdiction in informal probate proceedings. Read together, these provisions invest district courts with exclusive original jurisdiction over formal probate proceedings and with concurrent original jurisdiction, which it shares with probate courts, over informal probate proceedings." *Id* at {15}. Thus, the only way this court could possibly acquire jurisdiction over "The Estate of…" or the "personal representative" is by first having its probate jurisdiction invoked, which can only happen under a new cause of action and legal theory.

The fact that NMSA 1978 § 45-3-104B allows a "secured creditor" to make a claim prior to the appointment of a personal representative does not divest it of the requirement to properly invoke the court's probate jurisdiction in order to assert that claim.

B. The Complaint does not allege the Plaintiff to be a "Secured Creditor"

The plaintiff is attempting to sidestep probate requirements by claiming that a secured creditor is not required to follow the statutory requirements of the UPC; however, even if that were the case, the Complaint fails to allege that the plaintiff is a secured creditor and alleges only a right to enforce the Note. Despite claiming that the mortgage was assigned to the Plaintiff there are no allegations or attachments to the complaint showing that the plaintiff acquired any right to the Mortgage as a secured creditor, e.g. the Complaint fails to show any transfer of the alleged underlying debt and given that only the Note is a negotiable instrument, this claim must be clearly alleged with supporting facts. The assignment is hardly evidence of an assignment of debt or a proper transfer of mortgage, which is non-negotiable. *See e.g. Charles F. Curry Co. v. Goodman* (Okl.App 1987) 737 P2d 963 ("The mere filing of a document in a county recorder's office does not create property rights in those persons named in the document."); *Pathway Financial v. Beach* (1987) 162 IL.App.3d 1036, 516 NE2d 409.

The original complaint made it very clear that the plaintiff was attempting to enforce a Note, "endorsed in blank", as a "real party in interest" rather than a holder in due course, and that it was entitled to enforce this note due to possession alone, as it alleged that it became a holder by "delivery alone". Neither the original complaint nor the amended Complaint alleges that the plaintiff is a secured creditor. However, if the plaintiff purports to assert a right to make a secured claim, it must still follow the statutory provisions of the UPC in order to do so. This would necessarily require the claim to be made via a new action under the UPC jurisdiction.

C. The original Complaint was not a Quiet Title claim under NMSA 1978 § 42-6-1

In its reply to the motion to amend the complaint, the plaintiff states, "[t]his is a judicial foreclosure so, contrary to Martinez' assertion, this Court has subject matter jurisdiction pursuant to NMSA 1978, § 42-6-1 ("An action to determine and quiet the title of real property may be brought by anyone having or claiming an interest therein, **or by the holder of any mortgage…in an action brought to foreclose the said mortgage"**) amongst perhaps other authority." Emphasis theirs. Indeed this provision exists within NMSA 1978, § 42-6-1, however, neither the original or amended Complaint invoked the court's jurisdiction under this provision. It is clear that the original complaint seeks to enforce a Note. "Under the common law rule, an action to foreclose on real property is separate and distinct from an action to recover on an underlying promissory note." *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P. 3d 1046 citing *Edwards v. Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169.

Given that the original complaint was pleaded as an *in personam* action against the maker of a Note, it was clearly an action to recover on the Note, which is separate and distinct from an action to foreclose on real property. Had the plaintiff intended to invoke the court's Quiet Title jurisdiction it was required to follow the provisions in that statute.

Neither the original nor amended Complaint alleges that the plaintiff is attempting to quiet the title as the holder of a mortgage. Pursuant to NMSA 1978 § 42-6-2,

> "The plaintiff must file his complaint in the district court, ***setting forth the nature and extent of his estate*** and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff, and praying for the establishment of the plaintiff's estate against such adverse claims, and ***that the defendant be barred and forever estopped from having or claiming any lien upon or any right or title to the premises***, adverse to the plaintiff, ***and that plaintiff's title thereto be forever quieted and set at rest***. Any or all persons whom the plaintiff alleges in his complaint he is informed and believes make claim adverse to the estate of the plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his complaint in his lifetime made claim adverse to

> the estate of the plaintiff, and all unknown persons claiming any lien, interest or title adverse to plaintiff, may be made parties defendant to said complaint by their names, as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person, and said unknown persons who may claim any lien, interest or title adverse to the plaintiff, by the name and style of unknown claimants of interest in the premises adverse to the plaintiff. ***When the plaintiff shall allege generally in his complaint that he has made due search and inquiry to ascertain whether any person whom he desires to name as party defendant in said cause is living or dead and is unable to ascertain with certainty whether such person is living or dead, such person and his unknown heirs may be made parties defendant to said complaint under the name and style of "(name of the party), if living, if deceased, the unknown heirs of (name of the party), deceased."*** Service of process and notice of said suit against all of such defendants shall be made as in other cases in conformity with the provisions of law and rules of court relating to the service of process. Emphasis Added.

Notwithstanding the plaintiff's attempt at invoking the Court's quiet title jurisdiction under the aforementioned section in the amended Complaint, the original complaint does no such thing, thus the amendment is an entirely new, "separate and distinct", action.

II. PLAINTIFF'S CLAIM IS BARRED BY STATUTE OF LIMITATIONS

The plaintiff's amended Complaint alleges a new cause of action, particularly against the named defendants as argued above. It is attempting to invoke the court's probate jurisdiction and/or quiet title jurisdiction purportedly as a superior titleholder; however the complaint is not well-pleaded as required and the plaintiff is not alleging to be a titleholder but a lienholder. Despite the ambiguity of the plaintiff's legal theory, the nature of the original complaint is now materially different. Notwithstanding its failure to properly invoke the court's jurisdiction under either one of those two, separate, jurisdictions, the amended Complaint does not relate back to the original complaint thus the amended Complaint is barred by the statute of limitations under NMSA 1978 § 37-1-3A, which provides, "[a]ctions founded upon any bond, promissory note, bill of exchange or other contract in writing shall be brought within six years."

A. The Plaintiff's claim expired around January of 2019

According to the amended Complaint, allegedly the "Loan is in default and is due for the January 1, 2013 monthly payment". Marcelina disputes that there was ever any loan subject to this action; however, with regards to the limitation of the plaintiff's action, pursuant to the statute, the plaintiff cannot recover on its claim as the period has expired based on its own allegation. This is applicable to both the alleged Note and the alleged mortgage. "Mortgage is a contract in writing and it falls within the six-year statute." *Griffith v. Humble*, 1942-NMSC-006, 46 N.M. 113, 122 P.2d 134.

B. The amended Complaint does not relate back to the original complaint

The plaintiff sought its amendment under Rule 1-015 NMRA. According to subsection C,

Relation back of amendments.

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) When a party files a motion to amend a pleading prior to the running of the statute of limitations, changing the party against whom a claim is asserted, a ruling granting the motion relates back to the date the motion was filed if the motion was accompanied by a proposed amended pleading naming the new party.

(3) When a party files a motion to amend a pleading after the statute of limitations has run, changing the party against whom a claim is asserted, a ruling granting the motion relates back to the date of the original pleading if Paragraph (C)(1) of this rule is satisfied and, within the period provided by Rule 1-004(C)(2) NMRA for serving process, the party to be brought in by amendment

(a) has received such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits; and

(b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.

In this case, the plaintiff is attempting to trigger subsection C(3), to change the party(ies) against whom the claim is asserted. Both Paragraph (C)(1) and (C)(3)(a) and (b) must be satisfied for the Complaint to relate back.

i. <u>Rule 1-015C(1) NMRA is not satisfied thus the Complaint does not relate back</u>

Rule 1-015C(1) NMRA is not satisfied because there is no longer an *in personam* cause of action against the maker of the note thus there is no subject matter jurisdiction because the case is moot. Any alleged claim made by the alleged plaintiff must be made under a new theory. According to *Garcia v. Dorsey*, 2006-NMSC-052, 140 N.M. 746, 149 P.3d 62, "[i]n *Gunaji*, we stated that, "[a]s a general rule, this Court does not decide moot cases."" Citing *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. "A case is moot when no actual controversy exists, and the court cannot grant actual relief." *Gunaji,* 2001-NMSC-028, ¶ 9. As a general rule, a moot case is subject to summary dismissal. *Id*. In order to confer jurisdiction on the court, actual controversy must exist. *See Mowrer v. Rusk*, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886 (S. Ct. 1980).

"Where a plaintiff has not established the right to enforce the note, it cannot foreclose the mortgage, even if evidence shows the mortgage was assigned to Plaintiff. *See Flagstar Bank FSB v. Licha*, 2015-NMCA-086 at {17} *citing Bank of New York v. Romero*, 2014-NMSC-007 at {34, 35}. A party cannot foreclose on a mortgage without proving a right to enforce the Note. *See Deutsche Bank v. Johnston*, 2016-NMSC-013, 369 P.3d 1046. The plaintiff cannot enforce the Note and therefore cannot foreclose on the mortgage.

Notwithstanding the plaintiff's attempt to place itself in the shoes of a creditor through transfer of a Note but failing to properly allege this position in its Complaint, the mortgage lien has been extinguished upon the passing of Rose Martinez, the woman. "[A] judgment lien can attach only to whatever interest the debtor has in the property. If he has no interest, then no lien can attach." *Romero v. State*, 1982-NMSC-028, 97 N.M. 569, 642 P.2d 172 quoting 2 A.C. Freeman, a Treatise of the Law of Judgments § 950 (5^{th} ed. 1925). "The purchaser at a foreclosure sale can acquire only such interest as the judgment debtor had in the property sold." *Id* at {16}. Thus any inferior title the plaintiff might acquire via foreclosure would essentially grant it nothing, as it would not acquire any right or interest in the property. This conforms to the principles of usufruct wherein the ultimate interest a man or woman could have in land is the right to possess the property. Rose, the woman, no longer has a need or right to possess the land and therefore her ultimate interest extinguished upon her passing. The fictitious entity, "Estate of Rose Martinez", which currently does not exist, has no right to possession of the land, nor does it have a contract with the plaintiff. In fact, no "dead" entity existing only on paper, including "Estate of"… anything has a right to possess land, as it would violate the principle of usufruct.

ii. Rule 1-015C(3) is not satisfied given that the claim has materially changed

The Complaint must also satisfy Rule 1-015C(3)(a) and (b). The new party(ies) must receive "such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits" and the party(ies) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. Neither of these has been met. First, the parties now named are most certainly prejudiced in maintaining a defense on the merits of the original complaint, as they were not parties to the underlying transaction. They are not named on the alleged Note or Mortgage and their mother, Rose, the maker, has passed away thus they have no way to properly admit or deny any of the allegations other than the obvious, e.g. the expiration of the statute of limitations.

As to Marcelina being now named as a defendant but acted solely as an intervener in the original case, she was not made aware that she would be added as a defendant until the Plaintiff attempted to do so after the second substitution of the plaintiff, after the statute of limitations had expired. The plaintiff had plenty of time to attempt to join her as a defendant within the period of limitations if it felt she was a proper party to be named and yet it did not. It now would like to add her as a defendant simply because it needs someone, anyone, to name in order to attempt to steal a house. Marcelina has no obligation to the plaintiff under its alleged Note or mortgage and despite its attempt to pull a fast one over the Court by claiming to have an interest "superior" to Marcelina's paramount and possessory interest, the plaintiff has not alleged or shown itself to hold title but only a lien, while Marcelina is actually named on the deed to the land, of which the alleged plaintiff is well aware, and she is in possession of the land. The only legal theory upon which the plaintiff might attempt to add her as a party defendant now is through the court's probate jurisdiction as an heir, or under a quiet title jurisdiction, as an owner of the land. However, as previously argued, the plaintiff has not properly invoked either of those jurisdictions and the original complaint was brought under a completely different legal theory thus the original action is now moot.

With regards to subsection C(3)(b), none of the new defendants would have been proper parties to the original complaint nor could they, would they, or should they have known they would be sued by the plaintiff. Their identities were not inadvertently mistaken thus the Complaint does not relate back to the original complaint. "Under Rule 1-015(C)(2), Plaintiffs must establish that [added party] Warren CAT was not made a party to the lawsuit before the statute of limitations expired because of "inadvertence due to mistaken identity."" *Snow v. Warren Power & Mach., Inc.*, 2015-NMSC-026, 354 P.3d 1285 at {14} citing *Romero* v. *Ole Tires*, 1984-NMCA-092, ¶ 17, 101 N.M. 759, 688 P.2d 1263.

<u>CONCLUSION</u>

The alleged plaintiff's original complaint did not invoke the Court's jurisdiction to quiet title and even if it had, the addition of the "Estate of Rose Martinez" to its complaint necessarily