COURT OF APPEALS NO. APL-2021-00017

TO BE ARGUED BY:
ANDREW D. HIMMEL, ESQ.
TIME REQUESTED: 20 MINUTES

State of New York
Court of Appeals

In the Matter of
JOHN KOEGEL AS EXECUTOR OF THE ESTATE OF
WILLIAM F. KOEGEL, A/K/A
WILLIAM FISHER KOEGEL,

Deceased,

PURSUANT TO SCPA 1421.

JOHN B. KOEGEL,

Petitioner-Respondent,

-against-

IRENE LAWRENCE KOEGEL,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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Date Completed: April 16, 2021

Appellate Division, Second Department Docket No. 2019-03605
Surrogate's Court, Westchester County, File No. 2014-452/A

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PRELIMINARY STATEMENT

Respondent-Appellant Irene Lawrence Koegel ("Irene") appeals from the June 17, 2020 Order of the Second Department, which affirmed the February 5, 2019 Order of the Surrogate's Court, Westchester County granting the summary judgment motion of Petitioner-Respondent John B. Koegel ("John") to invalidate Irene's notice of election pursuant to Estates, Powers and Trusts Law §5-1.1-A and to declare that Irene was not entitled to an elective share of the estate of her late husband, the decedent William F. Koegel.

In *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013), this Court held that a certificate of acknowledgment accompanying the parties' prenuptial agreement was materially defective where the acknowledgment, in violation of Domestic Relations Law §236(B)(3), omitted language expressly stating that the notary public knew the signer or ascertained through some form of proof that the signer was the person described. This Court viewed such language as a "core component" of a valid acknowledgment, given the requirement in DRL §236(B)(3) that a nuptial agreement be executed in the same manner as a recorded deed. 969 N.Y.S.2d at 831.

The Estates, Powers and Trusts Law contains an equivalent provision that any waiver or release of the right of election "must be in writing and subscribed by the maker thereof, and acknowledged

or proved in the manner required by the laws of this state for the recording of a conveyance of real property." EPTL §5-1.1-A(e)(2).

The *Galetta* court, however, left unanswered the question of whether a materially defective acknowledgment of a prenuptial agreement could be cured by extrinsic proof. This Court should hold that the certificate of acknowledgment in this case is not susceptible to cure, for the following reasons:

(1) The defect in the certificate is not a technical or minor error. Instead, as this Court ruled in *Galetta*, the absence of the statutorily required language was a material and substantial defect, given that the language omitted from the certificate was a "core component" of a valid acknowledgment.

(2) New York courts allow cures for defective documents which violate statutory requisites where legislative authority so provides, typically in cases involving minor or technical defects. But in the absence of legislative authority, Courts do not permit cures of *material* defects, i.e., those defects that constitute substantial deviations from statutory requirements. In particular, neither the Domestic Relations Law nor the Estates, Powers and Trusts Law contains any language providing for the cure of documents governed by DRL §236(B)(3) or EPTL §5-1.1-A(e)(2) which suffer from substantial and material defects.

(3) This Court should not intrude upon the legislative function and allow for the cures of materially defective

certificates of acknowledgment that lack a core component of statutory requirements. The legislature could easily have included language in DRL §236(B)(3) or EPTL §5-1.1-A(e)(2) stating that substantial and material defects in marital documents or right of election waivers can be cured through the use of extrinsic evidence. Yet neither the Domestic Relations Law nor the Estates, Powers and Trusts Law contains any such provision and this Court should not, in the exercise of its function, draft *de facto* amendments to the statutes.

(4) Allowing the availability of cure with respect to materially defective acknowledgments would inject an unwarranted level of unpredictability and uncertainty into the statutory framework. The detailed and elaborate legislative scheme would face potential dilution by a procession of case law involving fact patterns competing to qualify as post-execution cures. As a matter of statewide public policy, courts should not allow this statutory framework to be subject to a variety of fact-based determinations as to whether post-execution cures can resurrect an otherwise materially defective acknowledgment.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal pursuant to CPLR 5602(a)(1)(ii) because the June 17, 2020 order of the Second Department (the "2020 Second Department Order") (*Matter of Koegel*, 184 A.D.3d 764, 126 N.Y.S.3d 153 (2d Dep't. 2020)), ROA 11-13[1], which affirmed the February 5, 2019 order of the Surrogate's Court, Westchester County (ROA 47-55) granting John's motion for summary judgment to invalidate Irene's notice of election and to declare that Irene was not entitled to an elective share of her late husband's estate, disposes of all the claims in this case. It is thus a final order pursuant to CPLR 5611. Further, the Second Department February 7, 2018 order on the prior appeal in the action (ROA 14-28) necessarily affects the final 2020 Second Department order within the meaning of CPLR 5602(a)(1)(ii) and is therefore brought up for review within the meaning of CPLR 5501(a)(1). This Court granted Irene leave to appeal in its order of February 11, 2021. *Matter of Koegel*, 36 N.Y.3d 905 (2021). ROA 10.

[1] References to the Court of Appeals Record on Appeal will be indicated in the form "ROA [page number]."

QUESTION PRESENTED

The question presented by this appeal is whether or not a certificate of acknowledgment accompanying a nuptial agreement or right of election waiver which is materially defective due to noncompliance with New York Domestic Relations Law §236(B)(3) and Estates, Powers and Trusts Law §5-1.1-A(e)(2) can be cured by extrinsic evidence.

STATEMENT OF FACTS

Irene, 91, and the decedent William F. Koegel ("Decedent"), were married on August 4, 1984, and remained married until the death of Decedent on February 3, 2014. See Petition to Set Aside Spousal Election ("Petition"), ROA 85-120. Prior to their marriage, on or about July 30, 1984, Irene and the Decedent executed a prenuptial agreement (the "Prenuptial Agreement"). The Prenuptial Agreement consisted of two pages. ROA pp. 117-118. The first page contained the signatures of Irene and Decedent. The second page contained a certificate of acknowledgment of both signatures, each signed by different notaries public. Id.

The certificate of acknowledgment was defective in that it omitted language stating that the official indicate that he or she knew or had ascertained that the signer was the person described in the document. This defect was identical to the defect of the acknowledgment addressed by this Court in *Galetta*, a defect

resulting in an acknowledgment which *Galetta* found not to be in substantial compliance with statutory requisites.

Decedent left a Last Will and Testament dated December 18, 2008 (the "Will") which was admitted to probate by Decree of the Surrogate's Court, Westchester County on March 21, 2014. ROA 98-112. Letters Testamentary were issued to John on March 21, 2014. ROA 111-112. Thereafter, Irene served a Notice of Election on John pursuant to EPTL §5-1.1-A, and filed same with the Surrogate's Court on August 21, 2014. ROA 113-115.

On or about December 15, 2014, John commenced a proceeding by way of petition pursuant to §1421 of the Surrogate's Court Procedure Act ("SCPA") to set aside Irene's spousal election pursuant to EPTL §§5-1.1-A. ROA 85-120. Irene interposed an Answer to the Petition (ROA 121-127) setting forth two affirmative defenses: (i) that the certificate of acknowledgment accompanying the Prenuptial Agreement was defective due to the omission of statutorily required language pursuant to DRL §236(B)(3); and (ii) that the Prenuptial Agreement was invalid and unenforceable on the grounds of unfairness, duress and inequitable conduct. Id.

By motion dated February 7, 2015, Irene moved to dismiss the Petition and for judgment declaring the Prenuptial Agreement invalid, entitling Irene to her spousal elective share pursuant to New York Estates, Powers and Trusts Law ("EPTL") §5-1.1-A on the ground that the acknowledgment of the signatures accompanying the

Prenuptial Agreement was defective. By decision and order dated June 23, 2015 (the "2015 Surrogate's Court Order"), the Surrogate's Court, Westchester County (Walsh, Acting Surrogate) denied the motion to dismiss the Petition. ROA 259-264.

Thereafter, Irene appealed the 2015 Surrogate's Court Order to the Second Department. During the pendency of that appeal, by decision and order dated September 22, 2016 (the "2016 Surrogate's Court Order"), the Surrogate's Court granted in part the motion of John for summary judgment. ROA 410-419. The Surrogate's Court granted John's motion to the extent of dismissing the second affirmative defense in Irene's Answer. The 2016 Surrogate's Court Order stated that John's motion "addresses only the second affirmative defense [claiming unfairness], while the first [claiming defect] is currently the subject of an appeal in the Appellate Division, Second Department." Id.

By decision and order dated February 7, 2018 (the "2018 Second Department Order"), the Second Department affirmed the 2015 Surrogate's Court Order denying Irene's motion pursuant to CPLR 3211(a)(1) and Domestic Relations Law §236(B)(3) to dismiss the Petition. *Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep't. 2018). ROA 14-28. As a result, both affirmative defenses in the Answer to the Petition were dismissed, the first affirmative defense by virtue of the 2018 Second Department Order affirming the 2015 Surrogate's Court Order on the grounds that defective

acknowledgments can be cured (and that the affidavits of the notaries public cured the acknowledgment's defects) and the second affirmative defense claiming unfairness by virtue of the 2016 Surrogate's Court Order dismissing such defense.

By decision and order dated April 26, 2018, the Second Department denied the motion of Irene for leave to appeal the 2018 Second Department Order to the Court of Appeals. ROA 444. Thereafter, by order dated September 13, 2018 (the "2018 Court of Appeals Order"), this Court denied Irene's motion for leave to appeal the 2018 Second Department Order to this Court, on the ground that the 2018 Second Department Order "does not finally determine the proceeding within the meaning of the Constitution." *In re Koegel*, 32 N.Y.3d 948, 84 N.Y.S.3d 429 (2018). ROA 449.

On October 3, 2018, John moved for summary judgment in the Surrogate's Court pursuant to CPLR 3212. ROA 79-80. On February 5, 2019, the Surrogate's Court granted John's motion for summary judgment (the "2019 Surrogate's Court Order"), finding that the defects in the Prenuptial Agreement were curable and that the affidavits of the notaries public cured such defects. See 2019 Surrogate's Court Order, ROA 47-55.

The Second Department in the 2020 Second Department Order affirmed the 2019 Surrogate's Court Order, on the ground that the issue of whether extrinsic evidence could cure a defect in the acknowledgment of a prenuptial agreement had been previously

raised and decided against Irene on the prior appeal. *Matter of Koegel*, 184 A.D.3d 764, 126 N.Y.S.3d 153 (2d Dep't. 2020). ROA 11-13. As noted above, the Second Department held in the 2018 Second Department Order (*Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep't. 2018)), ROA 14-28, that defects in the acknowledgment of a prenuptial agreement were curable and that the affidavits of the notaries public effected a cure of the Prenuptial Agreement.

By decision and order dated October 5, 2020, the Second Department denied Irene's motion for leave to appeal the 2020 Second Department Order to this Court. ROA 57. Thereafter, Irene moved before this Court for leave to appeal the 2020 Second Department Order to this Court. On February 11, 2021, this Court granted Irene's motion for leave to appeal the 2020 Second Department Order to this Court. *Matter of Koegel*, 36 N.Y3d 905 (2021). ROA 10.

ARGUMENT

Under certain circumstances, courts allow legal documents which fail to adhere to statutory requisites to be cured, either through the use of extrinsic evidence or through corrective submissions. Courts typically focus on two preliminary considerations in making these determinations: (i) whether or not the defect at issue is technical in nature or material and substantial and (ii) whether or not statutory authority exists allowing for such corrections. As set forth below, the defect at issue in the certificate of acknowledgment is material and substantial, and no statutory authority exists in the Domestic Relations Law or the Estates, Powers and Trusts Law providing for cures of materially defective marital agreements or right of election waivers under DRL §236(B)(3) or EPTL §5-1.1-A(e)(2). In addition, important policy considerations argue in favor of precluding cures of materially defective certificates of acknowledgments.

I

THE CERTIFICATE OF ACKNOWLEDGMENT WAS MATERIALLY DEFECTIVE

In *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013) this Court held that a certificate of acknowledgment attached to the parties' prenuptial agreement was materially defective where the acknowledgment omitted language expressly stating that the

notary public knew the signer or ascertained through some form of proof that the signer was the person described. This Court viewed such language as a "core component" of a valid acknowledgment, the absence of which rendered the prenuptial agreement defective. 969 N.Y.S.2d at 831.

In reaching its holding, this Court focused on the language of DRL §236 (B) (3), which provides:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded.[2]

Galetta then surveyed the relevant provisions of the Real Property Law to discern the requisites of a proper acknowledgment. Reading together §§291, 292, 303 and 306 of the Real Property Law, this Court identified the requirements of a proper acknowledgment as consisting of (i) the party signing the document orally acknowledging to the notary public that he or she in fact signed the document; (ii) the notary taking the acknowledgment only where he or she knows or has satisfactory evidence that the person making it is the person described in and who executed the instrument; and (iii) the notary or other officer including express language in

[2] As previously noted, the Estates, Powers and Trusts Law contains an equivalent provision stating that any waiver or release of the right of election "must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." EPTL §5-1.1-A(e)(2).

the acknowledgment stating "all the matters required to be done, known, or proved . . ." 969 N.Y.S.2d at 829-30.

Galetta next focused on the language of the two acknowledgments relating to the signatures of the husband and wife. The language of the acknowledgment relating to the wife's signature was acceptable to the *Galetta* court. That language read:

> [B]efore me came (name of signer) to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that s/he executed the same.

Galetta stated that the crucial language *"to me known and known to me to be the person described in the document"* satisfied the substance of the requirement that the official include express language in the acknowledgment that he or she knew or had ascertained that the signer was the person described in the document. 969 N.Y.S.2d at 830.

Galetta then turned its attention to the language of the acknowledgment relating to the husband's signature. That language stated as follows:

> On the 8 [sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.
>
> 969 N.Y.S.2d at 830.

The *Galetta* court observed that the "to me known and known to me" phrase was omitted. This omission rendered the certificate of acknowledgment defective, because the acknowledgment lacked the

required language expressly stating that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. This Court stated: "New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective . . ." 969 N.Y.S.2d at 830.

The certificate of acknowledgment signed by both Decedent and Irene suffers from the same omission of the required language. The certificate of acknowledgment relating to the Decedent's and Irene's signatures read respectively as follows:

> On this 26 day of July, 1984, before me personally appeared WILLIAM F. KOEGEL, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be his free act and deed.
>
> On this 30th day of July, 1984, before me personally appeared IRENE N. LAWRENCE, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be her free act and deed.

ROA 117-118.

Like the defective acknowledgment in *Galetta*, the acknowledgment in the Prenuptial Agreement omits the required language expressly stating that the notaries public knew the signatories or had ascertained through some form of proof that the signatories were the persons described in the prenuptial agreement. Further, and as was the case in *Galetta*, none of the language contained in the acknowledgment in this case rose to the level of "substantial compliance" sufficient to meet the statutory

requirements contained in §236(b)(3) of the Domestic Relations Law, §5-1.1-A(e)(2) of the Estates, Powers and Trusts Law or §291 of the Real Property Law.

II

NO STATUTE EMPOWERS THE COURTS TO ALLOW CURES OF MATERIAL DEFECTS IN CERTIFICATES OF ACKNOWLEDGMENTS

New York courts allow cures for defective documents which violate statutory requisites where legislative authority so provides, typically in cases involving minor or technical defects. For example, CPLR 2001 broadly allows for the correction of "mistakes, omissions, defects or irregularities" in cases involving technical or minor defects regarding court papers or procedure. See, e.g., *Dorcinvil v. Annucci*, 186 A.D.3d 1853, 131 N.Y.S.3d 724 (3rd Dep't. 2020)("CPLR 2001 . . . may be utilized only to cure technical infirmities or defects ((*Ruffin v. Lion Corp*, 15 N.Y.3d 578, 915 N.Y.S.2d 204 (2010)").

Similarly, the New York Election Law allows voters to cure defects in submitted absentee ballots, provided that such defects are minor. See, e.g., *Tenney v. Oswego County Board of Elections*, 70 Misc.3d 680, 136 N.Y.S.3d 853 (Sup. Ct. Oswego Co. 2020)("[T]he Legislature . . . added a new cure provision to the Election Law, which requires Boards of Election to . . . identify minor, curable defects (such as missing signatures); and immediately inform voters of their right to correct those problems (Election Law §9-

209[3]"). See also, *Balberg v. Board of Elections in the City of New York*, 109 A.D.3d 910, 972 N.Y.S.2d 271 (2d Dep't. 2013)("Although the provisions of the Election Law 'shall be liberally construed not inconsistent with substantial compliance . . ., this matter does not involve a mere technical defect subject to cure pursuant to Election Law §6-134 (2) . . . ").

Other statutes in New York provide for the correction of minor defects in court filings or statutorily governed documents. See, e.g., *427 W. 51st Street Owners Corp. v. Division of Housing and Community Renewal*, 3 N.Y.3d 337, 786 N.Y.S.2d 416 (2004)("The Rent Stabilization Code vests the DHCR Commissioner with discretion to permit correction of technical defects in a timely filed [petition for administrative review] . . . 9 NYCRR 2529.7[d] . . ."); *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 893 N.Y.S.2d 472 (2009)("'salutary purpose' of CPLR 205(a) . . . is to 'prevent a statute limitations from barring recovery where the action, at first timely commenced, had been dismissed due to a technical defect which can be remedied in a new action,'")(citations omitted); *Sokoloff v. Schor*, 176 A.D.3d 120, 109 N.Y.S.3d 58 (2d Dep't. 2019)("CPLR 5019(a) provides . . . that a trial court may unilaterally and affirmatively correct minor mistakes, defects or irregularities in its orders or judgments . . ."); *I.T.K. v. Nassau Boces Educational Foundation, Inc.*, 177 A.D.3d 962, 113 N.Y.S.3d 726 (2d Dep't. 2019)(General Municipal

Law §50-3(6) "allows good-faith, nonprejudicial technical changes, but not substantive changes in the theory of liability . . .").

But in the absence of legislative authority, courts do not permit cures of *material* defects, i.e., those defects that constitute substantial deviations from statutory requirements. In particular, neither the Domestic Relations Law nor the Estates, Powers and Trusts Law contains any language providing for the cure of documents governed by DRL 236(B)(3) or EPTL §5-1.1-A(e)(2) which suffer from substantial and material defects.

The clear statutory requirements of DRL §236(b)(3) and EPTL §5-1.1-A(e)(2), combined with (i) this Court's finding in *Galetta* that the precise defect in the instant case is material and substantial, involving a "core component" of a certificate of acknowledgment, and (ii) the absence of any legislative provision allowing for the cure of such substantial defects, compel a finding that the defective certificate of acknowledgment in this case is not susceptible to cure.

III

COURTS PROPERLY DECLINE TO REDRAFT LEGISLATION IN THE EXERCISE OF THEIR JUDICIAL FUNCTION

In dicta, this Court in Galetta stated that a compelling case could be made "that the door should be left open to curing a deficiency like the one that occurred here . . ." where "due to no fault of their own, the certificate of acknowledgment was defective

or incomplete." 969 N.Y.S.2d at 832. The appellate division in the 2018 Second Department Order similarly focused on the distinction between *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997) (which held that "an unacknowledged agreement is invalid and unenforceable in a matrimonial action") and *Galetta* (which addressed a case involving the existence of a defective acknowledgment).

Yet neither the Second Department in its 2018 decision nor the *Galetta* dicta addressed whether or not courts should intrude upon the legislative function and allow for cures of materially defective acknowledgments that lack a core component of the statutory requirements.

While Irene agrees that "a compelling case" might be made to allow for such cures, such a case should be made through legislation, not by the courts. The legislature could easily have included language in DRL §236(b)(3) or EPTL §5-1.1-A(e)(2) stating that substantial and material defects in marital documents or right of election waivers can be cured through the use of extrinsic evidence. Although such a provision would be unusual, given that it would apply to material defects (unlike the statutes discussed in section II herein, which apply to minor, technical defects), the legislature could have included such language.

Yet, neither the Domestic Relations Law nor the Estates, Powers and Trusts Law contains any such provision, and this Court

should not, in the exercise of its function, draft *de facto* amendments to the statutes. Indeed, if the legislature did not see fit to provide for corrections of minor, technical defects in the Domestic Relations Law or the Estates, Powers and Trusts Law, then the fair inference to draw is that the legislature did not intend for substantial defects to be curable. See, e.g., *Patrolmen's Benevolent Assn. of City of New York*, 41 N.Y.2d 205, 391 N.Y.S.2d 544 (1976)(had the legislature intended to expand the scope of a wage freeze statute, "they were free . . . to draft appropriately worded legislation . . ."). See also *Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 626 N.Y.S.2d 1 (1995) ("a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact"); *Henry Modell & Col v. Minister, Elders & Deacons of the Reformed Protestant Dutch Church*, 68 N.Y.2d 456, 510 N.Y.S.2d 63 (1986)("[W]e decline to rewrite the statute to add language that the Legislature did not see fit to include . . ."); *In re Doe*, 16 Misc.3d 714, 842 N.Y.S.2d 200 (Sur. Ct. New York Co. 2007)("The legislature clearly knows how to close proceedings if it so chooses, as, for example, in DRL §235(2). Its failure to do so with regard to adoptions can only be 'cured,' if appropriate, by statute, not by judicial construction, as proposed here by Respondent."); *In re Daniel C.*, 99 AD.2d 35, 472 N.Y.S.2d 666 (2d Dep't.), *aff'd* 63 N.Y.2d 927,

483 N.Y.S.2d 679 (1984)("Where, as here, a statute is clear, a court should not attempt to cure an omission in the statute by supplying what it believes should have been put there by the Legislature")

IV

POLICY REASONS ARGUE AGAINST ALLOWING CURES OF MATERIALLY DEFECTIVE MARITAL AGREEMENTS GOVERNED BY DRL §236(B)(3) OR EPTL §5-1.1-A(e)(2)

Aside from the general division of judicial and legislative functions, there are unique reasons why blurring these roles with regard to the Domestic Relations Law and the Estates, Powers and Trusts Law constitutes ill-advised policy. Prior to the enactment of the New York Equitable Distribution Law in 1980 (which included DRL §236(B)(3)), the validity of an antenuptial agreement was determined by the Statute of Frauds. Yet, as this Court noted in *Matisoff*, 659 N.Y.S.2d at 212, DRL §236(B)(3) did not incorporate the safeguards of the Statute of Frauds. Instead, the Legislature went out of its way to create "more onerous requirements for a nuptial agreement to be enforceable . . ." *Matisoff*, 659 N.Y.S.2d at 213. At the same time, the legislature recognized the "public policy in favor of individuals resolving their own family disputes . . ." *Matisoff*, 659 N.Y.S.2d at 211.

DRL §236(B)(3) and EPTL §5-1.1-A(e)(2) strike an appropriate balance. Spouses or prospective spouses are free, if they so chose, to "contract out of the elaborate statutory system and

provide for matters such as inheritance, distribution or division of property . . ." *Matisoff*, 659 N.Y.S.2d at 212. But the price for opting out of the carefully balanced legislative scheme is an intentionally inflexible and cumbersome requirement of statutory requisites, "more exacting than the burden imposed when a deed is signed. . ." Galetta, 969 N.Y.S.2d at 829.[3]

Allowing the availability of cure with respect to materially defective acknowledgments would disrupt this balance and inject an unwarranted level of unpredictability and uncertainty into the statutory framework. The detailed and elaborate legislative scheme would face potential dilution by a procession of case law involving fact patterns competing to qualify as post-execution cures. As a matter of statewide public policy, courts should not allow this statutory framework to be subject to a variety of fact-

[3] Cases construing the less exacting burden involving deeds have nonetheless precluded the use of extrinsic evidence to cure defective certificates. See, e.g., *80P2L LLC v. U.S.Bank Trust, N.A.,* 2019 N.Y. Misc. LEXIS 4825, *Index* # 153849/2015, 2019 NY Slip Op 32604 (U)(Sup. Ct. New York Co. 2019)("'Where a proper certificate of acknowledgment is essential to the validity of a conveyance, a defective certificate cannot be aided or cured by parol testimony. Nor so as to make the record of a defectively acknowledged instrument constructive notice.'"); See also *Carolan v. Yoran*, 104 A.D. 488, 93 N.Y.S. 935 (1st Dep't. 1905), *aff'd* 186 N.Y. 575 (1906)("an acknowledgment which did not state that the person who appeared before the notary was known to the notary to be the person described in and who executed the instrument was not sufficient to entitle the instrument to be recorded . . .") *citing* *Paolillo v. Faber*, 56 A.D. 241, 67 N.Y.S. 638 (1st Dep't. 1900)(acknowledgment defective where notary taking acknowledgment did not state that the person who appeared before him was known to him to be the person described in document); *Moran v. Stader*, 52 Misc. 385, 103 N.Y.S. 175 (City Court of NY, Special Term 1907) (defective certificate of acknowledgment not cured by resort to parol evidence).

based determinations as to whether post-execution cures can resurrect an otherwise materially defective acknowledgment.

Instead, this Court should adhere to the plain language of the statute, an approach which "promotes the goals of clarity, efficiency and judicial economy. . . . and protects against vexatious and costly litigation." *Larchmont Pancake House v. Board of Assessors*, 33 N.Y.3d 228, 100 N.Y.S.3d 680 (2019).

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Court reverse the 2020 Second Department Order and the 2018 Second Department Order and grant Irene's motion pursuant to CPLR 3211(a)(1) to dismiss the Petition on the grounds that the Prenuptial Agreement is defective and unenforceable and that therefore Irene's Notice of Election is valid, entitling Irene to her statutory spousal elective share pursuant to EPTL §5-1.1-A, together with attorney's fees, costs and disbursements and such other relief as this Court deems just and proper.

Dated: New York, New York
April 16, 2021

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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State of New York
Court of Appeals

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In the Matter of

JOHN KOEGEL AS EXECUTOR OF THE ESTATE OF
WILLIAM F. KOEGEL, A/K/A
WILLIAM FISHER KOEGEL,

Deceased,

PURSUANT TO SCPA 1421.

JOHN B. KOEGEL,

Petitioner-Respondent,

-against-

IRENE LAWRENCE KOEGEL,

Respondent-Appellant.

STATEMENT PURSUANT TO CPLR 5531

1. Surrogate's Court, Westchester County, File No. 2014-452/A.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in Surrogate's Court, Westchester County.

4. Action was commenced by the filing of a Notice of Petition and Petition.

5. Nature of action: Validity of Notice of Election pursuant to EPTL §5-1.1-A.

6. This appeal is from the Appellate Division, Second Department Order, entered June 17, 2020.

7. Appeal is on the Record (reproduced) method.

80P2L LLC v U.S. Bank Trust, N.A.

Supreme Court of New York, New York County

September 3, 2019, Decided

INDEX NO. 153849/2015

Reporter
2019 N.Y. Misc. LEXIS 4825 *; 2019 NY Slip Op 32604(U) **

[1]** ***80P2L*** LLC, Plaintiff, - v - U S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: *80P2L LLC v. U.S. Bank Trust, N.A., 2018 N.Y. Misc. LEXIS 6512 (N.Y. Sup. Ct., Dec. 20, 2018)*

Core Terms

mortgage, recorded, reargument, summary judgment motion, summary judgment, acknowledgment, certificate, declaring

Judges: **[*1]** KATHRYN E. FREED, J.S.C.

Opinion by: KATHRYN E. FREED

Opinion

DECISION, ORDER AND JUDGMENT

In this declaratory judgment action, plaintiff 80P2L LLC moves, pursuant to *CPLR 2221*, for reargument of its motion for summary judgment against defendant U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (motion sequence 001) and, upon reargument, granting it summary judgment on all of its claims in this action; declaring that 80P2L has priority over defendant in the chain of title for the property known as and by 80 Park Avenue, Unit 2L, New York, New York; declaring that the mortgage by Michelle Shipshman Zar in favor of Washington Mutual Bank, N.A., recorded in the Office of the City Register of the City of New York on April 18, 2005 at CFRN 2005000221020 ("the mortgage") was improperly recorded; striking the mortgage from the record; and for such other and further relief as this Court deems just and proper. After oral

argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

[**2] FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in detail in the decision and order of this Court entered December 24, 2018 ("the 12/24/18 **[*2]** order"). Docs. 143 and 144. Other relevant facts are set forth below. In the 12/24/18 order, this Court denied plaintiff's motion for summary judgment (motion sequence 001), reasoning that, although plaintiff established its prima facie entitlement to summary judgment by demonstrating that the mortgage was not properly acknowledged at the time it was recorded, defendant raised an issue of fact by submitting sworn affidavits of individuals who attested to the fact that the mortgage filed with the City Register bore a notary stamp. Id. Having found that such an issue of fact existed, this Court also denied defendant's motion for summary judgment (motion sequence 002) which sought, inter alia, dismissal of the complaint as well as a declaration that plaintiff's right, title and interest in the premises was subject and subordinate to defendant's judgment of foreclosure and sale. Id.

Plaintiff now moves, pursuant to *CPLR 2221*, for reargument of its motion for summary judgment. Doc. 151. In support of the motion, plaintiff argues that, since the mortgage was not properly acknowledged, and was thus not in recordable form, it did not have legal notice of the mortgage and its title could not have been **[*3]** affected by the recording of the instrument. Plaintiff further asserts that, since defendant was in the best position to ensure that the mortgage was properly acknowledged, it (defendant), and not plaintiff, should suffer the consequences of that mistake. Upon reargument, plaintiff seeks summary judgment on all of its claims in this action; declaring that 80P2L has priority over defendant in the chain of title for the property known as and by 80 Park Avenue, Unit 2L, New York, New York; declaring that the mortgage by Michelle Shipshman Zar in favor of Washington Mutual Bank, N.A., recorded in the Office of the City Register of the City of New York on April 18, 2005 at CFRN 2005000221020 ("the mortgage") **[**3]** was improperly recorded; striking the mortgage from the record; and for such other and further relief as this Court deems just and proper.

In opposition to the motion, defendant maintains that certain contentions raised by plaintiff for the first time cannot be considered in connection with this reargument motion. It further asserts, inter alia, that, since the mortgage was "entitled to be recorded" when received by the Register, it was "considered recorded from the time of such delivery" **[*4]** pursuant to *Real Property Law § 317*. Defendant also maintains that *Real Property Law § 318* does not prohibit defendant from submitting evidence proving that the mortgage was validly recorded. Next, defendant argues that plaintiff is not a bona fide purchaser for value because it had constructive and inquiry notice of the mortgage.

LEGAL CONCLUSIONS

The purpose of a motion for leave for reargument pursuant to *CPLR 2221(d)* is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. *See Foley v Roche, 68 AD2d 558, 567, 418 N.Y.S.2d 588 (1st Dept 1979)*. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27, 588 N.Y.S.2d 8 (1st Dept 1992)* (citations omitted).

Real Property Law § 291 requires that an instrument conveying real property cannot be recorded unless it is acknowledged. Pursuant to *Real Property Law § 318*, "it is vital to include the acknowledgment and authenticating certificate with the recorded instrument. Thus, *Section 318* provides that the certificate of the acknowledgment or proof of the execution of an instrument, and the certificate authenticating the signature or seal of the officer so certifying, or **[**4]** both, if required, must be recorded **[*5]** together with the instrument so acknowledged or proved; otherwise neither the record of the instrument nor its transcript can be read in evidence." 11 Warren's Weed New York Real Property § 115.43 (2019).

Although this Court correctly determined in the 12/24/18 order that plaintiff established its prima facie entitlement to summary judgment by demonstrating that the mortgage was not acknowledged, it was incorrect in finding that defendant raised a triable issue of fact by submitting affidavits of individuals attesting to the fact that the mortgage contained a proper acknowledgement at the time it was presented to the Register. "Where a proper certificate of acknowledgment is essential to the validity of a conveyance, a defective certificate cannot be aided or cured by parol testimony. Nor so as to make the record of a defectively acknowledged instrument constructive notice." *Smith v Tim, 1884 NY Misc LEXIS 228, 14 Abb. N. Cas. 447 (Ct Common Pleas 1884)* (citations omitted); *see also Precision Performance, Inc. v Perez, 84 AD3d 647, 923 N.Y.S.2d 320 (1st Dept 2011)* ("an improperly recorded judgment does not give constructive notice of the correct terms of the judgment" [citation omitted]).

As plaintiff correctly asserts, relying on *Federal National Mortgage Ass., v Levine Rodriguez, 153 Misc2d 8, 579 N.Y.S.2d 975 (Sup Ct Rockland County 1991)*, "the burden was on [defendant] to insure that full recordation occur[red] properly [based] on the theory that where one **[*6]** of two innocent persons must suffer a loss the onus should be on the one [here, defendant] who was in the best position to correct [any error in the acknowledgement]." *Id. at 11* (citation omitted); *see also Flagstar Bank, FSB v State of New York, 114 AD3d 138, 146, 978 N.Y.S.2d 266 (2nd Dept 2013)*. "A cogent reason underlying the rule which places upon the grantee of a deed or other instrument the responsibility for seeing that the record made of the instrument is accurate is that one who files a **[**5]** paper for record[ing] always has it in his [or her] power to examine the records and satisfy himself [or herself] that his paper has been duly and

accurately recorded . . ." *Id. at 11*. A subsequent purchaser is not liable for ensuring that a document is recorded properly. Rather, "[i]t is the business of the mortgagee; and if a mistake occurs to his [or her] prejudice, the consequences of it lie between him and the [Register], and not between him [or her] and the bona fide purchaser." *Id., at 12* (citation omitted). Therefore, plaintiff is granted reargument of its motion for summary judgment and, upon reargument, its underlying motion for summary judgment is granted.

Defendant's argument that, pursuant *Real Property Law § 317*, the mortgage was "considered recorded" at the time it was delivered to the City Register is unavailing. **[*7]** That section explicitly states that that it applies to documents "entitled to be recorded" and, since the mortgage was not properly acknowledged, it clearly was not entitled to be recorded.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff 80P2L for reargument pursuant to *CPLR 2221* is granted; and it is further

ORDERED and ADJUDGED that, upon reargument, plaintiff's motion for summary judgment (motion sequence 001) is granted, and defendant's mortgage, recorded in the Office of the City Register of the City of New York on April 18, 2005 as number CRFN 2005000221020 **[**6]** in favor of Washington Mutual Bank, NA is hereby vacated, cancelled, and expunged from the public record, and is void and unenforceable against the property; and it is further

ORDERED and ADJUDGED that the defendant and every person or entity claiming under it be forever barred from all claims to an estate or interest in the property at 80 Park Avenue, Apartment 2L, New York, New York (Block: 868, Lot: 1216) to the extent that any such claim may be asserted to be superior to plaintiff's interest in the same; and it is further

ORDERED that the Clerk of the court is to enter judgment accordingly; **[*8]** and it is further

ORDERED that this constitutes the decision, order and judgment of the court.

9/3/2019

DATE

/s/ Kathryn E. Freed

KATHRYN E. FREED, J.S.C

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