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RECEIVED
8-14-78

CV 98-0086079S

WILLIAM J. ZISK

: SUPERIOR COURT

V.

: JUDICIAL DISTRICT OF
: MIDDLESEX AT MIDDLETOWN

WALKLEY HEIGHTS ASSOCIATES

: AUGUST 10, 1998

MOTION TO STRIKE

Pursuant to the provisions of Connecticut Practice Book Section 10-39(a), the defendant, Walkley Heights Associates, hereby moves to strike the plaintiff's Amended Complaint dated July 17, 1998 on the ground that it fails to state a claim upon which relief may be granted. The plaintiff has instituted this action to settle title to a parcel of land located in Hamden, Connecticut. The plaintiff, however, does not have an actual interest to justify his instituting an action concerning it.

The defendant incorporates its memorandum of law which sets forth in detail the basis of this motion.

WHEREFORE, the defendant respectfully requests that this Court grant its Motion to Strike the plaintiff's Amended Complaint.

ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

-2-

DEFENDANT

By Linda J. Cannata
Linda J. Cannata
Jozus, Milardo & Thomasson
Its Attorney

ORDER

The following Motion having been presented to this Court, it
is hereby Ordered: GRANTED/DENIED.

BY THE COURT

Judge/Clerk

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed,
postage prepaid, this 10th day of August, 1998 to all counsel and
pro se parties of record as follows:

Charles W. Snow, Jr., Esq.
547 Main Street
Middletown, CT 06457

William J. Zisk
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Linda J. Cannata
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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

The defendant, Walkley Heights Associates (hereinafter "Walkley Heights"), submits the following Memorandum of Law in Support of its Motion to Strike.

I. BACKGROUND

The plaintiff, William J. Zisk, instituted this action against Walkley Heights purportedly to settle title to a parcel of land located in Haddam, Connecticut and owned by Walkley Heights. The plaintiff claims to have an interest in the subject property by being an heir of Mary Zisk who had previously owned the subject property with William Zisk. (Complaint, Paragraph 2). The plaintiff further claims that said Mary Zisk acquired a mortgage interest in the subject property as a result of a mortgage deed wherein she is a mortgagee with Edward Zisk and Donald Zisk outlined in a mortgage deed form High Street Associates, predecessor to Walkley Heights. (Complaint, Paragraph 3).

The plaintiff further alleges that "on September 8, 1994, the

said Mary Zisk died a resident of Roseville, California and on the date of her death she had a one-third interest in the mortgage deed and note..." (Complaint, Paragraph 3). The plaintiff also claims that no executor has been appointed for the estate of Mary Zisk. (Complaint, Paragraph 4).

The defendant moves to strike the complaint on the basis that it fails to state a claim upon which relief may be granted.

II. ARGUMENT

PLAINTIFF'S COMPLAINT SHOULD BE STRICKEN BECAUSE HE DOES NOT HAVE AN ACTUAL INTEREST IN THE PROPERTY SUFFICIENT TO JUSTIFY HIS INSTITUTING AN ACTION CONCERNING IT.

In deciding upon a motion to strike, a trial court must take the facts to be those alleged in the complaint. Blancato v. Feldspar Corp., 203 Conn. 34, 36 (1987).

Conn. Gen. Stat. Section 47-31 entitled "Action to settle title or claim interest in real or personal property" provides that an action to quiet title may only be brought by "a person claiming title to, or any interest in, real or personal property.." The court in Brill v. Ulrey, 159 Conn. 371, 373 (1970), enunciated the purpose of this requirement as follows:

The purpose of this requirement 'is to make certain that a plaintiff has, within the purview of the allegations of his complaint, not a mere groundless claim but an actual interest in the property sufficient to justify his instituting an action concerning it and asking the court to adjudicate his rights and those of the parties defendant.'

Brill at 374-75 citing Loewenberg v. Wallace, 147 Conn. 689 (1960).

In this case, the plaintiff does not have an actual interest in the subject property for many reasons. To begin with, the Complaint does not allege any more than that Mary Zisk died a resident of Roseville, California. There is no allegation as to whether or not the Estate is open, closed, or what plaintiff's interest in the Estate is.

Moreover, plaintiff does not allege that he has an interest in the subject property. The plaintiff merely alleges that he is an heir of Mary Zisk, (Complaint, Paragraph 2), and purportedly bases his complaint on the presumption or assumption that he will be a distributee of Mary Zisk's estate with respect to her interest in the mortgage without alleging any basis for it. He does not allege that there has been a distribution of the estate or that he has acquired any portion of his mother's 1/3 interest in the mortgage or that he is the fiduciary of his mother's

estate.

In furtherance of defendant's motion it asserts the plaintiff has not alleged whether an inventory of Mary Zisk's estate has been filed or whether her estate is possessed of Mary Zisk's mortgage interest at this time.

But more importantly, plaintiff makes no claim that the mortgage debt of Walkley Heights is in default. Even assuming arguendo that the plaintiff is a distributee of Mary Zisk's 1/3 interest in the subject mortgage, plaintiff would not be able to pursue a quiet title action because a mortgage deed is a conditional deed of security and it does not become effective unless or until the underlying obligation is in default. Becker v. Dramin, 6 Conn. Supp. 33, 34 (1938). At that point, the proper cause of action for plaintiff to pursue would be a suit for foreclosure of his mortgage interest.

For all the foregoing reasons, this court should strike plaintiff's complaint on the basis it is legally insufficient as a matter of law.

III. CONCLUSION

Wherefore, the defendant respectfully requests that this

Court grant her Motion to Strike.

DEFENDANT

By Linda J. Cannata
Linda J. Cannata
Jozus, Milardo & Thomasson
Its Attorney

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memstrike.pld