

STATE OF VERMONT
WINDSOR COUNTY, SS

Michael J. Sullivan
Theresa A. Sullivan
Plaintiffs

v.

Debra Ann Carter, Admin.
Jane Susan Carter
Defendants

SUPERIOR COURT
Docket No. 166-3-09 Wrev

DECISION ON MOTION TO JOIN

This case is a foreclosure action brought by Plaintiffs seeking to foreclose on a mortgage deed allegedly executed by the late Garth Carter in May 1987. To secure a promissory note, Carter is alleged to have mortgaged a 50 acre parcel of land in Plymouth, Vermont to the Plaintiffs. The promissory note was payable on demand at any time on or after November 1, 1987. At the time Garth Carter acquired the property he was married to Defendant Jane Susan Carter. They were divorced in 1986, before the mortgage was executed.

Garth Carter died on June 1, 1996. No estate was opened at the time of his death. Demand for payment of the promissory note was allegedly first made in March 2009, 22 years after the execution of the mortgage deed and promissory note and 13 years after the death of Garth Carter.

Defendant Jane Susan Carter claims an interest in the real property, asserting Garth Carter did not disclose his ownership of the property to her during their divorce proceeding. She has been named as a defendant in the foreclosure action due to her claimed interest in the property.

In her answer to the foreclosure action, Jane Susan Carter asserts a number of affirmative defenses, including, inter alia, estoppel, laches, statute of limitations, failure to make proper demand, unclean hands and failure to state a claim against her.¹ In addition to her numerous asserted defenses, Jane Susan Carter seeks to join as indispensable parties R. Joseph O'Rourke, Esq., Victor Segale, Esq. and Ryan, Smith and Carbine, Ltd.(R,S&C). Both attorneys, at all times relevant, were employed by R.S.& C.

¹ The attachment to the answer and counterclaim references a divorce order from 1986. That order was not attached to the answer and counterclaim. Further, as the parties sought to be joined were not named as parties by the Plaintiffs, the assertion of claims against them in a pleading styled as a counterclaim is not proper in any event.

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Attorney Segale allegedly represented Garth Carter at the time he purchased the property in 1981. He also allegedly represented him in his divorce in 1986 and in the mortgaging of the subject property in 1987. Attorney O'Rourke informed Debra Carter in 1996 that the Sullivans owned the subject property and that no estate had been opened for Garth Carter. None of the claimed indispensable parties represented Jane Susan Carter, either at the purchase of the property or at the time of the Carters' divorce.

There has been a recent stipulation and order in the Carter divorce action which has been submitted to this Court. The stipulation purports to award Jane Susan Carter all interest in the Plymouth property. Whether leave to reopen the divorce action was ever sought or the legal effect of a stipulation executed over twenty years after the divorce order and property division became final has not been explained. See, e.g. *Ellis v. Ellis*, 135 Vt. 83 (1977)

Jane Susan Carter's attempt to join the attorneys and R.,S. & C. as parties to this matter is improper. Vermont Civil Procedure Rule 19(a), under which Carter apparently seeks joinder, reads as follows:

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

In considering a motion for joinder, the court must first decide whether the absence of a specific person prevents it from according complete relief among those already parties. V.R.C.P. 19(a); *Grassy Brook Village, Inc. v. Blazej, Inc.*, 140 Vt. 477, 481 (1981). There is no specific formula for calculating whether a specific non-party is indispensable to the case; consideration is given to the general policies of avoiding multiple litigation, providing parties with complete and effective relief in a single action, and protecting absent persons from the possible prejudicial effects of the judgment. 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1604; see also *Grassy Brook Village*, 140 Vt. at 481 (explaining that V.R.C.P. 19 is patterned after the federal rules). If any specific persons are identified under this standard, the court must order that the person be made a party.

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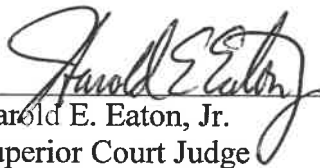
The Plaintiffs are seeking to foreclose on a mortgage deed upon which there has neither been payment nor demand for payment for over 20 years. The parties sought to be joined have no interest in the property and are not parties to the debt. It may be that Ms. Carter has defenses to the claims of the Plaintiffs. Those issues await further development in the case but do not depend on the presence of the attorneys or the law firm in the litigation to do so.

It may also be that one or more of the parties sought to be joined may be witnesses in the action. This does not mean they are necessary parties. If Plaintiffs are successful in their claim they can obtain foreclosure on the property. If Defendants are successful in their defense the foreclosure can be prevented. Neither outcome requires the attorneys or the law firm as parties. The foreclosure action will either be successful or unsuccessful regardless of the presence of the parties against whom joinder is sought.

Similarly, joinder under V.R.C.P. 19(a)(2) is not appropriate here. As indicated above, it appears that Carter can adequately protect her interests in this lawsuit by presenting the testimony of witnesses, rather than joining those witnesses as necessary parties. Furthermore, if foreclosure is obtained, it is possible that Carter may seek to pursue a claim against one or more of the parties sought to be joined. If the foreclosure action is unsuccessful, the potential claim against these attorneys and the law firm is not apparent. Either way, Defendant Carter does not run the risk of multiple or inconsistent judgments as might be the case when there are multiple litigations over the ownership of property. There is a single litigation concerning this property. Claims against others may be asserted based upon the outcome of this litigation, but there is no risk of inconsistent judgments.²

For the reasons stated herein, the Motion to Join Parties is **DENIED**.

Dated at Woodstock this 13th day of May, 2009.


Harold E. Eaton, Jr.
Superior Court Judge

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² The parties sought to be joined ask the Court to reach the merits of the attempted claims and rule any claims against the attorneys and the law firm are baseless due to the lack of any attorney-client relationship. Given the incomplete factual record, and the fact that such a ruling on the merits cannot be made unless the attorneys and the law firm are in fact parties to the lawsuit, the Court declines to reach the merits of those claims at this time.