

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33576
O/kmb

_____AD3d_____

Argued - December 19, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-04200

DECISION & ORDER

JP Morgan Chase Bank, National Association, etc.,
appellant, v Bette Kalpakis, et al., defendants, Lythia A.
Rousseas, et al., intervenors-defendants-respondents.

(Index No. 14875/10)

Butler, Fitzgerald, Fiveson & McCarthy, New York, N.Y. (David K. Fiveson and
Mark J. Krueger of counsel), for appellant.

Donald Pearce, New York, N.Y., for intervenors-defendants-respondents.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated March 8, 2011, as granted that branch of the motion of Lythia A. Rousseas, Barbara M. Kalpakis, and Mark G. Kalpakis which was pursuant to CPLR 1012(a)(3) for leave to intervene in the action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The subject property was owned by George Kalpakis until his death in 1995. According to the affidavit of Lythia A. Rousseas, George Kalpakis died intestate, and his only heirs were his four children: Lythia A. Rousseas, Barbara Kalpakis, Mark Kalpakis, and James Kalpakis. Pursuant to a deed dated March 12, 2003, the subject property was purportedly transferred from George Kalpakis, who was then deceased, to Bette Kalpakis, James Kalpakis's wife. In 2007 Bette Kalpakis executed a mortgage on the property in favor of the plaintiff's predecessor.

In April 2010 the plaintiff commenced this action to foreclose the mortgage. In

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December 2010 Lythia A. Rousseas, Barbara Kalpakis, and Mark Kalpakis (hereinafter collectively the movants) moved, inter alia, pursuant to CPLR 1012(a)(3) for leave to intervene in the action. The movants asserted that the deed dated March 12, 2003, was a forgery, and that they did not discover the fraud until 2009.

The Supreme Court properly granted that branch of the movants' motion which was pursuant to CPLR 1012(a)(3) for leave to intervene in the action, as the movants established that they may have an ownership interest in the property that is the subject of the foreclosure proceeding (*see US Bank N.A. v Gestetner*, 74 AD3d 1538, 1541; *Greenpoint Sav. Bank v McMann Enters.*, 214 AD2d 647, 647-648). Contrary to the plaintiff's contention, it did not establish that the movants' claim to invalidate the deed dated March 12, 2003, was barred by the statute of limitations. The movants' claim was asserted within two years of discovery of the fraud (*see Piedra v Vanover*, 174 AD2d 191, 196), and the plaintiff did not establish, as a matter of law, that the fraud could have been discovered earlier with reasonable diligence (*see CPLR 213[8]; Sargiss v Magarelli*, 12 NY3d 527, 532; *Citicorp Trust Bank, FSB v Makkas*, 67 AD3d 950, 953).

SKELOS, J.P., HALL, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court