

<b>Li Operations LLC v McEntee</b>
2016 NY Slip Op 32087(U)
August 1, 2016
Supreme Court, Queens County
Docket Number: 13777/2005
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14  
Justice

LI OPERATIONS LLC,  
Plaintiff,

Index  
No. 13777 2005

-against-

Motion  
Date July 26, 2016

ALFRED R. MCENTEE, etc., et al.,  
Defendants.

Motion  
Cal. No. 100

Motion  
Seq. No. 14

Papers  
Numbered

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In this foreclosure action, nonparties Naichuan Chen and Bihua Zeng Chen (Chens) move for an order: (1) granting them leave to intervene; and (2) granting them a preliminary injunction.

Plaintiff's predecessor-in-interest, National City Bank of Indiana (National City), commenced this action on June 21, 2005 based upon the failure of mortgagor Alfred McEntee (decedent) to make certain payments pursuant to the mortgage loan. Upon attempted service upon decedent, it was discovered at that point that he had passed away. Thus, by order dated December 2, 2005, National City was permitted to serve decedent's heirs, etc., by publication, and a guardian ad litem was appointed. On September 3, 2008, National City was awarded, inter alia, summary judgment against John R. McEntee, one of decedent's claimed distributees, and a referee was appointed to compute the amount due to National City. On April 23, 2010, the court issued a final judgment of foreclosure and sale. Notably, the judgment specifically provided (which was also reiterated in a prior order of this court dated February 1, 2016) the following:

“that each and all of the Defendants in this action and all persons claiming under them, or any or either of them, after the filing of such Notice of Pendency of this action, be and are hereby forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof.”

Since that time, several applications have been made, mostly by defendant Matthew McEntee (defendant), decedent’s son, including one to “stop the sale of the home” based upon the fact that defendant had sold the property to the Chens. After numerous stays and canceled sales, the property was ultimately sold at public auction by the appointed referee on May 20, 2016 for the purchase price of \$845,000.00. The same day as, and following, the sale, the Chens presented an application to the court to, inter alia, “request court to correct the improper auction on our property.” The court declined to sign the order, as there was no basis for the relief. The Chens now seek leave to intervene and a preliminary injunction pending a determination of: (1) the Chens’ rights to the property and the improvements they have made thereon; and (2) whether the foreclosure sale should be set aside either upon payment in plaintiff’s favor or a new auction whereby the Chens be permitted to bid.

In support of their motion, they submit the affidavit of Naichuan Chen. Mr. Chen states that, on May 15, 2015, he and his wife attended the public auction in this court (presumably pursuant to the Notice of Sale filed with the court on April 10, 2015), hoping to purchase the property. However, due to defendant’s bankruptcy filing, the auction was stayed. Nevertheless, Mr. Chen states that defendant approached them about the possibility of entering into a private sale, and “assured” them no attorney was needed since the sale would be done as part of the foreclosure action and the bankruptcy filing.

During negotiations, the Chens provided certain cash payments directly to defendant to offset the cost of preparing closing documents and to pay for mold remediation and deodorization of the property. They then entered into a contract of sale with defendant on or about July 21, 2015 for the purchase of the property in the amount of \$765,000.00, which provided for a down payment in the amount of \$76,500.00. Two separate cashier’s checks were made payable to defendant’s son, defendant William McEntee, at defendant’s direction.

Negotiations lasted several months, whereby defendant and Mr. Chen kept plaintiff’s prior counsel informed about the purchase. The Chens state they put said counsel, Mr. Stephen M. Valente, Esq., on notice of their purchase of the property and requested his presence at the closing together with a payoff amount. Finally, on December 7, 2015, the Chens and defendant entered into an all-cash purchase and sale agreement whereby defendant apparently agreed to deliver the premises free and clear of any liens, including the

lien held by plaintiff.<sup>1</sup> The closing was held on December 8, 2015, and “Valente chose not to attend the Chen Closing, and did not give us instructions as to the logistics of making our payoff of the Note.” Instead, the Chens agreed that defendant would pay off the loan using the funds the former delivered to the latter. Two cashier’s checks were made payable to defendant representing the balance of the purchase price. Defendant then delivered the key and a deed to the property. The deed has not been submitted in support of this motion; however, it is noted that same is part of the County Clerk file as part of the papers filed on May 26, 2016.<sup>2</sup> The deed has not been recorded, apparently having been rejected by the City Register. Since the closing, the Chens have been in possession of the property and have expended over \$300,000.00 in renovations thereof.

Mr. Chen further alleges the following: (1) Valente and defendant had direct knowledge of the sale negotiations, but neither of them disclosed same to the court nor did plaintiff attempt to add the Chens as defendants to this action; (2) that plaintiff failed to inform them that there was a possibility that the property would be “sold out from under them unless we paid off the final judgment of foreclosure” and that, as a result, the Chens were unable to protect their rights in and to the property; (3) that plaintiff and the referee, at the final foreclosure auction, instructed the Chens not to bid on the property since “a valid, recorded deed from McEntee would supersede the foreclosure auction”; and (4) defendant, to date, has refused to pay off the note.

Defendant submits opposition to the motion. He urges that the Chens are sophisticated business people and that they enlisted lawyers during the sale negotiation process. He confirms that Valente as well as the bankruptcy court were well aware of the Chens and their desire to purchase the property and were even assisting in facilitating the deal. Defendant indicates that the Chens asked that he sign papers, which included the “deed papers,” without being permitted to read them after they were altered. Nevertheless, defendant “begged” them to get a lawyer to assist with the filing of the deed. Defendant also claims that the balance of funds paid at closing was not for the purpose of paying off the loan and for profit; rather,

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1. The Chens provide only four of the fifty-one pages of the purchase and sale agreement. Further, there are several handwritten amendments thereto, some of which appear to have been only unilaterally agreed to.

2. The purported deed is between “Alfred R. or Matthew M. McEntee” and Naichuan Chen. Further, the deed contains a “covenant” which refers to an order of Justice Phyllis O. Flug and the promise by defendant that he would pay off the existing mortgage. This court noted on the face of the proposed order to show cause submitted by the Chens –which contained the deed – which the court declined to sign, that the purported order of Justice Flug upon which the Chens relied appeared to be a fraudulent document.

he indicates that “I had right to keep the money because they had broken the contract and sale the house to one of the three buyers I tried to be fair [sic].”

Defendant also indicates that when the Chens presented him with an order from Justice Flug, he was skeptical and, upon physically appearing in this Courthouse, he confirmed with several court staff that Justice Flug had since retired.

Defendant agrees that the foreclosure sale be set aside as the Chens are the owners of the property. He informed the court, referee, the Chens, and plaintiff’s current counsel that there should not be an auction. Despite that, defendant asserts that the Chens knew that he has not been able to settle with the bank, purportedly due to the fact that the amount the bank alleged was owed versus what he thought was owed was different. Notwithstanding same, the Chens “wanted to close anyway.”

Finally, defendant denies allegations of fraud, breach of contract, or unjust enrichment on his part.

Parenthetically, defendant requests, in his opposition to the motion, that defendant William McEntee be “extracted” from these proceedings, as he is an infant with a disability. Defendant also requests that his bank account be unfrozen.

Plaintiff also submits opposition to the motion. Plaintiff points out that there has never been a deed transferring ownership in the property to defendant, nor has there been satisfaction of the mortgage. Further, plaintiff indicates that the Chens have failed to produce any documentary proof to support their declarations: (1) there is no deed or any other documentary proof of ownership; (2) there is no documentary evidence that Valente was aware of the sale or that he provided the Chens with a payoff letter; (3) there is no proof of the bankruptcy court’s awareness of a potential sale of the property which involved the Chens; (4) there is no proof that they expended money to improve the property but, in any event, it appears they did so without ownership. Instead, the Chens chose to engage in a private negotiation without the benefit of an attorney or a title company.

Plaintiff further argues that the Chens’ application is untimely inasmuch as they had notice of this action. Further, plaintiff states that the Chens’ claims are against defendant and, thus, there is no need for them to intervene in this action.

Finally, plaintiff states that, it is a bona fide purchaser of the mortgage and, thus, is protected against the Chens alleged interest (which alleged interest has never been recorded). Further, and to that end, plaintiff reiterates that defendant essentially acknowledges that the loan has never been satisfied.

In reply, the Chens' attorney impresses that her clients are the only ones really interested in actually living in the property, the winning bidder apparently having failed to go forward with the closing and rather having contacted the Chens in an attempt to sell his winning bid. She points out that defendant also believes that the foreclosure sale should be set aside – the property having been sold to the Chens – and asks that the court recognize the validity of the Chens' purchase. Counsel also interprets defendant's position to suggest that defendant is willing to pay off the mortgage once a correct calculation of the payoff amount is provided.

As far as responding to plaintiff's opposition, it appears that plaintiff and the Chens are in agreement that the mortgage should be paid off so that the Chens may live in the property free of the bank's lien. To that end, counsel suggests that the court "bring everyone together, including the winning bidder at the Foreclosure Auction, to assist us in hammering out a viable and equitable settlement of this long-running litigation."

CPLR § 1013, Intervention by permission states:

"Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

That branch of the motion seeking leave to intervene is denied as untimely. Despite the fact that the Chens were aware of this foreclosure action, wherein a judgment of foreclosure had already been awarded, as early as over one year from the making of this motion when they attended a public auction for the sale of the property, they waited until after the foreclosure sale before seeking leave to intervene (*see Castle Peak 2012-1 Loan Trust v Sattar*, 140 AD3d 1107 [2016] [alleged transferors' of title to foreclosure premises delay of approximately four months considered untimely]; *U.S. Bank Natl. Assn. v Bisonso*, 98 AD3d 608 [2012] [proposed intervenor having conceded to waiting at least one year after she had actual notice of foreclosure action was untimely]; *JP Morgan Chase Bank, N.A. v Edelson*, 90 AD3d 996 [2011] [proposed intervenor who acquired an interest in foreclosure premises, who became aware of the judgment of foreclosure and sale months before the motion was made, was untimely]). Permitting intervention would prejudice plaintiff, who obtained its judgment of foreclosure and sale over six years ago.

Moreover, the Chens have not established that they are record owners of the premises (*see Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875 [2015]), having failed to produce a

valid deed. Notably, as pointed out by plaintiff herein, there is no evidence to suggest that defendant had the authority to convey the premises to the Chens, *i.e.*, defendant is only able to convey the interest that he may hold by virtue of his relationship with decedent, by virtue of the statute governing the distribution of decedent's property (absent any rights of potential creditors of the estate). No such proof is present here and it is not for this court, within the context of a simple mortgage foreclosure action, to determine rights of intestacy so as to establish whether the Chens indeed have some legal title to the property. In any event, their rights, if any, would be subject and subordinate to plaintiff's.

To the extent the Chens argue that they should be permitted to intervene since plaintiff failed to inform the court of their existence despite plaintiff's knowledge, the Chens have failed to submit a legal basis to support that plaintiff had such an obligation to inform the court of what the Chens describe as a "private sale." Nor does the court see that plaintiff had an obligation to add the Chens as defendants since their rights, just like defendant's rights, were subject to the judgment of foreclosure, of which the Chens were actually aware (*see e.g. Bank of America v Riccardi*, 51 Misc 3d 1225[A] [Sup Ct, Suffolk County 2016]; *see also Citimortgage, Inc. v Dulgeroff*, 138 AD3d 419 [2016]).

Further, whether the Chens were defrauded into believing, inter alia, that: (1) defendant had a 100% interest in the property such that he had such interest to convey<sup>3</sup>; or (2) defendant would use funds given to him by the Chens to pay off the lien, they are issues that are well beyond the scope of this foreclosure action. Indeed and in any event, the court has been informed that the Chens have already filed a separate plenary action in Supreme Court against, inter alia, defendant, under Index No. 6824/2016. A review of County Clerk records show that the action is one, inter alia, to compel the determination of title to the property, and it also sounds in fraud and conversion.

As to the remaining branch of the motion which seeks a preliminary injunction, the Chens have alleged that the referee and plaintiff, on the date of the foreclosure sale, "instructed us not to [bid on the property], and represented that a valid, recorded deed from McEntee would supercede the foreclosure auction." Notwithstanding the fact that whether or not the Chens held a valid deed is of no moment given the priority of the judgment of foreclosure, a hearing must be held to determine the propriety of the foreclosure sale (*see e.g. 3-30 Bergman on New York Mortgage Foreclosures* § 30.06 [a sale may be overturned if it was conducted in such a manner that prevents "bona fide bidders from bidding and that impede[s] a fair and impartial sale . . ."]).

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3. It is noted that Mr. Chen states that "[u]pon information and belief, no closing has taken place with respect to the May 2016 Foreclosure Auction and title still remains with Alfred McEntee, subject to the final judgment of foreclosure.

As far as defendant's informal requests in his opposition, same will not be entertained inasmuch as he has failed to make the appropriate application for such relief. It is noted that part of the relief he seeks – to wit: that his bank account be unfrozen – appears to be a reference to a temporary restraining order granted by Justice Denis Butler in the Chens' separate action against defendant. Thus, the relief he seeks should be made within the context of that action.

With respect to the request by Chens' counsel in reply for a settlement conference to be scheduled by the court, given the history of this case, the allegations made by the Chens both on this application and in their separate plenary action, and a representation made by the Chens' attorney that she has been in contact with the Queens County District Attorney's office, the court finds it inappropriate under the circumstances to schedule a settlement conference in this matter.

Accordingly, the branch of the motion for an order granting the Chens leave to intervene is denied. The remaining branch of the motion is set down for a hearing to be held in this Courthouse, located at 88-11 Sutphin Boulevard, Jamaica, New York, in Courtroom 5001, on Tuesday, August 16, 2016, at 10:00 a.m., at which date and time the Chens, plaintiff, and the referee are required to appear to address the allegation raised by the Chens. Given the hearing, it is hereby

ORDERED that any closing of the property that may be scheduled is hereby STAYED, and any transfer of the deed is hereby STAYED pending resolution of the remaining branch of the Chens' motion.

A copy of this order is being mailed to counsel for plaintiff, counsel for the Chens, the referee, the successful bidder, and defendant on this date.

Dated: August 1, 2016

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J.S.C.