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| Santos v CNB Realty Group LLC |
| 2020 NY Slip Op 33354(U) |
| October 5, 2020 |
| Supreme Court, Kings County |
| Docket Number: 515204/2019 |
| Judge: Richard J. Montelione |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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ROCIO D. SANTOS,

Plaintiff,

-against-

CNB REALTY GROUP LLC, 1334 ADR LLC, LPKM
REALTY ENTERPRISES INC., SANFORD SOLNY
and HENRY PERALTA,

Defendants.
-----X

Decision and Order

Index No. 515204/2019

Cal. No. 39

Mot. Seq. 2

Date: OCT 5 2020

After oral argument on September 30, 2020, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

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| Notice of Motion dated June 12, 2020 of Proposed Intervener Deutsche Bank National Trust Company, As Trustee for Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2007-A, Home Equity Mortgage Loan Asset-Backed Certificates Series INABS 2007-A ("DBNTC") for Intervention; Attorney Affirmation of Fernando C. Rivera-Maissonet, affirmed on June 12, 2020..... | 1 |
| EXHIBIT 1-Notice of Motion of DBNTC v Santos, et al., Index No. 4835/2010; Memorandum of Law; Attorney Affirmation of Fernando C. Rivera-Maissonet, affirmed on March 12, 2020; | |
| <u>EXHIBITS ATTACHED TO EXHIBIT 1:</u> | |
| 1-Summons and Complaint, Index No. 4835/2010; (Various documents none of which are tabbed-copy of Fixed/Adjustable rate note; Mortgage dated September 22, 2006; 1-4 Family Rider; Assignment of Mortgage dated July 17, 2008; Assignment of Mortgage dated February 9, 2010; Verification page of a Summons and complaint; Notice of Pendency dated February 24, 2010; Additional Notice of Pendency dated February 14, 2013; | |
| 2-Affidavits of Service of the Summons and Complaint; Affidavit of Compliance with CPLR 3215(G)(3); Affidavit of Mailing of RPAPL 1303 Notice to Tenant; Notice of Appearance and Claim to Surplus Monies; | |
| 3-Request for Judicial Intervention; unsigned Order of Reference; | |
| 4-Decision and Order of Hon. Johnny Lee Baynes, dated April 16, 2012; | |
| 5-Decision and Order of Hon. Johnny Lee Baynes, dated November 27, 2012; | |
| 6-Order upon non-appearance; | |
| 7-Consent to Change Attorney; | |

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| <p>8-Conditional Order of Dismissal entered on March 2, 2015; 9-Web appearance detail sheet;</p> <p>10-Decision and Order of Hon. Johnny Lee Baynes denying motion to vacate and to restore entered on July 29, 2016;</p> <p>11-Consent to change attorney; proposed order granting restoration;</p> | |
| <p>EXHIBIT 2 Affidavits of Service re: Summons and Complaint, Index No. 4835/2010;</p> <p>EXHIBIT 3 Request for Judicial Intervention re: Index No. 4835/2010 and other papers;</p> <p>EXHIBIT 4 Decision and Order of the Hon. Johnny L. Baynes dated April 16, 2012;</p> <p>EXHIBIT 5 Decision and Order of the Hon. Johnny L. Baynes dated November 27, 2012;</p> <p>EXHIBIT 6 Order of Hon. Johnny L. Baynes dated July 9, 2013, "Settle Judgment and Order of Reference on Notice;</p> <p>EXHIBIT 7 Consent to Change Attorney;</p> <p>EXHIBIT 8 Conditional Order of Dismissal of Hon. Lawrence Knipel entered March 2, 2015;</p> <p>EXHIBIT 9 Appearance Detail Sheet starting July 28, 2016;</p> <p>EXHIBIT 10 Decision of Hon. Johnny Lee Baynes denying motion to vacate and to restore ("on the record") Note: no record provided;</p> <p>EXHIBIT 11 Consent to Change Attorney;</p> | |
| <p>Tab EXHIBIT 2-Appearance Detail Sheet; Tab EXHIBIT 3-Appearance Detail Sheet; Tab Exhibit 4-Proposed Answer.</p> | |
| <p>Plaintiff's Attorney Affirmation of Rovin R. Rozario, affirmed on August 24, 2010; Memorandum of Law dated August 24, 2020.....</p> | 2 |
| <p>Proposed Intervener's Attorney Affirmation of Melisa Zukic, Esq., affirmed on September 21, 2020.....</p> | 3 |

MONTELIONE, RICHARD J., J.

Deutsche Bank National Trust Company, As Trustee for Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2007-A, Home Equity

Mortgage Loan Asset-Backed Certificates Series INABS 2007-A (“DBNTC”) seeks to intervene pursuant to CPLR 1012 or 1013. Although DBNTC provides the court with a proposed answer, it failed to provide the court with a copy of the complaint. However, the court takes judicial notice of the complaint by reviewing its own records in this matter. This action involves alternate theories, *inter alia*, of quiet title, fraud, breach of contract, unjust enrichment, etc.

Prior Action Involving DBNTC and Plaintiff

The proposed intervener, DBNTC, previously commenced a foreclosure action against the plaintiff Rocio D. Santos (“Santos”) by filing a summons and complaint on February 25, 2010 under Index No. 4835/2010 (the “prior action”). Santos, plaintiff here but defendant in the prior action, defaulted and DBNTC filed a Request for Judicial Intervention on May 10, 2010. In the prior action, defendant Santos also failed to appear at a status conference and the court issued an order on July 9, 2013, “ORDERED that the answer, if any, is stricken. Settle Judgment and Order of Reference on notice.” DBNTC was required to settle the order within 60 days. *See LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223, 1224-1225 [2d Dept 2018]):

‘Proposed orders . . . , with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted’ (22 NYCRR 202.48 [a]). ‘Failure to submit the order . . . timely shall be deemed an abandonment of the motion or action, unless for good cause shown’ (22 NYCRR 202.48 [b]). These provisions are not applicable where the decision does not explicitly direct that the proposed judgment or order be settled or submitted for signature (*see Funk v Barry*, 89 NY2d 364, 675 NE2d 1199, 653 NYS2d 247 [1996]). However, the direction to ‘settle order’ ‘ordinarily entails more complicated relief,’ and therefore ‘contemplates notice to the opponent so that both parties may either agree on a draft or prepare counter proposals to be settled before the court’ (*Funk v Barry*, 89 NY2d at 367). Here, the decision entered September 16, 2009, directed the plaintiff to ‘settle order.’ Accordingly, pursuant to 22 NYCRR 202.48 (a),

the plaintiff was required to submit a notice of settlement and proposed order within 60 days after September 16, 2009.

Here, no proof was provided by the proposed intervener that the Settlement of the Judgment or Order of Reference in the prior action was ever served and filed within 60 days of the July 9, 2013 Order. Subsequently, a Status Conference was scheduled, and the court issued the following Conditional Order, entered on March 2, 2015:

At a Status Conference held this day, it is the finding of this Court that more than one year has elapsed since the joinder of issue and plaintiff has unreasonable neglected to prosecute this action.

Accordingly, this action is dismissed pursuant to CPLR 3216 and the County Clerk is directed to cancel the Notice of Pendency unless the plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof.

Thereafter, DBNTC filed a motion to vacate the Order and to restore to the calendar which was denied by Order of the Hon. Johnny Lee Baynes entered July 29, 2016. The Order reflects, "plaintiff's motion to vacate and restore is hereby denied based on the record after oral argument on the record." The transcript of the record was not provided to the court. No explanation has been offered as to why DBNTC failed to settle a judgment on notice after the July 9, 2013 Order or why DBNTC did not move to settle the judgment *nunc pro tunc* after it received the purportedly erroneous March 2, 2015 Order.¹ There is currently a motion pending before the Hon. Reginald A. Boddie to vacate the order of dismissal and to restore the matter to the calendar returnable on November 5, 2020.

Legal Analysis

DBNTC argues, *inter alia*, that the court should allow intervention in the

¹ DBNTC claims the Conditional Order was improper because issue was never joined and dismissal was not therefore permissible under CPLR 3216(b)(1). (*See, Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 194 [2d Dept 2001], "CPLR 3216 requires three conditions precedent before a case can be dismissed for want of prosecution: (1) issue has been joined; (2) one year has elapsed from the joinder of issue; and (3) the court or a party has served a written demand that the plaintiff file a note of issue within 90 days.")

interest of justice. But under these particular facts, the court is not inclined to grant such relief. This issue is not before the court, but assuming *arguendo* that an automatic dismissal was not permissible under CPLR 3216(b)(1) because issue was never joined, DBNTC never took any action to “Settle Judgment and Order of Reference on Notice” as required under the court’s prior July 9, 2013 Order which is now “deemed abandoned” under Uniform Rule 202.48.

See Uniform Rule 202.48:

§ 202.48 Submission of orders, judgments and decrees for signature

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) Failure to submit the order or judgment timely *shall be deemed an abandonment of the motion or action*, unless for good cause shown.

Notwithstanding the Conditional Order entered on March 2, 2015 that is purported to be, in effect, a nullity, DBNTC was placed on *additional* notice that *some action* needed to occur, or the matter will be treated as abandoned. Again, there is no explanation as to why there was no Settlement of the Judgment, as directed, since July 9, 2013. In any event, intervention is unnecessary because the issues to be determined in the present action, allegedly fraudulent transfers after the subject mortgage was filed, are separate and apart from the issue of whether or not DBNTC’s may proceed with the foreclosure of plaintiff’s mortgage. *See R.C. Diocese of Brooklyn, NY v Christ the King Regional High Sch.*, 164 AD3d 1394, 1396 [2d Dept 2018]:

...(T)he court, in its discretion, may permit a person to intervene, inter alia, ‘when the person’s claim or defense and the main action have a common question of law or fact’ (CPLR 1013; *see Leonard v Planning Bd. of Town of Union Vale*, 136 AD3d 866, 867-868, 25 NYS3d 319 [2016]; *Trent v Jackson*, 129 AD3d at 1062; *Spota v*

County of Suffolk, 110 AD3d at 786; *Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819, 820, 941 NYS2d 631 [2012]). ‘However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings’ (*Trent v Jackson*, 129 AD3d at 1062 [internal quotation marks omitted]; see *Spota v County of Suffolk*, 110 AD3d at 786; *Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d at 820; *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d at 843).

The are no significant common facts or law between the present action under Index No. 515204/2019 concerning the titled owner, and alleged fraud, and DBNTC’s action under Index No. 4835/2010 concerning the foreclosure of a mortgage which pre-existed the facts alleged in the instant matter. If DBNTC is successful in its motion to vacate the Order of Conditional Dismissal and/or reargue the court’s denial of its earlier motion, which is now pending under Index No. 4835/2010, DBNTC’s rights will be protected notwithstanding any judgments that may be entered in the instant action and if DBNTC is not successful in the foregoing motion, its intervention will not protect any rights which have already been forfeited.

Based on the foregoing, the Proposed Intervener DBNTC’s motion is denied.

Plaintiff must serve a copy of this order on all parties with Notice of Entry within fifteen (15) days of its entry.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY


RICHARD J. MONTELIONE, A.S.C.

2020 OCT -9 PM 12:33
KINGS COUNTY CLERK
FILED

