

Riskin v Pam Vic Enters., Ltd.

2007 NY Slip Op 30436(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0112188

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **HON. JUDITH J. GISCHE**
J.S.C.

PART _____

Index Number : 112188/1999

RISKIN, MARTIN

vs

PAM VIC CENTERPRISES, LTD.

Sequence Number : 007

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

... WILL REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/07

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

MARTIN RISKIN and PHILIP GOODMAN,

Plaintiffs,

-against-

PAM VIC ENTERPRISES, LTD. a/k/a PAM-
VIC ENTERPRISES, LTD. a/k/a PAMVIC
ENTERPRISES, LTD., et al.,

Defendants.

-----X

Decision/Order

Index No.: 112188/99

Seq. No. : 007

Present:

Hon. Judith J. Gische

J.S.C.

FILED

MAR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltffs motion to reargue and restore case w/RB affirm, exhs	1
RF affirm (sep back), exhs	2
MDG affirm (Bankruptcy Counsel) o/b/o Pam Vic w/exhs	3
Proposed Pltf-Intervenor Singer amended x-motion to intervene w/TS affid, RF, MDG & DS affirm, exhs	4
RB affirm in opp to TS motion to intervene, exhs	5
TS reply w/RF affirm, exh	6
MDG affirm (Bankruptcy Counsel) o/b/o Pam Vic in reply to TS motion	7
Pam Vic in support of TS motion w/DS	8
Hon. York SFO w/ redacted (crossed out) signature and date (6/23/06)	9
Hon. York SFO dated 8/22/06 of recusal	10
Steno Minutes of OA 11/9/06	11
RB letter w/ Consolidation Order by Hon. Ambrosio dated 12/15/06	12
County Clerk's file Index No. 112188/99 (<i>Riskin v. Pam Vic</i>)	13
County Clerk's file Index No. 115780/01 (<i>Singer v. Riskin</i>)	14

Upon the foregoing papers, the court's decision is as follows:

Gische J.:

The underlying action sought foreclosure of five mortgages on real property located at 341 West 30th Street, New York, New York ("341 West"). This case was started in 1999 and has an incredibly convoluted history. Most recently the Hon. Louis B. York recused himself from this case, [Order, York J., 8/22/06]. The case has now been randomly reassigned to this judge with open motions and numerous unresolved disputes.

Plaintiffs Martin Riskin and Philip Goodman ("plaintiffs") have brought a motion to "reargue" Judge York's decisions dated October 13, 2004 and March 16, 2005, which held that this case is "inactive." Plaintiffs now seek to restore the case to the calendar and to refer the matter referred to an already appointed referee with an order to "compute" the sums due to them. Defendants, Pam Vic and David Segal (collectively "Pam Vic") do not oppose the restoration, although the parties disagree on what now needs to be done in order bring this case to a conclusion.

Ted Singer ("Singer"), who is not a party to this action, cross-moves to intervene. Singer contends that he is the true owner of all mortgages secured by 341 West, based upon a business relationship he had with the plaintiffs starting in 1977. Singer provides a proposed pleading, which asserts eight causes of action on "all the notes which are the subject of this action." Pam Vic supports Singer's motion, but the plaintiffs oppose it. Although Singer claims that the "re-argument" motion is improper and should be denied, he argues that if this case is restored, he should be permitted to intervene and serve his proposed complaint.

For the reasons that follow the court grants the motion to restore but denies the

cross motion by Singer to intervene because there is another pending and active court action in which Singer seeks relief identical to what he is seeking to assert in his proposed complaint.

Procedural History

Review of the chronological history of this and other court proceedings involving the various parties appearing on these motions and 341 West is critical to any analysis of the depth and breadth of the parties' disputes, and the issues framed by these motions. It is also important to understand the current status of their disputes, what has happened in these cases, and what still remains to be decided.¹

Judge York, in a short form, handwritten decision, dated April 8, 2000, granted plaintiffs partial summary judgment. The decision was reduced to a formal order signed by Justice York and filed with the clerk on May 24, 2000. Justice York granted summary judgment to plaintiffs on mortgages #2 and #5. Relief as to mortgages #1,3 and 4 was severed and allowed to continue under a new index number. It appears that no new index number was ever purchased. In any event, any issues regarding the foreclosure of mortgages #1, 3 and 4 have not been before the court in this case since at least May 24, 2000.²

¹Many representations made by the parties about the status of these cases are not borne out by the record. Rather than rely upon the statements by the parties in this case about the chronology of this case, the court turns to, and relies upon, the court orders on file with the County Clerk's office, in addition to the copies of other orders, transcripts and records provided as exhibits to these motions. The parties are so deeply entrenched in advocacy that they are not reliable sources of information about such facts.

²Plaintiff represented before the Bankruptcy Court that issues pertaining to mortgages #s 1,3 and 4 were still before the court. There is no evidence supporting this

As to mortgages #2 and #5, the matter was referred to a special referee to:

"take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or their agents on oath or by affidavit, as to any payments which have been made and the amount due to the plaintiffs and to ascertain and compute the amount due the plaintiffs herein for principal, interest, water and sewer rentals, insurance premiums, taxes and all other charges on the Mortgage #2 and Mortgage #5 and the notes secured thereby mentioned in the complaint, the cost of preserving and protecting the mortgaged premises; to examine whether the mortgages premises can be sold in parcels and, the Referee make his report to this court with all convenient speed.."

See: Order dated 5/24/00

Bruce Feffer, Esq was appointed as the referee. He noticed a hearing for May 4, 2000. There is no indication that the hearing ever took place and certainly no report was ever filed with the court. Instead, on or about May 31, 2000 Pam Vic filed a bankruptcy petition in the Southern District of New York, The bankruptcy petition automatically stayed the instant foreclosure proceeding. Ted Singer was a creditor appearing in the bankruptcy proceeding and asserted a claim that he is the true owner of the mortgages on 341 West.

On October 23, 2000 the Bankruptcy Judge lifted the stay to the extent of allowing this mortgage foreclosure proceeding to go forward, at least up until the point of advertising any sale of 341 West. At such point the plaintiffs were required to make

representation. (See transcript dated 8/9/06). No new index number was purchased on the severed issues as required by the court. The only other pending New York County action between the parties was one started by Mr. Singer against plaintiffs (Index #157801/2001). Equally unsupportable is Singer's attorney's representation on his cross-motion that this action concerns "three (3)" remaining mortgages. (Felton affirm dated para 11). According to prior court orders, this foreclosure only concerns two (2) mortgages.

an application to the Bankruptcy Court. The order further provided that Singer was permitted to commence an action in Bankruptcy Court or in state court to determine the validity of claims raised regarding the ownership of certain mortgages which presently encumber 341 West.

A status conference was scheduled by the Hon. Stephen Crane on this case for January 19, 2001. Justice Crane issued an order which dismissed the case due to "plaintiff's failure to appear".

Singer thereafter (on June 29, 2001) presented an Order to Show Cause seeking to intervene in this case. Justice York declined to sign the Order to Show Cause based upon the January 19, 2001 dismissal by Justice Crane.

By order dated August 23, 2001, however, Judge York vacated the dismissal of the case and restored the matter to the active calendar. Judge York found that the case had been inappropriately set for a conference while the Bankruptcy Stay was still in effect. The finding that any Bankruptcy stay prevented this case from going forward on January 19, 2001 was a mistake, apparently based upon information provided by plaintiffs' counsel. He further found that the parties had not known about the January 2001 conference date, which explained their default in appearance.

Notwithstanding Justice York's August 2001 decision to restore the case to the active calendar, there was no activity in this mortgage foreclosure case for several years thereafter.

On August 24, 2001, however, Singer filed a separate action in New York County Supreme Court (Index # 115780/2001) against the plaintiffs herein and Pam Vic. ("Singer-NY action"). The amended complaint in the Singer-NY action is virtually

identical to the proposed complaint that Singer seeks to interpose as the intervenor herein. In the Singer-NY action Singer moved to stay the instant mortgage foreclosure action. That motion was denied by Justice Martin Schoenfeld by decision and order dated July 22, 2003. In part, the stay was denied based upon Justice Schoenfeld's determination that the dispute between Singer and the plaintiffs was redressable by money damages. On January 24, 2005 a motion to reargue the basis for the July 22, 2003 decision was denied. Until recently, this case appears to have otherwise lain dormant.

Beginning in 2001 Singer also filed actions in the Kings County Supreme Court against plaintiffs, concerning other properties and mortgages. It is unclear where exactly these cases procedurally stand.

Notwithstanding the lack of activity in this mortgage foreclosure action and the Singer-NY action, things were still happening in the Bankruptcy proceeding. In fact, on April 17, 2002 a settlement was reached in the Bankruptcy Court that was placed on the record. Bankruptcy Judge Richard L. Bohanon signed an order on July 16, 2002 giving effect to the settlement.

Insofar as pertinent to these motions, the settlement permitted to 341 West to be sold with free and clear title to a third party. Pam Vic agreed to segregate from the proceeds an amount to satisfy New York State and City Transfer Taxes and to hold the net proceeds in an interest bearing escrow, subject to further order of the Bankruptcy Court or State Court.

The parties further agreed that there were two outstanding categories of issues regarding the 341 West that would proceed in State Court. One was the issue between

plaintiffs and Pam Vic, which is concededly the subject of this foreclosure. The second category was the claims by Singer against plaintiffs, which plaintiffs attorney claimed was pending before different judges in different proceedings both in Kings County and Manhattan County Supreme Court. Referring to the net proceeds of the sale of the 341 West the parties agreed:

“ The money is being put into escrow in and interest-bearing account. The parties go back to state court, and they litigate the matter until their hearts are content or until further reason arises where reasonable minds can arrive at numbers to resolve those issues.”

Further reason apparently has not yet arisen. Approximately another two years passed after the Bankruptcy settlement before both plaintiffs and Singer made motions in this case for various relief. Their motions resulted in three orders issued by Justice York respectively dated October 13, 2004; November 1, 2004 and March 16, 2005.

The October 13, 2004 order denied plaintiffs' request for relief because the case had been previously dismissed on January 19, 2001 and further provided that the court would not consider the additional relief requested unless and until a motion to restore had been granted. This decision was obviously made in error because on August 23, 2001 the dismissed marking had been vacated.

The November 1, 2004 order denied Singer's motion to intervene because the case had been previously dismissed on January 19, 2001. This decision was also made in error because on August 23, 2001 the dismissed marking had been vacated.

The March 16, 2005 order denied plaintiffs' request to restore this case to the active calendar and marked the matter "N/A/Ps/ (10:25AM)."

On April 19, 2006 plaintiffs tried again to restore this matter to the calendar.

Justice York declined to sign the Order to Show Cause presented stating "This Order to Show Cause contains such convoluted and verbose language that the Court is unable to comprehend the relief being sought and the reasons therefore."

The parties thereafter, on June 6, 2006, appeared before newly assigned Bankruptcy Judge Drain and plaintiffs' attorney represented that he would be making another motion in a simplified format to this court. The present motion is apparently that "simplified" motion.

The Parties Primary Contentions

Plaintiffs' argue that because Justice York has recused himself, this court can hear re-argument on his decisions dated October 13, 2004 and March 16, 2005 which deny restoration and any treatment of this case as an active case. They further argue that their motion is timely (notwithstanding that the subject orders are many years old) because the orders were never entered or served upon them. Finally, they contend that once the case is restored, this court must adhere to Justice York's decision granting summary judgment [dated March 16, 2000] to the plaintiffs and directing the computation of the sums due to them on mortgages #2 and #5. They oppose the adjudication of Singer's claims in this case because they were never before the court and either should have been or could have been raised in other litigations pending before the Supreme Courts of both New York and Kings counties.

Singer contends that he is the true owner of the mortgage #2 and mortgage #5, based upon a business relationship he had with the plaintiffs starting in 1977. Singer further contends that plaintiffs secretly commenced this foreclosure action in 1999 and falsely claimed they are the sole owners of the notes and mortgages being foreclosed.

Singer sets forth complicated facts relating to a rotating fund, describing a system that involved transfers of nominal ownership and contractual rights for over 160 parcels of real property. Thus, it is Singer's contention, that if this action is restored to the active calendar, his claims must be decided and a declaration must be made about who is the rightful owner of the mortgages before reaching the computations.

Discussion

A. The Applicable Law

As a general matter, re-argument should be addressed to the Justice who made the underlying decision. This is based upon the principal that a court is bound by the prior ruling of a judge of concurrent jurisdiction. People v. Jennings, 69 N.Y.2d 103, 113-114 (1990). Where a Judge is "unavailable" to consider a motion to reargue, however, a newly assigned Judge can decide the issues raised. People v. Davis, 162 Misc.2d 662 (N.Y. Sup 1994).

Re-argument should be granted if a judge has over looked or misapprehended the relevant facts, or misapplied any principle of law in his or her prior orders (CPLR § 2221 [d] [2]; Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]). On the issue of timeliness, the law requires that a motion for re-argument be made before the period in which to appeal has expired. Liberty National Bank & Trust Company v. Bero Construction Corp., 29 AD2d 627 (4th dept. 1967). An appeal as of right must be taken within 30 days after service of the order appealed from, with Notice of Entry. CPLR § 5513.

With respect to intervention, CPLR § 1012 (a) (2) permits a nonparty to be added as a party when: (1) the person seeking to intervene "is or may be bound by the

judgment" and (2) representation of the person's interest "is or may be inadequate."

Vantage Petroleum v. Board of Assessment Review of the Town of Babylon, 61 NY2d 695, 698 (1984). One class of cases in which a person may intervene as of right is where such person has an interest in real property, the title to which may be affected by the judgment. Lack v. Puentes, 239 AD 321 (2nd Dept 1933). Greenpoint Savings Bank v. McMann Enterprises, 214 AD2d 647 (2nd dept. 1995).

In general, however, the court does not permit a party to maintain separate actions seeking identical relief. InKline Pharmaceutical Co., Inc. v. Coleman, 305 AD2d 151 (1st dept. 2003).

B. The Court's Analysis of these Motions.

Justice York has recused himself from this case. He is, therefore, unavailable to consider this re-argument motion, which may be considered on its merits by this court. Since the basis for the underlying decisions are largely procedural, ie: was the case dismissed or not, the court exercises its discretion to grant re-argument and decide the parties' arguments on the merits.

The motions are timely because, although the challenged orders are many years old, plaintiffs' attorney claims that he was never served with Notice of Entry of the orders. Neither Pam Vic nor Singer have produced any evidence to the contrary. Since the orders were not served, plaintiffs' time to appeal has not expired. Since the time to appeal the challenged orders has not expired, the time to re-argue the motions underlying the orders likewise has not expired.

On the merits, the court finds that the challenged orders are based upon an error of law and fact. They were based upon the belief that the cases had been dismissed

on January 19, 2001 and never restored to the court's calendar thereafter. This was a mistake. The cases were not in a dismissed posture when the challenged orders were made, but they had been restored by order dated August 23, 2001 of restoration. While Singer contests the validity of the underpinning of the August 23, 2001 order, he has not cross-moved to reargue that particular order. Moreover, even if the underpinnings of the order (that there was a bankruptcy stay in effect) were erroneous, restoration would have still been warranted because it is clear that the underlying foreclosure action was never finally determined.

The court finds, however, that Singer should not be permitted to intervene in this mortgage foreclosure action. While certainly his claims are interrelated with issues about who will ultimately recover the funds in escrow from the sale of 341 West, intervention is not allowed because the claims are already pending before the court in the Singer-NY action. Not only would intervention completely duplicate the claims made in the Singer-NY action, but it would indirectly contravene Justice Schoenfeld's decisions in that action denying Singer any stay of the foreclosure action while he was pursuing his claims about ownership of the mortgages.

Plaintiff argues that an order of consolidation made by the Hon. Michael A. Ambrosio in Kings County Supreme Court consolidating the Singer-NY action with the cases before him affects this motion. Regardless of Judge Ambrosio's ruling on consolidation, intervention would still be denied because Singer's claims will be adjudicated in the Singer-NY action, whatever county that case is ultimately heard in.

In deciding these motions the court notes (as other Judges have before) the prolix and incendiary nature of the motions, which are a distraction from the actual

issues before the court. Just to be clear, in restoring this case to the calendar the court is not deciding: (1) the merits of the respective claims of mortgage ownership; (2) whether this case should be consolidated with the pending Singer-NY action in whatever county it may now be pending; and/or (3) who is entitled to the monies in escrow derived from the sale of 341 West. The import of the court's decision is more simple: this case has to be restored and amounts due under the mortgage computed as against Pam Vic, in order to bring this foreclosure case, thought not necessarily the parties' disputes, to a final conclusion.

Conclusion

It accordance herewith is hereby:

ORDERED that plaintiff's motion to restore this case to the active calendar is granted, and it is further,

ORDERED that the matter is re-referred to Bruce M. Feffer Esq. to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or their agents on oath or by affidavit, as to any payments which have been made and the amount due to the plaintiffs and to ascertain and compute the amount due the plaintiffs herein for principal, interest, water and sewer rentals, insurance premiums, taxes and all other charges on the Mortgage #2 and Mortgage #5 and the notes secured thereby mentioned in the complaint, the cost of preserving and protecting the mortgaged premises; to examine whether the mortgages premises can be sold in parcels and, the Referee make his report to this court with all convenient speed, and it is further

ORDERED that the motion of Ted Singer to intervene in this action is denied, and it is further,

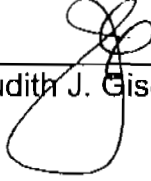
ORDERED that any requested relief not expressly addressed has nonetheless been considered by the court and is hereby denied and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order with Notice of its Entry on all defendants, Ted Singer and Bruce M. Feffer, Esq., and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
March 23, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
MAR 30 2007
NEW YORK
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