

Washington Mut. Bank v LKH Assets LLC

2008 NY Slip Op 32631(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0604209/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 604209/2007

WASHINGTON MUTUAL BANK

VS.

LKH ASSETS LLC

SEQUENCE NUMBER : # 001

REFERENCE & AMENDMENT

INDEX NO. 604209-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

1, 2

5, 6

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, It is ordered that this motion & cross-motion are decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN

Dated: 9/23/08

[Signature]
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 36

-----X
WASHINGTON MUTUAL BANK,

Plaintiff,

-against-

Index № 604209/07

LKH ASSETS LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE DEPARTMENT OF FINANCE, SANITARY PLUMBING & HEATING CORP., NEW YORK CITY ENVIRONMENTAL REVIEW BOARD, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, "JOHN DOE NO. 1" to "JOHN DOE NO. XXX," inclusive the last thirty names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Motion Seq. No.: 001

Defendants.

-----X
DORIS LING-COHAN, J.:

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

This is a foreclosure action in which plaintiff Washington Mutual Bank (WaMu) moves for an order, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1321, referring this matter to a court-appointed referee to compute and report the amount due to plaintiff. Defendant LKH Assets LLC (LKH) opposes WaMu's motion and cross-moves for an order: (1) pursuant to CPLR 5015, vacating its default in appearing and answering; (2) pursuant to CPLR 3211 (a) (8) and (e), dismissing the action based on lack of personal jurisdiction; or, in the alternative (3) permitting LKH to serve and file a later answer. WaMu's motion is also opposed by Esquire Group Estates LLC, Vintage Ventures LLC and Chase Group Alliance LLC (collectively, The Group), who, pursuant to a March 26, 2008 deed, became the "new" fee owners of the subject property, and who apparently, but inartfully, seek to intervene as party

defendants under CPLR 1012 (a). The Court notes that subsequent to the submission of the within motion and cross-motion, The Group filed a motion to intervene, which was recently submitted to this Court, and will be decided by separate order.

As the owner and holder of one or more notes secured by one or more mortgages on real property located at 225-235 West 146th Street, New York, New York (the property), WaMu commenced this foreclosure action against obligor LKH, by the service and filing of a summons and verified complaint on or about December 21, 2007. On January 25, 2008, plaintiff filed a notice of pendency in the New York County Clerk's office. By motion, dated February 25, 2008, WaMu seeks an order of reference as set forth above, based on the alleged nonpayment of principal and interest on a mortgage which became due October 1, 2007 and on the first day of each subsequent month, and based on the failure of defendants to serve a timely answer to the verified complaint as required under CPLR 320, or to make a pre-answer motion with respect to the verified complaint.

In support of its motion, WaMu submits copies of the affidavits of service upon the named defendants indicating service *via* the Secretary of State, a copy of the relevant mortgage and note, and an affidavit of merit setting forth the basis of its claim of default against LKH as obligor on the note. The moving papers fail, however, to contain proof of the additional mailing required where service is made upon the Secretary of State, as provided in CPLR 3215(g)(4) (i) & (ii); thus, the motion by WaMu is defective and therefore denied, without prejudice.

In its opposition and cross motion, dated April 15, 2008, LKH explains that its default in serving a timely answer stems from its failure to receive a copy of the summons and complaint which plaintiff had served upon the Secretary of State, and that it was not until LKH was served

with plaintiff's instant notice of motion, that it learned of the pending foreclosure action. As a defense to this action, LKH asserts that this Court lacks personal jurisdiction over it, due to improper service of the pleadings.

It is noted that, LKH asserts that prior to serving its cross motion, counsel for LKH communicated with counsel for WaMu, both orally and in writing, requesting that WaMu withdraw its motion and/or grant LKH an extension of time to serve its answer. [Exh. B, Notice of Cross Motion]. These requests were apparently rejected. Plaintiff's counsel, in conjunction with her client, also apparently rejected the attempt by The Group to intervene in the foreclosure action on consent. Notwithstanding the "suggestion" by plaintiff's counsel, in her letter of April 3, 2008, that LKH "refrain from moving to intervene as this will only add to the cost of the action which we will recoup from the sale of the property" (Exh. B, Friederich Affirmation in Opposition), as indicated above, The Group has filed a motion to intervene as of right pursuant to CPLR 1012(a).

Inasmuch as CPLR 3012 (d) authorizes the court to "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default," and public policy "favors the resolution of cases on the merits" (Sippin v Gallardo, 287 AD2d 703 [2nd Dept 2001]), it is the determination of the court that all necessary parties to this action be given an opportunity to address the pleadings as noted above.

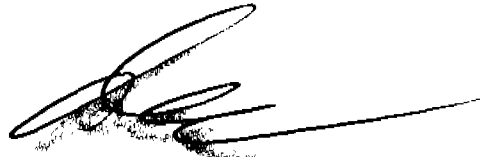
Accordingly, it is

ORDERED that the cross motion by LKH is granted to the extent that it may file an answer to the within proceeding, provided that such answer is served and filed within 30 days of

service of a copy of this order with notice of entry.

ORDERED that the plaintiff's motion is denied, without prejudice to re-file, after the filing of LKH's answer, or if LKH fails to timely file its answer, 30 days after service of a copy of this order with notice of entry and the determination of The Group's motion to intervene.

Dated: September 23, 2008



Hon. Doris Ling-Cohan, J.S.C.

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