

**Washington Mut. Bank v LKH Assets LLC**

2009 NY Slip Op 30049(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 604209/07

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

Washington Mutual Bank

INDEX NO. 404229/07

- v -

MOTION DATE \_\_\_\_\_

LKH Assets LLC

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1, 2

Replying Affidavits \_\_\_\_\_

3, 4

5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is disposed of in accordance with the attached memorandum decision.*

**FILED**  
JAN 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/9/09

[Signature]  
**DORIS LING-COHAN**  
J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
WASHINGTON MUTUAL BANK,

Plaintiff,

-against-

Index No. 604209/07

Motion Seq. No. 002

LKH ASSETS LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, SANITARY PLUMBING & HEATING CORP., NEW YORK CITY ENVIRONMENTAL CONTROL 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,

Defendants.

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

**FILED**  
JAN 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this mortgage foreclosure action, non-parties Esquire Group Estates, LLC, Vintage Ventures, LLC and Chase Group Alliance, LLC (collectively, The Group) move for, among other things, an order granting intervention to The Group, pursuant to CPLR 1012 (a)(2) and (3); 1013.

Plaintiff Washington Mutual Bank (WaMu) commenced this action in order to foreclose on real property owned by defendant/obligor LKH Assets LLC (LKH), which is located at 225-235 West 146<sup>th</sup> Street, New York, New York (the Property). WaMu asserts that it is the owner and holder of one or more notes secured by one or more mortgages on the Property (LKH Mortgage) which are, undisputably, in default, and it seeks to take possession of the Property in order to recoup the outstanding loan amount.

Also undisputed are the following underlying facts. LKH defaulted on the subject

mortgage payments, including both principal and interest, due October 1, 2007, November 1, 2007 and December 1, 2007. WaMu served and filed a summons and verified complaint commencing this foreclosure action on or about December 21, 2007. On the same date, the New York County Civil Court appointed an Article 7-A administrator to manage the Property. On January 25, 2008, WaMu filed a notice of pendency in the New York County Clerk's office.

Pursuant to written deed dated March 26, 2008, The Group became the "new" fee owners of the Property, subject to all liens filed or affecting the premises, and thereafter made requests to intervene on consent. The requests were rejected by WaMu, which also opposes the within intervention motion.

In support of its motion, The Group submits the affirmation of merit<sup>1</sup> of one of its members, Robert Rosenberg, who explains The Group's financial investment and intentions with respect to correcting current violations, improving the premises, reinstating the defaulted mortgage and making WaMu whole with respect to payment of the mortgage arrears and attorneys' fees (Rosenberg Affirm ¶¶ 4-5, 7, 14).

CPLR 1012 (a) (3) provides for non-party intervention as of right in any action "[w]hen the action involves the disposition or distribution of, or the title or a claim for damages for injury to, [sic] property and the person may be affected adversely by the judgment." Under CPLR 1013:

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

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<sup>1</sup>Robert Rosenberg states that he is submitting an affirmation instead of an affidavit "for religious purposes" (*see* Order to Show Cause, Rosenberg Affirm at 1).

unduly delay the determination of the action or prejudice the substantial rights of any party.

The sequence of events referenced above adequately demonstrates that The Group, as the new fee owner of the Property, has an interest in the instant dispute between plaintiff and defendants which could be adversely, and inequitably, affected by a judicial determination in this action. Not only should intervention be liberally granted (*Eberlin v Herman*, 18 AD2d 1068, 1069 [1<sup>st</sup> Dept 1963]), but, as the ultimate purpose of a foreclosure action is for the mortgagee to take possession of the property in order to recoup the outstanding loan balance, there appears to be no prejudice to the mortgagee in this instance, since, through The Group's intervention, the mortgagee would not be denied its right to be made whole, as a result of the underlying default.

In opposition, plaintiff cites to cases where courts have held that new owners of real property were not necessary parties in foreclosure actions (*Novastar Mortgage, Inc. v Mendoza*, 26 AD3d 479 [2d Dept 2006]; *Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203 [2d Dept 1999]). However, such cases are inapplicable as the intervenors in the cited cases were seeking to *vacate* a judgment of foreclosure, which already had been granted by the court. Furthermore, none of the cases cited by WaMu are from the First Department.

Here, movants are seeking to intervene prior to any foreclosure being granted to adequately protect their rights. Even though movants were on notice of the commencement of the foreclosure action prior to purchasing the Property, such notice should not prevent movants from raising valid defenses prior to foreclosure being granted. Additionally, movants are in a better position than defendant LKH to defend this action as they stand to be most adversely affected by any judgment as the actual property owners. Thus, movants have shown a sufficient

basis for intervention, and their motion is granted.

In addition to the issues raised in the within motion, another issue has arisen with regard to WaMu's legal status. The court takes judicial notice of the current national economic crisis which is effecting the banking industry, including WaMu (*see* Prince, Richardson on Evidence § 2-204 [e] [Farrell 11<sup>th</sup> ed]). Apparently, on September 25, 2008, WaMu was seized by the federal government and then taken over, in whole or in part, by another banking institution, J.P. Morgan Chase & Co. (JP Morgan). The takeover was reported as:

what is by far the largest bank failure in U.S. history, federal regulators seized Washington Mutual Inc. and struck a deal to sell the bulk of its operations to J.P. Morgan Chase & Co. . . . J.P Morgan agreed to pay \$1.9 billion to the government for WaMu's banking operations and will assume the loan portfolio of the thrift, which has \$307 billion in assets

(Robin Sidel et al., *WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History*, THE WALL STREET JOURNAL, Sept. 26, 2008, <http://online.wsj.com/article/SB122238415586576687.html>; *see also* Eric Dash and Andrew Ross Sorkin, *Government Seizes WaMu and Sells Some Assets*, THE NEW YORK TIMES, Sept. 25, 2008, <http://www.nytimes.com/2008/09/26/business/26wamu.html>]).

As a result of these events, questions have arisen as to WaMu's status at this time, which shall be discussed at the next court conference. Clarification is necessary to determine whether WaMu has been completely absorbed by JP Morgan such that it has ceased to exist as a separate, independent, jural entity that can no longer be a named party to this litigation, or whether the takeover has resulted in some other arrangement which may or may not affect WaMu's capacity to pursue the instant foreclosure action (*see Westside Fed. Sav. & Loan Ass'n of New York City v*

*Fitzgerald*, 136 AD2d 699, 699 [2d Dept 1988]).

Accordingly, it is

ORDERED that the motion by The Group for an order permitting The Group to intervene in the instant foreclosure matter is granted; and it is further

ORDERED that **all parties, including representatives from both Washington Mutual Bank and J.P. Morgan Chase & Co.<sup>2</sup>, are directed to appear before this court on January 28, 2009 at 10:00 AM, Room 428, 60 Centre Street, New York, NY**, for a preliminary conference and to address the issue of whether WaMu has legal capacity to foreclose on the LKH Mortgage, or whether JP Morgan, as a result of the takeover, has become the successor-in-interest of the LKH Mortgage with the capacity to pursue the foreclosure action; and it is further

ORDERED that The Group's Answer, attached as Exh. E to Patricia A. Friederich's Affirmation in Support of the motion to intervene, is deemed timely served and filed upon service of a copy of this decision/order with notice of entry; and it is further

ORDERED that within 30 days of entry of this decision/order, movants The Group shall serve a copy upon all parties, with notice of entry.

This constitutes the decision and order of the court.

Dated: 1/9/09

**FILED**  
JAN 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

<sup>2</sup> Alternatively, the parties can stipulate as to how this case shall proceed, in light of the recent events as to the change in WaMu's status.

J:\Mortgage Foreclosure\Wash Mutual.LKH Assets - intervention, schloss updated.wpd