

276 W. 113 Funding, Inc. v 113th St. Realty, LLC

2010 NY Slip Op 30017(U)

January 4, 2010

Supreme Court, New York County

Docket Number: 603299/08

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. CAROL EDMEAD

PART 35

Index Number : 603299/2008

276 WEST 113 FUNDING

vs

113TH STREET REALTY

Sequence Number : 012

LEAVE TO INTERVENE

INDEX NO. _____

MOTION DATE 12/17/09

MOTION SEQ. NO. 012

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 ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by Patricia Best for permission to intervene in this action is denied; and it is further

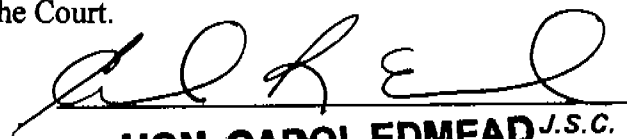
ORDERED that the branch of the motion by Patricia Best requesting that the Court vacate the Order Appointing Receiver is denied; and it is further

ORDERED that the branch of the motion by Patricia Best for a Traverse hearing is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and Patricia Best within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/4/2010


HON. CAROL EDMEAD 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):

FILED
JAN 07 2010
NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
276 WEST 113 FUNDING, INC.,

Plaintiff,

-vs-

113th STREET REALTY, LLC, HARRIET E BEST,
JONATHAN EINHORN, SOUTH CAROLINA HEATING
FUEL, INC., NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, PEOPLE OF THE STATE
OF NEW YORK, and JOHN DOE AND JANE DOE #1
through #10, the last ten being fictitious and unknown
to the plaintiff, the persons or parties intended being
the tenants, occupants, persons, or parties, in any, having
or claiming an interest in or lien upon the mortgaged
premises described in the complaint,

Index No. 603299/08

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
JAN 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Petitioner Patricia Best ("Patricia") moves for leave to intervene in this action to foreclose on the premises located at 276 West 113th Street, New York, New York (the "Premises") and a Traverse Hearing.

Factual Background

According to the Complaint, on November 24, 2003, defendant, Harriet E. Best ("Harriet"), executed and delivered to Flushing Savings Bank, FSB ("FSB"), a Note (the "Note"), promising to pay FSB \$300,000.00, and a Mortgage ("Mortgage") in such amount, mortgaging the Premises as collateral for the Note. The Mortgage was recorded on December 29, 2003.

Thereafter, on or about January 6, 2005, Harriet "transferred the property by deed dated January 6, 2005 to 113th Street Realty LLC, which deed was recorded on November 6, 2006. . .

.” and defendant 113th Street Realty LLC, “executed, acknowledged and delivered a second mortgage to Jonathan Einhorn, which mortgage was recorded on November 6, 2006. . . .” both in direct contravention of the Mortgage (Complaint ¶¶ 7, 8).

Plaintiff alleges that the Mortgage being foreclosed was assigned by FSB to Bayside Funding, Inc., by assignment of mortgage dated October 8, 2008, and was further assigned by Bayside Funding, Inc. to plaintiff by assignment of mortgage dated October 29, 2008.

Plaintiff alleges that Harriet failed to make the required payments since April 1, 2008 and further defaulted on her obligations by transferring the premises to 113th Street Realty LLC and allowing the placement of a second mortgage on the premises without plaintiff’s consent. As a result of Harriet’s failure to remedy the default, the plaintiff elected to declare the entire principal balance due and owing and notified Harriet of this election and to foreclose on the Premises. The Summons and the Notice of Pendency were also duly filed on November 13, 2008.

Patricia now moves to intervene in this foreclosure action, arguing that she is entitled to intervene as of right under the Federal Rules of Civil Procedure. Patricia argues that her intervenor application is timely and that she has sufficient legal and personal interest in this case as a co-owner of the subject property. Patricia contends that the representation of her interests “may be” inadequate and that her ability to protect her interests will be impaired if she is not permitted to intervene. The disposition of this action may also harm her ability to protect her interest in the potential loss of her residence and the financial hardship would impede her ability to protect her interest without duress.

Patricia also argues she is entitled to a discretionary grant of permissive intervention under Rule 24(b), which provides that a court may grant intervention if “the applicant’s claim or

defense and the main action have a question of law or fact in common." Not only is her application timely, but her application will not "unduly delay or prejudice the adjudication of the rights of the original parties." Patricia will raise defenses that have numerous questions of law and fact in common with the main action. Therefore, she argues, permissive intervention is appropriate.

Patricia as the alleged original owner of said Property, also requests that the Court vacate the Order Appointing Receiver for lack of notice and argues that the Premises is protected under the federal automatic stay associated with her bankruptcy filing.

Patricia also seeks a Traverse Hearing to establish that she was not served of proper notice of this proceeding. Patricia claims that she never received notice of a hearing or any legal documentation either by personal service or Certified/Registered/Overnight mailing. Absent adequate proof that a party was personally served with the Notice or had actual knowledge of it, the Notice is defective and the Relief granted should be vacated by the Court. The drastic remedy of selling the Premises to enforce a plaintiff's judgment of default requires plaintiff to prove that the person was personally served with or had actual knowledge of the relief requested by the moving party. Since Patricia has not been given effective service of process of the Summons, or other motions by the plaintiff, it would be unfair that the plaintiff should benefit from its ability to speed up the process without Due Process and the Court should deny the relief sought by plaintiff due to fraud, surprise, mistake, abuse of discretion and ill practices.

Patricia also argues that under the 14th Amendment of the United States Constitution, the critical components of Due Process are adequate Notice, opportunity for a Fair hearing and availability of appropriate review. Since Patricia was never given the opportunity to have a

Traverse hearing, as part of her Due Process Right, Patricia requests a Traverse Hearing. Relief was granted to the plaintiff without Notice of Due Process, against the 14th Amendment at every critical stage of the Process. Patricia's allegations must be taken as true and construed in light most favorable to her unless the other party can prove that Service was proper. In a Court of Equity, this Court has the power to set aside the sale for good cause, surprise, and mistake especially when the Federal and State Constitutions are binding on State courts and are Subject to their Judicial Notice.

Further, Patricia argues that equitable principles of "Fair Play" govern foreclosure actions and that the doctrine of unclean hands precludes relief to the plaintiff, whose conduct has violated the Court's conscience and good will.

In opposition, plaintiff points out that Patricia, in her numerous motion filings in the last month, has continued to attempt to assert that she has an interest in the Premises, and the Court has denied or has refused to respond to her repeated efforts.

Plaintiff argues that Patricia lacks standing and failed to establish an interest in the Premises. Plaintiff asserts that pursuant to a copy of the deed dated January 6, 2005 between Harriet, as grantor, to 113th Street Realty LLC, as grantee, and duly recorded on November 6, 2006, Patricia is not the fee owner of the Property; the current owner of the Premises is 113th Street Realty LLC ("113th Street"). Patricia's contention that she is a current owner of the Premises and thus, attains an interest in same which would be impaired if not permitted to intervene is based on a defective deed dated January 15, 2009 between Harriet, as grantor, to "Patricia Best," as grantee, and duly recorded in the Recording Office on October 2, 2009. The transfer is invalid, because 113 Street was and remains the owner of the Premises. 113th Street is

the sole party that could duly transfer the Premises to Patricia. Even if the transfer as contemplated by the Patricia Deed was valid upon recordation on October 2, 2009, Patricia would have taken title to the Premises subject to the plaintiff's Mortgage, lis pendens and appointment of the receiver. Additionally, upon information and belief, a second mortgagee foreclosed 113th Street Realty LLC's ownership interest *via* a foreclosure sale conducted on October 7, 2009. Since Patricia has no standing in this foreclosure action and has no viable interest in the Property, Patricia's motion to intervene should be given no credence by the Court, and Patricia's allegations be dismissed.

Discussion

Even construing Patricia's papers liberally (*Rosen v Raum*, 164 AD2d 809, 810, 559 NYS2d 541 [1st Dept 1990]), intervention is unwarranted.

Under New York's rules of intervention,¹ CPLR § 1012(a) provides:

Upon timely motion, any person shall be permitted to intervene in any action:

1. When a statute of the state confers an absolute right to intervene; or
2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or
3. When the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

CPLR 1013, which pertains to permissive intervention, provides:

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.

¹ Although Patricia relies upon the Federal Rules of Civil Procedure, New York law applies.

The record demonstrates that Patricia is not the fee owner of the Property subject to this foreclosure action. Harriet conveyed the Premises by deed, to 113th Street Realty LLC on January 6, 2005. By that conveyance, all the right and title which Harriet then had in the Premises, passed to her grantee, 113th Street Realty LLC. The recorded deed presumptively establishes Harriet's transfer of the premises to 113th Street Realty LLC (*see Smith v Andre*, 43 AD3d 770, 843 NYS2d 209 [1st Dept 2007]). Therefore, the purported deed subsequently executed by Harriet and delivered to Patricia is ineffective, in that at the time of the purported transfer to Patricia, Harriet no longer had any ownership interests in the Premises.

Further, while "tenants are clearly necessary parties to a foreclosure action" (Real Property Actions and Proceedings Law ("RPAPL") 1311²; *Rossrock 2005 Fund LLC v Estate of Shui King Wong*, 19 Misc 3d 1110, 862 NYS2d 817 [Supreme Court Kings County 2008]), a tenant who acquires possession after the filing of the lis pendens, is "not entitled to intervene in . . . a mortgage foreclosure action, although tenant face[s] the loss of [the] tenancy" where he tenant's intervention would not alter the result because the tenant has no defense to the plaintiff's right to foreclose and there were no common issues of law or fact to be considered (*Nomura Home Equity Loan Inc. v Vacchio*, 21 Misc 3d 333, 864 NYS2d 834 [Supreme Court Nassau County 2008]).

² RPAPL § 1311 requires that all persons whose interest is claimed to be subject and subordinate to the plaintiff's lien be named as defendants in a foreclosure action. Necessary defendants include "Every person having an estate or interest in possession, or otherwise, in the property as a tenant in fee, for life, by the curtesy, or for years" (RPAPL § 1311(1); *Mortgage Electronic Registration Sys., Inc. v Anuforo*, 15 Misc 3d 1124, 841 NYS2d 219 [Supreme Court Nassau County 2007]).

There is no indication that Patricia acquired any interest, as a tenant, in the Premises *prior* to the filing of the Notice of Pendency in November 2008. Notably, the purported deed to Patricia is dated January 15, 2009, after the date the Notice of Pendency of filed (*see Greenpoint Sav. Bank v McMann Enters., Inc.*, 214 AD2d 647, 625 NYS2d 273 [2d Dept 1995] [finding that the denial of intervention was proper where it was undisputed that the proposed intervenors acquired their interest in the property after the mortgagee filed a notice of pendency]), and Patricia submits no documentation to support her claim that she resides at the Premises. It is apparent that Patricia's intervention will not alter the result of this action as the record fails to indicate that she any defense to the plaintiff's right to foreclose.

Even assuming as true, Patricia's claim that she resides in the Premises, such claim does not defeat plaintiff's right to foreclose on the Premises based on Harriet's default in payments due under the Note. It is noted that a "tenant is not an indispensable party to a foreclosure action, and the failure to name a tenant does not render the judgment of foreclosure and sale defective" (*Balt v J.S. Funding Corp.*, 230 AD2d 699, 699 [1996]). "Thus, a tenant or occupant who was not named as a party in the foreclosure action retains his or her possessory rights and a right of redemption" (*Mers, Inc. v Bernard*, 2008 N.Y. Slip Op. 50308 [Supreme Court Nassau County 2008]; *Rossrock 2005 Fund LLC v Estate of Shui King Wong*, 19 Misc 3d 1110, 862 NYS2d 817 [Supreme Court Kings County 2008]). The Court notes that the record does not indicate that Patricia intends to effect a redemption of the Premises.

Therefore, although Patricia may be bound by the judgment and this action involves the disposition of property and Patricia may be affected adversely by the judgment, Patricia is not entitled to intervention (*see Nomura* [holding that tenant, whose tenancy at the premises that

were the subject of plaintiff's mortgage foreclosure action began after plaintiff commenced its action and filed a notice of pendency, was not entitled to intervene in the action]).

Further, as to Patricia's claim that she was not served, such claim is also rejected since "plaintiff's failure to serve [her] does not nullify the judgment of foreclosure and sale" (*Rossrock 2005 Fund LLC* citing *G.C.M. Corp. v 382 Van Duzer Corp.*, 249 AD2d 264, 264 [1998], lv denied 99 NY2d 507 [2003]). Thus, Patricia's request for a Traverse Hearing based on improper or inadequate notice of this proceeding is denied as unwarranted.

Further, Patricia fails to assert facts to support her contention that the sale of the Premises should be set aside for good cause, surprise, and mistake, or that the doctrine of unclean hands precludes relief to the plaintiff.

Therefore, Patricia's application to vacate the Order Appointing Receiver is denied.

The Court also notes that permissive joinder pursuant to CPLR § 1013 is moot in light of the above.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by Patricia Best for permission to intervene in this action is denied; and it is further

ORDERED that the branch of the motion by Patricia Best requesting that the Court vacate the Order Appointing Receiver is denied; and it is further

ORDERED that the branch of the motion by Patricia Best for a Traverse hearing is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and Patricia Best within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 4, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMead

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COUNTY CLERK'S OFFICE