

United Cent. Bank v Vernon Realty Holding, LLC

2010 NY Slip Op 31787(U)

June 30, 2010

Supreme Court, Queens County

Docket Number: 19547/2009

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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UNITED CENTRAL BANK,	x	Index Number <u>19547</u> 2009
Plaintiff,		Motion Date <u>April 21,</u> 2010
- against -		
VERNON REALTY HOLDING, LLC, et al.,		Motion Cal. Number <u>49</u>
Defendants.		Motion Seq. No. <u>2</u>
<hr/>		x

The following papers numbered 1 to 11 read on this motion by Baruch Singer and River East City LLC, as proposed intervenors, pursuant to CPLR 1012 and 1013, for leave to intervene in the action and serve and file an answer as proposed.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Baruch Singer and River East City LLC, as proposed intervenors, pursuant to CPLR 1012 and 1013 for leave to intervene in the action and serve and file an answer as proposed.

Plaintiff¹ commenced this action seeking to foreclose a consolidated first mortgage against the real property known as 44-02 Vernon Boulevard, Long Island City, New York. The mortgage was dated May 8, 2008 and recorded on June 10, 2008. The property is also subject to a second mortgage, which is the subject of a separate foreclosure action, entitled *Global Team L.I., LLC v Vernon Realty Holdings, LLC* (Supreme Court, Queens County, Index No. 19547/2009).

Singer and River East, an entity wholly owned and controlled by Singer, seek leave to intervene herein as party defendants, claiming they are vendee lienors and holders of a judgment lien against the property. In their proposed answer, they seek to assert an affirmative defense that they have a vendee's lien, which has priority over the first and second mortgages, and interpose a counterclaim and cross claim to foreclose such vendee's lien and to maintain and enforce the judgment lien. Singer and River East allege they entered into a contract to purchase the subject property with Vernon Realty pursuant to which they made payments into a "construction" escrow account, in addition to an original down payment and additional deposits and the release of escrowed funds. According to Singer and River East, the vendee's lien arose on October 17, 2005, at the time of the execution of the contract, and the making of the down payment. They also allege that plaintiff's predecessor-in-interest had notice and knowledge of the agreement at the time of the making of the first mortgage loan.

Vernon Realty commenced an action entitled *Vernon Realty Holding LLC v Singer*, (Supreme Court, Queens County, Index No. 20084/2006) against Singer and River East, alleging they had breached the contract by refusing to close the purchase on August 30, 2006, and claiming, among other things, it was entitled to a judgment allowing it to retain, as liquidated damages, all moneys paid by them under the contract. Singer and River East interposed a counterclaim to recover the down payment and escrowed funds based upon breach of contract. The court determined that Vernon Realty terminated the contract, and was entitled to retain only \$9,350,000.00, representing the moneys paid with respect to the construction escrow account, and that Singer and River East were entitled to recover the amount of \$54,650,000.00, as the amount paid by them in respect of the purchase price. The court granted a judgment dated December 2, 2009, which among other things, awarded in favor of Singer and River East, and against Vernon Realty the amount of

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By so-ordered stipulation dated February 11, 2010, Global Team Vernon, LLC was substituted as plaintiff for United Central Bank.

\$54,650,000.00, plus prejudgment interest thereon at the statutory rate from August 30, 2006 to the date of entry of judgment.

Plaintiff and defendant Blue Water Environmental, Inc., n/k/a Posillico Environmental, Inc. (Blue Water), GCL Group Inc. (GCL Group) and Moretrench American Corporation (Moretrench) oppose the motion on the motion on the grounds that 1) the contract of sale and the purported vendee's lien were never recorded, 2) the purported vendee's lien was extinguished as a matter of law because Singer and River East elected to obtain a money judgment against Vernon Realty in the *Vernon Realty* action (Index No. 20084/2006) rather than to seek foreclosure of such lien, and 3) the money judgment was filed after the notice of pendency was filed in this action. Defendants Blue Water, GCL Group and Moretrench also argue that to the extent Singer and River East have a vendee's lien against the property, it is subordinate to their mechanic's liens filed against the premises.

“Upon a timely motion, a person is permitted to intervene as of right in an action involving the disposition of property where that person may be adversely affected by the judgment (*see* CPLR 1012 [a] [3]; *Velazquez v Decaudin*, 49 AD3d 712, 717 [2008]; *George v Grand Bay Assoc. Enter. Inc.*, 45 AD3d 451, 452 [2007]; *Greenpoint Sav. Bank v McMann Enters.*, 214 AD2d 647 [1995]; *but see Citibank, N.A. v Plagakis*, 8 AD3d 604, 605 [2004]). In addition, a 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 (*see* CPLR 1013). 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 since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings (*see Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840 [2009]; *Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 [2007]; *Sieger v Sieger*, 297 AD2d 33, 36 [2002]; *County of Westchester v Department of Health of State of N.Y.*, 229 AD2d 460, 461 [1996]; *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825 [1988]). 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 (*see Reliance Ins. Co. of N.Y. v Information Display Tech.*, 2 AD3d 701 [2003])” (*Wells Fargo Bank, Nat. Assn. v McLean*, 70 AD3d 676, 676-677 [2010]).

Singer and River East have failed to make a sufficient showing of a real and substantial interest in the outcome of the foreclosure action warranting their intervention as party defendants based upon their claim they are vendee lienors (*see CPLR 1012, 1013; Bancplus Mortg. Corp. v Galloway*, 203 AD2d 222 [1994]; *cf. Capital Resources, Co. v Prewitt*, 266 AD2d 176 [1999]). It is clear that regardless of whether plaintiff was aware of the contract to purchase at the time of the making of its mortgage loan, whatever equitable interest and rights Singer and River East had in the property, merged into the money judgment which they took against Vernon Realty (*see Buchan v Sumner*, 2 Barb Ch 165 [1847]; *see also* 3 Bergman on New York Mortgage Foreclosures § 35.03[8]; *cf. Sloan v Pinafore Homes*, 34 AD2d 681 [when, in an action for specific performance by the vendee, the vendee is held to be limited to the recovery of payments made on the contract, the court may award a vendee’s lien]).

To the extent Singer and River East claim to be judgment creditors, they docketed their judgment against the property after the filing of the notice of pendency herein, and as a consequence, are not necessary party defendants (*see Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.* 98 AD2d 400 [1983]). Nevertheless, insofar as a judgment of foreclosure and sale has yet to be obtained herein, it is appropriate to allow them to intervene as party defendants since they have docketed a judgment which became a lien subject to that of the mortgage lien against the subject premises (*see Henderson v Moran*, 235 App Div 818 [1932]; *cf. Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co.*, 98 AD2d 400 [1983], *supra*).

The motion for leave to intervene is granted, and defendants Singer and River East shall serve and file an answer within 20 days of service of a copy of this order with notice of entry, which answer shall not include any affirmative defense, counterclaim or cross claim based upon a vendee’s lien and for foreclosure thereof.

The caption shall be amended hereinafter, in accordance with the so-ordered stipulation dated February 11, 2010 to read as:

x

Global Team Vernon, LLC

Plaintiff,

- against -

VERNON REALTY HOLDING, LLC, a New York limited liability company, MARSHALL WEISMAN, an individual, GLOBAL TEAM L.I., LLC, a New York limited liability company, POSILLICO ENVIRONMENTAL, INC. f/k/a BLUE WATER ENVIRONMENTAL, INC., a New York corporation, HYDRO TECH ENVIRONMENTAL CORP., a New York corporation, NYCON SUPPLY CORP., a New York corporation, DOMANI CONSULTING, INC., a New York corporation, BEDFORD CONSTRUCTION CORP., a New York corporation, MORETRENCH AMERICAN CORPORATION, a New Jersey corporation, GCL GROUP INC., a New York corporation, FLEMING-LEE SHUE, INC., a New York corporation, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOES 1-10, the last ten 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.

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Dated: June 30, 2010

 J.S.C.