

JPMorgan Chase Bank, N.A. v Edelson

2010 NY Slip Op 32647(U)

September 22, 2010

Supreme Court, Suffolk County

Docket Number: 20269/2006

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 JPMORGAN CHASE BANK, N.A., as
 Trustee, successor in interest to Bank One,
 N.A., as Trustee for the registered holders on
 Mortgage-Backed Pass-Through Certificates,
 Series 2002-AR33,

Plaintiff,

-against-

JON EDELSON; MCS MORTGAGE
 BANKERS, INC.; BOARD OF MANAGERS
 OF PINWOOD ESTATES AT COMMACK
 CONDOMINIUM HOMEOWNERS
 ASSOCIATION; CHASE MANHATTAN BANK
 USA, N.A.; JOANN EDELSON,

Defendants.

ORIG. RETURN DATE: MAY 6, 2010
 FINAL SUBMISSION DATE: MAY 20, 2010
 MTN. SEQ. #: 003
 MOTION: MD

PLTF'S/PET'S ATTORNEYS:
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 INTERVENOR C-CON CORP.:**
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REFEREE:
 NANCY M. HARK, ESQ.
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 SMITHTOWN, NEW YORK 11787

Upon the following papers numbered 1 to 7 read on this motion _____
FOR LEAVE TO INTERVENE AND TO DISMISS

Order to Show Cause and supporting papers 1-3; Attorney's Affirmation 4; Affirmation in
 Opposition and supporting papers 5, 6; Replying Affirmation 7; it is,

ORDERED that this motion by C-CON CORP. ("C-CON"), the
 current title holder of the premises located at 10 Sandy Hill Road, Commack,
 New York ("Premises"), subject to judicial sale, for an Order, pursuant to CPLR
 1001 (a), 1012 (a), 1013, and/or RPAPL 1311 (1), holding that C-CON be made a
 necessary party to the within action for foreclosure; and upon C-CON being made
 a necessary party to this action, for an Order, pursuant to CPLR 3211 (a) (3), (a)

(10), and/or 1003, vacating the Judgment of Foreclosure and Sale herein and dismissing plaintiff's complaint on the grounds that plaintiff lacked the capacity to sue at the time of commencement and that plaintiff failed to join a necessary party, is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff.

On August 28, 2002, defendant JON EDELSON ("defendant") gave a mortgage on the Premises to MCS Mortgage Bankers, Inc. ("MCS") in the principal sum of \$260,000. Said mortgage was recorded in the Suffolk County Clerk's Office on September 17, 2002. The within foreclosure action of that mortgage was commenced on July 28, 2006, by the filing of a summons with notice and complaint, and a notice of pendency was filed in the Suffolk County Clerk's Office on even date.

By Order dated September 12, 2008, this Court directed the Suffolk County Clerk to record a Lost Assignment Affidavit, executed on March 19, 2008, in place of an Assignment of Mortgage from MCS to Ocwen Loan Servicing, LLC ("Ocwen"), and ordered that the Lost Assignment Affidavit be deemed to have the same force and effect as the misplaced Assignment of Mortgage. Ocwen assigned the subject mortgage to the plaintiff herein, which was memorialized by an Assignment of Mortgage executed on March 19, 2008, and recorded in the Suffolk County Clerk's Office on December 2, 2008.

By Order dated May 27, 2009, this Court granted plaintiff's unopposed application for summary judgment and the appointment of a referee. On January 26, 2010, this Court granted plaintiff a Judgment of Foreclosure and Sale, also without opposition. The Premises was scheduled for public auction on April 22, 2010; however, C-CON filed the instant application on April 20, 2010, and obtained the following temporary restraining Order:

ORDERED, that the Plaintiff, Plaintiff's attorneys, the Sheriff, the Referee, and all other persons acting through them or on their behalf, be and hereby are stayed pending the return date of the within application from any and all proceedings to enforce or collect the Judgment of Foreclosure and Sale in connection herewith including any enforcement proceedings with regard to any sale of the [Premises] and specifically, from proceeding with the sale scheduled for April 22,

2010 at 9:00 am at Smithtown Town Hall, located at 99 West Main Street, Smithtown, New York 11787.

C-CON informs the Court that during the pendency of the within action, the Premises was sold at a public auction conducted in connection with a separate foreclosure proceeding commenced by defendant BOARD OF MANAGERS OF PINEWOOD ESTATES AT COMMACK CONDOMINIUM HOMEOWNERS ASSOCIATION against defendant EDELSON. C-CON alleges that it became the title holder of the Premises pursuant to a referee's deed dated April 25, 2008, and recorded in the Suffolk County Clerk's Office on April 29, 2008. C-CON contends that plaintiff was aware that C-CON was titled owner of the Premises yet failed to name C-CON as a defendant herein. Based upon the foregoing, C-CON argues that if it is not permitted to intervene, it will be irreparably harmed by the loss of the Premises.

Moreover, C-CON alleges that if it is permitted to intervene, it will be able to raise the defense of lack of standing, in that plaintiff was allegedly not the owner of the subject mortgage when this action was commenced. C-CON claims that MCS was still the owner of the mortgage on July 28, 2006, the date of commencement herein, and that Ocwen assigned the mortgage to plaintiff on March 19, 2008 by the aforementioned Assignment of Mortgage. Additionally, C-CON alleges that the assignment itself was falsified or altered. C-CON argues that assuming such assignment is valid, it was executed approximately nineteen months after the commencement of this action. In support of its motion, C-CON has submitted, among other things, an affidavit of its president and a proposed verified answer with affirmative defenses.

In opposition, plaintiff alleges that intervention should be denied to a person who had no interest in the Premises at the time the foreclosure action was commenced, and when a person waits one year or more to seek intervention after acquiring knowledge of the foreclosure action. Plaintiff argues that when C-CON took title to the Premises, the notice of pendency filed by plaintiff on July 28, 2006 was still in effect. As such, plaintiff claims that C-CON had constructive notice of this action, and is therefore bound by the Judgment of Foreclosure entered on March 3, 2010. Moreover, with respect to C-CON's argument concerning lack of standing, plaintiff alleges that this was raised by defendant BOARD OF MANAGERS OF PINEWOOD ESTATES AT COMMACK CONDOMINIUM HOMEOWNERS ASSOCIATION in its answer, which answer was struck by the Court in the Order granting plaintiff summary judgment dated

May 27, 2009. As such, plaintiff argues that this has now become law of the case.

Regarding civil actions in general, CPLR 1001 provides in pertinent part that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants” (CPLR 1001 [a]). With respect to the latter requirement, the possibility that a judgment rendered without the omitted party could have an adverse practical effect on that party is enough to indicate joinder. A principal reason for compulsory joinder of parties is to protect non-parties whose rights should not be jeopardized if they have a material interest in the subject matter (see *27th St. Block Ass’n v Dormitory Auth.*, 302 AD2d 155 [2002]; *Hitchcock v Boyack*, 256 AD2d 842 [1998]; *N.Y. County Lawyer’s Ass’n v State*, 192 Misc 2d 424 [Sup Ct, New York County 2002]). Further, CPLR 1012 provides in pertinent part that “[u]pon timely motion, any person shall be permitted to intervene in any action . . . 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” (CPLR 1012 [a] [2]). Additionally, permissive intervention under CPLR 1013 is appropriate when a person’s claim and the action have common questions of law or fact (see CPLR 1013).

Regarding foreclosure actions in particular, the underlying objective of such an action is to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale (*Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400 [1983]). All parties having an interest, including persons holding title to the subject premises, must be made a “party defendant to the action” (RPAPL 1311 [1]; see *Home Sav. of Am., F.A. v Gkanios*, 233 AD2d 422 [1996]; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, *supra*).

Pursuant to CPLR 6501, the filing of a notice of pendency provides constructive notice of an action in which the judgment demanded may affect the title to real property (see *Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203 [1999]; *Goldstein v Gold*, 106 AD2d 100 [1984], *affd* 66 NY2d 624 [1985]). The statute further provides that a person whose conveyance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party (see CPLR 6501; *Mallick v Farfan*, 66 AD3d 649 [2009]; *Novastar Mtge. Inc. v Mendoza*, 26 AD3d

479 [2006]; *Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203, *supra*; *American Auto. Ins. Co. of St. Louis v Sansone*, 206 AD2d 445 [1994]; *Goldstein v Gold*, 106 AD2d 100, *supra*). Furthermore, his or her interest is deemed foreclosed upon entry of a properly-obtained judgment of foreclosure (*Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203, *supra*). Necessary parties in a foreclosure action include, among others, persons with title to the premises (*Slattery v Schwannecke*, 118 NY 543 [1890]; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, *supra*), unless the interest in the property was obtained after the mortgagee filed a notice of pendency (RPAPL 1353 [3]; *Novastar Mtge. Inc. v Mendoza*, 26 AD3d 479, *supra*; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, *supra*; *Westchester Fed. Sav. & Loan Assn. v H.E.W. Constr. Corp.*, 29 AD2d 670 [1968]; 9-96 Warren's Weed, New York Real Property § 96.15 [2]).

Here, under the circumstances presented, the Court finds that C-CON is not a necessary party to this action. While C-CON argues that it is inequitably affected by the Judgment of Foreclosure rendered herein, it is undisputed that C-CON acquired its interest in the Premises on or about April 25, 2008, subsequent to plaintiff's filing of the notice of pendency on July 28, 2006, and while such notice of pendency was still in effect (see CPLR 6501). Thus, C-CON is bound by the Judgment of Foreclosure rendered herein as if it were a party (see *Novastar Mtge. Inc. v Mendoza*, 26 AD3d 479, *supra*).

In view of the foregoing, that branch of C-CON's motion for leave to intervene in this foreclosure action is **DENIED**. Accordingly, that branch of C-CON's motion to vacate the Judgment of Foreclosure and to dismiss plaintiff's complaint is **DENIED** as academic.

The foregoing constitutes the decision and Order of the Court.

Dated: September 22, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court