

<b>JPMorgan Chase Bank v Choung Koo Kang</b>
2011 NY Slip Op 31721(U)
June 23, 2011
Supreme Court, Queens County
Docket Number: 32071/2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14  
Justice

\_\_\_\_\_  
JPMORGAN CHASE BANK, NATIONAL  
ASSOCIATION

-against-

CHOUNG KOO KANG, et al.  
\_\_\_\_\_

Index  
Number 32071 2010

Motion  
Date May 3, 2011

Motion  
Cal. Number 10

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by Jun Hee Kim and Sang Ok Kim (the Kims) for, inter alia, an order permitting them to intervene as defendants in this action to foreclose on a mortgage.

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NUMBERED

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I. The Allegations of the Complaint

The allegations made by plaintiff in its complaint filed on or about December 30, 2010 are as follows: On or about October 22, 2002, defendants Choung Koo Kang (Kang) and Honor Management Inc., executed a note in the amount of \$378,000 in favor of Washington Mutual Bank FA. The note required monthly payments of principal and interest. The bank secured the note with a mortgage on premises known as 171-62 46<sup>th</sup> Avenue,

Flushing, New York (the subject property). The debtors failed to pay the monthly installments due on March 1, 2010 and thereafter, causing the bank to accelerate the entire sum due.

## II. The Allegations of the Proposed Intervenors

The proposed answer with cross claims alleges the following: The Kims each own a one-third interest in the subject property, and Kang owns the remaining one-third interest. The Kims made the acquaintance of Kang in the early 1990s when he assisted them in starting a delicatessen business and in purchasing the building from which they operate. In 2002, the Kims and Kang entered into a verbal agreement pursuant to which each of them contributed \$50,000 toward the purchase of the subject property. The parties also agreed: (1) to obtain a mortgage covering the balance of the purchase price; (2) to share the profits and losses equally; and (3) to entrust Kang with the management of the building. Although the parties agreed to take title in their joint names, Kang placed the title first in the name of his company, Honor Management Inc., and then solely in his own name. In 2004, Kang placed a second mortgage on the subject property without notice to or permission from the Kims.

In 2004, the Kims and Kang entered into a second verbal agreement whereby each made an equal investment in property known as 144-07 21<sup>st</sup> Avenue, Whitestone, New York (the 21<sup>st</sup> Avenue property). Although the purchasers agreed to take title in their joint names, Kang placed title in his name alone. Moreover, Kang placed a second mortgage on the 21<sup>st</sup> Avenue property without notice to or permission from the Kims.

In 2008, the Kims discovered that Kang had taken title to the subject property and to the 21<sup>st</sup> Avenue Property in his own name alone. The Kims confronted Kang about the title to the two properties and about the second mortgages on the properties, and he admitted what he had done. Kang promised to execute a written document containing the terms of the parties' prior oral agreements regarding the two properties and to execute new deeds showing title in all three names. On July 29, 2008, Kang and the Kims executed the document, but Kang has so far refused to execute new deeds.

Before the Kims discovered Kang's dishonest conduct in regard to the two properties, Kang induced Jun Hee Kim and her husband (Nam Su Kim) to invest in the purchase and development of two parcels of land located at 84-03/07 Lander Street, Briarwood, New York (the Briarwood property) upon which Kang intended to build a seven-story condominium. Jun Hee Kim and her husband procured funds for the project by mortgaging their property located at 367/369 Seventh Avenue, New York, New York (the Seventh Avenue property) to obtain a \$3,000,000 loan. Kang formed Honor Property Management, Inc. (HPM) to

purchase and develop the Briarwood property, and he and Mr. Kim agreed to each hold a 50% interest in the company. Kang surreptitiously took a 51% interest in HPM, an act that Mr. Kim did not discover until 2008. Loans procured for the development of the Briarwood property are in default, resulting in foreclosure actions filed against the Briarwood property and the Seventh Avenue property.

### III. The Proposed Affirmative Defenses and Cross Claims

The answer of the proposed intervenors raises ten affirmative defenses to the foreclosure action: the first, failure to provide appropriate notice of foreclosure to all interested parties, the second, failure to comply with, inter alia, the Banking Law with respect to the foreclosure action, the third, failure to state a cause of action, the fourth for, inter alia, contributory negligence, the fifth, a disclaimer of responsibility for damages caused by Kang and Honor Management, the sixth, for an offset of damages, the seventh waiver, estoppel, and release, the ninth, failure to name necessary parties, and the tenth, failure to mitigate damages.

The answer of the proposed intervenors also asserts six cross claims against Kang and Honor Management: the first for unjust enrichment, the second for breach of contract, the third and fourth for fraud, and the fifth and sixth for conversion. The proposed intervenors allege, inter alia: (1) Kang used loans on the subject property and the Briarwood property for “his own use and personal enjoyment”; (2) Kang “has stolen rent monies paid by Tenants”; (3) Kang breached a contract whereby he obligated himself to place the names of the Kims on the deeds for the subject property and the 21<sup>st</sup> Avenue property; (4) Kang committed fraud in regard to the subject property, the 21<sup>st</sup> Avenue property, and the Briarwood property; and (5) Kang committed fraud in regard to the ownership of HPM.

### IV. Intervention

CPLR 1012, “Intervention as of right,” etc., provides in relevant part: “(a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action . . . [w]hen the action involves the disposition . . . of, or the title . . . to, property and the person may be affected adversely by the judgment” (*see US Bank Natl. Assn. v Gestetner*, 74 AD3d 1538 [2010]).

Plaintiff’s action to foreclose on the mortgage involves the disposition and title to property in which the Kims allege to have an interest, and they may be permitted to intervene as of right pursuant to CPLR 1012 (a) (3) for the limited purpose of defending their property interests (*see US Bank Natl. Assn.*, 74 AD3d at 1541 [mortgagor’s wife was entitled to intervene as of right pursuant to CPLR 1012 (a) (3) in a foreclosure action where she alleged,

inter alia, that she was a co-owner of the subject property and had not authorized the mortgaging of the property]; *Greenpoint Sav. Bank v McMann Enters., Inc.*, 214 AD2d 647 [1995] [party claiming that she had an unrecorded ownership interest in the property allowed to intervene in foreclosure action]). The Kims have “made a sufficient showing of a real and substantial interest in the outcome of the foreclosure action warranting [their] intervention” (*id.* at 648; *see US Bank Natl. Assn.*, 74 AD3d at 1541).

CPLR 1013, “Intervention by permission,” provides in relevant part: “Upon timely motion, any person may be permitted to intervene in any action . . . 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” (*see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197 [2010]).

The Kims cannot otherwise intervene in this action for the purpose of asserting their cross claims against Kang (whether as of right or as of permission). To litigate these cross claims in this foreclosure action involving the subject property, which – as described by the Kims – involve an intricate fraudulent scheme involving several other properties and, inter alia, another foreclosure action, all of which appear to be inextricable intertwined, it would, not only obfuscate the issues presented herein, but would cause prejudice to plaintiff and undue delay (*see e.g. Osman v Sternberg*, 168 AD2d 490 [1990]). It is noted that such a determination does not prevent the Kims from instituting a plenary action against, inter alia, Kang and Honor Management, where it would be more appropriate to explore the alleged frauds involving the several properties to which the Kims (including Mrs. Kim’s husband, who also appears to be involved in at least one of the above-discussed transactions but is not a movant herein) assert an interest.

## V. Other Relief

Upon weighing the prejudice to the parties (*see e.g. Britt v International Bus Sers.*, 255 AD2d 143 [1998]), the court finds that a stay of the foreclosure action is not necessary to protect the interests of the proposed intervenors and would unduly prejudice the rights of plaintiff.

In regard to the application for an order of attachment covering “all Kang assets,” the Kims allege that Kang has threatened to flee to Korea. CPLR 6201, “Grounds for attachment,” provides in relevant part: “An order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled . . . to a money judgment against one or more defendants, when: . . . 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has

assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . .” (see *Shisgal v Brown*, 3 AD3d 434 [2004]; *Benedict v Browne*, 289 AD2d 433 [2001]; *MFAI (Jersey) Ltd. v Westbury Holdings*, 264 AD2d 663 [1999]). The Kims did not show that the issuance of an order of attachment is warranted. First, attachment does not appear to be necessary for security purposes (see *MFAI (Jersey) Ltd.*, 264 AD2d at 663) since Kang has real estate assets in New York which he is not threatening to remove to Korea. Second, the application for an order of attachment covering “all Kang assets” is overly broad and unnecessary to protect the Kims’ alleged interest in the subject property (see *Cargill Fin. Servs. Intl., Inc. v Bank Fin. & Credit Ltd.*, 70 AD3d 456 [2010]). Third, to the extent that the Kims may be entitled to equitable relief regarding claims against Kang’s alleged breach of contract and fraud in omitting their names on the deed to the subject property, they did not show that they sustained monetary damages from his conduct and are entitled to a “money judgment” against him (see CPLR 6201).

The Kims did not set forth enough facts to demonstrate their entitlement to the appointment of a receiver with respect to rents paid by the tenants of the subject property. It is noted that the appointment of a receiver is not to be lightly granted (see A NY Prac, Enforcing Judgments and Collecting Debts § 4:138), and without such evidence as, inter alia, the respective lease agreements between tenants and owner, the rents paid by each tenant, the rent roll, etc., the court will not do so on the papers presented (it is noted that this does not prevent a party from making a further application for such relief, if it be so advised).

The Kims do not have any causes of action pending pursuant to Article 71 of the CPLR (Recovery of Chattel), and they are not entitled to an order of seizure regarding the books and records of the subject property.

In regard to the subpoena for books and records, and the notices of depositions, the Kims may follow the normal procedures for discovery set out in Article 31 of the CPLR insofar as the subject property is concerned, and/or can address these discovery issues at the preliminary conference.

In regard to the reformation of the deed concerning the subject property, the Kims cannot in effect obtain summary judgment on an application for provisional relief.

The motion is otherwise without merit.

## VI. Disposition

Accordingly, that branch of the motion which is for an order permitting the Kims to intervene in this action is granted to the extent that they may intervene for the purpose of

defending the action to foreclose on the mortgage. The Kims are directed to serve an intervenor pleading conforming with this decision within 10 days of the service of a copy of the order to be entered hereon with notice of entry. The summons and complaint in the above-entitled action is hereby amended to add Jun Hee Kim and Sang Ok Kim as party-defendants. The motion is otherwise denied.

Dated: June 23, 2011

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J.S.C.