

National City Home Loan Servs. Inc. v Arango
2015 NY Slip Op 31336(U)
May 1, 2015
Supreme Court, Queens County
Docket Number: 24366-2003
Judge: Robert L. Nahman
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SUPREME COURT - STATE OF NEW YORK
 COUNTY OF QUEENS - IAS PART 19

BY: NAHMAN, J

NATIONAL CITY HOME LOAN SERVICES INC.,

Action No. 1
 Index No.: 24366-2003

Plaintiff,

- against -

Motion
 Date: January 6, 2015

ODRA N. ARANGO, FFFC f/n/o FIRST FRANKLIN
 FINANCIAL GROUP, EFFINGHAM JAMES and
 LYDIA JAMES,

Mot. Cal.
 Number: 6

Defendants.

Mot. Seq.
 Number: 8

EFFINGHAM JAMES,

Action No. 2
 Index No.: 9644-2004

Plaintiff,

- against -

ODAN N. ARANGO, FFFC f/n/o FIRST FRANKLIN
 FINANCIAL GROUP, A&A GLOBAL
 RESOURCES, INC., a/k/a A&A GLOBAL
 RESOURCES LTD., ANN ALVAREZ and ALFRED
 MILLS,

Defendants.

Upon the following numbered papers read on this motion by defendant Effingham James to restore this action (Action No. 1) and the action entitled *James v Airing* (Supreme Court, Queens County, Index No. 9644/2004) (Action No. 2) to the calendar, to direct the caption in Action No. 1 be amended back to the original caption naming National Home Loan Services, Inc. (National City) as plaintiff in place and stead of PNC Bank National Association (PNC), to quiet title to the real property known as 119-47 166th Street, Jamaica, New York in defendant Effingham James, to vacate the foreclosure sale of the property to PNC, to dismiss the complaint in Action No. 1 insofar as asserted against defendant Effingham James for failure to join a necessary party, for failure to

timely amend the caption to reflect a change in the parties, and lack of standing to maintain the action:

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-6
Reply Affidavits	7

The motion is determined as follows:

Plaintiff National City commenced this action to foreclose a mortgage given by defendant Odra N. Airing, securing a note evidencing a loan from defendant FFFC f/n/o First Franklin Financial Group (FFFC). In the complaint, plaintiff National City alleged that it was the holder of the subject mortgage and note pursuant to an assignment dated September 4, 2003 from defendant FFFC, and that defendant Airing defaulted under the mortgage by failing to pay the monthly mortgage installment payment when due. On January 20, 2004, plaintiff National City obtained an order of reference, granting a default judgment against defendants. Plaintiff National City thereafter obtained a judgment of foreclosure and sale dated April 5, 2004. Defendant Effingham James, the prior record owner of the subject property, moved for leave to intervene and vacate the default judgment. By order dated April 20, 2004, the motion was granted, and Effingham James served an answer dated June 17, 2004, denying certain allegations of the complaint, asserting various affirmative defenses and interposing counterclaims to recover compensatory and punitive damages, to void the subject mortgage and underlying note, the September 4, 2003 assignment and a subordinate mortgage, and for an award of costs and disbursements including reasonable attorneys's fees. Plaintiff National City served a reply to the counterclaims.

Effingham James commenced a separate action entitled *James v Airing* (Supreme Court, Queens County, Index No. 9644/2004) (Action No. 2), on April 27, 2004, seeking, among other things, pursuant to RPAPL article 15, to declare the transfer of title of the subject property from Odra N. Airing to him void, quiet title to the premises in Effingham James, and declare the subject mortgage and subordinate mortgage void, and the property free and clear of those mortgage liens. National City is not a party to that action.

Defendant Effingham James moved for, among other things, summary judgment dismissing the complaint herein insofar as asserted against him, and plaintiff cross moved, for among other things, summary judgment dismissing the counterclaims by defendant Effingham James. By order entered November 25, 2008, the branch of the motion by defendant Effingham James for summary judgment dismissing the complaint

insofar as asserted against him was denied, and the branch of the cross motion by plaintiff National City for summary judgment dismissing the counterclaims of defendant Effingham James was denied. By order of the Appellate Division, Second Department, dated April 10, 2010, the November 25, 2008 order of the Supreme Court was affirmed insofar as appealed and cross-appealed from. The Appellate Court determined that defendant Effingham James and plaintiff failed to demonstrate their prima facie entitlements to judgment as a matter of law. It found that the evidence submitted by them in support of their respective motion and cross motion “revealed the existence of triable issues of fact as to the validity of a deed that [Effingham] James executed conveying title to certain real property to the defendant Odra N. Airing, and as to the validity of the subject mortgage, which Airing executed in favor of the defendant FFFC ..., and which FFFC assigned to the plaintiff” (*National City Home Loan Services, Inc. v Airing*, 72 AD3d 915, 916 [2d Dept 2010]). It further determined “[t]hat evidence also revealed the existence of a triable issue of fact as to whether FFFC and the plaintiff were bona fide encumbrancers for value” (*id.*).

Nonparty PNC subsequently moved for, among other things, leave to be substituted as the plaintiff in this action in the place and stead of National City and to amend the caption accordingly. Defendant Effingham James cross moved, by notice of cross motion dated October 5, 2012, for, among other things, summary judgment dismissing the complaint insofar as asserted against him. By order dated May 13, 2013, the motion by nonparty PNC for leave to be substituted as the plaintiff in this action and to amend the caption accordingly was granted, and the cross motion by defendant Effingham James for summary judgment dismissing the complaint insofar as asserted against him was denied. By decision and order dated April 30, 2014, however, the Appellate Division, Second Department modified the May 13, 2012 order of the Supreme Court deleting the provision thereof granting nonparty PNC’s motion, inter alia, for leave to be substituted as the plaintiff in the action and to amend the caption accordingly, and substituted therefor a provision denying the motion, and affirming the order as so modified (*National City Home Loan Servs., Inc. v Airing*, 116 AD3d 1013 [2d Dept 2014]). The Appellate Court determined that the Supreme Court should have denied the substitution and amendment because nonparty PNC lacked standing to prosecute the action, having failed to establish that it was the holder or assignee of the subject mortgage and underlying note either at the time of commencement or by virtue of a subsequent assignment (*id.* at 1013-1014). The Appellate Court also determined that the Supreme Court properly denied the cross motion of defendant Effingham James, inter alia, for summary judgment dismissing the complaint insofar as asserted against him, because it was based on the same proof and was for the same relief as was sought in the prior motion (*see National City Home Loan Services, Inc. v Airing*, 72 AD3d 915) (*id.* at 1014).

Action Nos. 1 and 2 have been joined for the purpose of trial, but each retains its own index number, and separate requests for judicial intervention and notes of issue are

required to be filed for each action (*see* order of the Hon. Howard G. Lane, J.S.C. in Action No. 2 dated October 16, 2012).

With respect to that branch of the motion by defendant Effingham James to restore this action (Action No. 1) to the court's calendar, plaintiff National City previously moved to restore the case to the calendar. By order dated April 11, 2012, the motion was granted to the extent plaintiff was granted leave to file a note of issue and statement of readiness within 30 days of the date of the order. Plaintiff filed a note of issue and statement of readiness on May 10, 2012. Thus, that branch of the motion by defendant Effingham James to restore this action to the court's calendar is denied as moot.

With respect to that branch of the motion by defendant Effingham James to restore Action No. 2 (Index No. 9644/2004) to the court's calendar, Action Nos. 1 and 2 are joined for trial, keeping the individual actions intact and subject to separate resolution (*see* Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 602:2; *Sample v Temkin*, 87 AD3d 686 [2d Dept 2011]; *Rossignol v Rossignol*, 82 AD3d 1335 [3d Dept 2011]). Thus, to the extent defendant Effingham James seeks to restore Action No. 2 to the court's calendar, he cannot properly move for such relief within the confines of this action. Rather, any motion to restore Action No. 2 to the court's calendar must be made under the index number assigned to Action No. 2. That branch of the motion by defendant Effingham James to restore Action No. 2 to the court's calendar is denied without prejudice to a motion to restore Action No. 2 to the court's calendar within the confines of that action.

With respect to that branch of the motion by defendant Effingham James for leave to amend the caption to reflect that National City Home Loan Services, Inc. is the plaintiff herein instead of PNC Bank National Association, defendant Effingham James has made no showing that PNC Bank National Association is the named plaintiff herein. National City Home Loan Services, Inc. is named as the plaintiff in the summons, and by virtue of the Appellate Division's order, nonparty PNC was denied its motion to substitute itself as party plaintiff and amend the caption accordingly (*see National City Home Loan Servs., Inc. v Airing*, 116 AD3d 1013).¹ That branch of the motion by defendant Effingham James for leave to amend the caption to reflect that National City Home Loan Services, Inc. is the plaintiff herein is denied as moot.

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Although the copy of the transcript of the proceedings in Action No. 2 before the Hon. Roger N. Rosengarten on September 23, 2013 reflects PNC Bank National Association is plaintiff in Action No. 1, the proceedings were held at a time prior to the modification by the Appellate Division of the order denying substitution (*see National City Home Loan Servs., Inc. v Arango*, 116 AD3d 1013).

Defendant Effingham James asserts that plaintiff National City has failed to join “the mortgagee,” as a necessary party plaintiff, and therefore the complaint should be dismissed insofar as asserted against him pursuant to CPLR 3211. Defendant Effingham James, however, has failed to identify the mortgagee he claims is the proper plaintiff. As a consequence, he has failed to show that the unnamed mortgagee cannot be made a party (*see* CPLR 3211[a][10]). Moreover, to the extent defendant Effingham James claims that plaintiff National City is the improper party plaintiff and some other entity, which has not been joined as a party plaintiff, is the proper plaintiff, he, in effect is claiming a lack of standing on the part of plaintiff National City. Defendant Effingham James, however, did not raise such defense based upon lack of standing in his answer or in a pre-answer motion to dismiss and therefore waived it (*see* CPLR 3211[a][3], [e]; *see HSBC Bank USA, NA v Schwartz*, 88 AD3d 961 [2d Dept 2011]; *U.S. Bank N.A. v Eaddy*, 79 AD3d 1022 [2d Dept 2010]; *Wells Fargo Bank Minn., N.A. v Perez*, 70 AD3d 817, 817–818 [2d Dept 2010], *cert denied* ___ US ___, 131 S Ct 648, 178 L Ed 2d 480; *cf. Aurora Loan Services, LLC v Thomas*, 70 AD3d 986 [2d Dept 2010]). Those branches of the motion by defendant Effingham James to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211 based upon failure to join a necessary party plaintiff and lack of standing are denied.

With respect to that branch of the motion by defendant Effingham James to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 based upon plaintiff National City’s alleged delay in moving to amend the caption to reflect a change in the parties, it appears that he claims Merrill Lynch or Home Loan Services should have been substituted as party plaintiff in this action. Although Merrill Lynch purchased plaintiff National City in 2006 (*see National City Home Loan Servs., Inc. v Airing*, 116 AD3d at 1013-1014), defendant Effingham James has failed to show that plaintiff National City did not retain its own identity. Furthermore, an original mortgagee can continue an action even though it assigned its interest in the mortgage and note to another entity during the pendency of an action, unless the court directs a substitution of parties pursuant to CPLR 1018 (*see CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759 [2d Dept 2011]; *NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563 [2d Dept 2005]; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760 [2d Dept 2004], *lv to appeal dismissed* 3 NY3d 766 [2004]). Defendant Effingham James has not demonstrated that Merrill Lynch or Home Loan Services is now the real plaintiff in interest (*cf. Citibank, N.A. v Van Brunt Props, LLC*, 95 AD3d 1158 [2d Dept 2012]). As a consequence, defendant Effingham James has failed to show the caption should have been amended, substituting Merrill Lynch or Home Loan Services as party plaintiff. That branch of the motion by defendant Effingham James to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 based upon plaintiff National City’s alleged delay in moving to amend the caption is denied.

That branch of the motion by defendant Effingham James to vacate the foreclosure sale of the subject property to nonparty PNC is denied. Defendant Effingham James has made no showing that the subject property was sold to nonparty PNC pursuant to the judgment of foreclosure and sale.

With respect to that branch of the motion by defendant Effingham James to quiet title to the subject property pursuant to the orders issued in Action No. 2 (Index No. 9644/2004), defendant Effingham James, in effect, seeks the ultimate relief requested in complaint in Action No. 2. The proper procedure is to make such motion, which is in effect a motion for summary judgment, within the confines of Action No. 2 (*see supra* at 4). That branch of the motion by defendant Effingham James for summary judgment in Action No. 2 is denied.

This is the decision and order of the court.

Date: May 1, 2015

Robert L. Nahman, J.S.C.