

Bank of N.Y. Mellon v Miller

2015 NY Slip Op 32080(U)

February 18, 2015

Supreme Court, New York County

Docket Number: 110084/09

Judge: Joan A. Madden

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

EA
2 Pgs
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PRESENT: How Joan A. Miller
Justice

PART 11

Index Number : 110084/2009
BANK OF NEW YORK MELLON

INDEX NO. _____

vs
MILLER, REBECCA TARA

MOTION DATE _____

Sequence Number : 001
LEAVE TO INTERVENE

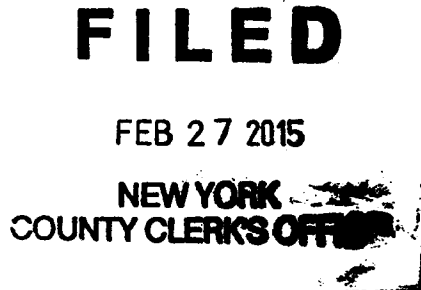
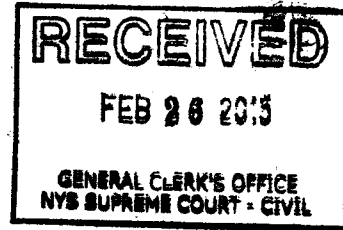
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for intervene

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
 Answering Affidavits — Exhibits _____ | No(s). _____
 Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



Dated: February 18, 2015

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
THE BANK OF NEW YORK MELLON f/k/a
THE BANK OF NEW YORK,

Index No. 110084/09

Plaintiff,

-against-

REBECCA TARA MILLER, et al,

Defendants.

JOAN MADDEN, J.:

Non-party Pale Horse Realty, LLC (“Pale Horse”) moves for an order permitting it to intervene as a defendant in this mortgage foreclosure action. Plaintiff opposes the motion, which is granted for the reasons below.

FILED

FEB 27 2015

**NEW YORK
COUNTY CLERK'S OFFICE**

Background

This action was commenced in 2009, to foreclose on a first mortgage on a condominium unit, located at 216-218 East 47th Street, New York, NY (hereinafter “6B”). In 2011, the Board of Managers of the condominium commenced a separate action (under Index No. 105971/11) to foreclose on a lien it had filed against Unit 6B for common charges (hereinafter “the Common Charge action”). On September 18, 2013, a judgment of foreclosure and sale was entered in the Common Charge action, directing that Unit 6B be sold at public auction, subject to the lien of plaintiff. The auction was held on August 27, 2014, and Pale Horse was the highest bidder. On October 7, 2014, Pale Horse became the record owner of Unit 6B.

In November 2014, Pale Horse served this motion to intervene in this action, which was originally returnable in the submissions part on December 8, 2014. Oral argument was held on January 8, 2015.

Pale Horse argues that it is entitled to intervene since, as the purchaser of 6B it has a substantial interest in this foreclosure action. Specifically, it asserts that as a current owner it is entitled to any surplus money generated by the sale of Unit 6B. Moreover, it argues that since it first became the record owner in October 2014, this motion, which was made in November 2014, is timely.

Plaintiff opposes the motion, arguing that the motion is untimely since it was made almost five years after the commencement of this action, and that if Pale Horse is now added as a defendant plaintiff will be prejudiced by delay caused in the event Pale Horse seeks discovery since the note of issue has already been filed. Plaintiff also asserts that under Section 339-z of the New York Real Property Law, Pale Horse's interest in the unit is junior to its own, and that if Pale Horse is permitted to intervene that it be permitted only to make a limited appearances to seek only any right it may have to surplus moneys obtained in the sale of 6B.

In reply, Pale Horse points out that although numerous discovery conferences have been held, plaintiff points to no discovery that has been conducted in this matter, and that plaintiff has not moved for summary judgment or sought an order of reference. Pale Horse also argues that the issue of priority of liens has not relevance to its right to intervene and that holders of liens that are junior are necessary parties to a foreclosure action, citing RPAPL section 1311¹.

Discussion

CPLR 1012 (a), specifically, subdivisions (2) and (3), provides that upon timely motion,

¹Section 1311 of the RPAPL, entitled necessary defendant, provides that in an action for foreclose a mortgage “[e]ach of the following persons, whose interest is claimed to be subject and subordinate to the plaintiff’s lien shall be made a party defendant to the action: (3) [e]very person having any lien or incumbrance on the property claimed to be subject and subordinate to the lien of the plaintiff.”

any person shall be permitted to intervene in an 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” (subd [2]) or “[w]hen 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” (subd [3]).

CPLR 1013 provides that:

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.

Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action [and] [d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied. Yuppie Puppy Pet Products, Inc. v. Street Smart Realty, LLC, 77 AD3d 197, 201 (1st Dept 2010)(internal citations and quotations omitted).

Here, leave to intervene is appropriately granted based on Pale Horse's substantial interest in this action as the record owner of unit 6B. See George v. Grand Bay Assoc. Enter. Inc., 45 AD3d 451, 452 (1st Dept 2007)(affirming trial court's grant of motion for leave to intervene by purchasers of subject property in an action seeking cancellation and reformation of a deed to that property). Indeed, under Furthermore, as noted by Pale Horse, any judgment in this action will affect its right to any surplus proceeds generated by the sale of 6B, and its status as a party defendant will enable it to ensure the accuracy of the calculation of the amounts due and owing under the mortgage.

Next, with respect to the timing of the motion, while leave to intervene may be denied as untimely where intervention would delay the resolution of the action or prejudice a party (Yuppie Puppy Pet Products, Inc. v. Street Smart Realty, LLC, 77 AD3d at 201), in this case the court finds no such prejudicial delay. Here, Pale Horse moved to intervene within a month of becoming a record owner. In addition, plaintiff has not shown prejudice resulting from the motion to intervene which was made prior to the entry of a judgment of foreclosure. ABM Resources Corp v. Doraben, 89 AD3d 773 (2d Dept 2011)(leave to intervene should have been granted in mortgage foreclosure action where motion was made “before the was made before a judgment of foreclosure and sale... and thus, under the circumstances of this case, the plaintiffs were not prejudiced by the timing of the motion).

Finally, while the action has been pending for five years, it appears that plaintiff will not be prejudiced, particularly as it appears that Pale Horse is not seeking discovery, and any discovery that Pale Horse might seek may be sought on an expedited basis.

Conclusion

In view of the above, it is

ORDERED that Paul Horse’s motion to intervene is granted and Pale Horse Realty, LLC be permitted to intervene in the above-entitled action as a party defendant; and it is further

ORDERED that the summons and complaint in the above entitled action be amended by adding Pale Horse Realty, LLC as the last defendant in the caption; and it is further

ORDERED that the proposed answer attached to the moving papers shall be deemed served within 20 days of served a copy of this order with notice of entry upon all parties appearing in this action; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice

of entry upon the County Clerk (room 141B) and upon /the Clerk of the Trial Support Office (room 158), who are directed to amend their records to reflect such a change in the caption herein; and it is further

ORDERED that counsel are directed to appear for a status conference in room 351, 60 Centre Street on March 5, 2015 at 9:30 am.

Dated: February 18, 2015



J.S.C.

FILED
FEB 27 2015
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