

HSBC Mtg. Corp. (USA) v Selim
2016 NY Slip Op 32090(U)
June 22, 2016
Supreme Court, Queens County
Docket Number: 16775/09
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART_2_

HSBC MORTGAGE CORP. (USA),

Index No: 16775/09

Plaintiff

Motion Date: 5/5/16

-against-

Motion Seq. No.: 6

JUBARAJ SELIM a/k/a SELIM JUBARAJ,
 CHUN BEE TONG a/k/a CHUN B. TONG,
 JPMORGAN CHASE BANK, NEW YORK CITY
 ENVIRONMENTAL CONTROL BOARD, NEW
 YORK CITY TRANSIT ADJUDICATION BUREAU,
 EUNICE WHITE, NYISHA PACK, OMECA ALSTON,
 SHATEKA WASHINGTON,

Defendants.

The following papers numbered 1 to 14 were read on this application by nonparty, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (U.S. Bank), for, among other things, leave to intervene, pursuant to CPLR 1012 and/or 1013.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmations - Affidavit - Exhibits	1 - 6
Answering Affirmations - Exhibits	7-12
Reply Affirmation	13-14

Upon the foregoing papers, it is ordered that this application seeking intervention, pursuant to CPLR 1012 and/or 1013, is determined as follows:

Defendant, Jubaraj Selim, executed a mortgage to HSBC Mortgage Corporation (USA), now plaintiff, HSBC Bank USA, N.A. (HSBC), dated April 15, 2008, on the property, 180 Beach 27th Street, Far Rockaway, New York. On April 15, 2008 Selim executed a deed conveying the subject property Selim to Selim and Chung Bee Tong a/k/a Chung B. Tong,.

HSBC's mortgage was mistakenly marked “satisfied,” and a satisfaction of mortgage was recorded by plaintiff on February 17, 2009. On March 25, 2009 JP Morgan Chase Bank, N.A. (Chase) loaned money to Selim and Tong secured by a mortgage on the subject property which mortgage was recorded on April 17, 2009. On April 17, 2009, Bank of America, N.A. (BOA) loaned money to Tong and Selim, secured by a mortgage on the subject property, which mortgage was not recorded until April 9, 2010.

On June 24, 2009, plaintiff commenced the instant action, seeking to foreclose the 2008 mortgage, and to “expunge” the “erroneously filed” satisfaction of mortgage and named, inter alia, Chase Bank as a defendant in the action. Although not a party to the foreclosure action, BOA filed a notice of appearance “as successor in interest to JP Morgan Chase Bank, N.A.” Thereafter, in 2014, BOA amended its notice of appearance to appear for BOA, alone, although still not a party to the action. On April 17, 2015, BOA assigned its 2009 mortgage to the proposed intervenor, U.S. Bank. Plaintiff was granted an Order of Reference by Order dated Oct 22, 2010. Thereafter, on or about November, 2015, the plaintiff, moved to vacate the Order of Reference, for a new Order of Reference, amendment of the cation and for an Order vacating and declaring the satisfaction of mortgage recorded on February 17, 2009 null and void. The plaintiff's motion was granted by Order dated April 7, 2016.

U.S. Bank now moves, by order to show cause, for leave to intervene in the instant action, alleging intervention as of right, pursuant to CPLR 1012 (a) (2) and (3), and/or seeking discretionary intervention, pursuant to CPLR 1013. For intervention in an action as of right, under CPLR 1012 (a), a person must demonstrate, among other things, “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” or “affected adversely by the judgment.” Additionally, under CPLR 1013, the court may, in its discretion, permit intervention “when the person’s claim or defense and the main action have a common question of law or fact.” However, under the liberal rules of construction, such distinctions between intervention as of right and discretionary intervention have been rendered insignificant, and intervention should be allowed where the proposed intervenor has shown a substantial interest in the outcome of the proceeding (*see Trent v Jackson*, 129 AD3d 1062 [2015]; *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840 [2009]).

U.S. Bank has demonstrated its requisite “real and substantial interest in the outcome of the litigation” (*Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819, 820 [2012]; *see Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676 [2010]), by producing the BOA-assigned mortgage to the subject property, and demonstrating that its interest in the property may be adversely affected by the judgment sought (*see Brown v Brown*, 136 AD3d 852 [2016]). Movant also established that the representation of its interest by the parties to

the action has been inadequate (*see ABM Resources Corp. v Doraben, Inc.*, 89 AD3d 773 [2011]).

Plaintiff opposes the intervention on, among other things, the ground that it was untimely made, as the foreclosure action was commenced, and notice of pendency filed, in June 2009. Further, plaintiff alleges that BOA had notice of the action prior to July 2010, when it filed a notice of appearance in the foreclosure action, and almost five years before U.S. Bank was assigned the mortgage. Plaintiff's reasoning is that even if the subject mortgage loan by BOA was justifiably made in "detrimental reliance" on the erroneous satisfaction of mortgage by plaintiff (*see Regions Bank v Campbell*, 291 AD3d 437 [2012]), both BOA's and U.S. Bank's laches in moving to remedy the situation should bar intervention at this late date.

The "[c]onsideration of any motion to intervene begins with the question of whether the motion is timely" (*Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [2010]). "Intervention pursuant to either CPLR 1012 or 1013 requires a timely motion (*Matter of Rutherford Chems., LLC v Assessor of Town of Woodbury*, 115 AD3d 960, 960 [2014]; *see U.S. Bank, N.A. v Bisono*, 98 AD3d 608 [2012]). Undue delay in seeking leave to intervene will result in a denial of that motion (*see Deutsche Bank Nat. Trust Co. v Golding*, 123 AD3d 757 [2014]).

In the case at bar, there was no argument with the fact that the BOA mortgage loan was given during the period when the property appeared to be "unencumbered of record" by any mortgage lien, due to the recording of the satisfaction of mortgage by plaintiff. Further, no party contests the fact that plaintiff's 2008 mortgage was not restored as a "valid and subsisting lien" on the subject foreclosure premises, until the satisfaction of mortgage was cancelled, pursuant to the order of April 7, 2016. Consequently, U.S. Bank's knowledge of the possible existence of another mortgage on the subject property cannot be charged against it earlier than April 7, 2016. Although U.S. Bank did not seek leave to intervene until five years from the time this action was commenced, no constructive notice of plaintiff's claims, and the existence of an action against the property, were imputable to movant, as neither U.S. Bank, nor BOA, were included as parties to this action, and due diligence by movant would not have revealed the outstanding 2008 mortgage until April, 2016. Further, "intervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties" (*Halstead v Dolphy*, 70 AD3d 639, 640 [2010]; *see Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, *supra*), or unnecessarily complicate the issues of the foreclosure action (*see Ocelot Capital Management, LLC v Herskovitz*, 90 AD3d 464 [2011]).

U. S. Bank has demonstrated, based on the circumstances of this action and the fact that a judgment of foreclosure and sale has not yet been entered herein, that no prejudice to

plaintiff existed with regard to the timing of this motion or the possible service of an answer on behalf of movant (*see ABM Resources Corp. v Doraben, Inc.*, supra). In opposition, plaintiff has offered no colorable claim that intervention will delay the proceeding or prejudice plaintiff in any way.

Accordingly, pursuant to CPLR 1012 (a) (2) and (3), the branch of U.S. Bank's motion, for leave to intervene in this action as an interested party, is granted. The caption is amended adding U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust as a defendant in this action. The proposed verified answer, attached as an exhibit to the order to show cause, is deemed served and plaintiff shall serve its response within 20 days of being served with a copy of this Order with Notice of Entry.

The branch of U.S. Bank's motion seeking summary judgment dismissing the action as against it is denied. Movant has failed to remove all triable issues of fact herein, including, the priority of the mortgages and whether BOA was a good faith mortgagee, without knowledge of the plaintiff's mortgage. Consequently, movant has failed to demonstrate that it held its mortgage free and clear of plaintiff's claims herein.

In addition, and in view of the foregoing, the Order dated April 7, 2016 and entered on May 4, 2016 is vacated and set aside, except the portion amending the caption of the action by substituting HSBC Bank USA, N.A. as plaintiff in place of the HSBC Mortgage Corporation (USA) and substituting Shateka Washington, Nyisha Pack, Eunice White and Omeca Alston as defendants in place of the defendant s/h/a JOHN DOE. The Referee appointed in the Order of Reference dated April 7, 2016 is relieved and discharged of and duties or obligations under the Order.

The parties shall appear for a preliminary conference in the Preliminary Conference Part on Monday, August 22, 2016 at 9:30 a.m. in courtroom 314 of the courthouse located at 88-11 Sutphin Blvd., Jamaica, NY.

The caption of the action is amended to reflect the addition of U.S.A. Bank Trust, N.A., as Trustee for LSF Master Participation Trust as an additional defendant in the action shall be as follows.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HSBC MORTGAGE CORP. (USA),

Plaintiff

Index No: 16775/09

-against-

JUBARAJ SELIM a/k/a SELIM JUBARAJ,
CHUN BEE TONG a/k/a CHUN B. TONG,
JPMORGAN CHASE BANK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
EUNICE WHITE, NYISHA PACK, OMECA ALSTON,
SHATEKA WASHINGTON, and U.S.A. BANK
TRUST, N.A., as Trustee for LSF MASTER
PARTICIPATION TRUST

Defendants.

x

Dated: June 22, 2016

J.S.C.