

U.S. Bank, N.A. v Jean
2021 NY Slip Op 31187(U)
April 1, 2021
Supreme Court, Kings County
Docket Number: 22820/10
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the ~~14~~ day of ~~December, 2020~~ April 2021

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PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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U.S. BANK, NATIONAL ASSOCIATION,

Plaintiff,

- against -

Index No. 22820/10

AUDELINE JEAN; LASALLE NATIONAL BANK, AS TRUSTEE; MARK LABARBIERA; CHRISTOPHER LABARBIERA; ANTHONY LABARBIERA; MADHUSUDAN VYAS; VASANT GODBOLE; SHUBHADA GODBOLE; EUGENE EVANS; ESTHER EVANS; ROBERT ORENDORF; BEATRICE MEHLBURG; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATIONS BUREAU; THE CITY OF NEW YORK; "JOHN DOES" and "JANE DOES," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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FILED
APR - 9 2021
KINGS COUNTY CLERK'S OFFICE

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Supplemental Opposition _____

58 #1-#3¹
10-17, 18-23 2-5, 25-26
28 9, 29-49
53-55

¹#1-#3 are hard copies of the cross motion, which were not electronically filed.

Upon the foregoing papers in this action to foreclose a mortgage on the property at 512 Classon Ave in Brooklyn (Property); plaintiff U.S. Bank, National Association (US Bank) moves (in motion sequence [mot. seq.] two) for an order: (1) lifting the stay in place and restoring the action to the active calendar; (2) vacating the February 6, 2014 conditional order of dismissal (February 2014 Dismissal Order); (3) granting it leave to amend and supplement the complaint, pursuant to CPLR 3025 (b); and (4) granting leave to extend service of its pleadings, pursuant to CPLR 306 (b).

Nonparty Ibrahim Mohammed (Mohammed) of Worthnet Partners, Inc. (Worthnet) cross-moves (in mot. seq. three) for an order upholding the February 2014 Dismissal Order, or, alternatively, granting Mohammed leave to intervene.

Background

On September 15, 2010, US Bank commenced this action to foreclose the Property by filing a summons, a complaint and a notice of pendency against the Property. US Bank is the alleged assignee of a \$908,245.00 note executed on May 22, 2009 by the decedent, Audeline Jean (Audeline), which is secured by a mortgage on the Property. According to the complaint, Audeline allegedly defaulted under the note and mortgage by failing to pay the principal and interest that became due on March 1, 2010, and monthly thereafter.

On February 6, 2014, a status conference was held before this court and the February 2014 Dismissal Order was issued, which provides that:

“At a Status Conference held this day, it is the finding of this Court that more than one year has elapsed since the joinder of issue² and plaintiff has unreasonably neglected to prosecute this action.

“Accordingly, this action is dismissed pursuant to CPLR 3216 and the County Clerk is directed to cancel the Notice of Pendency unless plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof.”

When US Bank failed to comply with the February 2014 Dismissal Order, this action was marked “dismissed” on June 5, 2014.

Meanwhile, on May 25, 2014, Audeline died.³ On December 3, 2015, US Bank filed a motion to restore the action to the court’s active calendar, vacate the February 2014 Dismissal Order and for an order of reference. However, the court did not entertain US Bank’s motion because the action was stayed.

Following Audeline’s death, on August 31, 2015, Albert Jean, the decedent’s brother, filed a petition with the Kings County Surrogate’s Court for letters of administration. On October 6, 2016, the Kings County Surrogate’s Court issued letters of administration in favor of Albert Jean. By an August 9, 2019 order, the Surrogate’s Court revoked the appointment of Albert Jean as the administrator and named Odcie Jean as the administrator of Audeline’s estate.

2

In actuality, none of the defendants answered or otherwise responded to the complaint.

3

By a February 17, 2012 deed, Audeline transferred the Property to 512 Classon Realty, LLC (Classon Realty), and the 2012 deed was later recorded on December 31, 2015.

3

US Bank's Instant Motion

US Bank now moves for an order lifting the stay, restoring this action to the active calendar, vacating the 2014 Dismissal Order and granting it leave to amend its complaint.

US Bank seeks to amend its complaint to add additional defendants “who have, since the filing of the Summons and Complaint, been identified as having a potential interest in the Subject Premises.” Specifically, US Bank seeks to add Classon Realty and Worthnet as defendants *in place of Audeline's estate* “since the borrower deeded the Subject Property away before [his] death, and both conveyances, regardless of their validity or lack thereof, are subject to this foreclosure.” Notably, US Bank confirms that it previously waived its right to seek a deficiency judgment against Audeline's estate.

US Bank also seeks to add New York City Department of Housing Preservation and Development (NYCHPD) as a party defendant “by virtue of it having a judgment docketed against the Subject Property.” In addition, US Bank seeks to add Earl Brown, Barbara Washington and “Jane” Christian (first name refused) as defendants, pursuant to RPAPL 1311, since they are tenants residing at the Property.

US Bank also seeks to amend the complaint to add Bank of America, N.A., as successor by merger to Countrywide Bank, FSB as a necessary party, and to assert a cause of action against it pursuant to RPAPL Article 15 “to effect title or interest in and to . . .” the Property and “to vacate an erroneous satisfaction of mortgage dated June 16, 2009 . . .” Finally, US Bank seeks to amend the complaint to substitute in “Bank of

America, N.A. A/S/O LaSalle National Bank, as Trustee” in place and instead of defendant LaSalle National Bank, as trustee.

US Bank argues that its motion to amend should be granted because “despite having been duly served, issue has not been joined [and] there is no substantial delay or prejudice upon any party Defendant hereto, and the amendments sought . . . are meritorious.”

Opposition to US Bank's Motion

The estate of Audeline Jean (Audeline's Estate) makes a limited appearance “solely for the purpose of contesting the court's jurisdiction to vacate its prior dismissal of the action or to otherwise proceed in any fashion.” Audeline's Estate challenges personal jurisdiction over the decedent who, according to US Bank's affidavit of service, was served with process on September 22, 2010 by delivery to Paula Rubin, a person of suitable age and discretion, at 4429 18th Avenue in Brooklyn and a subsequently mailing.

Audeline's Estate submits an affidavit from Herbert Tepfer, Esq. (Tepfer), who attests that the decedent never lived or worked at 4429 18th Avenue in Brooklyn, the location of his law firm in 2010. While Tepfer acknowledges that “[i]n 2010 Paula Rubin was employed by Tepfer and Tepfer PC as a secretary” he attests that “[i]f a summons and complaint of any kind were delivered to the office Ms Rubin would have given it to me as part of her regular duties.” Audeline's Estate asserts that it has “produced more than sufficient specific facts” to overcome the presumption of validity given to US Bank's affidavit of service upon the decedent. Audeline's Estate requests that “the relief

sought by the Moving party be denied and [that] this deeply flawed action be put to rest.”

Non-party Phoenix Assets 1961 LLC (Phoenix), the current record owner of the Property, submits an affirmation in opposition to US Bank’s motion in which its counsel asserts that the motion should be denied based on US Bank’s “multiyear delay in prosecuting the instant action . . .”

US Bank’s Reply

US Bank, in reply, asserts that Phoenix (Audeline’s successor) stepped into the shoes of Audeline, a defaulting party, and therefore, has no authority to oppose US Bank’s motion because it never moved to vacate Audeline’s appearance default or for leave to file a late answer.

Mohammed’s Opposition and Cross Motion to Intervene

Mohammed opposes US Bank’s motion to vacate the 2014 Dismissal Order based on US Bank’s “inordinate delay” in prosecuting this foreclosure action. Mohammed also cross-moves to intervene in this action as a necessary party because he purchased the Property from Phoenix by a September 11, 2019 deed.

Opposition to Mohammed’s Cross Motion

US Bank, in opposition to Mohammed’s cross motion to intervene, argues that the cross motion is untimely because it was made 13 months after Mohammed’s company, Worthnet, purchased the Property and three years after the latest notice of pendency was filed. US Bank asserts that permitting Worthnet or Mohammed to intervene at this juncture “would delay this action substantially and would be highly prejudicial to

plaintiff.”

Nonparty Phoenix also opposes Mohammed’s cross motion to intervene on the ground that it is “premature, since this action was dismissed for failure to prosecute . . .” and there is another pending litigation regarding Worthnet’s ownership interest in the Property. According to Phoenix, until the other action is resolved, Worthnet cannot prove that it has a real and substantial interest in this foreclosure action. However, Phoenix simultaneously argues that Mohammed’s cross motion is untimely.

Mohammed’s Reply

Mohammed, in reply, asserts that “the filing of this Cross-Motion was delayed due to the coronavirus.” Mohammed contends that he has standing to intervene in this foreclosure action because he is the sole owner of the Property. Mohammed contends that his and Worthnet’s intervention would not prejudice US Bank, since it “has not prosecuted this case and does not even have an Order of Reference.”

Discussion

(1)

US Bank’s Motion to Restore and Vacate the 2014 Dismissal Order

As a preliminary matter, lifting of the automatic stay and restoration of this action to the court’s active calendar is warranted, since the Kings County Surrogate’s Court issued letters of administration for Jean’s estate on October 6, 2016.

Regarding that branch of US Bank’s motion for an order vacating the 2014

Dismissal Order, it is well established that a court may vacate its own judgment “for sufficient reason and in the interest of substantial justice” (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [1999]). Here, an order vacating the 2014 Dismissal Order is warranted because US Bank previously filed an application for an order of reference on December 3, 2015, thereby manifesting an intent not to abandon this action (*see HSBC Bank USA, N.A. v Traore*, 139 AD3d 1009, 1010-1011 [2016]).

(2)

US Bank's Motion to Amend

“In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*US Bank National Association v Murillo*, 171 AD3d 984, 985 [2019] [internal quotations omitted]). “Where the standard is met, no evidentiary showing of merit is required in a motion to amend the complaint under CPLR 3025 (b)” and “[t]he determination to permit or deny amendment is committed to the sound discretion of the trial court” (*id.* at 985-986).

Here, Audeline’s Estate has failed to establish that it would be prejudiced or surprised by the amendments that US Bank seeks, especially since US Bank seeks to substitute Classon Realty and Worthnet in place and instead of Audeline Jean based on Audeline’s transfer of the Property, and US Bank specifically waived a claim against Audeline’s Estate for a deficiency judgment. The court has considered the other arguments in opposition and does not find them to be compelling. Since US Bank’s

proposed amendments are not palpably insufficient or patently devoid of merit, its motion to amend the complaint is granted.

(3)

Mohammed's Cross Motion to Intervene

Under CPLR 1012 (a) (2), a party may intervene as of a right upon a timely motion "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 . . ." The Second Department has held that a motion to intervene in a foreclosure action is timely if it was made before a judgment of foreclosure and sale was entered because it presents no prejudice to the other parties (*see ABM Resources Corp. v Doraben, Inc.*, 89 AD3d 773, 774 [2011]).

Here, Mohammed, who may be the current owner of Property, is entitled to intervene in this action because his interest may not be adequately represented by the parties and he is bound by the judgment. Given the fact that this case is at the early stages of litigation due to the stay, the parties will not be prejudiced by his intervention. Accordingly, it is hereby

ORDERED that US Bank's motion (in mot. seq. two) is granted to the extent that: (1) the action is restored to the court's active calendar; (2) the 2014 Dismissal Order is hereby vacated; and (3) US Bank is granted leave to amend its complaint and the complaint is hereby amended (as reflected in the proposed amended complaint) to add Classon Realty and Worthnet in place and instead of Audeline Jean, to add NYCHPD, Earl Brown, Barbara Washington, "Jane" Christian and Bank of America, N.A., as

successor by merger to Countrywide Bank, FSB as defendants, to substitute Bank of America, N.A. A/S/O LaSalle National Bank, as Trustee in place and instead of defendant LaSalle National Bank, as trustee, and to assert a cause of action against Bank of America, N.A., as successor by merger to Countrywide Bank, FSB, pursuant to RPAPL Article 15. US Bank shall effect service with process upon those defendants within 30 days after service of this order with notice of entry thereof; and it is further

ORDERED that Mohammed's cross motion (in mot. seq. three) for leave to intervene in this action is granted; and it is further

ORDERED that the caption is amended and shall hereinafter read:

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U.S. BANK, NATIONAL ASSOCIATION,

Plaintiff,

- against -

BANK OF AMERICA, N.A. A/S/O LASALLE NATIONAL BANK, AS TRUSTEE; MARK LABARBIERA; CHRISTOPHER LABARBIERA; ANTHONY LABARBIERA; MADHUSUDAN VYAS; VASANT GODBOLE; SHUBHADA GODBOLE; EUGENE EVANS; ESTHER EVANS; ROBERT ORENDORF; BEATRICE MEHLBURG; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATIONS BUREAU; THE CITY OF NEW YORK; 512 CLASSON REALTY, LLC; WORTHNET PARTNERS, INC.; IBRAHIM MOHAMMED; NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; EARL BROWN; BARBARA WASHINGTON; "JANE" CHRISTIAN; BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO COUNTRYWIDE BANK, FSB; "JOHN DOES" and "JANE DOES," said names being fictitious, parties

intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants:

-----X; and it is further

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

FILED

APR - 9 2021

KINGS COUNTY CLERK'S OFFICE