

Dean Capital Partners LLC v 556 Dean Holdings LLC
2022 NY Slip Op 32809(U)
August 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 512689/18
Judge: Lawrence Knipel
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At an IAS Term, Part Comm 6 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 17th day of August, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
DEAN CAPITAL PARTNERS LLC,

Plaintiff,

- against -

Index No. 512689/18

556 DEAN HOLDINGS LLC and "JOHN DOE NO 1" through "JOHN DOE NO 25", the last twenty five named defendants being persons in possession of part of premises 556 Dean Street, Brooklyn, New York, true names being unknown to plaintiff,

Defendants,

-and-

556 DEAN HOLDINGS LLC,

Third-Party Plaintiff,

-against-

TOMOHIKI SHIMURA a/k/a TOM SHIMURA, ARYEH BROMBERG, GRO HOLDINGS LLC and GRO DEVELOPMENT GROUP LLC,

Third-Party Defendants.
-----X

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) _____

135-138
149-152

Upon the foregoing papers in this action to foreclose a commercial mortgage encumbering the property at 556 Dean Street in Brooklyn (Property), nonparty and

proposed intervenors Asushi Nakagawa and Marie Otsuka (proposed intervenors) move (in motion sequence [mot. seq.] seven), for an order, pursuant to CPLR 1012, 1013 and 1014, granting them leave to intervene as third-party plaintiffs, as reflected in their proposed verified third-party complaint (NYSCEF Doc No. 137), and directing that the pleadings and caption be amended accordingly.

Background

On June 20, 2018, plaintiff Dean Capital Partners LLC (Dean Capital) commenced this action by filing a summons, a complaint verified by Tomohiki Shimura, as managing member of Dean Capital, and a notice of pendency against the Property. The complaint alleges that on or about October 29, 2014, defendant 556 Dean Holdings LLC (borrower or Dean Holdings) executed, acknowledged and delivered a note in the principal amount of \$2.15 million in favor of the lender, W Financial Fund LP (W Financial), which was secured by a mortgage encumbering the Property (*see* NYSCEF Doc No. 1, complaint at ¶¶ 2-3). The complaint alleges that Dean Holdings “failed to comply with the terms and conditions of the Note and Mortgage in failing to pay the installment interest due on September 1, 2016 and continuing monthly thereafter in accordance with the terms of the Note and Mortgage” (*id.* at ¶ 18). The complaint alleges that Dean Capital is “the sole, true and lawful owner and holder of the Mortgage and the note secured thereby which forms the basis of the instant foreclosed action” because “[s]imultaneously with the assignment of the mortgage to Plaintiff, the Note was transferred and assigned to Plaintiff by Allonge to Note dated the 15th day of September, 2016” (*id.* at ¶¶ 6-7).

On October 30, 2018, three minority members of defendant Dean Holdings filed an answer to the complaint, which was verified by Chaim Pollack, as an authorized signatory, and asserted counterclaims against plaintiff Dean Capital and third-party defendants Tomohiki Shimura a/k/a Tom Shimura (Shimura), Aryeh Bromberg (Bromberg), GRO Holdings LLC (GRO Holdings) and GRO Development Group LLC (GRO Development), the other members of Dean Holdings (third-party defendants). Essentially, the third-party complaint alleges that Shimura lacked authority and did not inform any of Dean Holdings' members that Dean Capital had purchased the note from W Financial in September 2016 (*see* NYSCEF Doc No. 24).

On February 28, 2022, third-party defendant Shimura and plaintiff Dean Capital moved (in mot. seq. eight) for an order, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), dismissing Dean Holdings' purported verified answer with counterclaims on the ground that the three minority members were not authorized to appear on behalf of Dean Holdings (*see* NYSCEF Doc No. 141-148). On May 11, 2022, the minority shareholders cross-moved (in mot. seq. 10) for leave to intervene (*see* NYSCEF Doc No. 194-198).

By a July 12, 2022 decision and order, this court granted Shimura and Dean Capital's motion to dismiss Dean Holdings' answer and third-party complaint on default. In doing so, the court specifically noted that:

“Motion to dismiss answer and 3d party complaint is granted on default. It appears that the answer, counterclaims, etc. were submitted by minority shareholders who were without authority to do so.

“Cross-motion to intervene is denied as intervention is sought by the same minority shareholders. Intervention, amendment, etc. are all too late. Underlying all is that cross movants still lack standing” (NYSCEF Doc No. 213).

Proposed Intervenors’ Instant Motion

Meanwhile, on February 8, 2022, the proposed intervenors and third-party plaintiffs, Atsushi Nakagawa and Marie Otsuka, who are “citizens of Japan,” filed the instant motion for an order, pursuant to CPLR 1012, 1013 and 1014, granting them leave to intervene in this commercial foreclosure action (*see* NYSCEF Doc Nos. 135 and 136 at ¶ 4). They submit an attorney affirmation which recites the basic legal standards for mandatory and permissive intervention and generally asserts that “the current Third-Party Complaint and the proposed Intervenors’ Complaint amply demonstrate precisely why intervention must respectfully be issued” (NYSCEF Doc No. 136 at ¶ 25).

The proposed third-party complaint alleges that the proposed intervenors reside in Tokyo, Japan, and “[p]ursuant to an Operating Agreement of June 7, 2018 . . .” *about two weeks prior to the commencement of this foreclosure action*, the proposed intervenors became “member partners of [plaintiff] DEAN CAPITAL PARTNERS, each possessing a 2.67% percent membership interest respectively” for a \$100,000.00 investment (*see* NYSCEF Doc No. 137, proposed third-party complaint at ¶¶ 6 and 20 [emphasis added]). The proposed third-party complaint further alleges that “a recent search was performed and it was learned by the Plaintiffs for the first time that defendant Shimura has mismanaged

the LLCs' properties and funds resulting in numerous litigations . . ." including this one (*id.* at ¶ 27). Essentially, the proposed third-party complaint asserts eleven claims against Shimura regarding their June 2018 minority investment in Dean Capital, including fraudulent inducement, breach of the June 2018 Operating Agreement and breach of fiduciary duty based on the allegations that:

“[a]t no time did Mr. Shimura explain or otherwise disclose the distressed history of the subject property to plaintiffs, or the pendency of the instant case.

“Significantly, Shimura led Nakagawa to believe that the [June 2018] business venture was to purchase the Property outright in fee simple. It was only recently learned that Shimura did not acquire the Property in fee but, rather, acquired the note and the underlying mortgage attached to the Property without the plaintiffs' knowledge, consent or understanding of the nature of such a transaction” (*id.* at ¶¶ 17-18).

The proposed third-party complaint alleges that “plaintiffs initiate this action for damages due to Mr. Shimura's mishandling and/or fraudulent inducement of plaintiffs into investing into the subject property” and seemingly seeks an injunction preventing Dean Capital and Shimura from proceeding with this foreclosure proceeding (*id.* at ¶¶ 32 and 40-42).

Dean Capital and Shimura's Opposition

Plaintiff Dean Capital and third-party defendant and Dean Capital's managing member, Shimura, submit a memorandum of law asserting that “[i]ntervenors seek to harm Dean Capital and multiply these proceedings to secure unwarranted priority distributions from Dean Capital as ransom to stop holding this foreclosure hostage” (NYSCEF Doc No. 153 at 4). They further argue that:

“As members of the LLC lender Dean Capital, Intervenor’s lack standing because they are not party to the subject mortgage loan and otherwise have no interest in the title to the subject commercial property. Intervenor’s eleven proposed causes of action concern unrelated claims internal to Dean Capital with nothing whatsoever to do with the foreclosure” (*id.*).

Shimura also submits an affidavit in which he attests that the proposed intervenor’s motion should be denied because they were advised in June 2018, when they invested in Dean Capital, that the Property was distressed:

“In 2017 I put together a proposal to a group of investors – including Intervenor – to invest as members of Dean Capital in realizing value on the mortgage loan secured by the subject property 556 Dean Street.

“Intervenor now complain I failed to disclose 556 Dean Street had a distressed history and was mortgaged. That is not true. Before they invested I disclosed to Intervenor that 556 Dean Street was mortgaged, that Dean Capital held the mortgage loan, not title to the property, that the property was distressed, and the plan could lead to three years or more of foreclosure litigation.

“Annexed hereto as Exhibit 1 is a copy of an August 25, 2017 email correspondence I sent to Intervenor concerning the investment. As an attachment to the email, I provided Intervenor with a copy of the subject mortgage note. In the correspondence, among other things, I advised Intervenor that Dean Capital had acquired the note and mortgage for the subject property following the collapse of the original financing plan due in part to the bankruptcy of the sponsor, that the mortgage was in default, Dean Capital was headed to ‘three years of foreclosure litigation,’ and that the goal of the foreclosure plan was to acquire title to the property or payment of the loan.

“Apparently, Intervenor are frustrated with the negative effects of the pandemic on the pace of the foreclosure and the

increased expense and Intervenor, their representatives and Jeffrey Benjamin, Esq., their counsel on this motion to intervene, have already brought an action and special proceeding against me and Dean Capital with substantially identical allegations as proposed here – again underscoring their longstanding knowledge of their proposed claims (NYSCEF Doc No. 149 at ¶¶ 2-6).

Shimura identified an action currently pending in New York County Supreme and another pending special proceeding in the same court in which the proposed intervenors, Nakagawa and Otsuka, have asserted many of the same claims against Shimura that appear in the proposed third-party complaint (*see Otsuka v Shimura, et al.*, New York County index No. 159202/20 and *Nakagawa, et al. v Shimura et ano.*, New York County index No. 155996/21, NYSCEF Doc Nos.).

Discussion

CPLR 1012 (a) (3) provides that a party may intervene as of right “when 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.” CPLR 1013 provides that a court has discretion to permit a person to intervene “when the person’s claim or defense and the main action have a common question of law or fact” and, 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.”

The Second Department has held that a property owner’s motion for leave to intervene in an action to foreclose the property must be made “[u]pon a timely motion . . .” (*HSBC Bank USA, National Assoc. v Minogue*, 202 AD3d 662 [2022] [affirming denial

of proposed intervenor's motion for leave to intervene in foreclosure action as untimely since it was "made more than four years after the appellants took title to the property . . ."; *see also JP Morgan Chase Bank, N.A. v Edelson*, 90 AD3d 996, 996-997 [2011]). The Second Department has held that a motion for leave to intervene in a foreclosure action more than a year after the proposed intervenor took title to the property is untimely (*Morequity, Inc. v Centennial Insurance Co.*, 201 AD3d 929 [2022] [nonparty's request for leave to intervene "would have been untimely (since) appellant did not make its cross-motion until *well over a year after taking title*"] [emphasis added]; *Bank of America National Assoc. v New York City Environmental Control Board*, 199AD3d 874 [2021] [affirming denial of motion for leave to intervene in foreclosure action as untimely where nonparty did not move for leave to intervene "for more than two years and ten months after taking title"]; *Fulton Holding Grp., LLC v Lindoff*, 165 AD3d 1045, 1047 [2018] [same]). The Second Department has also held that a motion for leave to intervene in a foreclosure action is untimely where "it was made approximately eight months after the appellant acquired notice that the foreclosure action was pending" (*Federal National Mortgage Assoc. v Sanchez*, 172 AD3d 1005, 1006 [2019]).

Here, the proposed intervenors have failed to demonstrate that they would be adversely affected by the outcome of this commercial foreclosure of the Property, since they are minority members of Dean Capital, the foreclosing plaintiff, and they already asserted an action and a special proceeding against Shimura regarding their minority investment in Dean Capital, which are currently pending in New York County Supreme

Court. In any event, the proposed intervenors, who admittedly invested in Dean Capital on June 7, 2018, when they executed Dean Capital's Operating Agreement, inexplicably waited until February 8, 2022 (about three years and eight months) before moving for leave to intervene in this commercial foreclosure action. Third-party defendant Shimura demonstrated, through uncontroverted testimonial and documentary evidence, that he advised the proposed intervenors about the subject mortgage and the potential of foreclosure litigation *more than five years ago* in 2017. Consequently, the proposed intervenors' motion for leave to intervene in this foreclosure action is denied because the proposed intervenors failed to demonstrate a basis for intervention, ether by right or permission, and their February 2022 motion is untimely. Accordingly, it is

ORDERED that the proposed intervenors' motion (mot. seq. seven) for leave to intervene in this commercial foreclosure action and to amend the caption is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.


HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE