

**1133 Lexington Ave. Realty Corp. v Seiden Lexington Holdings, LLC**

2023 NY Slip Op 32329(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 160933/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

1133 LEXINGTON AVE. REALTY CORP.,

Plaintiff,

- v -

SEIDEN LEXINGTON HOLDINGS, LLC, OFFICE OF THE
CITY REGISTER OF THE CITY OF NEW YORK, 1131
PROPERTY OWNER LLC, 150-152 EAST 79, LLC,

Defendant.

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INDEX NO. 160933/2022

MOTION DATE 07/10/2023,
N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 44, 45

were read on this motion to/for JUDGMENT - DEFAULT .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30,
31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE .

Upon the foregoing documents, the motion to intervene is granted and the default
judgment motion is stayed.

Motion to Intervene pursuant to CPLR §§ 1012(a)(2) & (a)(3)

Third party W 79th Street Owner LLC (the lot 154 owner) files the instant motion to
intervene in plaintiff's claim for declaratory judgment pursuant to CPLR §§ 1012(a)(2) or (a)(3),
claiming the proposed declaratory judgment will adversely affect its interest and the named
defendants cannot adequately defend its interest. The court agrees.

CPLR §§ 1012(a)(2), intervention as of right, provides that "upon timely motion, any
person shall be permitted to intervene in any 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."

Here, none of the named defendants is the present owner of lot 154 and thus has no incentive to zealously represent the intervenor's interest. In the complaint, plaintiff sought to nullify the recorded memo of sale, zoning declaration and development agreement that encumber both lot 153 and lot 154. NYSCEF Doc. No. 1, pages 5-6. NYSCEF Doc. No. 29. If said recorded documents get nullified and the encumbrance gets lifted, lot 153 and lot 154 will cease to be treated as "a single zoning lot" and that could in turn significantly decrease the "total developable square footage". NYSCEF Doc. No. 32, page 2. NYSCEF Doc. No. 31, ¶ 15. Since lot 154 owner also owns adjacent lots 51, 52, 53 and 152, the potential synergy created by treating all five lots as one zoning block is too substantial to ignore. Given that all named defendants are either past owners or disinterested third-party, and the intervenor will be bound by the declaratory judgment if the underlying suit is later decided in plaintiff's favor, lot 154 owner should be allowed to intervene as of right under either CPLR §§ 1012 (a)(2) or (a)(3).

The court is unconvinced of plaintiff's rebuttal that the motion to intervene is filed untimely. Plaintiff argues that the intervenor had actual or constructive notice of the underlying suit when they acquired the lot 154 and they waited until the last minute to intervene. The only basis for this assertion is that the intervenor and the named defendant Seiden share the same attorney and any knowledge acquired by the attorney about Seiden should be imputed to the intervenor, meaning the intervenor should have known the transaction between plaintiff and Seiden had fallen through. The court disagrees.

First, plaintiff cannot convincingly explain why it did not sue and serve the intervenor from the beginning. The record clearly reflects that Philip Arcara, president of plaintiff, had been closely following the foreclosure action initiated by W Financial REIT, the entity affiliated with the intervenor, against the named defendant 150-152 EAST 79, LLC, the immediate predecessor of

the intervenor. NYSCEF Doc. No. 48, ¶ 21. It is reasonable to presume that he knows that the intervenor finally acquired lot 154 from a court-appointed referee, given that lot 154 is contiguous to lot 153 and the recorded zoning declaration encumbering both lots. If so, plaintiff needs to offer a convincing explanation of why it did not sue and serve the intervenor from the beginning? If not, plaintiff should get prepared to answer the following question: has it ever engaged in a negotiation with W Financial in December 2022 to discuss possible sale of lot 153 and knew that W Financial or its affiliate would soon become the owner of lot 154, as claimed by David Heiden, the Managing Partner of W Financial Fund? NYSCEF Doc. No. 31, ¶¶ 23-24. Accordingly, until proven otherwise, the motion will be considered timely filed.

Second, the argument about “imputation of knowledge” is unavailing. Seiden and the intervenor are two different clients for the firm. Any suggestion that the attorney should disclose one client’s proprietary information to another is a blatant violation of Rule 1.6 of New York Rules of Professional Conduct, i.e., a lawyer’s duty of confidentiality. Also, plaintiff’s focus on the fact that the zoning declaration was not executed by the named defendant 1131 Property Owner is misplaced because when the zoning declaration was signed and recorded in 2016, 1131 Property was not the owner of lot 154 and it only became one in 2017. NYSCEF Doc. No. 48, ¶¶ 8-9. NYSCEF Doc. No. 1, ¶¶ 11, 13. NYSCEF Doc. No. 51, page 12. The key is the sales contract on which is relied by plaintiff was not recorded in the city register office. The court does not believe that the duty to inquire entails discovery of an unrecorded document in a title search.

The complaint and the motion to intervene have one common question of law, i.e., whether the recorded zoning declaration should be nullified, and thus invalid to encumber both lot 153 and lot 154. In addition, RPAPL §§ 1511(2) also confers the discretion to court when “it appears to the court that a person not a party to the action may have an estate or *interest* in the real property which

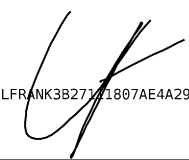
may in any manner be affected by the judgment, the court... *may direct* that such person be made a party.” Therefore, the court agrees with the intervenor that the motion could also be granted under either prong of CPLR § 1013.

**Motion For Default Judgment Should Be Stayed**

CPLR § 2201 prescribes that “the court in which an action is pending *may* grant a stay of proceedings in a proper case, upon such terms as may be *just*.” Here, granting the motion to intervene should automatically stay the default judgment motion because continuation of the latter would largely defeat the point of the former. Based on the foregoing, it is hereby

ORDERED that the default judgment motion filed by plaintiff 1133 LEXINGTON AVE. REALTY CORP. against defendants SEIDEN LEXINGTON HOLDINGS, LLC, OFFICE OF THE CITY REGISTER OF THE CITY OF NEW YORK, 1131 PROPERTY OWNER LLC,150-152 EAST 79, LLC, is resolved by being stayed pending further action in this litigation , and it is further

ADJUDGED and DECLARED that the motion to intervene filed by the third-party W 79<sup>th</sup> Street Owner LLC is hereby granted.

<p>7/12/2023</p> <hr/> <p>DATE</p>	 <p>20230712133305LFRANK3B27711807AE4A2980841C9576433311</p> <hr/> <p>LYLE E. FRANK, J.S.C.</p>																																
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