

JPMorgan v EY Bay Ridge

2023 NY Slip Op 34673(U)

December 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 6914/08

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of December 2023.

P R E S E N T:

HON. LARRY D. ~~Justice Lawrence Knipe~~
J.S.C.

Index No.: 6914/08

JPMORGAN,

Plaintiff,

DECISION AND ORDER

-against-

EY BAY RIDGE et al,

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion (MS 10)	<u>1</u>
Opposition	<u>2</u>
Cross-Motion (MS 11)	<u>3</u>
Reply/Opp to Cross	<u>4</u>
Cross-Reply	<u>5</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced on March 4, 2008. Among the defendants were EY Bay Ridge (then the owner of the property) and Yisroel Moster (the borrower). EY and Moster jointly answered the complaint through counsel, Sanford Solny. On July 28, 2008, Plaintiff filed its initial motion for summary judgment which was granted by the Honorable Gerard Rosenberg by order dated November 19, 2010.¹ However, Plaintiff withdrew the motion prior to the order

¹ Judge Rosenberg's order appears to have been ignored by all parties in their subsequent filings.

of reference being executed. Thereafter, Solny was suspended and then disbarred. Upon Plaintiff's unopposed motion, the matter was stayed to allow Defendants to secure new counsel.

Plaintiff then again moved for summary judgment. EY – but not Moster – appeared through new counsel, Abraham Hoschander, and cross-moved for dismissal on a variety of grounds. By order dated October 21, 2015, the Honorable Kenneth Sherman denied both motions. In relevant part, Judge Sherman found that Plaintiff had not demonstrated compliance with the default notice provision of the mortgage.

On August 29, 2017, Plaintiff moved for reargument and/or renewal of its prior motion. EY – but again not Moster – opposed. By order dated December 4, 2018, Judge Sherman denied reargument, rejecting Plaintiff's argument that the default notice defense was personal to Moster and could not be raised by EY as it had not been "raised in its plaintiff's reply papers on the prior motion and is presented on th[e] reargument motion for the first time." Renewal based upon a new affidavit from a representative of Plaintiff was granted and, thereupon, Plaintiff's motion for summary judgment was granted.

EY appealed from Judge Sherman's decision and, on January 25, 2023, the Appellate Division Second Department reversed finding that Plaintiff had not offered a reasonable justification for failing to submit the improved client affidavit on the prior motion – and, thus, that renewal should not have been granted.

Plaintiff now moves to drop Moster and EY from this action as they are no longer necessary parties, for default judgment against the remaining parties, and for an order of reference. EY opposes arguing that, while Moster can be removed from the action, it should not be unless replaced by New Utrecht Properties, Inc which (it claims) is its successor-in-interest. New Utrecht, represented by the same counsel as EY, cross-moves for substitution in place of EY. Plaintiff opposes.

Preliminarily, a review of the deeds is necessary. It is undisputed that Moster transferred the property to EY in May 2007. Thereafter, by deed dated July 22, 2009 and recorded on July 27, 2009, the property appears to have been transferred from EY to "Sarah Y. Leitner." Nonetheless, by deed dated July 24, 2009 and recorded on October 6, 2009, EY again transferred the property, this time to New Utrecht. In 2015, New Utrecht commenced a quiet title action

against Leitner seeking to expunge the deed to Leitner. Leitner has actively defended that action – proffering, among other things, an affidavit from Moster stating that it is the deed to Leitner that is genuine and the one to New Utrecht that was unauthorized. A note of issue has been filed therein but a trial does not appear to have been scheduled.²

As recently reiterated by the Appellate Division, a mortgagor who has made an absolute conveyance of all his or her interest in the mortgaged premises is not a necessary party to a foreclosure action where the plaintiff waived its right to seek a deficiency judgment against him – and, thus, it is appropriate to allow a plaintiff to drop such a borrower as a defendant rather than addressing his defenses (*Citimortgage v Warsi*, 212 AD3d 592, 594 [2d Dept 2023])[Plaintiff elected to discontinue against borrower rather than proceeding to traverse hearing]. As it is undisputed that Moster no longer owns the property, the portion of Plaintiff's motion seeking to drop Moster is, thus, granted.

It is also undisputed that EY no longer owns the property and has not since 2009. Logic and the record,³ however, strongly suggest that it has actually been New Utrecht that has been defending this action – among other things, the two entities share counsel and New Utrecht filed an order to show cause in the quiet title action based upon a settlement offer extended by Plaintiff to EY. Under such circumstances, Plaintiff's argument that New Utrecht waited too long to seek substitution is unavailing.

To the extent that EY transferred ownership of the property during the pendency of this action, its successor stepped into its shoes and inherited its answer and non-personal defenses (*Wells Fargo v McKenzie*, 183 AD3d 574, 575 [2d Dept 2020]). As such, while EY is no longer necessary, dropping it without substituting the new owner would be improper. At this moment in time, however, that is not (legally) New Utrecht. The deed to Leitner was both executed and recorded prior to that of New Utrecht. While it is possible that New Utrecht will be victorious in its efforts to expunge Leitner's interests, unless and until it does, she is the owner of the premises.⁴ As the outcome of that action is unclear, however, this Court will neither drop EY

² Leitner's counsel unsuccessfully moved to withdraw from the representation in 2022. It is unclear whether the action could even go to trial were it to be calendared therefor.

³ Both in this action and the quiet title action.

⁴ Leitner has not sought to participate in this action and no request has been made to substitute her as a defendant in place of EY..

from this action nor allow it or New Utrecht to defend this action – as neither currently has standing to do so.

In light of the foregoing, it is

ORDERED that the caption of this action be amended by striking Defendants Yisroel Moster, “JOHN DOE,” and “JANE DOE” without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that default judgment is granted against non-answering National City Bank, New York City Department of Housing Preservation and Development, New York City Environmental Control Board, and Bernie Miller; and it is further

ORDERED that the portions of Plaintiff’s motion seeking to drop EY Bay Ridge from this action and for an order of reference are denied; and it is further

ORDERED that New Utrecht’s cross-motion to be substituted in place of EY Bay Ridge is denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D. ~~Mc~~ JSC


HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

KINGS COUNTY CLERK
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