

Barnes v O'Keefe

2024 NY Slip Op 32460(U)

July 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 1922/2018

Judge: Lisa S. Ottley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
LANNEL BARNES,

Plaintiff,

-against-

Mot. Seq. # 4

Index # 1922/2018

DECISION AND ORDER

John O'Keefe, 49 Andrew, Islip, New York Oren I. Zaka
Development, 15 Fairview Ave' Great Neck, N.Y. 11023
NYCTL 1998-2 TRUST, and THE BANK OF NEW YORK
MELLON as Collateral Agent and Custodian for the
NYCTL 1998-2 Trust, 1550 FULTON STREET REALTY
HOLDINGS, LLC, 2152 59th Street, Brooklyn, New York
11204; HOME ABSTRACT CORPORATION AS AGENT
(P.U. REJECTIONS)8225 THIRD AVENUE, HAR-1546
BROOKLYN, NY 11209; PRIMO HOLDINGS LLC 8 Douglas
Drive Holmdel, NJ 07733 AND ANGELO GALLO,
NotaryNo.O1GA4715241, JOHN AND JANE DOE,

Defendants.
-----X

HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to intervene and amend the complaint submitted on March 4, 2024.

Papers	Numbered
Notice of Motion and Affidavit	1&2 [Exh. A-D]
Affirmation/Affidavit in Opposition.....	3 and 4
Affidavit(s) in Reply.....	5[Exh. A-D]; 6 [annexations]

Proposed plaintiff-intervenor, DialloRafik Asar Madison (hereinafter proposed intervenor), moves pursuant to CPLR 1001, 1012, 1013 for an order granting permission to intervene in the subject action and directing that the summons and complaint be amended by adding the proposed intervenor as a plaintiff. Defendants, 1550 Fulton Street Holdings, LLC and Primo Holdings LLC (hereinafter "Defendants"), oppose said motion on the grounds that (1) the motion does not include a proposed intervention pleading as required by CPLR § 1014, (2) plaintiff's motion for leave to amend the complaint to add DialloRafik Asar Madison as a plaintiff was previously denied by Judge Karen Rothenberg's decision/order dated, August 6, 2021, and (3) the proposed intervenor has no rights which can be enforced in this action. In reply, the proposed intervenor has submitted his proposed intervention pleading.

In this action, inter alia, to quiet title, plaintiff alleges that he is the rightful owner of the premises located at 1550 Fulton Street Brooklyn, New York 11216 (hereinafter "Fulton Street property"), and 906 Putnam Avenue, Brooklyn, New York 11221, having inherited these premises on February 10, 2010, by operation of law as the sole distributee of his deceased father, Augustus L. Barnes. Plaintiff alleges that Joan Ince Barnes, the decedent's spouse, from whom the decedent was separated at the time of his death, was appointed administrator of the estate on July 22, 2010, and received Letters of Administration that restricted her from selling the Fulton Street property without further order of the court. Plaintiff claims that due to Ince's mismanagement of his father's estate, defendant 1550 Fulton Street Realty Holdings forged a deed to the Fulton Street property and recorded same on June 5, 2014, reflecting a sale price of \$0, and thereafter acting in concert with defendant, Primo Holdings, LLC, recorded a corrected deed to the property. Plaintiff asserts that he learned that a foreclosure sale of the Fulton Street property was scheduled to take place on August 9, 2018, but that he was unable to get a home equity loan without the deed to the premises being in his name.

Plaintiff commenced this action seeking to quiet title to the premises, to permanently enjoin defendants from entering the property, and to recover damages for fraud, forgery, intentional infliction of emotional distress, conversion, slander of title, and unjust enrichment. Plaintiff filed a notice of pendency in this action on June 10, 2022. A review of the court records involving these parties/premises reveals that defendants NYCTL and BNY, were holders of certain tax and other liens for the years 2009, 2013, and 2014, and commenced a tax lien foreclosure on November 30, 2016 (Supreme Court Kings County Index No. 521188/16) against defendant Primo Holdings, LLC and non-party Chillax Mgmt LLC to recover the value of the tax liens against the Fulton Street property. A notice of pendency was filed in that action on November 30, 2016. Neither of the defendants answered or appeared in that action and NYCTL and BNY were granted a judgment of foreclosure and sale by order dated May 10, 2018. A sale of the property occurred on August 9, 2018, for the winning bid of \$1,600,000. NYCTL and BNY later stipulated with the purchaser to void the foreclosure sale and moved for an order for leave to add Ince as a necessary party to that action and for an extension of time to conduct the foreclosure sale. The relief was granted by separate orders dated December 9, 2020.

A foreclosure sale was held in the tax lien foreclosure action on April 28, 2022, and the successful bidder was 1550 Fulton Realty 123 LLC (hereinafter "123"). The tax lien foreclosure Referee conveyed the property to 123 by Referee's Deed dated April 20, 2023, and recorded on April 28, 2023. Although defendant 1550 Fulton Street Realty Holdings LLC ("Holdings") and the tax lien foreclosure sale purchaser 1550 Fulton Realty 123 LLC ("123") have similar names, they are separate, distinct, and unrelated entities which have no common ownership.

Discussion

In support of his motion, proposed intervenor argues that he has a “real and substantial” interest in the outcome of this action in the interest of justice as an occupant of the first and second floors of the Fulton Street property and as part owner of the businesses operated at said address for more than eleven years, namely 1550 Event Space and Bed Stuy Charbroiled Burgers. The proposed intervenor further argues that as a part owner of the businesses with the plaintiff he has provided the finances, furniture, wi-fi, and upkeep of the premises while plaintiff extended the opportunity to collaborate as business partners. The proposed intervenor submitted a contract dated September 13, 2023, in which plaintiff authorizes the proposed intervenor to intervene in this action due to plaintiff’s health issues and proposed intervenor’s history of occupying, operating, and paying the bills for the Fulton Street property as a tenant in common since March 3, 2010. The proposed intervenor further argues that he has a strong interest in the outcome of this action because he has invested more than ten years of protection, sweat equity, upkeep, and expenses for the premises and as a result will be affected by any rulings and outcome of this action and related proceedings.

In opposition, defendants argue that the proposed intervenor has no rights which can be enforced in this action. The plaintiff did not have authority to grant any rights to the proposed intervenor since plaintiff was not appointed as the administrator of his father’s estate and failed to submit documentation to support such. Defendants further argue that all proceedings in this action are subordinate to the tax lien foreclosure action since plaintiff’s notice of pendency (June 10, 2022) was filed after the filing of the tax lien notice of pendency (November 30, 2016), judgment of foreclosure and sale (May 10, 2018), and auction sale (April 28, 2022). The tax lien foreclosure sale terminated any rights to the property as alleged by the proposed intervenor.

Upon a timely motion, a person is permitted to intervene in an action as of right when, inter alia, “the action involves the disposition or distribution of, or the title ... to, property and the person may be affected adversely by the judgment.” See, CPLR 1012(a)(3). The court, in its discretion, may permit a person to intervene, inter alia, “when the person’s claim or defense and the main action have a common question of law or fact.” See, CPLR 1013. “However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance,” and that “intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.” See, Sieger v Sieger, 297 A.D.2d 33, 747 N.Y.S.2d 102 (2nd Dept., 2002).

In determining whether a motion to intervene is timely, a court should consider the time between the proposed intervenor's knowledge of the basis for the motion and the making of the motion, and whether any delay in seeking intervention caused prejudice to a party. See, Onewest Bank, FSB v Harrington, 213 A.D.3d 682, 183 N.Y.S.3d 510 (2nd Dept., 2023). In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party. See, HSBC Bank USA, N.A. v Islam, 222 A.D.3d 731, 202 N.Y.S.3d 219 (2nd Dept., 2023).

First, the court will address the issue of the plaintiff's motion papers being defective since plaintiff failed to include a proposed pleading for intervention, which the movant attempts to cure by annexing same to its reply papers. This court does have discretion to consider the movant's motion if a substantial right of a party is not prejudiced. See, CPLR §2001 which permits a court at any state of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced. In addition, in the interest of judicial economy, this court will overlook the procedural defect.

While it is correct that plaintiff's motion for leave to amend the complaint to add DialloRafik Asar Madison as a plaintiff was previously denied by Judge Karen Rothenberg's decision/order dated, August 6, 2021, differing standards of judicial review are to be employed for a motion to amend a complaint versus a motion to intervene as detailed below.

Here, the proposed intervenor failed to demonstrate that he has a threshold "real and substantial" interest in the Fulton Street property. See, 112-40 F.L.B. Corp. v Tycoon Collections, Inc., 73 A.D.3d 719, 901 N.Y.S.2d 294 (2nd Dept., 2010). The proposed intervenor failed to submit any evidence to support his claim that he had an ownership interest in the subject real property. See, Sieger, supra. The intervenor contract was entered into after the auction sale and does not provide the proposed intervenor with a "real and substantial" or ownership interest in the Fulton Street property. Moreover, the proposed intervenor claims that he is a tenant in common, part owner of businesses, and has been paying bills for the Fulton Street property yet has failed to provide documentary evidence in support of his claim. It appears that the plaintiff is contractually authorizing an intervenor based on his own health issues, rather than the proposed intervenor having a "real and substantial interest" in the property.

The court also finds that the motion for leave to intervene was untimely. As reflected in his affidavit in support, the proposed intervenor discovered the initial alleged fraud along with the plaintiff on June 13, 2018, when Mario Prestigiacomio, as an agent/owner of 1550 Holdings, attempted to enter the Fulton Street property claiming he had purchased the property in a foreclosure sale but only possessed a quitclaim deed. The proposed intervenor has admitted having knowledge about the alleged fraud relating to the underlying foreclosure action, and this action to quiet title, yet he waited approximately six years from the filing of this action to move for leave to intervene. See, Castle Peak 2012-1 Loan Trust v Sattar, 140 A.D.3d 1107, 35 N.Y.S.3d 368 (2nd Dept., 2016). As such, the further delay caused by the motion to intervene would

prejudice the rights of the defendants. See, *Federal Natl. Mtge. Assn. v Thomas*, 209 A.D.3d 841, 177 N.Y.S.3d 79 (2nd Dept., 2022).

Accordingly, proposed intervenor's motion to intervene and amend the complaint by adding the proposed intervenor as a plaintiff is hereby denied in the entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
July 2, 2024



HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

2024 JUL 19 A 9:52
KINGS COUNTY CLERK
FILED