

KZ RE Mgt. LLC v Thor 680 Madison Ave LLC

2025 NY Slip Op 30489(U)

February 7, 2025

Supreme Court, New York County

Docket Number: Index No. 653500/2024

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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KZ RE MANAGEMENT LLC,	INDEX NO. <u>653500/2024</u>
Plaintiff,	MOTION DATE <u>09/25/2024</u>
- v -	MOTION SEQ. NO. <u>(MS) 001</u>
THOR 680 MADISON AVE LLC, FIRST NATIONWIDE TITLE AGENCY LLC,	DECISION + ORDER ON MOTION
Defendant.	
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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21

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

In this failed real property purchase action between plaintiff purchaser KZ RE Management LLC (KZ) and defendant Thor 680 Madison Ave LLC (Thor), plaintiff deposited a \$5,000,000 downpayment to be held in escrow by co-defendant First Nationwide Title Agency LLC (Escrowee). The sale of the real property failed to close on March 5, 2024. Both plaintiff KZ and defendant Thor separately demanded release of the downpayment to their own benefit, which the Escrowee denied. Plaintiff commenced this action against Thor and the Escrowee to recover the \$5,000,000 downpayment. In MS 001, non-party JPMorgan Chase Bank¹ (JPMorgan) seeks to intervene in this case because Thor assigned to JPMorgan all of its rights, title, and interest to the downpayment in exchange for a lower payoff amount of its initial mortgage loan and building loan from JP Morgan. Plaintiff opposes the motion.² For the reasons below, JPMorgan's motion to intervene is granted.

Background

Plaintiff KZ, as Buyer, and defendant Thor, as Seller, entered into a Sale-Purchase Agreement (SPA) effective January 5, 2024, for the real property known as 680 Madison Avenue in Manhattan for \$180,000,000. Plaintiff was to deposit \$5,000,000 as downpayment to be held by Escrowee (NYSCEF # 1, Complaint ¶s 4-

¹ JPMorgan Chase Bank as administrative agent for certain lender to Thor.

² Plaintiff submits only an affirmation by its Manager, Jeffrey Weissman, who is also an attorney but not the attorney of record on this case. No brief was submitted. Plaintiff is directed to the Part 49 rules, specifically Rule V.C.

5). The closing date, which was 60 days from January 5, 2024, came and went without a closing. Plaintiff, claiming that Thor failed to furnish plaintiff with the required estoppel certificates in order to close, terminated the SPA on March 5, 2024. Plaintiff demanded the return of the downpayment from the Escrowee on March 7, 2024. Thor, on the other hand, disputed the termination and claimed that plaintiff was in default. Thor also demanded disbursement of the downpayment (*id.* ¶'s 16-18). The Escrowee denied both plaintiff's and Thor's respective demands for the downpayment and remains in possession of the downpayment (*id.* at 19).

On May 21, 2024, Thor entered into an "Assignment Agreement" with JPMorgan under which Thor assigned to JPMorgan all the rights, title, and interest to the downpayment in exchange for a lower payoff amount on its August 2017 mortgage and its July 2019 building loan from JPMorgan (NYSCEF # 15, JPMorgan mol at 3). Based on the Assignment Agreement, JPMorgan argues that it may intervene as of right under CPLR 1012 (a)(3) (*id.* at 5). JPMorgan adds that it may intervene by permission under CPLR 1013 as well because its claim concerns the same law and facts as those in the main action (*id.*). JPMorgan maintains that whether this case results in favor of plaintiff or vice versa, JPMorgan still has a right to protect its interest.

Plaintiff argues that section 36 of the SPA prohibits claims by third parties against buyer or seller (NYSCEF # 19, Weisberg aff ¶ 6). That paragraph pertains to buyer and seller's acknowledgement that there are no third parties to the SPA (*id.* quoting NYSCEF # 13 – SPA at 40). KZ adds that the SPA terminated on March 5, 2024 (*id.* at 7). Hence, plaintiff reasons that there is no SPA to assign to JPMorgan on May 21, 2024, and Thor had sold the property that was the subject of the SPA to a third party (*id.* at 8 citing from Complaint, and NYSCEF # 9 – Thor's Answer). Plaintiff points out that JPMorgan is not prejudiced absent intervention because it is represented by Thor's counsel, and the Assignment gave JPMorgan control of Thor (*id.* ¶'s 16-18). Plaintiff posits that if JPMorgan were permitted to intervene, JPMorgan would use the Assignment to allege claims against plaintiff under the SPA. But, if intervention were to be granted, plaintiff argues that JPMorgan "should be made to put its own pockets on the line to make KZ whole on its claims against Thor" (*id.* ¶ 13).

Discussion

Interventions are liberally permitted. Under CPLR 1012(a), intervention is proper 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" or "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 by the judgment" (*Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 190 [1st Dept 2010 quoting CPLR 1012 (a) (2) and (a) (3)].

Here, JPMorgan has shown that, with the Assignment Agreement between itself and Thor, JPMorgan has the rights, title, and interest to the \$5,000,000 downpayment that Thor had under the SPA. But plaintiff claims that because the SPA is terminated at the time of the assignment, no rights could be assigned. Yet plaintiff's claims are based on the same terminated SPA.

Plaintiff argues that JPMorgan's rights are adequately represented by Thor because they have the same counsel. However, having joint counsel does not mean that JPMorgan, as lender to Thor, need not be concerned about the substantial amount due under the loan agreements between JPMorgan and Thor should Thor prevail in this action. Here, in that Thor and JPMorgan each seek to recover the \$5,000,000 downpayment, the disposition or distribution of the property that is the downpayment may affect JPMorgan adversely (see *id.* at 201). Thus, prudence dictates that JPMorgan may intervene in this action, which is still in its early stages, under CPLR 1012 (a)(3) and CPLR 1013.

Plaintiff also raises two procedural arguments that it claims calls for denying intervention: the Assignment Agreement is not authenticated; and JPMorgan's proposed answer is not verified. Both of plaintiff's procedural arguments are without merit.

On the authentication issue, Thor's counsel also represents JPMorgan in this action. This counsel has affirmed, under penalties of perjury pursuant to CPLR 2106, that based on his personal knowledge, the Assignment Agreement, attached to his affirmation "as Exhibit C is a true and correct copy of the Assignment" (see NYSCEF # 11, Robson aff). Notably, plaintiff's argument on the Assignment Agreement does not challenge the existence or authenticity of the Assignment Agreement, only that it was not properly authenticated. Even so, courts may consider "documentary evidence defendants appended to their attorney affirmations in support of their motions" (*Gerard Acquisition LLC v G.A.L. Manufacturing Co. LLC*, 232 AD3d 505, 506 [1st Dept 2024]).

As to plaintiff's complaint about the unverified proposed answer, it is just that – a proposed answer. JPMorgan, in its reply, assures that if JPMorgan were granted intervention, it will submit a verified answer. In any event, it would be error to deny the motion on the basis that the proposed answer was unverified as "[d]efects shall be ignored if a substantial right of a party is not prejudiced" (*Davis v Schley*, 227 AD3d 491, 491 [1st Dept 2024]).

In sum, JPMorgan Chase Banks' motion to intervene is granted.

Accordingly, it is

ORDERED that JPMorgan Chase Bank's motion to intervene is granted; it is further

ORDERED that JPMorgan Chase Bank shall file its Answer within 20 days of this order; and it is further

ORDERED that counsel for JPMorgan Chase Bank shall serve all parties and the Clerk of the Court, with notice of entry, within 10 days of this order, and it is further

ORDERED that the Clerk of the Court shall amend the caption to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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KZ RE MANAGEMENT LLC,

Index No. 653500/2024

Plaintiff,

- against -

THOR 680 MADISON AVE LLC, FIRST NATIONWIDE
TITLE AGENCY LLC, and JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, solely as Administrative Agent
for certain lenders to Defendant Thor,
Defendants.

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This constitutes the Decision and Order of the court.

02/07/2025
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> DENIED	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE