

**Mazzei v Kyriacou**

2012 NY Slip Op 33839(U)

August 15, 2012

Supreme Court, Nassau County

Docket Number: 22907/10

Judge: Antonio I. Brandveen

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

MICHAEL MAZZEI,  
  
Plaintiff,

TRIAL / IAS PART 29  
NASSAU COUNTY

Index No. 22907/10

- against -

Motion Sequence No. 003

NICOLE KYRIACOU aka NICOLE DEBONIS  
ALL ISLAND EQUITY INC., and THOMAS  
DEBONIS,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

U.S. Bank National Association moves for leave to intervene and to serve its answer to the plaintiff's verified complaint within 30 days from the entry of the order permitting intervention. The movant claims it is the owner and holder of a mortgage on the subject real, and that it has a real and substantial interest in the outcome of the underlying litigation. U.S. Bank National Association asserts it must be permitted to intervene to protect its interest in the property.

The plaintiff opposes the motion. The plaintiff contends U.S. Bank National Association has absolutely no interest in the instant litigation, and no standing to prosecute claims against the defendant Nicole Kyriacou. The plaintiff indicates the mortgage with

Kyriacou was never recorded, and the purported assignment of the mortgage to U.S. Bank National Association neither contained a corporate resolution nor a power of attorney authorizing the assignment of the mortgage. The plaintiff contends this request for intervention is untimely. The plaintiff asserts U.S. Bank National Association will introduce issues which have absolutely nothing to do with the scope of this action. The plaintiff points out U.S. Bank National Association prosecutes its own action against Kyriacou in the Nassau Supreme Court which has been pending for more than a year and seeks the same relief it wants to obtain here, that is to foreclosure against Kyriacou and cut off the plaintiff's rights as an anticipated creditor of Kyriacou. The plaintiff avers this attempt by U.S. Bank National Association to intervene here introduces issues that have absolutely nothing to do with the scope of the instant action.

U.S. Bank National Association replies to the plaintiff's opposition. U.S. Bank National Association maintains the plaintiff fails to show any reason intervention should be denied. U.S. Bank National Association reiterates its basis for seeking intervention, and amplifies that repetition. U.S. Bank National Association asserts this motion is timely because the mere lapse of time is not the standard for deciding such a motion, rather the test is whether the intervention would cause any undue delay of the action or prejudice to the existing parties. U.S. Bank National Association avers the plaintiff does not demonstrated any undue delay of the action or prejudice to the existing parties, and notes there has not been much significant activity in this action, and discovery has not started. U.S. Bank National Association points out it has a mortgage interest against the subject real property, and a real and substantial interest in the outcome of this action. U.S. Bank National

Association asserts, although its mortgage describes and clearly encumbers the subject real property, it was recorded by the Nassau County Clerk as against the wrong lot before the plaintiff filed his notice of pendency against the subject property. U.S. Bank National Association argues the filing of the notice of pendency prior to the mortgage recording against the subject real property binds it to the outcome of this action, so it is compelled to intervene here to protect the priority of its mortgage interest against the plaintiff's constructive trust claims.

Upon a timely motion, a person is permitted to intervene as of right in an action involving the disposition of property where that person may be adversely affected by the judgment (*see* CPLR 1012 [a] [3]; *Velazquez v Decaudin*, 49 AD3d 712, 717 [2008]; *George v Grand Bay Assoc. Enter. Inc.*, 45 AD3d 451, 452 [2007]; *Greenpoint Sav. Bank v McMann Enters.*, 214 AD2d 647 [1995]; *but see Citibank, N.A. v Plagakis*, 8 AD3d 604, 605 [2004]). In addition, a 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). 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 since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings (*see Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840 [2009]; *Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 [2007]; *Sieger v Sieger*, 297 AD2d 33, 36 [2002]; *County of Westchester v Department of Health of State of N.Y.*, 229 AD2d 460, 461 [1996]; *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825 [1988]). 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 (*see Reliance Ins. Co. of N.Y. v Information Display Tech.*, 2 AD3d 701 [2003]).

*Wells Fargo Bank, N.A. v McLean*, 70 A.D.3d 676, 676-677, 894 N.Y.S.2d 487 [2d Dept, 2010].

This Court determines U.S. Bank National Association meets the statutory prerequisites for intervention, to wit U.S. Bank National Association shows there is no potential for undue

delay in the determination of this action, there is no potential for substantial prejudice to any of the original parties and the motion to intervene is timely (*see American Home Mortgage Servicing, Inc. v. Sharrocks*, 92 A.D.3d 620, 938 N.Y.S.2d. 202 [2d Dept, 2012]). The Court finds U.S. Bank National Association also shows it has a real and substantial interest in the outcome of this action, the representation of its interest by the parties here is inadequate and it may be bound by any judgment here where its claim has a common question of law or fact (*Plantech Housing, Inc. v. Conlan*, 74 A.D.2d 920, 426 N.Y.S.2d 81 [2d Dept., 1980]). In opposition, the plaintiff fails to show otherwise. The plaintiff's assertions are speculative regarding potential for undue delay in the determination of this action, potential for substantial prejudice to any of the original. Under the circumstances here, none of the original parties are prejudiced by the timing of this motion (*see ABM Resources Corp. v. Doraben, Inc.*, 89 A.D.3d 773, 933 N.Y.S.2d 296 [2d Dept, 2011]; *also see Halstead v. Dolphy*, 70 A.D.3d 639, 892 N.Y.S.2d 897 [2 Dept, 2010]). The litigation is in the early stages of development.

Accordingly, the motion is granted.

So ordered.

Dated: **August 15, 2012**

ENTER:

J. S. C.

NON FINAL DISPOSITION

**ENTERED**  
 AUG 23 2012  
 SASSAU COUNTY  
 COUNTY CLERK'S OFFICE