

PNC Bank, N.A. v Oatkin
2018 NY Slip Op 30194(U)
February 7, 2018
Supreme Court, Suffolk County
Docket Number: 14260/2009
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

HON. HOWARD H. HECKMAN, JR., J.S.C.

INDEX NO.: 14260/2009

MOTION DATE: 12/29/2016

MOTION SEQ. NO.: 006 MG

007 Mot D

CASE DISP

-----X
PNC BANK, N.A.,

Plaintiff,

-against-

HARVEY N. OATKIN, JOYCE OATKIN,
BANK OF AMERICA, N.A.,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:

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DEFENDANT'S ATTORNEY:

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Upon the following papers numbered 1 to 29 read on this motion 1- ; Notice of Motion 1- 5 (#006) ; Notice of Cross Motion and supporting papers 6-25(#007) ; Answering Affidavits and supporting papers 26-27 ; Replying Affidavits and supporting papers 28-29 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff PNC Bank, N.A. for an order: 1) confirming the referee's report dated September 23, 2016; 2) discontinuing the action against defendant Joyce L. Oatkin; 3) amending the caption; and 4) for a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by proposed non-party intervenor, LJ Equities II, LLC, seeking an order pursuant to CPLR 1012, 1013, 2221, 3012(d) & 5015: 1) vacating an Order (Gazzillo, J.) dated January 15, 2016 denying the non-party LJ Equities prior motion seeking leave to intervene in this action; and 2) vacating an Order (Gazzillo, J.) dated June 27, 2016 granting plaintiff's prior motion seeking an order vacating a prior Order of Reference (Gazzillo, J.) dated October 29, 2009 and granting a second Order of Reference and appointing a referee to compute the sums due and owing plaintiff; and 3) granting the proposed non-party intervenor LJ Equities leave to intervene in this action as a named party defendant is granted solely to the extent that the Court deems the proposed non-party intervenor's motion as one seeking, in part, leave to renew plaintiff's prior motion (#003) seeking a default judgment and the non-party's cross motion (#004) seeking leave to intervene and the Orders (Gazzillo, J.) thereon dated December 7, 2015 granting plaintiff's motion and January 15, 2016 denying the non-party's motion; and it is further

ORDERED that the non-party's application pursuant to CPLR 2221(e) seeking leave to renew plaintiff's prior motion (#003) is granted and, upon renewal, the Order (Gazzillo, J.) dated December 7, 2015 granting plaintiff's unopposed default judgment motion (#003) is hereby vacated and the motion is denied; and it is further

ORDERED that the non-party's application pursuant to CPLR 2221(e) seeking leave to renew the non-party's prior motion (#004) is granted and, upon renewal, the Order (Gazzillo, J.) dated January 15, 2016 denying the non-party's motion is hereby vacated; and it is further

ORDERED that upon re-submission and consideration of the merits of the non-party's cross motion (#004) seeking leave to intervene in this action, the non-party's motion is denied; and it is further

ORDERED that the non-party's remaining requests for relief seeking an order pursuant to CPLR 3012 & 5015 vacating the Order (Gazzillo, J.) dated June 27, 2016 granting plaintiff's motion for a default judgment and a second order of reference and granting the non-party leave to intervene in this foreclosure action and to serve a late answer is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$362,000.00 executed by defendant Harvey N. Oatkin and Joyce L. Oatkin on August 15, 2006 in favor of National City Mortgage. Both Oatkin defendants executed a promissory note on the same day promising to re-pay the entire amount of the mortgage indebtedness to the mortgage lender. The defendants defaulted in making mortgage payments beginning September 1, 2008 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint on April 14, 2009. By Order (Gazzillo, J.) dated October 29, 2009 plaintiff's unopposed motion for a default judgment and for the appointment of a referee was granted. Plaintiff's motion for an order granting a judgment of foreclosure and sale which was submitted to the Clerk's office on February 16, 2010 was subsequently withdrawn by Order (Gazzillo, J.) dated April 22, 2010.

This Court will take judicial notice of the fact that during this time period (2009-2013) a series of administrative orders were promulgated to ensure the accuracy of documents submitted by mortgage lenders and mortgage servicers in support of applications seeking to foreclose mortgage loans. Chief Administrative Judge's Order (AO/548/10) requiring plaintiff's attorneys in certain foreclosure actions to submit an affirmation confirming the accuracy of claims set forth in mortgage foreclosure complaints was issued on October 20, 2010. Shortly thereafter the Chief Administrative Judge's Order was replaced by a second Order (AO/431/11) which revised the form of the attorney affirmation required to be filed with motion papers. This second Administrative Order was issued on March 2, 2011. In August, 2013, CPLR 3012-b further amended the certification requirements in mortgage foreclosure actions.

Plaintiff claims that in order to comply with these certification requirements additional delay occurred so that the accuracy of the underlying claims could be confirmed. As a result the notice of pendency filed on April 14, 2009 expired on April 14, 2012. The notice of pendency was subsequently re-filed on March 10, 2015. Non-party LJ Equities has submitted evidence in the form of copies of Suffolk County Clerk's Office records indicating that a deed dated October 11, 2011 transferring title to the mortgaged premises was executed by the Oatkins' to an entity known as 166 Frowein LLC. Conspicuously absent from the exhibit is a copy of the actual deed conveying title to 166 Frowein LLC, but the Suffolk County Clerk's Records Office Recording Page provides that the deed amount was \$2000.00 which would indicate that 166 Frowein LLC "purchased" the mortgaged premises then in foreclosure from the mortgagors for the sum of \$2000.00 and have since utilized the premises for profit. Non-party LJ Equities claims that it is the present title owner of the mortgaged

premises since it was formerly known as 166 Frowein LLC. Counsel for LJ Equities filed a notice of appearance dated May 31, 2012 on behalf of LJ Equities indicating that counsel had been retained and demanding all papers be served on counsel.

As reflected in the submission of the pending motions by both parties, the procedural history of this action became a subject of confusion among and between the parties and the court. As a result this Court requisitioned the County Clerk's file and has thoroughly reviewed the paper file as well as computer records maintained in the court's case management system. Computer records indicate that on April 7, 2015 plaintiff submitted a motion made returnable April 29, 2015 (#003) seeking an order vacating Acting Justice Gazzillo's original October 29, 2009 Order and granting a second order of reference. Although case management (computer) records indicate that this motion (#003) was submitted without opposition on Acting Justice Gazzillo's motion calendar on July 2, 2015 and was granted by long form Order (Gazzillo, J.) dated December 7, 2015, in the computerized "comments" section there is a notation that the non-party intervenor submitted opposition to the motion on June 19, 2015. The County Clerk file contains a signed Order of Reference dated December 7, 2015 appointing a referee to compute the sums due and owing to the plaintiff. Neither party alludes to this Order of Reference and it appears that this Order was never disseminated from the court file since the referee who was appointed in this Order is not the referee who computed the sums due and owing to the plaintiff which is the subject of this motion.

With respect to the non-party intervenor's cross motion seeking leave to intervene (#004), computerized records maintained by the Clerk reflect that this motion was originally returnable on June 25, 2015. The motion tab setting forth information related to this motion indicates only receipt of the plaintiff's opposition to this motion. However the case management computerized "comments" section shows that the cross motion was received by the Clerk on June 19, 2015 and submitted on July 2, 2015. The County Clerk file contains a copy of a short form Order (Gazzillo, J.) dated September 30, 2015 referencing motions sequenced #003 & #004 (with an RRH notation indicating these motions were referred for a hearing) directing the parties and counsel to appear for a conference on November 18, 2015 at 2:30 p.m. The computer records confirm that a conference was held on that date at 2:30 p.m.. By short form Order (Gazzillo, J.) dated January 15, 2016, motion (#004) was denied. A copy of that short form Order is contained in the County Clerk file and reads as follows:

"ORDERED that this application is denied in its entirety (*see* NYCRR Sect. 202.5; *see also Macias v. City of Yonkers*, 65 AD3d 1298, 885 NYS2d 613 (2nd Dept., 2009)), without prejudice, for the following reasons:

Attorneys were to forward a bound copy of motion papers pursuant to a conference held November 18, 2015, by November 26, 2015. No copy was received by chambers, thereby leaving the court with no other alternative but to reject this motion."

The next record of case activity shows that plaintiff submitted another motion (#005) returnable May 6, 2016 seeking an order vacating Acting Justice Gazzillo's October 29, 2009 Order of Reference and granting a second order of reference. Computer records indicate the motion was fully submitted without opposition on May 19, 2016 and was granted by Order (Gazzillo, J.) dated June 27, 2016. This motion was unopposed and the referee appointed submitted the report plaintiff now seeks to confirm. Paragraph 25 of the attorney's affirmation in support of the motion states: "A

previous application has been made for the relief requested in the annexed Order, but was denied due to Plaintiff's failure to provide a bound copy of motion papers pursuant to a conference held November 18, 2015." The affidavit of service attached to the motion papers indicates that the non-party LJ Equities' counsel was served with the motion papers at his Lindenhurst address.

Plaintiff's motion seeks an order confirming the referee's report and granting a judgment of foreclosure and sale. The non-party's cross motion seeks an order vacating Acting Justice Gazzillo's prior Orders dated January 15, 2016 and June 27, 2016. The non-party claims that the January 15, 2016 Order must be vacated since it was issued in error. The non-party claims that the Order was intended to deny plaintiff's motion seeking an order of reference (#003) since it was plaintiff's counsel who had been warned to file a bound copy of motion papers after the November 18, 2015 conference. The non-party argues that once that order is vacated, this Court should grant LJ Equities motion to intervene in this action since LJ Equities owns the premises and has a meritorious lack of standing defense to plaintiff's foreclosure action. The non-party also claims that the June 27, 2016 Order granting a default judgment must be vacated since counsel was never served with the original motion papers.

Based upon this record it is clear that non-party counsel's position that the cross motion seeking leave to intervene in this action was mistakenly denied by Acting Justice Gazzillo's January 15, 2016 Order is accurate, particularly since plaintiff's counsel's affirmation (recited above at paragraph 25) concedes that, in fact, the January 15, 2016 Order was intended to deny plaintiff's application based upon plaintiff's counsel's failure to submit bound copy of motion papers. Under the circumstances, LJ Equities' motion with respect to the January 15, 2016 Order must be deemed a motion to renew plaintiff's prior motion (#003) and its prior cross motion (#004) based upon the undisputed facts now presented in these applications. CPLR 2221(e) provides the procedural mechanism to consider the non-party's application as one, in part, for renewal since the prior determination was clearly rendered in error with respect to the motion sequence of both motions. Unlike a motion to re-argue a motion to renew has no time limitation and clearly the non-party has provided a reasonable justification for its renewal motion. Accordingly this Court hereby vacates the prior Order (Gazzillo, J.) dated December 7, 2015 granting plaintiff's motion (#003) and vacates the prior Order (Gazzillo, J.) dated January 15, 2016 and grants the non-party leave to renew its motion seeking leave to intervene in this action.

Upon such renewal and consideration of the motion seeking leave to intervene de novo, this Court denies the proposed intervenor's motion in its entirety. The test to determine whether in a particular proceeding intervention should be granted is whether the proposed intervenor has a real and substantial interest in the outcome of the proceeding (*see Wapnick v. Wapnick*, 295 AD2d 422, 743 NYS2d 318 (2nd Dept., 2002); *Plantech Housing Inc. v. Conlon*, 74 AD2d 920, 426 NYS2d 81 (2nd Dept., 1980) *appeal dismissed* 51 NY2d 862, 433 NYS2d 1018(1980)). CPLR 1013 provides that any person may be permitted to intervene by a timely motion; "when the person's claim or defense and the main action have a common question of law or fact. 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."

In this case, LJ Equities claims to have taken title to the mortgaged premises on October 11, 2011 with full knowledge of the underlying foreclosure proceeding and the mortgage encumbering the premises based upon the plaintiff's filing of the notice of pendency on April 14, 2009. Such

filing is constructive notice to any person who purchases or obtains title from any defendant named in the notice and as a result LJ Equities is not a necessary party to this action (RPAPL 1353(3); *see Polish National Alliance of Brooklyn, U.S.A. v. White Eagle Company, Inc.*, 98 AD2d 400, 470 NYS2d 642 (2nd Dept., 1983)). Nor has the proposed non-party intervenor provided any reasonable justification for permitting it to intervene as a named party defendant since there has been no showing that it has any meritorious defense to the underlying foreclosure action.

Moreover, even were this Court to overlook LJ Equities lack of a real interest in the outcome of this foreclosure proceeding, the record shows that its counsel served a notice of appearance dated May 31, 2012. A notice of appearance confers jurisdiction and constitutes an appearance (CPLR 320) and therefore LJ Equities application to now serve a late answer must be accompanied by the submission of a reasonable excuse for the delay in seeking to serve an answer. Counsel for LJ Equities provides no explanation in his original motion papers (which are dated June 16, 2015 more than three years after counsel filed the notice of appearance) seeking leave to intervene in this action for this prolonged delay and clearly LJ Equities' application is untimely absent some reasonable excuse for the delay. Given the criteria for granting leave to intervene under the terms of the statute (CPLR 1013) and in the exercise of its discretion, defendant's application clearly would result in undue delay thereby prejudicing the substantial rights of the mortgage lender to finally foreclose the mortgage particularly given the fact that more than 9 years has passed since there have been any payments made under terms of the underlying mortgage agreement.

Additionally, even were this Court to consider the lack of standing defense asserted by the non-party, such a defense has clearly been waived since it can only be asserted in a timely answer (*see HSBC Bank USA, N.A. v. Angeles*, 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage, LLC v. Avella*, 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016)) and based upon the evidence submitted by the plaintiff, the record contains sufficient evidence to establish plaintiff's standing to maintain this foreclosure action (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Wells Fargo Bank v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept. 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)).

With respect to defendant's claim that the prior Order (Gazzillo, J.) dated June 27, 2016 granting plaintiff's motion for a second Order of Reference should be vacated, no legal basis exists to vacate the order. Plaintiff has submitted sufficient proof in the form of an affidavit of service to show that defense counsel was timely served with a copy of the motion papers seeking a default judgment and for a second order of reference at the Lindenhurst law office address provided in counsel's notice of appearance.

Finally, with respect to plaintiff's motion for an order confirming the referee's report, amending the caption and for a judgment of foreclosure and sale, plaintiff has submitted sufficient evidence in support of its motion to confirm the referee's report, to discontinue the action against defendant Joyce L. Oatkin and to justify granting a judgment of foreclosure and sale. Accordingly plaintiff's motion must be granted in its entirety. The proposed judgment of foreclosure and sale has been signed simultaneously with execution of this order.

HON. HOWARD H. HECKMAN, JR.

J.S.C.

Dated: February 7, 2018