

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket No. BCD-WB-RE-08-35

DAVID BORDETSKY,

Plaintiff

v.

ORDER ON DEFENDANT'S  
MOTION FOR JOINDER

PAUL NIXON,

Defendant

Before the Court is Defendant Paul Nixon's Motion to Join Necessary Parties pursuant to M.R. Civ. P. 19.

#### BACKGROUND

Plaintiff has filed a foreclosure action against Defendant. At issue is a Promissory Note given by Defendant to Plaintiff (the "Note") and a mortgage on property owned by Defendant securing the Note.

Plaintiff has filed a Motion for Summary Judgment on his Complaint. That motion is currently pending. In opposition to Plaintiff's Motion for Summary Judgment and in support of the instant Motion to Join, Defendant has argued, among other things, that Plaintiff has assigned his interest in the Mortgage and the Note and is therefore not a proper party in interest.

There is no dispute that Plaintiff executed five distinct assignments relating to the Mortgage and the Note. Under each of the Assignments, Plaintiff

assigned a percentage of his interest in the Note and Mortgage to each of the respective assignees. *See* Exh. to Def.'s Opp.<sup>1</sup>

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<sup>1</sup> The Assignments, which are nearly identical, read in relevant part:

NOTICE TO ASSIGNEE: The mortgage referred to herein is subject to special rules under the Maine Consumer Credit Code. Purchasers or assignees of the mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.

WHEREAS, DAVID BORDETSKY . . . (hereinafter referred to as ASSIGNOR) is indebted to [Assignee] . . . as evidenced by a promissory note in the amount of \$50,000 (hereinafter referred to as the OBLIGATION) and

WHEREAS, ASSIGNOR is the holder of a mortgage note secured by a mortgage on real estate located in Livermore, Androscoggin County, State of Maine . . . said note and mortgage given by Paul R. Nixon . . .

WHEREAS, ASSIGNOR wishes to assign [an] . . . interest in the NOTE AND MORTGAGE to ASSIGNEE for the purpose of securing the OBLIGATION,

NOW THEREFORE, the parties in consideration of the foregoing and other good and valuable consideration, hereby mutually covenant and agree as follows:

FOR VALUE, ASSIGNOR hereby assigns to ASSIGNEE [an interest] . . . in the NOTE AND MORTGAGE. ASSIGNOR intends hereby to sell, assign, transfer, and set over [an interest] in the said mortgage described above and the note, debt, and claims thereby secured, and all interest by virtue of said mortgage in and to the real estate therein respectively described.

TO HAVE AND TO HOLD the same unto the ASSIGNEE and to the successors, legal representatives and assigns of the ASSIGNEE forever.

#### FORECLOSURE

Notwithstanding ASSIGNEE'S interest in the NOTE AND MORTGAGE as security, ASSIGNOR shall, in his sole discretion, have the right at any time to exercise all of the rights of a holder of a mortgage note and deed, including but not limited to foreclosure. In the event of foreclosure of the MORTGAGE, ASSIGNOR, notwithstanding any provision contained herein to the contrary, shall be entitled to all of the usual rights of a foreclosing party, including the right to purchase at foreclosure sale. ASSIGNOR, in his sole discretion, shall determine procedure for foreclosure, including but not limited to acceptable selling price at foreclosure sale, but in no event less than the amount secured by this assignment.

*Id.*

For the purposes of the motion to join, Defendant contends that the assignment, and the assignees' respective interests in the Mortgage and the Note make them indispensable parties to this suit, requiring joinder. According to Defendant, because the assignees may have the right to sue him to enforce their rights in the Note and mortgage and because Defendant has a right to bring his defenses and counterclaims regarding the enforceability or legality of the mortgage against the assignees as well as against Plaintiff, joinder is appropriate.

In opposition to joinder, Plaintiff argues that the assignment was given as collateral for a debt and, as a result, the assignees are not owners of the Note and Mortgage merely by reason of the Assignments. Instead, the assignees can only become owners after default by Plaintiff. Because the assignees would have to take additional action after any default by Plaintiff to become owners of the Note and Mortgage, Plaintiff argues that they are not joint obligees whose involvement is necessary to this action. He further suggests that although Defendant may potentially assert various consumer protection claims and defenses against the assignees, joinder is not necessary because Defendant has not sufficiently proved his claims and defenses. Pl.'s Opp. at 5-6.

#### DISCUSSION

In this case, the parties have focused their arguments almost entirely on whether joinder is permissible or necessary under M.R. Civ. P. 19 in order to protect their respective rights and interests.<sup>2</sup> Neither has addressed the interests of the Assignees or

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<sup>2</sup> M.R. Civ. P. 19 provides, in relevant part that "(a) Persons to Be Joined if Feasible. A person who is subject to service of process *shall* be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to

the necessity of their joinder under Rule 19(a)(2)(i). In the court's view, joinder is undeniably necessary in this case both in order to protect the rights and interests of the current parties but also to protect the interests of the Assignees.

The advisory notes to Rule 19 explain, "subdivision (a) defines the persons whose joinder in the action is desirable." Alexander, *The Maine Rules of Civil Procedure with Advisory Committee Notes and Commentary* § 19 (2008). While "Clause (1) looks to the joinder of all persons whose absence will make impossible complete relief to those already parties[,] Clause (2) recognizes the importance of protecting an absentee . . . ." *Id.* As such, Rule 19(a) requires "the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute." *Centamore v. Commissioner, Dep't of Human Servs.*, 634 A.2d 950, 951 (Me. 1993) (quoting *Efstathiou v. Payeur*, 456 A.2d 891, 893 (Me. 1983)).

The parties do not dispute that Plaintiff assigned his interest in the Note and Mortgage or that those assignments were given in order to secure his own obligations to the assignees. There is therefore no dispute that the assignees possess a security interest in the Note and Mortgage. In light of the fact that the validity, enforceability and scope of the Note and Mortgage are at issue in the underlying foreclosure action, the assignees' interests are directly implicated. Should Defendant prevail in any number of his defenses or affirmative claims, there is a possibility that the Note and Mortgage may be rendered void, unenforceable or that their value may be reduced thus leaving the assignees unsecured or undersecured. Further, Defendant argues that the assignees may become

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protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

subject to claims and defenses with respect to the Mortgage that Defendant might otherwise assert against Plaintiff. As such, there is a possibility that the assignees will be directly implicated in this case such that their involvement is necessary – both to protect their interests and to protect Defendant’s ability to put on his case.

Contrary to Plaintiff’s assertions, it is not necessary for Defendant to prove the merits of his claims or defenses in order to compel joinder. Instead, he must simply demonstrate that the assignees have an interest in the subject of the dispute and that their involvement is necessary “so that any relief that *may* be awarded will effectively and completely adjudicate the dispute.” *Centamore*, 634 A.2d at 951 (citations omitted) (emphasis added).

Additionally, although Plaintiff has argued that the language of the Assignments precludes joinder, the court disagrees. As outlined above, the provision within the Assignments related to foreclosure gives Plaintiff sole *discretion* as to whether he will exercise the rights of a holder of a mortgage by initiating foreclosure and what the process for any foreclosure will be. The Assignments do not, however, purport to exclude the assignees from participation once foreclosure proceedings have been initiated nor do they foreclose the assignees’ ability to defend themselves or their own interests in the face of claims asserted against them by the mortgagor.

In light of the foregoing and in the absence of any evidence that service may not be made on the assignees, Defendant’s motion for joinder should be granted.

Because the assignees may be joined in this action, the court concludes that Plaintiff will not be prejudiced by the granting of Defendant's motion to amend his Answer and Counterclaim. *See* M.R. Civ. P. 13(h).<sup>3</sup>

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

Defendant's motion to amend his answer and counterclaim is GRANTED, and Defendant shall have 10 days from the date of this order within which to file such amendments; and

Defendant's Motion to Join Necessary Parties is GRANTED, and Defendant shall have 21 days from the date of this order within which to join each of the assignees as a party to Defendant's counterclaims.

Dated: December 19, 2008



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Justice, Superior Court

Docket Entry: 12/23/08

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<sup>3</sup> Maine's Rule is comparable to federal "[r]ule 13(h)[, which] defers to Rules 19 and 20 the process of joining parties whose presence may be required for the granting of complete relief in the determination of a counterclaim or crossclaim, if jurisdiction of the parties can be obtained and their joinder will not deprive the court of jurisdiction over the action." Moore's Federal Practice – Civil, Vol. 3, c. 13 § 13.112.