STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-12-119
TDR Cum - 10/23/2012

BANK OF NEW YORK MELLON,

Plaintiff

v.

ORDER

ALICE MELLIN, et al,

Defendants

Before the court is a motion by defendant Melco LLC to dismiss the complaint on res judicata grounds.

This is the third skirmish between BNY and the defendants relating to a foreclosure action brought by Alice Mellin and Melco against certain property in Yarmouth on which BNY also held a mortgage. Mellin v. Coyne, RE-10-22 (Superior Ct. Cumberland, judgment of foreclosure entered November 23, 2010). The background of the previous two skirmishes is set forth in this court's March 2012 decision in a prior action between the parties, Bank of New York Mellon v. Mellin, et al, RE-11-421 (Superior Ct. Cumberland) and will not be repeated here.

The issue in this case is whether, having defaulted when named as a party-in-interest in the foreclosure action brought by Melco and Alice Mellin, BNY may now bring a separate action to challenge alleged deficiencies in the manner in which the foreclosure sale was conducted. At that sale Alice Mellin, one of the parties who had

brought the foreclosure action, purchased the Yarmouth property for approximately $98,000.[1]

A logical argument can be made that BNY's default should preclude BNY from challenging any deficiencies in the sale as well as challenging the foreclosure itself. However, in a relatively recent case a defendant who had appeared in a foreclosure action and had not prevailed then filed a Rule 60(b) motion and two separate actions challenging aspects of the foreclosure. Keybank N.A. v. Sargent, 2000 ME 153, 758 A.2d 528. Sargent's Rule 60(b) motion was denied on the ground that the arguments presented in her Rule 60(b) motion could have been raised in the original action. That denial was affirmed by the Law Court. 2000 ME 153 ¶ 15. One of the separate actions she had filed after the foreclosure was dismissed because the trial court ruled that the claims raised were claims that would have been compulsory counterclaims in the foreclosure action and were therefore barred. That dismissal was also affirmed by the Law Court. 2000 ME 153 ¶ 25.

However, both the trial court and the Law Court considered the third separate action filed by Sargent – an action challenging deficiencies in the public sale held after the judgment of foreclosure – on the merits. 2000 ME 153 ¶¶ 7, 34-39. In that connection the court held that a foreclosure proceeding and a subsequent public sale did not constitute a "unified action" for purposes of determining whether errors in the public sale would vitiate the entire foreclosure action. 2000 ME 153 ¶ 37.

Given that Sargent's challenge to alleged deficiencies in the foreclosure sale was considered on the merits and given the Law Court's decision in Sargent that the

[1] This court can take judicial notice of its own records. See, e.g., Currier v. Cyr, 570 A.2d 1205, 1207-08 (Me. 1990); Warren v. Waterville Urban Renewal Authority, 290 A.2d 362, 367 (Me. 1972). In considering Melco's res judicata argument, it has considered the court file in Mellin v. Coyne, RE-10-22, and the court file in the prior action between the parties, RE-11-421.

foreclosure judgment and the ensuing public sale were not part of a unified action, the court concludes that BNY's challenge to the public sale in this case is not foreclosed by res judicata.

The entry shall be:

Defendant Melco LLC's motion to dismiss is denied. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: October 22, 2012

Thomas D. Warren
Justice, Superior Court

THE BANK OF NEW YORK MELLON VS ALICE MELLIN ET AL
UTN:AOCSsr -2012-0035984 CASE #:PORSC-RE-2012-00119

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