

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32828  
O/kmb

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Submitted - October 18, 2011

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

2010-06781

DECISION & ORDER

Joel Holubar, et al., appellants, v Michelle Holubar,  
respondent, et al., defendant.

(Index No. 2095/09)

Joel Holubar and Mariana Holubar, Setauket, N.Y., appellants pro se.

In an action for a judgment declaring, inter alia, that a certain security agreement is a mortgage, the plaintiffs appeal from an order of the Supreme Court, Putnam County (Nicolai, J.), dated April 14, 2010, which granted the cross motion of the defendant Michelle Holubar, among other things, pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against her.

ORDERED that the order is reversed, on the law, with costs, and the cross motion of the defendant Michelle Holubar to dismiss the complaint insofar as asserted against her is denied.

The defendant Michelle Holubar (hereinafter the defendant) was in default for failing to timely answer the complaint or appear in this action. Thus, the defendant's cross motion to dismiss the complaint insofar as asserted against her was untimely (*see* CPLR 308[2], 320[a]) and should not have been considered. To avoid the entry of a default judgment against her, the defendant was required to provide both a potentially meritorious defense and a reasonable excuse for her delay in answering or appearing (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141; *McGee v Dunn*, 75 AD3d 624, 625; *DeStaso v Bottiglieri*, 52 AD3d 453, 454). The defendant did not request an extension of time to answer or appear (*see* CPLR 2004). In granting the defendant's untimely motion to dismiss the complaint insofar as asserted against her, the Supreme Court improperly, in effect, excused the defendant's default in the absence of a request for such relief (*see McGee v Dunn*, 75 AD3d at 625; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522; *see also May v Hartsdale Manor Owners Corp.*, 73 AD3d 713; *Mastroianni v Rallye Glen Cove, LLC*,

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59 AD3d 686, 687). Accordingly, the Supreme Court erred in granting the defendant's cross motion to dismiss the complaint insofar as asserted against her.

To the extent the plaintiffs raise arguments on appeal regarding their motion for summary judgment, that motion was not addressed by the Supreme Court and, thus, remains pending and undecided (*see Katz v Katz*, 68 AD2d 536, 542-543).

RIVERA, J.P., ENG, BELEN and AUSTIN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court