

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

D33920
C/kmb

_____AD3d_____

Argued - January 20, 2012

WILLIAM F. MASTRO, A.P.J.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
JEFFREY A. COHEN, JJ.

2010-09133

DECISION & ORDER

Tribeca Lending Corporation, appellant, v Rosemary
Correa, respondent, et al., defendants.

(Index No. 102011/07)

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, N.Y. (Sara Z. Boriskin and Jonathan M. Cohen of counsel), for appellant.

Law Offices of Robert E. Brown, P.C., New York, N.Y. (Nicholas M. Moccia of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Richmond County (Maltese, J.), dated August 3, 2010, as granted those branches of the motion of the defendant Rosemary Correa which were, in effect, pursuant to CPLR 5015(a)(1) to vacate a judgment of foreclosure and sale of the same court dated January 22, 2008, entered upon her default in appearing or answering the complaint, to estop the referee from transferring title to certain real property, and for leave to file and serve an answer with counterclaims.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and those branches of the motion of the defendant Rosemary Correa which were, in effect, pursuant to CPLR 5015(a)(1) to vacate the judgment of foreclosure and sale, to estop the referee from transferring title to certain real property, and for leave to file and serve an answer with counterclaims are denied.

In order to prevail on that branch of her motion which was, in effect, to vacate the judgment of foreclosure and sale entered upon her default in appearing or answering the complaint,

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the defendant Rosemary Correa was required to demonstrate both a reasonable excuse for her default and the existence of a potentially meritorious defense to the action (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141; *see Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922, 923-924; *Cohen v Romanoff*, 83 AD3d 989). Correa failed to proffer any explanation for her default (*see Maida v Lessing's Rest. Servs., Inc.*, 80 AD3d 732; *Alterbaum v Shubert Org., Inc.*, 80 AD3d 635; *Abdul v Hirschfield*, 71 AD3d 707), and the Supreme Court improvidently exercised its discretion in finding that her explanation for delaying in making the motion was sufficient to constitute a reasonable excuse for her default in appearing or answering the complaint in the first instance (*see Bank of Am. v Faracco*, 89 AD3d 879, 879-880). In view of the lack of a reasonable excuse, it is unnecessary to consider whether Correa sufficiently demonstrated the existence of a potentially meritorious defense to the action (*see Maida v Lessing's Rest. Servs., Inc.*, 80 AD3d at 733; *Abdul v Hirschfield*, 71 AD3d 707).

Accordingly, those branches of Correa's motion which were to vacate the judgment of foreclosure and sale, to estop the referee from transferring title of the subject real property, and for leave to file and serve an answer with counterclaims should have been denied.

MASTRO, A.P.J., ANGIOLILLO, ENG and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court