

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

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DEUTSCHE BANK NATIONAL TRUST		Number <u>11069</u> 2006
COMPANY, etc., et al.		
		Motion
- against -		Date <u>March 25,</u> 2007
		Motion
MARIO INIGUEZ, et al.		Cal. Number <u>10</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 14 read on this motion by defendant Mario Iniguez to vacate and set aside the default judgment entered against him, to stay the foreclosure sale and for leave to serve an answer as proposed.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-10
Sur Reply and Sur Sur Reply.....	11-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Deutsche Bank National Trust Company, as trustee of Ameriquest Mortgage Securities Inc. asset backed, pass through certificates, series 2005-R5 under the pooling and servicing agreement dated as of June 1, 2005, without recourse, commenced this action seeking foreclosure of a mortgage executed, acknowledged and delivered to Ameriquest Mortgage Company (Ameriquest) by defendant Mario Iniguez on the property known as 83-03 31st Avenue, Queens, New York to secure a note evidencing a loan, in the principal amount of \$700,000.00, plus interest. Plaintiff alleged that it was the holder of the mortgage pursuant to an assignment, defendant Mario Iniguez defaulted under the mortgage by failing to pay the monthly mortgage installment payment due on January 1, 2006, and it elected to accelerate the mortgage

debt and declare all sums secured by the mortgage to be due and payable.

Defendant Mario Iniguez makes no claim of lack of personal jurisdiction, and it appears from the affidavit of service, that proper service was made upon him pursuant to CPLR 308(2) (see Skyline Agency, Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]). According to the affidavit of service, service of process upon defendant Mario Iniguez by delivery of a copy of the summons and complaint upon Joanna Iniguez, on May 20, 2006 at 7:30 P.M. at the subject premises, as the dwelling place or usual place of abode of Mario Iniguez, and a mailing on May 22, 2006 of a copy of the summons and complaint to defendant Mario Iniguez at the same address. The affidavit of service was filed with the County Clerk on May 22, 2006, and therefore, defendant Mario Iniguez had 30 days thereafter in which to serve an notice of appearance, an answer or move with respect to the complaint (see CPLR 320[a], 308[2], 3012[a], 3211[e]). Defendant Iniguez had not moved in relation to the complaint, and was in default in answering (see e.g. Arroyo v Feggoudakis, 21 AD3d 975 [2005]; I.J. Handa, P.C. v Imperato, 159 AD2d 484 [1990]), when on June 23, 2006, the law firm of Michael N. Durante, P.C., served, on behalf of defendant Mario Iniguez, a notice of appearance by mail on plaintiff's counsel, specifically demanding that service of all papers in the action be made upon that attorney (CPLR 320[a]).¹

On October 4, 2006, plaintiff entered a judgment of foreclosure and sale dated September 15, 2006, in the amount of \$734,898.23, plus interest, against defendant Mario Iniguez upon his default in answering the complaint. Plaintiff served a notice of entry of the judgment upon defendant Mario Iniguez on October 13, 2006, and the foreclosure sale was scheduled for November 17, 2006. Defendant Mario Iniguez filed a voluntary petition in bankruptcy on November 16, 2006, thereby invoking the automatic stay of all proceedings against him (11 USC § 362[a]). Defendant Mario Iniguez entered into an amended Chapter 13 bankruptcy plan, dated March 2, 2007, to repay his mortgage arrears. Under the amended plan, defendant Mario Iniguez was required to make payments on the arrears to the bankruptcy trustee, and make current payments to plaintiff outside the plan. The amended plan provided that upon defendant Mario Iniguez's satisfaction of the mortgage arrears, the default under the

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Plaintiff's counsel erroneously asserts that defendant Mario Iniguez's time to answer expired on July 1, 2006. The deadline for service of Iniguez's answer was June 21, 2006.

mortgage would be cured, and the subject mortgage would be reinstated with its original terms. The amended plan was confirmed on March 21, 2007.

Plaintiff subsequently moved for relief from the automatic stay, apparently on the basis that defendant Mario Iniguez had failed to make post-petition payments, which motion was granted by the bankruptcy court on September 19, 2007.

A foreclosure sale was then scheduled for October 26, 2007, and defendant Mario Iniguez was served, by mail on October 1, 2007, with a copy of the notice of sale.

Defendant Mario Iniguez obtained this order to show cause on October 23, 2007, seeking to stay the foreclosure sale and vacate the judgment of foreclosure, and for leave to serve an answer as proposed. The order to show cause provided that the sale could proceed, but stayed the delivery of the referee's deed and the transfer of title. In support of the order to show cause, defendant Mario Iniguez asserted that plaintiff lacked standing to bring the action, and that the underlying mortgage loan is the result of fraudulent and negligent misrepresentations, and predatory lending practices.

At the sale held on October 26, 2007, prior to the return date of the order to show cause, plaintiff was the sole bidder, and successful purchaser, having bid the amount of \$633,789.00.

To the extent defendant Mario Iniguez relies upon CPLR 317 to vacate the judgment of foreclosure and sale, under that section, a person served with a summons other than by personal delivery to him (or his designated agent), who does not appear, may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. Defendant Mario Iniguez, who appeared by the service of the notice of appearance (CPLR 320), makes no claim that the appearance of the attorney on his behalf was unauthorized (cf. National Loan Investors, L.P. v Piscitello, 21 AD3d 537 [2005]; New Island Investors v Wynne, 251 AD2d 560 [1998]). As a consequence, defendant Mario Iniguez may not rely upon CPLR 317 to vacate his default in answering.

To the extent defendant Mario Iniguez relies upon CPLR 5015(a)(1), that provision allows a defendant to open an excusable default within a year after "service of a copy of the judgment or order with written notice of its entry upon the moving

party." CPLR 5015(a)(1) starts its year from "service" of the notice of entry.

In this instance, defendant Mario Iniguez served the order to show cause upon plaintiff's counsel by overnight delivery/federal express on October 24, 2007, one year and eleven days after the service of the copy of the notice of entry of the judgment of foreclosure and sale upon Mario Iniguez. Although the one-year limitation period set forth in CPLR 5015(a)(1) is not necessarily a statute of limitations, the court is unconvinced that it would be in the furtherance of justice to exercise its discretion, and extend the time period in this case (see Levine v Berlin, 46 AD2d 902, 903 [1974]; cf. State v Kama, 267 AD2d 225 [1999]).

Here, defendant Mario Iniguez asserts that he is a native Spanish speaker, who has limited proficiency in spoken and written English, and that he entered into the loan without understanding the mortgage documents (written in English) and in reliance upon misrepresentations made by a Spanish-speaking representative of Ameriquest. According to defendant Mario Iniguez, he had sought to obtain a home-equity loan with a fixed rate of interest, but unknowingly and unintentionally entered into a refinancing transaction, predicated upon a subprime, adjustable rate mortgage (ARM) loan. The subject mortgage called for an initial interest rate at 8.7% per annum, and provided that on April 1, 2007, and every six months thereafter, the interest rate would change on a "change date" based upon an index that was "the average of interbank offered rates for the six-month U.S. dollar-denominated deposits in the London market ... as published in the Wall Street Journal." Defendant Mario Iniguez asserts that he made on-time payments pursuant to the bankruptcy plan until April 2007, when the post-petition payment amount due under the ARM mortgage loan, increased by virtue of the increased rate of interest predicated upon the index amount.

Defendant Mario Iniguez claims that he defaulted in answering because he was advised that he was not required to submit an answer, by virtue of his filing the bankruptcy petition.

"The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (see Parker v City of New York, 272 AD2d 310 [2000])" (Gambardella v Ortov, Lighting, Inc., 278 AD2d 494 [2000]). To the extent defendant Mario Iniguez relied upon advice when not submitting an answer, he fails to identify who provided him with such advice. Defendant Mario Iniguez's counsel states in his affirmation dated February 18, 2007 (submitted in "Sur-sur reply") that the advice was given by Mr. Durante, who was representing Iniguez in "an

unrelated Bankruptcy action." Counsel, however, lacks personal knowledge of the facts. Furthermore, neither defendant Iniguez nor his present counsel states when defendant Iniguez received the advice. The court must conclude that either defendant Mario Iniguez first received the advice following the expiration of the statutory time period in which he had to serve his answer, and therefore, has no reasonable excuse for failing to do so, or received the advice during the relevant time period, but intentionally defaulted, insofar as he did not file his bankruptcy petition until almost five months after the date by which service of his answer became due. Defendant Mario Iniguez, therefore, has failed to offer a reasonable excuse for his default in answering the complaint in this action.

In addition, although it appears that defendant Mario Iniguez was not given proper notice of the motion by plaintiff to obtain the default judgment (see CPLR 2103; Home Savs. Bank v Chiola, 203 AD2d 525 [1994]), defendant Mario Iniguez does not object herein to such failure, and in any event, he makes no showing that such omission prejudiced him (see 36 North Water, Inc. v Mark Caliper, Inc., 295 AD2d 499 [2002]). Again, defendant Mario Iniguez was served with a copy of the notice of entry of the judgment of foreclosure and sale. At that time, defendant Mario Iniguez did not take any steps to vacate the judgment after becoming aware of its entry (see e.g. Home Savs. Bank v Chiola, 203 AD2d 525 [1994], supra), but rather, filed a petition in bankruptcy. He makes no claim that he was unaware of the subsequent lifting of the bankruptcy stay or the rescheduling of the sale. Instead, he awaited until the eve of the rescheduled sale to seek the instant order to show cause. Under such circumstances, the issue of whether defendant Mario Iniguez has an arguable meritorious defense need not be addressed by this court.

Defendant Mario Iniguez also may not obtain relief from the effect of his default pursuant to CPLR 5015(a)(3). He has failed to establish that the judgment was procured by intrinsic or extrinsic fraud (see generally Shaw v Shaw, 97 AD2d 403 [1983]), misrepresentation, or other misconduct (CPLR 5015[a][3]).

The motion is denied.

Dated: August 18, 2008

AUGUSTUS C. AGATE, J.S.C.