

<b>WM Specialty Mtge., LLC v Lerner</b>
2005 NY Slip Op 30633(U)
August 19, 2005
Supreme Court, New York County
Docket Number: 114305/04
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

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WM SPECIALTY MORTGAGE, LLC  
c/o Option One Mortgage Corporation,  
3 Ada, Irvine, CA 96218,

Index No. 114305/04

Plaintiff,

- against -

RITA LERNER, EMIGRANT MORTGAGE COMPANY,  
INC., NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU, THE BOARD OF MANAGERS OF ASTOR  
TERRACE CONDOMINIUM and VICTORIA SHKRELI,

Defendants.

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Herman Cahn, J.

Defendant Rita Lerner moves to vacate a default judgment of foreclosure and sale,  
dated May 3, 2005, CPLR 5015.

In 2000, Lerner purchased condominium unit 18 F at 245 East 93<sup>rd</sup> Street, in  
Manhattan. On December 19, 2001, she signed and delivered an adjustable rate note and  
mortgage on the unit, to Option One Mortgage Corporation, in the face amount of \$285,000.00.  
By assignment dated May 8, 2003, Option One assigned the note and mortgage to plaintiff.

Lerner defaulted on her payment obligations under the note and mortgage,  
commencing June 1, 2004, and continuing thereafter. Plaintiff commenced this foreclosure  
action in October 2004. Lerner does not deny service of the summons and complaint, or any  
other papers in this action.

Rather than submitting her own affidavit, Lerner submits the affidavit of her  
daughter, Lynn D. Salvage, who attests to her awareness of Lerner's financial affairs (Salvage

Aff. [6/18/05] ¶¶ 1-4). She openly acknowledges that the mortgage was in default at the time the action was commenced (Salvage Aff. [7/26/05] ¶ 9).

Lerner submits an unsigned letter, purporting to be from her counsel, confirming a December 1, 2004, extension for Lerner's time to answer the complaint (Salvage Aff. [6/18/05] Ex. D). Despite the extension, no answer was ever served.

The court granted plaintiff's motion for judgment of foreclosure and sale, on default, on May 3, 2005.

Lerner's daughter, Salvage, makes assertions about post-judgment efforts by her to negotiate down the amount of the indebtedness, as accelerated by plaintiff pursuant to the note and mortgage (Salvage Aff. [7/26/05] ¶¶ 5-9). She attaches a copy of a letter from plaintiff's counsel, dated July 6, 2005, detailing the amounts necessary to reinstate the loan, totaling \$46,357.29, including late charges, disbursements, and attorneys' fees (*id.*, Ex. A).<sup>1</sup> The letter expressly reserves plaintiff's right to proceed with the foreclosure. The amounts were not paid. Salvage asserts that the overdue payment component, listed at \$32,522.68, is inaccurate, and should be \$26,000.00 (*id.*, ¶ 7). However, neither amount has been paid, and Salvage "admit[s]" that the loan was in default at the time of commencement of this foreclosure action (*id.*, ¶ 9). Lerner submits no affidavit of her own in support of her instant motion to vacate the judgment of foreclosure and sale.

The foreclosure sale was stayed by this court on July 7, 2005, pending the within disposition.

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<sup>1</sup> Section 7 of the note expressly provides for late charges; acceleration of the debt; and reimbursement for costs incurred by the lender as a result of default, including reasonable attorneys' fees.

A motion to vacate a default judgment can only be granted if the movant establishes that the default was excusable, and that a meritorious defense exists (CPLR 5015 (a) [1]; *In re Starasia C.*, 18 AD3d 213 [1<sup>st</sup> Dept 2005]).

Lerner has not demonstrated a reasonable excuse for her default. Even if the court were to credit Salvage's assertion that an extension to answer the complaint was granted until December 1, 2004, no answer was ever served, at all, and no explanation is given as to the reason therefor, irrespective of Salvage's bald assertion that plaintiff's figures are inaccurate. Plaintiff's counsel affirms that no extension was granted beyond December 1, 2004 (Steward Aff. ¶ 15). Lerner submits no evidence to the contrary.

Lerner has not demonstrated a meritorious defense to the underlying foreclosure action. Plaintiff submits its default letter dated July 6, 2004, setting forth amounts due (Steward Aff. ¶ 21, Ex. A). Lerner paid only \$1,990.04 out of the total amount claimed to be owing, \$5,866.03 (*id.*). Plaintiff further submits an internally generated data list of tax payments it was compelled to make on account of Lerner's defaults (*id.*, ¶ 25, Ex. C). In addition, plaintiff's counsel details the manner in which payments made by Lerner, or by Salvage on her behalf, were applied to the outstanding indebtedness (*id.*, ¶¶ 30-37). No rebuttal is presented by Lerner, or Salvage (*see, Fleet Natl. Bank v Olasov*, 16 AD3d 374 [2d Dept 2005]).

Absent the necessary showing of excusable default and meritorious defense, the motion to vacate the default judgment is denied.

Accordingly, it is

ORDERED that defendant's motion to vacate the default judgment of foreclosure and sale herein, dated May 3, 2005, is denied; and it is further

ORDERED that the July 7, 2005, stay of the foreclosure sale is hereby vacated.

Dated: August 19, 2005

ENTER:

  
J.S.C.

**FILED**  
AUG 24 2005  
NEW YORK  
COUNTY CLERK'S OFFICE