M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IAS TERM, PART 19

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GMAC Mortgage Corporation,

Plaintiff,

-against-

Harold Jackson, Dorothy Jackson, T.A.M. Equity Corp. D/b/a Hometrust Mortgage Bankers, New York City Parking Violations Bureau, New York City Environmental Control Board, New York City Transit Adjudication Bureau, Criminal Court City of New York, New York State Department of Taxation & Finance, Department of Housing Preservation and Development, United States of America/Internal Revenue Service, Frank Jones,

Defendants.

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By: Satterfield, J.
Index No: 2385/00
Motion Date: 12/20/06

Motion Cal. No: 16

This is a foreclosure action that resulted in a Judgment of Foreclosure and Sale dated July 5, 2001, and entered in the Queens County Clerk's Office on August 20, 2001, and a Report of Sale, dated December 6, 2002, which showed a surplus in the amount of $12,083.05. By order dated October 5, 2006, plaintiff's motion for an order confirming the referee's report and directing the New York City Department of Finance to distribute the surplus monies, plus all applicable interest, to defendants Harold Jackson and Dorothy Jackson was granted in all respects, without opposition. The underlying motion was made on June 21, 2006 and was returnable on August 9, 2006; on June 5 and June 30, 2006, defendants Harold Jackson and Dorothy Jackson ("Jackson defendants") and defendant T.A.M. Equity Corp. d/b/a Hometrust Mortgage Bankers ("Hometrust"), filed Notices of Claims in the Queens County Clerk's Office, respectively. Hometrust now moves for an order appointing a referee to determine the sums due to it, and vacating the October 5, 2006 order which confirmed the underlying referee's report and directed the distribution of the surplus monies to the Jackson defendants. Hometrust argues that, as a subordinate mortgagee, it has a meritorious claim and contends it has a reasonable excuse, to wit, law office failure, for failing to oppose the motion by the Jackson defendants.

"CPLR 5015 (a) (1) permits a court to vacate a default where the [movant] demonstrates both a reasonable excuse for the default and the existence of a meritorious cause of action (see

Lopez v. Tierney & Courtney Overhead Door Sales Co., Inc., 8 A.D.3d 347 [2d Dept. 2004]; Beale v. Yepes, 309 A.D.2d 886, 887 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (see, Scarlett v. McCarthy, 2 A.D.3d 623 [2d Dept. 2003]; Westchester Med. Ctr. v. Clarendon Ins. Co., 304 A.D.2d 753 [2d Dept. 2003]). Abrams v. City of New York, 13 A.D.3d 566 (2d Dept. 2004). See, also, Gironda v. Katzen, 19 A.D.3d 644 (2d Dept. 2005); Liotti v. Peace, 15 A.D.3d 452 (2d Dept. 2005). Law office failure may, in the court's discretion, serve as a reasonable excuse. See, CPLR 2005; Royal Agricola, S.A. v. F.D. Import and Export Corp., __ A.D.3d __, 828 N.Y.S.2d 908 (2d Dept. 2007); Washington Mut. Home Loans, Inc. v. Jones, 27 A.D.3d 728, (2d Dept. 2006); Liotti v. Peace, supra ; Ray Realty Fulton, Inc. v. Kwang Hee Lee, 7 A.D.3d 772 (2d Dept. 2004).

Here, Homestead sets forth that it did not oppose plaintiff's motion for an order permitting the distribution of the surplus funds to the Jackson defendants, the former owners of the foreclosed property, because the papers were misplaced in the office. Under the circumstances of this case, Homestead established a reasonable excuse for the default in opposing the underlying motion, which represented an isolated incident of non-appearance, with no evidence that the default was willful [see Liotti v. Peace, supra; Beizer v Funk, 5 A.D.3d 619 (2d Dept. 2004)]. Moreover, Hometrust, as the second mortgagee of the property, has a meritorious claim to the surplus funds. See, Washington Mut. Home Loans, Inc. v. Jones, 27 A.D.3d 728(2d Dept. 2006) ["Bank One had a right, as the only subordinate mortgagee, to the surplus moneys . . . .Under the circumstances, Bank One's untimely cross motion was a mere irregularity for which an extension may be granted (see CPLR 2001, 2004), not a waiver of its rights."]

The Jackson defendants, who defaulted on their mortgage obligations, oppose the application, contending that the claim of Hometrust, as second mortgagee, is time barred, relying upon Greenpoint Savings Bank v. Kijik, 297 A.D.2d 359 (2d Dept. 2002) and Allerwan Company v. Hermann, 262 N.Y. 625, 188 N.E. 93 (1933), which this Court finds to be inapposite as those cases involved attempts to enforce claims against the mortgagor who held the equity of redemption claims. See, Island Holding, LLC v. O'Brien, 6 A.D.3d 498 (2d Dept. 2004), lv. to appeal denied, 4 N.Y.3d 701 (2004). Instead, this Court finds that the decisions of the Appellate Division, Second Department, in Bennardo v. Del Monte Caterers, Inc., 27 A.D.3d 503 (2d Dept. 2006), and Fremont Inv. and Loan v. Kinlaw, 15 A.D.3d 345 (2d Dept. 2005) are more germane to this case. In Bennardo v. Del Monte Caterers, Inc., the Court, in rejecting the statute of limitations argument, stated the following reasoning:

> Under the particular circumstances of this case, the claim to the surplus money by the second mortgagee, Catz, is not time-barred under CPLR 213(4) (citations omitted). Catz's predecessor-in-interest, Catapano, participated in the foreclosure action of the first mortgagee, commenced in 1992, by answering the complaint and asserting counterclaims. Thus, Catapano's participation in the first mortgagee's foreclosure action placed all parties on notice of his claim as the second mortgagee (citation omitted). . . Moreover, once Catz's lien upon the property was extinguished due to the

> foreclosure and sale, it filed its notice of claim to the surplus money (citations omitted). Based on the facts herein, Allerwan Co. v. Hermann, 262 N.Y. 625, 188 N.E. 93 and Greenpoint Sav. Bank v. Kijik, 297 A.D.2d 359, 746 N.Y.S.2d 600 are not inconsistent with our determination. Therefore, the Supreme Court properly determined that Catz's claim was not time-barred (citations omitted).

In Fremont Inv. and Loan v. Kinlaw, 15 A.D.3d 345 (2d Dept. 2005), the sole claimant for the surplus money was an assignee of the second mortgage, who the Court found "was entitled to have the surplus applied towards elimination of its subordinate lien upon a showing of the unpaid amount. The Second Department reasoned [15 A.D.3d at 345-346):"

> 'Surplus money . . . stands in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land' (Shankman v Horoshko, 291 AD2d 441, 442 [2002], quoting Roosevelt Sav. Bank v Goldberg, 118 Misc 2d 220, 221 [1983]). Contrary to the Referee's conclusion, Omni Ventures, Inc. (hereinafter Omni), as assignee of the purchase money second mortgage of the defendants Reginald Spinello and Edward J. Bogan, which was duly recorded, was entitled to have the surplus applied towards elimination of its subordinate lien upon a showing of the unpaid amount (see Real Property Actions and Proceedings Law § 1361; Shankman v Horoshko, supra at 442; Citibank v Schroeder, 266 AD2d 332 [1999]; Federal Home Loan Mtge. Corp. v Grant, 224 AD2d 656 [1996]).

Same, Shankman v. Horoshko, 291 A.D.2d 441 (2d Dept. 2002; see, also, Federal Home Loan Mortg. Corp. v. Grant, 224 A.D.2d 656 (2d Dept. 1996)

A "'referee may inquire into and determine all questions of law and fact, usury, fraud or the like, and every question tending to show the equities of the claimant, to the end that it may be decided in such proceedings finally and on the merits to whom such surplus money belong' (Wilcox v. Drought, 36 Misc. 351, 352, 73 N.Y.S. 587, affd. 71 A.D. 402, 75 N.Y.S. 960; see, Citibank v. Schroeder, 266 A.D.2d 332, 333, 698 N.Y.S.2d 304; Corporate Investing Co. v. Mount Vernon Metal Prods. Co., 206 App.Div. 273, 276, 200 N.Y.S. 372)." Shankman v. Horoshko, 291 A.D.2d 441 (2d Dept. 2002); Citibank, N.A. v. Schroeder, 266 A.D.2d 332 (2d Dept. 1999). It thus would be appropriate, under the circumstances of this case, for a referee to determine whether any of the surplus funds should be distributed to Hometrust. Accordingly, the motion is granted, and the order of this Court dated October 5, 2006, hereby is vacated, and a referee to determine the sums due to all claimants shall be appointed.

Submit Order.

Dated: March 12, 2007

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J.S.C.