

**U.S. Bank Natl. Assoc. v Neptune**

2007 NY Slip Op 30733(U)

April 11, 2007

Supreme Court, New York County

Docket Number: 0107591/2006

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER  
Justice

PART 5

U.S. BANK NATIONAL ASSOC.

INDEX NO. 107591/06

- v -

FRANCOISE NEPTUNE,  
ETAL

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
APR 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 11, 2007

  
**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
U.S. BANK NATIONAL ASSOCIATION, as TRUSTEE  
for the structured asset investment loan trust, 2006-1

Index No.  
107591/06

Plaintiff,

- against -

FRANCOIS(E) NEPTUNE, SAMIH MEHMEDOVIC  
ET AL.,

**FILED**  
APR 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**ORDER AND  
DECISION**

mot. seq. 004 &  
005

-----X  
EILEEN A. RAKOWER, J.S.C.

Defendant Francois(e) Neptune (Neptune) executed a note dated November 28, 2005 for the sum of \$880,000. As security for this debt, Neptune gave a mortgage for a property located at 14 Convent Avenue, New York, New York (the property). Neptune failed to make payment on the note starting on February 1, 2006 and due to this default, Plaintiff U.S. Bank National Association, as trustee for the structured asset investment loan trust, 2006-1, (US Bank) began foreclosure proceedings. The proceedings resulted in a Judgment of Foreclosure and Sale that was filed with the County Clerk on January 22, 2007. Defendant Samih Mehmedovic (Mehmedovic) claims that he is the lawful owner of the property, having purchased it on January 27, 2006 from Neptune. Both Neptune and Mehmedovic have filed Orders to Show Cause and the Court has stayed the auction of the property pending the resolution of this matter. US Bank opposes both Orders to Show Cause.

Neptune claims that this Court lacks jurisdiction because Plaintiff was not properly served and now seeks an order from this Court vacating the default judgment. Mehmedovic seeks "an extension of time within which to secure and confirm the lawfulness of his ownership [of the property] and to redeem his property." Both say that they are the victims of fraud by an attorney and Mehmedovic claims that he was also defrauded by co-defendant Neptune, a real estate agency and others. US Bank opposes both applications, providing an affidavit of service upon Neptune and argues that neither Neptune or Mehmedovic offer any valid reason for their default.

Neptune submits a signed affidavit which is unsworn. US Bank, on the other hand, provides an affidavit of service showing that service was accomplished at Neptune's residence upon Neptune's Grandmother as a person of suitable age and discretion (followed by the necessary mailing). Neptune fails to controvert that affidavit. As the affidavit of the process server is prima facie evidence of proper service pursuant to CPLR § 308 (2) and Neptune's unsworn, conclusory allegation of deficient service is insufficient to raise an issue of fact, no traverse hearing is required. (*Simmons First National Bank v. Mandracchia*, 248 A.D.2d 375 [2<sup>nd</sup> Dept. 1998]).

Neptune and Mehmedovic next urge the Court to vacate the Judgment of Foreclosure in the interest of justice. Neptune wants to redeem the mortgage and pay the balance due while Mehmedovic wishes to pursue criminal charges and initiate a civil action to recover compensatory and punitive damages from those who he claims defrauded him.

To be relieved of a judgment on the ground of excusable default a party must show a reasonable excuse for the default and that it has a meritorious claim or defense. As explained above, the Court finds Neptune's lack of jurisdiction due to defective service argument unavailing. Additionally, for the parties to be relieved of a judgment due to fraud, the misrepresentation or misconduct must be that of an adversary. Neither Neptune or Mehmedovic claims that a fraud was perpetrated upon them by their adversary US Bank. Moreover, neither Neptune or Mehmedovic demonstrates a meritorious defense to the action.

Finally, as of the date of Plaintiff's complaint, the principle due on the outstanding note and mortgage, plus interest from January, 2006, exceeded \$879,421. Neither movant addresses why no payment has been as required by the note and mortgage agreement.

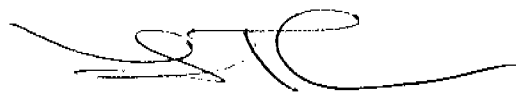
Wherefore, it is hereby

ORDERED that Neptune's motion to vacate the judgment is denied; and it is further

ORDERED that Mehmedovic's motion to vacate the judgment is denied.

This constitutes the decision and order of the Court.

DATED: April 11, 2007



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EILEEN A. RAKOWER, J.S.C.

**FILED**  
APR 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE