

**HSBC Bank USA v Berkowitz Dev., Corp.**

2007 NY Slip Op 31520(U)

May 31, 2007

Supreme Court, New York County

Docket Number: 0602579/2006

Judge: Martin Shulman

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

**MARTIN SHULMAN**

PRESENT: **J.S.C.**

PART 1

Index Number : 602579/2006

HSBC BANK USA N.A.

VS JOHNSON-BUTLER, BRIDGET

Sequence Number : 001

VACATE STAY/ORDER/JUDGMENT

INDEX NO.

602579/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: May 31, 2007

**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 1

-----X  
HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

Index No: 602579/06

-against-

**Decision and Order**

BERKOWITZ DEVELOPMENT, CORP. and  
BRIDGET BUTLER a/k/a BRIDGET JOHNSON-  
BUTLER,

Defendants.  
-----X

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Hon. Martin Shulman:**

Defendant Bridget Butler a/k/a Bridget Johnson-Butler ("defendant"), acting *pro se*, moves to vacate the money judgment entered against her in this action on September 18, 2006 in the amount of \$105,962.92 (the "judgment" at Exh. G to Falsone Opp. Aff.). Plaintiff HSBC Bank USA, National Association ("plaintiff" or "HSBC") opposes the motion.

HSBC commenced this action against defendant and co-defendant Berkowitz Development, Corp. ("BDC") based upon BDC's default under a revolving credit term loan (the "loan") which defendant allegedly guaranteed in her capacity as BDC's president.<sup>1</sup> See Exh. A to Falsone Opp. Aff. Defendant alleges in her affidavit in support of the motion that the case "arrived out of fraud and should be investigated first." Johnson-Butler Aff. at ¶1. Defendant also states in her notice of motion that her "identity has been stolen and my name has been used to obtain 100,000. I did not

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<sup>1</sup> While the judgment was entered against both defendant and BDC, defendant's motion seeks to vacate the judgment only as to herself.

know about this case and do not have any money for a lawyer . . .” Presumably due to her alleged identity theft, defendant also indicates that she has contacted the police and the district attorney. Johnson-Butler Aff. at ¶1.

In order to vacate a default judgment, defendant must demonstrate a reasonable excuse for the default *and* a meritorious defense to the action. See CPLR §5015(a)(1); *Kel Mgmt. Corp. v. Rogers & Wells*, 64 N.Y.2d 904, 488 N.Y.S.2d 156 (1985). Plaintiff contends defendant fails to satisfy the foregoing criteria in that: 1) defendant does not deny signing the loan documents (*Falsone Opp. Aff.* at ¶2[a]); 2) the complaint was personally served upon her and an additional mailing made pursuant to CPLR §3215(g) (*Lennon Opp. Aff.* at ¶¶2 & 3, and Exhs. E & F thereto); 3) defendant called plaintiff’s counsel after being served and acknowledged receipt of the complaint (*Lennon Opp. Aff.* at ¶4); 4) the allegations of “fraud” and “identity theft” are not supported by specific facts or documentary evidence (*Lennon Opp. Aff.* at ¶10); 5) defendant has a connection to BDC (*Lennon Opp. Aff.* at ¶11) as evidenced by a cancelled check from BDC to defendant which was deposited into her bank account (Exhs. M & N to *Lennon Opp. Aff.*); and 6) the loan documents<sup>2</sup> constitute documentary evidence establishing defendant’s guaranty of the loan. Finally, HSBC argues that it will be severely prejudiced if the judgment is vacated since “HSBC would lose its priority by virtue of its

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<sup>2</sup> The loan documents consist of BDC’s credit application dated May 31, 2005 and signed by “Bridget Johnson Butler” as BDC’s authorized signatory and guarantor; a business lending agreement; and HSBC’s loan approval letter dated June 17, 2005. Exhs. A, B & C to *Falsone Opp. Aff.* The credit application provides that by executing the application, the borrower agreed to the terms and conditions of the business lending agreement

duly perfected judgment lien on [defendant's] real property" in a pending foreclosure sale,<sup>3</sup> rendering defendant judgment proof. Falsone Opp. Aff. at ¶2©).

In response to HSBC's opposition, defendant alleges: 1) she "did not sign any loan documents with respect to this action" (Johnson-Butler Reply Aff. at ¶2[a]); 2) "was never served according to [the] CPLR" (Johnson-Butler Reply Aff. at ¶2[b]); 3) HSBC will not be severely prejudiced since two other mortgages were ahead of plaintiff's mortgage<sup>4</sup> (Johnson-Butler Reply Aff. at ¶2[c]); 4) "the purported guarantee is a forgery" (Johnson-Butler Reply Aff. at ¶8); and 5) she did not provide HSBC with her salary, net worth and other personal information which appears in the guaranty (Exh. A to Falsone Opp. Aff.) and which allegedly is incorrect (Johnson-Butler Reply Aff. at ¶9). Despite the foregoing denials, defendant goes on to inconsistently argue that plaintiff should have been more careful in reviewing the credit application since it granted the loan to BDC when it had only been in existence for one month before applying for the loan and the only collateral defendant had was real property which was encumbered by two existing loans equaling the value of the property. Johnson-Butler Reply Aff. at ¶¶3, 4 & 6.

Defendant's motion must be denied because defendant fails to establish a reasonable excuse for her default. Defendant only summarily alleges that she was

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<sup>3</sup> Defendant's reply affidavit avers that her real property was sold as a result of foreclosure and she received no money from the sale. Johnson-Butler Reply Aff. at ¶7.

<sup>4</sup> It does not appear that plaintiff ever obtained a mortgage in connection with the loan or any security interest in the real property owned by defendant which is alleged to be subject to foreclosure proceedings. Presumably, defendant intended to allege that two mortgages had priority over the judgment.


unaware of this action and was not properly served. However, defendant does not deny calling HSBC's counsel after being served, nor does she allege any specific facts to refute the process server's affidavit of service, which indicates that the summons and complaint were personally served upon her on July 25, 2006. Exh. E to Falsone Opp. Aff. Such bald conclusions that the pleadings were improperly served upon defendant are insufficient to rebut the presumption of delivery raised by the affidavit of service. See *Slater v. Congress of Racial Equality, Inc.*, 48 A.D.2d 623, 367 N.Y.S.2d 789 (1<sup>st</sup> Dept., 1975). Under these circumstances, defendant has not proffered a reasonable excuse for her default in appearing in this action.

As defendant has not satisfactorily explained away her default, it is unnecessary to consider whether defendant has a meritorious defense, the second required prong to vacate a default judgment. Nevertheless, defendant does not establish a meritorious defense. Specifically, defendant submits no proof to support her claim of identity theft, despite stating that she has reported the matter to authorities. Further, defendant does not deny her affiliation with BDC or BDC's application for and receipt of the loan funds. Notably, the credit application bears only one signature, expressly providing that the signatory is both an authorized representative of the borrower (BDC) and a guarantor. Defendant does not dispute that the sole signature is valid and binding as to BDC. It is thus simply incredible to claim that the same signature is a forgery as to the defendant guarantor. From the foregoing, it appears that defendant's challenges to the validity of the loan documents are mere afterthoughts made in response to HSBC's opposition.

Accordingly, the motion to vacate the default judgment must be denied.

This constitutes the Decision and Order of this court. Courtesy copies of this Decision and Order have been provided to defendant and to counsel for plaintiff.

Dated: New York, New York  
May 31, 2007



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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUN 05 2007  
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