

**Wells Fargo Bank, N.A. v Carney**

2007 NY Slip Op 32074(U)

July 2, 2007

Supreme Court, New York County

Docket Number: 0109815/2006

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH  
Justice

PART 59

Wells Fargo Bank

INDEX NO. 109815/06

MOTION DATE 5/17/07

MOTION SEQ. NO. 03

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

Denise Carney - v -

The following papers, numbered 1 to 3 were read on this <sup>OSC</sup> ~~motion~~ to/for Vacate default

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUL 09 2007

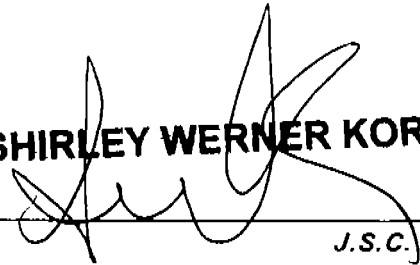
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 7/2/07

HON. SHIRLEY WERNER KORNREICH



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  DEEDENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

WELLS FARGO BANK, N.A., as Indenture Trustee  
Under the Indenture Relating to IMH Assets Corp.,  
Collateralized Asset-Backed Bonds, Series 2004-2,

Plaintiff,

-against-

INDEX NO. 109815/06  
DECISION & ORDER

DENISE CARNEY, ALDENCORT CORP., NEW YORK  
CITY PARKING VIOLATIONS BUREAU, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU,  
MADELEINE BEHETTE,

Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
JUL 09 2007  
NEW YORK COUNTY CLERK'S OFFICE  
17th Street,

This is an action to foreclose a mortgage on real property located at 427 West 17th Street, New York, NY ("the premises"). Plaintiff won a default judgment of foreclosure and sale and the property was sold at auction on March 28, 2007. Defendant Denise Carney brought this Order to Show Cause on the same day, March 28, 2007, seeking to vacate the default judgment. The auction, however, took place prior to service of the Order to Show Cause. The third-party purchaser who bought the property at auction has moved to intervene. The matters are consolidated for decision.

*I. Statement of Facts*

The facts surrounding the mortgage itself are uncontested. Ms. Carney executed the mortgage to secure a \$576,000 loan from CBSK Financial Group, Inc., d/b/a American Home Loans. The mortgage was recorded in the New York County Clerk's Office on September 16,

2003 in CRFN: 2003000360581. The mortgage and loan were then assigned to plaintiff and recorded on June 9, 2005 in CRFN: 2005000334814. Ms. Carney failed to make a payment due on April 1, 2006, with the default continuing for an excess of 15 days. Pursuant to the terms of the mortgage, plaintiff elected to declare the principal balance due.

Plaintiff submitted affidavits of service to prove all defendants were duly served with copies of the Summonses and Complaints. None of the defendants appeared, answered, or made any motion, and were held in default. The judgment of foreclosure and sale was signed on December 18, 2006 by this court and entered on January 29, 2007. All defendants were served with copies of the Notice of Sale on March 12, 2007. A foreclosure auction was scheduled and then held on March 28, 2007 at 1 p.m., and the premises were sold to third-party purchaser for \$1,055,000. Ms. Carney brought an Order to Show Cause that same day, which was signed at 3:30 p.m., seeking to vacate the judgment of foreclosure and sale and to set aside the Terms of Sale.

Ms. Carney submitted a copy of a contract for sale of the premises dated December 28, 2006 between Aldencort Corp., of which Ms. Carney is president, and Vedautie Seepersad. The contract specifies a purchase price of \$1,400,000 with a deposit of \$3,500 already in escrow. Ms. Carney's attorney affirms that she is authorized to deliver two checks based on March 26, 2007 payoff letters, one in the amount of \$654,194.53 to Country Wide Home Loan, and the other in the amount of \$9,480 to plaintiff's attorneys, if the court grants this Order to Show Cause.

Gordon R. Hamilton, the third-party purchaser at auction of the premises, brought his Order to Show Cause, seeking intervention, denial of Ms. Carney's Order to Show Cause, and for

leave to close title on the premises, on May 3, 2007.

## *II. Arguments*

Ms. Carney argues that equity abhors forfeiture, and that given no prejudice to the plaintiff, default should be vacated and she should be permitted to pay off plaintiff. Plaintiff argues that Ms. Carney is merely delaying foreclosure, and that the \$3,500 down payment is too small to provide incentive for the proposed purchaser to close in a timely fashion. Plaintiff also argues that, as a matter of law, a contract of sale alone is not a defense to foreclosure. Mr. Hamilton argues that Ms. Carney never acted to redeem pursuant to RPAPL § 1341, and that her equity of redemption was extinguished when the premises were sold at auction. He also argues that he should be allowed to intervene pursuant to CPLR § 1012(a)(3).

## *III. Conclusions of Law*

### *A. Intervention*

Mr. Hamilton has a legitimate right to intervene in this action under CPLR § 1012(a)(3). It is undisputed that he was the successful bidder at auction, and this action may adversely affect his interest in the property. Thus, his order to show cause seeking intervention is granted.

### *B. Default*

“The owner of an equity of redemption has a right to redeem at any time before an actual sale under a judgment of foreclosure.” *Deutsche Bank Co. of California, N.A. v. DePalo*, 38 A.D.3d 490 (2d Dept. 2007). However, since Ms. Carney failed, prior to the actual sale, to make a payment in court and make a motion to stay the sale as required by RPAPL § 1341(2), her right of redemption was extinguished. *See NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957 (2d Dept. 2003). Absent fraud, collusion, mistake, or misconduct, a court has no discretion to

set aside a sale of foreclosure. *See id.* Ms. Carney's equity arguments alone, therefore, are insufficient for this court to grant her Order to Show Cause. Accordingly, it is so

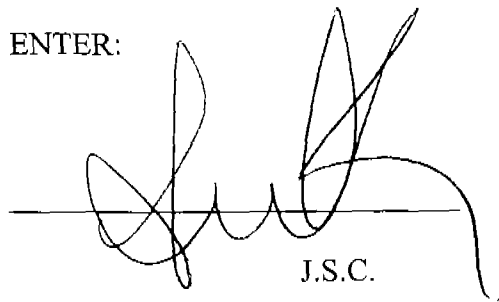
ORDERED that Gordon R. Hamilton's Order to Show Cause seeking to intervene in this action is granted; and it is further

ORDERED that the Order to Show Cause of defendants Denise Carney and Aldencort Corp. seeking to vacate the judgment of foreclosure and sale is denied; and it is further

ORDERED that the referee proceed to execute the transfer of title in accordance with this decision and order.

Dated: July 2, 2007

ENTER:



J.S.C.

**FILED**  
JUL 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE