

**Eilenberg v Ezagui**

2007 NY Slip Op 32188(U)

July 18, 2007

Supreme Court, Kings County

Docket Number: 0024415/2003

Judge: Herbert Kramer

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**MEMORANDUM**

SUPREME COURT                      KINGS COUNTY  
**TOVA EILENBERG,**

**CIVIL TERM PART 13**

**BY: H. KRAMER J.**

**Plaintiff,**

**DATED: JULY 18, 2007**

**-against-**

**INDEX NO. 24115/03**

**ELIYAHU EZAGUI, FREMA EZAGUI a/k/a FRUMA  
EZAGUI a/k/a FREHA EZAGUI and BOTAY  
MAMASH, INC.,**

**Defendants.**

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The following papers have been read on this motion:

<u>Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed</u>	<u>Papers Numbered</u>
_____ 1-8 _____	_____
Opposing Affidavits (Affirmations) _____ 9-25 _____	_____
Reply Affidavits (Affirmations) _____	_____
Memos of Law _____ 26-30 _____	_____

The Ezagui defendants cross move to set aside a default judgment rendered against them and the inquest that was subsequently held and the judgment in favor of the plaintiff and the order appointing plaintiff a receiver that issued therefrom and for such other and further relief as to this Court may seem fair. The plaintiff moves to consolidate certain foreclosure actions claiming that they are related to the issues at bar.

The default judgment in question evolved from a petition to confirm an arbitration award that was granted by the Beth Din of Crown Heights. After being duly authorized by both sides to arbitrate their dispute, the Beth Din determined that the plaintiff had acquired two apartments from the defendant by virtue of having paid the defendant-seller the sum of two hundred five thousand dollars and also acquired the keys to those apartments and also has in her possession a document proving the purchase of the apartments and concluded that the apartment belongs to the plaintiff according to Jewish law. The Beth Din found that after the plaintiff had been in

possession of the apartments for two years, the defendant had transferred the apartments to his mother's name to obtain a bank loan in order to pay debts and in so doing, he acted contrary to Jewish law.

The Beth Din rejected the defendant's argument with respect to the condition included in the agreement for the sale that which recited that if the seller is unable to construct the building or convey title it is released from all liability saying that the intent of this condition was with respect to a circumstance where some outside factor prevented the transmittal of the deed, whereas here it was the actions of the defendant that caused the failure to transmit the deed.

The Beth Din also rejected the plaintiff's argument that she had a loss based upon the interest the money could have earned on deposit in a bank saying that the prices of houses have not gone down and it is still possible to sell the house and receive more than she paid and even more than what she would have been able to sell it for previously.

The Beth Din ruled that the defendant was to arrange for the property to be conveyed to the plaintiff by deed and that the defendant was to pay off the mortgage encumbering the premises and give the plaintiff a document encumbering his assets if he is not able to arrange for the deed so that she will be able to recover from his assets that value of the apartments.

The defendant has not presented any persuasive procedural or substantive grounds for the vacatur of the longstanding default. This Court rejects the defendant's arguments alleging fraud or misconduct based upon an assumed bias of a member of the Beth Din panel and upon the fact that he was allegedly not represented at this proceeding as this Court finds the decision to be fair and unbiased and neither arbitrary nor capricious.

However, in reviewing the findings of the Beth Din, this Court finds that its own determination at the inquest which was made without the benefit of a full record of the proceedings at the Beth Din requires modification. Since a "Trial Justice who heard the testimony at the inquest even on his own initiative ha[s] the statutory and inherent power to modify the amount of damages he had previously awarded to plaintiff," Oppenheim v. Melnick, 34 A.D.2d 784 (2d Dept. 1970), lest plaintiffs "be granted an 'open season' at the expense of a defaulting defendant." Brosnan v. Behette, 186 A.D.2d 165(2d Dept. 1992), this Court is modifying its judgment pronounced at the inquest.

To effect this modification the previous judgment dated June 30, 2005 is vacated and the short form judgment enforcement receiver order appointing plaintiff as receiver dated March 9, 2007 is vacated.

The defendant is ordered to arrange for the conveyance to the plaintiff of the deeds to the two apartments that were purchased by the plaintiff within three weeks of the date of this decision. If, in fact, the deeds have not been conveyed to the plaintiff on or before that date, then the plaintiff is to submit an order for the appointment of a receiver to be named by this Court who will then be empowered solely for the purpose of transferring the deeds to these apartments to the plaintiff. The fees for the receiver will be borne by the defendant.

Additionally, the plaintiff shall have a judgment against the defendant in the original amount of the mortgages that are currently encumbering the two apartments she purchased together with interest to date. If foreclosure proceedings have commenced, then the judgment shall reflect the amounts owed to the mortgagees as stated in the reports of the referee to sell. The plaintiff is to submit the judgment on notice.

Accordingly, defendant's cross motion to vacate the default judgment is granted only to the extent indicated herein and is otherwise denied. Plaintiff's motion to consolidate certain foreclosure actions<sup>1</sup> is granted only to the extent that the actions are transferred to Part 13 by

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<sup>1</sup> Ameriquest Mortgage Company v. Reina Baruch, Kings County Index No. 4354/07; Ameriquest Mortgage Company v. Freha Ezagui, Kings County Index No. 6695/07; Aurora Loan Services, LLC., v. Freha Ezagui, et al., Kings County Index No. 1106/07; Bank One v. Freha Ezagui, Kings County Index No. 2625/07; Countrywide Home Loans, Inc. v. Freha Ezagui, Kings County Index No. 2898/07; Deutsche Bank National Trust Company v Reina Ezagui, Kings County Index No. 3724/07; Deutsche Bank National Trust Company v Reina Ezagui a/k/a Reina Baruch, Kings County Index No. 4169/07; Deutsche Bank National Trust Company v. Reina Ezagui, Kings County Index No. 6056/07; Deutsche Bank Trust Company America, As Trustee v. Reina Baruch, et al., Kings County Index No. 39943/06; Deutsche Bank National Trust Company v Joseph Ezagui, et al., Kings County Index No. 7149/07; Deutsche Bank National Trust Company v. Reina Baruch, et al., Kings County Index No. 9602/07; Fairmont Funding, LTD. v. Freha Ezagui, et al., Kings County Index No. 2035/07; Haim Nachum v. Freha Ezagui, Kings County Index No. 996/07; HSBC Mortgage Corporation v. Freha Ezagui, et al., Kings County Index No. 3339/07; Indymac Bank, FSB v. Reina Baruch, Kings County Index No. 5468/07; Indymac Bank, FSB v. Freha Ezagui, et al., Kings County Index No. 7657/07; Jacob Ekhaus, et al. v. Eliyahu Ezagui, Kings County Index No. 9987/07; Joseph Minsky v. Freha Ezagui, et al., Kings

order of the Administrative Judge for all purposes. Those actions that are in default are to proceed to foreclosure in the ordinary course. However, should any of these actions be contested, then applications can be made at the appropriate time for joinder or consolidation if warranted.

This constitutes the decision and order of the Court.

J.S.C.



**HON. JUSTICE HERBERT KRAMER**

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County Index No. 6509/07; JPMorgan Chase Bank v. Freha Ezagui, et al., Kings County Index No. 2145/07; Menachem Minsky v. Olympia Mortgage Corp., et al., Kings county Index No. 6510/07; Mortgage Electronic Systems, Inc. v. Reina Baruch, Kings County Index No. 7785/07; Sovereign Bank, FSB v. Freha Ezagui, et al., Kings County Index No. 5471/07; The Cit Group/Consumer Finance Inc., Kings County Index No. 8967/07; U.S. Bank National Association v. Reina Baruch, et al., Kings County Index No. 9403/07; Washington Mutual bank F/K/A Washington Mutual Bank, F.A. v. Reina Ezagui, Kings County Index No. 2651/07; Washington Mutual Bank f/k/a Washington Mutual Bank, F.A. v. Joseph Ezagui, Kings County Index No. 8632/07; Washington Mutual Bank f/k/a Washing Mutual Bank, F.A. v. Reina Ezagui a/k/a Reina Baruch, Kings County Index No. 11912/07; Wells Fargo Bank, N.A. v. Freha Ezagui, Kings County Index No. 3893/07; Wells Fargo Bank, N.A. v. Freha Ezagui, Kings County Index No. 3500/07; WM Specialty Mortgage LLC, Without Recourse v. Joseph Ezagui, et al, Kings County Index No. 7147/07