

Bank of New York v Stradford
2007 NY Slip Op 32681(U)
August 21, 2007
Supreme Court, Suffolk County
Docket Number: 0028574/2003
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/28/07
ADJ. DATES 4/20/07
Mot. Seq. # 005 - MD

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THE BANK OF NEW YORK, AS TRUSTEE,	:	SOLOMON & SIRIS, PC
	:	Attys. For Plaintiff
Plaintiff,	:	50 Charles Lindbergh Blvd.
	:	Uniondale, NY 11553
-against-	:	
	:	NEIL H. GREENBERG & ASSOC.
RUDOLPH STRADFORD, BARBARA A.	:	Attys. For SW Capital Investments
POWELL, as personal representative of the Estate	:	900 Merchants Concourse
of ELBERT A. POWELL, AMERICAN	:	Westbury, NY 11590
BUSINESS CREDIT, INC., REGATTA CAPITAL,	:	
LTD., MAXIMUM MEDIA PRODUCTIONS s/h/a	:	HEIDI FEYLER-MAJIAS, PC
MAXINUM MEDIA PRODUCTIONS k/n/a M2	:	Atty. For SW Capital Inv.
POST & DESIGN, STATE FARM INSURANCE	:	1160 E. Jericho Tnpk.
COMPANY a/s/o LOUIS CSAK,	:	Huntington, NY 11743
	:	
Defendants.	:	BERKMAN, HENOCH, PETERSON
	:	Attys. For Citifinancial
	:	100 Garden City Plaza
	:	Garden City, NY 11530
-----X		

Upon the following papers numbered 1 to 10 read on this motion to vacate an Order
_____; Notices of Motion/Order to Show Cause and supporting papers 1-4; _____; Notice of Cross
Motion and supporting papers _____; Answering Affidavits and supporting papers 5-6;
Replying Affidavits and supporting papers 7-8; Other 9-10 (sur-reply); (~~and after hearing counsel in
support and opposed to the motion~~) it is,

ORDERED that this Order to Show Cause by Southwest Capital Investments, LLC and Showhomes, Inc., the assignees of the defendant, American Business Credit, Inc., seeking an Order (i) pursuant to CPLR 5015(a)(3), vacating the Order and Judgment of Foreclosure and Sale of Justice Underwood; (ii) vacating the default of defendant, American Business Credit, Inc., for failure to answer the complaint; and (iii) permitting the movant to interpose a verified answer, is denied: and it is further

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ORDERED that movant and counsel for the Plaintiff shall each serve a copy of this Order with Notice of Entry upon respective counsel within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit(s) of service with the Clerk of the Court.

Familiarity with this matter and the previous Orders of this Court are presumed and only relevant facts will be restated where necessary. The defendant, American Business Credit, Inc. (hereinafter "American") moves to open its default and set aside the judgment entered against it pursuant to CPLR 5015(a)(3), among other things. The motion is opposed by plaintiff.

Among the affirmative relief American seeks on this motion is to vacate its default in answering the complaint. While it is the a vowed public policy of this State which favors the resolution of issues on their merits (*see Delgado v York*, 245 AD2d 123, 655 NYS2d 885 [1st Dept 1997]; *DFI Communications v Golden Penn Theatre Ticket Serv.*, 87 AD2d 778, 449 NYS2d 485 [1st Dept 1982]), under well settled case law in order to be relieved of a default, a party must establish a reasonable excuse for the default (*see Kranenburg v Butwell*, 34 AD3d 1005, 825 NYS2d 163 [3d Dept 2006]; *Eschevarria v Waters*, 8 AD3d 330, 777 NYS2d 724 [2d Dept 2005]; *DiLorenzo Inc. v Dutton Lumber Co. Inc.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *Eisentein v Rose*, 135 AD2d 369, 521 NYS2d 670 [1st Dept 1987]; *Gray v B.R. Trucking Co.*, 59 NY2d 649, 463 NYS2d 192 [1983]; *cf Ray Realty Fulton, Inc. v Kwang Hee Lee*, 7 AD3d 772, 776 NYS2d 864 [2d Dept 2004]). Among the factors to be considered by a Court are whether the neglect was excusable, the lack of prejudice to the plaintiff, a good faith intent to defend, the meritorious nature of the defense and the extent of the delay (*see Thompson v Steuben Realty*, 18 AD2d 864, 795 NYS2d 470 [2d Dept 2005]; *Stolpiec v Wiener*, 100 AD2d 931, 474 NYS2d 820 [2d Dept 1984]).

The determination as to the sufficiency of the moving defendant's application is a matter committed to the proper exercise of the Court's discretionary authority (*see Phillips, Nizer, Benjamin, Krim & Ballon v Matteo*, 271 AD2d 422, 706 NYS2d 898 [2d Dept 2000]; *Liberty Mut. Ins. Co. v Hermes Agency and Ship Supplies Corp.*, 251 AD2d 381, 672 NYS2d 817 [2d Dept 1998]). A defendant must demonstrate a meritorious defense by submitting an affidavit containing evidentiary facts by a person with personal knowledge of the facts (*see Vernon v Nassau County Med. Ctr.*, 102 AD2d 852, 477 NYS2d 24 [2d Dept 1984]; *Essner v Keavy*, 104 AD2d 632, 480 NYS2d 12 [2d Dept 1984]; *Hatcher v City of New York*, 99 AD2d 481, 470 NYS2d 420 [2d Dept 1984]).

American was served pursuant to CPLR 317 on November 24, 2003. CPLR 317 states that "a person served with a summons and complaint other than by personal service to him or her agent for service designated under CPLR 318, with or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of the of entry of judgment, but in no event more than five years after such entry, upon a finding by the Court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."

Four requirements must be met pursuant to CPLR 317 to vacate a default judgment. First, the defendant must show that service was made in a manner other than personal delivery. Second, the defendant must show that the he did not receive actual notice of the summons and complaint in time to

defend the action. Third, the defendant must show a meritorious defense and finally, the defendant must make a motion within one year from receipt of knowledge of entry of the default (see Alexander Practice Commentaries, McKinney's Cons Laws of NY Book 7B CPLR C317:1).

American has not submitted with its motion a sworn affidavit of denial containing facts sufficient on its face to rebut the propriety of service pursuant to CPLR 317 (see *Levine v Forgotson's Central Auto & Electric*, 41 AD3d 552, ___ NYS2d ___ [2d Dept 2007]; *Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875, 833 NYS2d 166 [2d Dept 2007]; *Kopman v Blue Ridge Ins. Co.*, 296 AD2d 479, 475 NYS2d 472 [2d Dept 2002]; *Figueroa v Luna*, 281 AD2d 204, 721 NYS2d 635 [1st Dept 2001]; *Adefioye v Volunteers of America*, 222 AD2d 246, 634 NYS2d 696 [1st Dept 1995]) or to dispute the veracity of the process server's affidavit (see *Fairmont Funding Ltd. v Stefansky*, 235 AD2d 213, 652 NYS2d 14 [1st Dept 1997]) or that it did not receive a copy of the summons and complaint in time to defend the action (see *Calderon v 163 Ocean Tenants Corp.*, 27 AD3d 410, 811 NYS2d 428 [2d Dept 2006]).

Additionally, pursuant to CPLR 5015(a)(1), a defendant may seek a vacatur of its default regardless of the means of service, however, it is still required to provide the court with evidence of an excusable default. American has failed to show an excusable default as the term is defined by the CPLR and, therefore, its motion must be denied (see e.g. *Kenol v Nelson*, 181 AD2d 863, 581 NYS2d 415 [2d Dept 1992]). The affidavit of Matthew Mattera, submitted with American's motion, is insufficient to justify vacatur of American's default (see 3 West's McKinney's Forms Civil Practice Law and Rules § 8:121 Relief from Judgment or Order Generally; see e.g. *Fergus v Brooklyn Law School*, 245 AD2d 62, 665 NYS2d 81 [1st Dept 1999]; see also *Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875, *supra*).

Furthermore, American previously moved by Order To Show Cause (Underwood, J.), submitted December 10, 2004, seeking affirmative relief to vacate the Judgment of Foreclosure and Sale. However, none of the enumerated grounds set forth in American's motion were to vacate its default either under CPLR 317 and/or CPLR 5015(a)(1) (see CPLR 2215). The motion was denied upon the grounds that American defaulted in answering the complaint; that American conceded liability and thus, admitted the allegations contained in plaintiff's complaint.

It is without a question that American was aware of the default judgment within five months after it was granted and yet, American did not move at that time to vacate the default. Essentially, American defaulted a second time and now, almost three years later, American still does not address the reasons why, nor set forth any explanation as to why it waited so long to address its failure to move to vacate the default in answering plaintiff's complaint. Such conduct constitutes an intentional default, which is not excusable (see 3 West's McKinney's Forms Civil Practice Law and Rules § 8:132 Grounds for Relief; *Eretz Funding v Shalosh Assocs.*, 266 AD2d 184, 697 NYS2d 335 [2d Dept 1999]; *Roussodimou v Zafiradis*, 238 AD2d 568, 657 NYS2d 66 [2d Dept 1997]; *app after remand* 267 AD2d 294, 700 NYS2d 717 [2d Dept 1999]; *Perellie v Crimson's Rest. Ltd.*, 108 AD2d 903, 485 NYS2d 789 [2d Dept 1985]; *Heller v Ward*, 10 AD2d 633, 196 NYS2d 847 [2d Dept 1960]).

In so far as American has failed to demonstrate a reasonable excuse to vacate its default, the Court need not consider whether American has demonstrated a meritorious defense (see *American Shoring*,

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Inc. v D.C.A. Const., Ltd., 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005]; *J.P. Equip. Rental & Materials, LLC v Fidelity & Guar. Ins.*, 288 AD2d 187, 732 NYS2d 354 [2d Dept 2001]; *Phillips, Nizer, Benjamin, Krim & Ballon v Matteo*, 271 AD2d 422, *supra*; *Mezail v Ryder Truck Rental*, 241 AD2d 902, 660 NYS2d 234 [3d Dept 1997]). Therefore, the application is denied as it is without any legal merit in the absence of any reasonable excuse for the almost three year delay from the date of the Judgment of Foreclosure and Sale until this application.

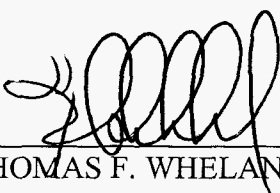
American's present motion appears to be an "end run" around this Court's previous decision of March 20, 2007. Furthermore, American's allegations of wrongdoing pursuant to CPLR 5015(a)(3) on the part of plaintiff in its causes of action in the complaint, do not excuse its failure to timely move to vacate the default in answering the complaint, especially in view of American's awareness of the relevant facts in this matter (*see Czernicki v Lawniczak*, 41 AD3d 418, 835 NYS2d 918 [2d Dept 2007]; *Rizzo v St. Lawrence Univ.*, 24 AD3d 983, 805 NYS2d 479 [3d Dept 2005]; *Weimer v Weimer*, 281 AD2d 989, 722 NYS2d 328 [4th Dept 2001]; *City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, 672 NYS2d 541 [3d Dept 1998]; *Green Point Sav. Bank v Arnold*, 260 AD2d 543, 688 NYS2d 595 [2d Dept 1999]; *see also* Watergate Legacies: CPLR 5015 (A)(3) Vacatur and Other Remedies; Alexandra Koeppl, NYLJ, 9/22/05, p 4, col 4).

Additionally, the Court finds no basis in the record on this matter or in American's motion for vacating the Judgment of Foreclosure and Sale in the interest of justice (*see City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, *supra*; *see also Savago v Payne*, 170 AD2d 850, 566 NYS2d 677 [3d Dept 1991]; CPLR 5015). It is well settled that a party seeking to vacate an order entered upon a default must demonstrate a reasonable excuse for its default (*see Phillips v Goord*, 16 AD3d 422, 790 NYS2d 709 [2d Dept 2005]) and must do so through a proffer of supporting facts in evidentiary form (*see Kumar v Yonkers Contr. Co., Inc.*, 14 AD3d 493, 788 NYS2d 408 [2d Dept 2005]).

Since this Court finds no reasonable excuse for American's failure to vacate its default in answering and since American has failed to make the requisite showing, relief pursuant CPLR 317 or CPLR 5015(a)(1) is not available. American's failure and neglect to interpose an answer to the summons and complaint in 2004 is fatal to its application and the instant application must be denied (*see Dubinsky v Rykowsky*, 266 AD2d 496, 698 NYS2d 727 [2d Dept 1999]; *City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, *supra*).

Accordingly, the motion is denied as herein stated. This constitutes the Order and decision of the Court.

DATED: 8/21/07



 THOMAS F. WHELAN, J.S.C.