5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-12
C/O Countrywide Home Loan, Inc.
400 Countrywide Way
Simi Valley, CA 29715

Plaintiff(s),

-against-

MAUREEN ARCHER A/K/A MAUREEN NEWTON, DWAYNE ARCHER,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendant(s).

INDEX No. 19293/06

MOTION DATE: 8/8/07

MOTION SEQ. No. 1-MG

The following papers read on this motion:
Order to Show Cause/Affirmation/Affidavit/Exhibits
Affirmation in Opposition/Exhibits
Reply

Defendant MAUREEN ARCHER seeks an Order vacating the default judgment of foreclosure issued against her in this action. The defendant claims that she was never served with the Summons and Complaint in this action as alleged. The plaintiff opposes ARCHER's application contending that the defendant has not

set forth any potentially meritorious defense. Thus, plaintiff argues that the motion should be denied in its entirety.

Plaintiff offers an affidavit of service wherein it is claimed that the defendant was served at her residence by affixing a copy of the Summons and Complaint to the door, and mailing a copy to that address, after two attempts to make personal service. Defendant does not contest that the address served is her residence, but denies receipt in the mail and claims she found a copy on the ground. ARCHER claims her son, who resides with her, was also not served. She does not contest that she did nothing upon finding the Summons and Complaint. ARCHER also does not deny that she is in default of her mortgage payments, nor does she deny having executed the mortgage.

The defendant claims however, that she was defrauded by the broker who negotiated the loan, and that this resulted in her financing at a much higher interest rate than initially promised, and requiring higher monthly payments. She claims that he submitted fraudulent documentation to the lender to obtain the mortgage and violated the Federal Truth in Lending Act. The defendant, does not, however, contest that she executed the mortgage upon receipt of notification of the higher rate and payment schedule. She also does not claim that the plaintiff provided her with any of this information or engaged in the alleged wrongful or fraudulent conduct.

The defendant blames a mortgage broker, not the plaintiff lender. The defendant argues, however that these claims are a valid defense to this action as the Truth in Lending Act permits the relief to a consumer to be asserted against the assignee of the original lender. 15 USC 1641(c). Thus, counsel for ARCHER argues that she should have been given the right to rescind against the original broker.

In her application ARCHER claims that she was provided refinancing documents on November 15, 2005, which she executed in her home. She claims that she did not read them and no one explained them to her. She claims that she did not attend any "closing" after that. She also claims that no one explained to her that it was an Adjustable Rate Mortgage, and she received no documents regarding the loan prior to that date. In her affidavit she later states that she received documentation on November 4, 2005 and November 9, 2005 regarding her loan application which contained different information than the ultimate November 15, 2005 loan.

ARCHER claims that the documents listed an inflated income for her. She seeks to rescind the loan based on the lender's failure to provide the appropriate documentation to her prior to the November 15, 2005 date. It is undisputed that the defendant was not represented by counsel at the time of this transaction.

Defendant seeks to vacate the default and permission to serve and file an Answer to assert defenses and counterclaims asserting that there has been a waiver, estoppel, bad faith fraud and unconscionable conduct on the part of plaintiff and its predecessors in interest. Counsel for the defendant argues that there is no explanation of why the interest quotes provided to the defendant in the plaintiff's good faith estimate were significantly raised prior to closing, and as plaintiff was aware that the defendant did not have an attorney, this change, significantly raising defendant's financial obligations, should have been explained. Further, counsel for the defendant claims that there is evidence that the broker acted in bad faith, permitting this "refinancing" of defendant's home, deliberately inflating ARCHER's stated income.

While counsel for plaintiff argues that none of his client's conduct amounts to fraud or bad faith, the Court does note that he offers no explanation of the sharp increase of the interest rate on the date of closing. He merely states that the defendant could have had an attorney if she so chose.

In order to vacate a default judgment, the moving party must submit a colorable excuse for the default and provide an affidavit of merit. CPLR §§ 3215, 5015(a)(1).

Defendant has provided documentary and other evidence to demonstrate that there is a question of material fact in dispute as to whether she was fraudulently induced to execute the mortgages in question, which financed at an interest rate much higher than what was quoted on the Good Faith Estimate provided to her. There is also a question of fact whether the original lender's representative advised the defendant to execute these refinancing documents without consulting or being represented by an attorney. Further, defendant provides proof that there is a question of whether the original lender violated the disclosure requirements of the Truth in Lending Act as provided in Regulation Z. 12 C.F.R. Part 26, Title 1, 15 U.S.C.A 1601, et seq. *EBC AMRO Asset Management Limited v. Kaiser*, 256 AD2d 161 (1st Dept 1998); *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 (1982).

Based on the proof presented, the Motion of the defendant for an Order vacating the default judgment and permitting her to serve and file an Amended Answer, is Granted. CPLR § 3025; 5015.

The Court finds that the defendant has set forth a potentially meritorious defense to the claims made in the Complaint, however the Court's jurisdiction to make that finding may only be had if jurisdiction over the defendants is established.

Bank of New York v. Archer

The proof defendants have offered is sufficient to vacate the judgment. Her Answer is deemed served.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 20th of November, 2007, at 2:30 p.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

It is, SO ORDERED.

Dated: Oct 26, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

OCT 31 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE