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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

1450 CUN HILL RD

- v -

CAPITAL HILL PARTNERS

INDEX NO. 601570/07

MOTION DATE 12/14/07

MOTION SEQ. NO. 004

MOTION CAL. NO. 1

The following papers, numbered 1 to 4 were read on this motion to/for VD

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/16/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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1450 GUN HILL ROAD LLC; STERLING TRUST COMPANY, CUSTODIAN FBO IRA SAFERSTEIN IRA 380206 AND STERLING TRUST COMPANY. CUSTODIAN FBO NORMAN SAFERSTEIN IRA 380207,

Plaintiffs,

Index No. 602510/2007
Mot. Seq. No. 004
Calendar No. 1 of Dec. 14, 2007

-against-

CAPITAL HILL PARTNERS, LLC, 9016 REALTY, LLC, BAXTER FORTY FOUR, LLC, TERENCE C. SCHEURER, AFTAB UDDIN TANVIR, WILLIAM SLATTERY, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD AND COLUMBIA ESTATES, LLC,

Defendants.

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Appearances:

For Plaintiffs:
Loeb & Loeb, LLP
By: David M. Satnick
345 Park Avenue
New York NY 10154-1895
212-407-4000

For Defendant Columbia Estates, LLC:
Boris Zivotov, Esq., P.C.
457 77th Street
Brooklyn NY 11209
718-833-7333

Papers considered in review of this motion to vacate a default judgment of foreclosure and sale:

Papers	Numbered
Order to Show Cause and Affidavits Annexed	1
Answering Affirmations	2&3
Reply Affirmation	4

PAUL G. FEINMAN, J.

In this mortgage foreclosure action, defendant Columbia Estates, LLC ("Columbia") moves, by order to show cause, pursuant to CPLR 317 and/or CPLR 5015(a), to vacate an October 11, 2007 judgment of foreclosure and sale entered against it on default.

Plaintiffs oppose the motion and request costs and sanctions against Columbia.

BACKGROUND

In March, 2005, defendant Capital Hill Partners, LLC ("Capital") executed a mortgage securing the $2.7 million financing that plaintiffs provided to Capital. That financing enabled Capital to purchase property located at 308 West 116th Street in Manhattan ("the property") from Columbia. The mortgage encumbers the property as well as two buildings that Capital owns in Brooklyn, New York. Non-party Titan Capital arranged the financing and the loan proposal states that financing will be advanced by Titan or "its affiliates and/or assigns." (Saferstein Opp. Aff., Ex. 1, p. 1). Because of particular financing arrangements associated with this loan, Titan directed that the loan documents, including the mortgage note and mortgage be made in the names of Titan's affiliate, plaintiff 1450 Gun Hill Road LLC and plaintiff Sterling Trust Company.[1] Plaintiffs claim that they were not aware that, on the same day that Capital closed on the $2.7 million loan, Capital also gave a "second position mortgage" to Columbia that secured a $1 million loan that Columbia granted to Capital.

By its terms, plaintiffs' $2.7 million mortgage, and the loan secured thereby, matured and became fully due and payable on April 30, 2007. On that date, Capital defaulted by failing to pay the outstanding principal and accrued interest.

On May 1, 2007, following Capital's default, plaintiffs commenced this mortgage foreclosure action. On May 11, 2007, Columbia was served with the summons and complaint by service upon the New York Secretary of State (Zivitov Aff., Ex. B).[2] Pursuant to LLCL section 303(a) service was complete on May 11, 2007 when the Secretary of State was served. Once

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[1] A portion of the financing came from Norman and Ira Saferstein's individual retirement accounts maintained at Sterling Trust Company.

[2] See also, Limited Liability Company Law ("LLCL") section 301 (statutory designation of Secretary of State as agent for service of process for domestic limited liability companies); LLCL section 303 (authorizing service of process on Secretary of State as agent for limited liability companies).

served, the Secretary of State sent a copy of the summons and complaint, by certified mail, return receipt requested, to Columbia in care of its designated agent for service of process, Itzhak Katan, at the address on file with the Secretary of State. On May 17, 2007, Itzhak Katan, or someone on his behalf, signed the Secretary of State's certified mail receipt. (Satnick Aff., Ex. 1). Thereafter, Columbia neither answered nor moved within the thirty days allotted by statute (CPLR 320[a]). However, on September 17, 2007, after plaintiffs had moved for a judgment of foreclosure, but before the judgment was entered, Columbia filed a notice of appearance. Columbia took no further action for more than two months until it filed this order to show cause to vacate its default dated November 27, 2007. The proposed order to show cause, contained two stay provisions requesting that the court stay enforcement of the judgment and that the court stay the referee from conducting the foreclosure sale. After hearing from both sides, the court declined to sign the stay provisions.

CONTENTIONS

In support of vacatur, Columbia contends that it did not receive the pleadings in this action in time to defend in the mortgage foreclosure action and that it has a meritorious defense because its vendor's purchase money mortgage has priority over all other mortgages and liens.

In opposition, plaintiffs argue that the evidence demonstrates that Columbia was duly served with the summons and complaint via the New York Secretary of State at the correct address of Columbia's agent for service of process, Itzhak Katan ("Katan"). Plaintiffs also argue that Columbia does not have a meritorious defense to this action because Columbia's mortgage, in Section 3.06 states that it is a second position mortgage.

DISCUSSION

CPLR 317 states in pertinent part:

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, . . . who does not appear may be allowed to defend the action within one year after he obtains knowledge of the entry of judgment . . . upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

Under CPLR 317, it is not necessary for a defendant to show a reasonable excuse for his/her delay if the court finds that the defendant did not personally receive notice of the summons in time to defend the action. (*See, DiLorenzo v. A.C. Dutton Lumber Co.,* 167 N.Y.2d 138,141 [1986]). The defendant must however demonstrate the existence of a meritorious claim or defense.

CPLR 317 appears to be applicable to this situation because Columbia has established that service was accomplished through the Secretary of State and "it is readily apparent that [pursuant to CPLR 317 and 318,] the Secretary of State is not to be considered a rule 318 agent." (*Seijas v Rawhide Ranch, Inc.,* 99 A.D.2d 739, 740 [1st Dept 1984]). Plaintiffs claim that CPLR 317 is not applicable because Columbia appeared in this action after the foreclosure motion was filed but before judgment was rendered. However, because the court finds that plaintiff cannot rely on CPLR 317 because it received actual notice, the court need not address plaintiffs' argument.

In the circumstances present here, Columbia has failed to establish that it did not personally receive notice of the summons in time to defend the action. Columbia's principal, Katan does not deny that he is Columbia's duly appointed agent for service of process and that the address for service of process on file with the Secretary of State is his current home address. Moreover, in his affidavit, Katan does not state that he did not receive process and sign the

certified mailing receipt. Moreover, he does not state that the signature on the card is not his. Rather, Katan avers that he does not recall receiving the mailing. In addition, although Katan contends that he first learned of this action when he returned from Israel at the end of September, 2007, he does not state that he was out of town on May 17, 2007 and he has failed to submit evidence to document that he was, in fact, not in the country on the date that process was served.

Rather, the evidence establishes that Columbia was properly served with process at the current and correct address on file with the Secretary of State and that Katan, or someone on his behalf, actually received and signed for the summons and complaint on May 17, 2007. Thus, it cannot be said, under CPLR 317, that Columbia did not personally receive notice of the summons and complaint in time to defend the action. (*Essex Credit Corporation v Theodore Tarantini Associates, Ltd.*, 179 A.D.2d 973 [3rd Dept. 1992]; *DeLisca v Courtesy Transportation Ltd.*, 6 A.D.3d 646 [2nd Dept 2004] [defendant failed to establish through competent evidence that it did not receive notice in time to defend where evidence showed that summons and complaint had timely been sent to corporate address and certified mail receipt had been signed by someone at that address]; *see also, Fleetwood Park Corp. v Jerrick Waterproofing Co.*, 203 A.D.2d 238 [2nd Dept. 1994]).

Columbia's reliance on *Di Lorenzo v A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138 (1986) and the commentary accompanying CPLR 317 is unavailing. Both *Di Lorenzo* and the commentary to CPLR 317 stand for the proposition that the courts will relieve a defendant's default pursuant to CPLR 317 where the evidence establishes that notice was sent to an incorrect address by the Secretary of State. ("Thus, corporate defendants served under Business Corporation Law [section] 306 have frequently obtained relief from default judgments where they had the wrong address on file with the Secretary of State, and consequently, did not receive

actual notice of the action in time to defend."[Reply Aff, para. 8]). That is not the situation here as Columbia does not dispute that the Secretary of State sent notice to the correct address.

Similarly, Columbia has failed to demonstrate that it is entitled to vacatur pursuant to CPLR 5015 (a) (1). Under CPLR 5015 (a) (1) a party who does not appear may be allowed to defend the action within one year after entry of the judgment if the party's default was excusable and there is a meritorious claim of defense. (*DiLorenzo v A.C. Dutton Lumber Co.,* 167 N.Y.2d at 140-141).

As stated above, the evidence in this case indicates that on May 17, 2007, Katan, or someone on his behalf, signed the receipt for a certified envelope containing a copy of the summons and complaint, and thus Columbia has failed to establish that its default was excusable because is appears that Columbia received actual notice in time to defend this action. (*Fleetwood Park v Jerrick Waterproofing*, 203 A.D.2d at 238; *Essex Credit Corp. v Theodore Tarantini Associates*, 179 A.D.2d at 973). Columbia's failure to establish that it did not receive timely notice renders academic the court's need to consider whether it has a meritorious defense. Nonetheless, were the court to consider that issue, it would conclude that Columbia cannot meet its burden of demonstrating that it has a meritorious defense because Columbia's purchase money mortgage explicitly states, in section 3.06 that, "[t]his is a second position mortgage subordinate to a first position mortgage executed by Mortgagor of even date herewith in favor of Titan Capital, Inc. as Mortgagee." The fact that Titan, rather than plaintiffs, is named as mortgagee is irrelevant because Titan's September 23, 2007 loan proposal specifically stated that funding would be provided by Titan or its affiliates or assigns and Titan's decision to take the $2.7 million mortgage in the name of Titan's affiliates was fully disclosed to Capital and Columbia at the closing. (See, Saferstein Aff, paras. 4-6 and Justice Aff., para. 5). Indeed, the

express reference in the subordination clause to "a first position mortgage executed by [Capital] of even date herewith" can only refer to the mortgage held by plaintiffs because that was the only first position mortgage executed by Capital on October 28, 2005, the date of the closing and the date of the Columbia-Capital "second position mortgage."

Accordingly, Columbia's motion to vacate the judgment of foreclosure and sale in favor a plaintiffs and against it, on default, is denied as Columbia has failed to demonstrate that it did not have actual notice of the proceeding and that it has a meritorious defense to the action.

COSTS AND SANCTIONS

Plaintiffs request that the court award them costs and sanctions on the ground that Columbia has engaged in frivolous conduct by making statements that are false, that have no factual or legal basis and that were made to delay resolution of the litigation and to harass plaintiffs.[3] (Satnick, Supp. Aff., para. 3). Although no notice of cross motion or motion was filed seeking said relief, and the application is therefore procedurally defective (22 NYCRR 130-1.1[d]), because Columbia has had an opportunity to respond to plaintiffs' request, the court will address the substance of plaintiffs' application. (*Chevy Chase F.S.B. v Lane,* 277 A.D.2d 545 [3rd Dept. 2000] [request for sanctions was not procedurally defective where request provided sufficient notice and ample opportunity for counsel to be heard).

The Rules of the Chief Administrator, 22 NYCRR 130-1.1(c) states:

> For the purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of

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[3] Plaintiffs point specifically to the statements that, ". . . defendant's mortgage is in no way subordinated to plaintiff's mortgage" (Zivotov Aff., para. 6) and "the language in the mortgage document recites Titan Capital as a potential superior mortgagee. In fact there is no such lender involved in the subject transactions nor in the instant lawsuit." (Id., para. 8).

> existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include making a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

In this case, Columbia's assertions that its mortgage is not subordinated to plaintiffs and that Titan is not a party to this action were made as part of a legal argument to advance Columbia's position that the default should be vacated because it had a meritorious claim. Those statements, are not "per se" false. Rather, under the circumstances here, the statements were found, by the court, to be unpersuasive. (See, *Llantin v Doe*, 30 A.D.3d 291 [1st Dept 2006] [record does not reveal that attorney falsely represented anything or sought to delay the litigation]). "The mere fact that a [party's] claims may not be meritorious does not mean that the claim was frivolous." *(Matter of Gerdts v State of New York*, 210 A.D.2d 645, 649 [3rd Dept. 1994]; *app. dismissed* 85 N.Y.2d 856 [1995]).

There is no indication that Columbia undertook this proceeding merely to harass or maliciously injure the plaintiffs or that Columbia, or its counsel, exhibited the extreme behavior that courts have traditionally found to merit sanctions. (*See, e.g. Sakow v Columbia Bagel, Inc.*, 32 A.D.3d 689 [1st Dept 2006]). Accordingly, plaintiffs' request for costs and sanctions is denied.

It is therefore

ORDERED that Columbia's motion to vacate the judgment of foreclosure and sale dated October 11, 2007 entered in favor of plaintiffs and against defendant Columbia Estates, LLC. by default is denied; and it is further

ORDERED that plaintiffs' application for costs and sanctions against Columbia is also denied; and it is further

ORDERED that the referee may proceed with any scheduled sale if same has not already occurred.

This is the decision and order of the court.

Dated: January 16, 2008

J.S.C.

HON. PAUL G. FEINMAN