

Fremont Inv. & Loan v Edwardsen

2008 NY Slip Op 30516(U)

February 26, 2008

Supreme Court, Richmond County

Docket Number: 0101563/2007

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
FREMONT INVESTMENT & LOAN,

Plaintiff,

-against-

TP9
Present:
Hon. Anthony I. Giacobbe

SHARON EDWARDSSEN a/k/a SHARON A. EDWARDSSEN;
UNITED STATES OF AMERICA INTERNAL REVENUE
SERVICE; NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE; "JOHN DOE 1" to "JOHN DOE 25",
said names being fictitious, the parties intended being persons
or corporations having an interest in, or tenants or persons in
possession of, portions of the mortgaged premises described
in the complaint,

Decision and Order
Index No. 101563/07
Motion No. 001

Defendants.

-----X
SHARON EDWARDSSEN,

Third-Party Plaintiff,

-against-

Index No. A101563/07

FREMONT INVESTMENT & LOAN; MERIDIAN ABSTRACT;
ARGENT MORTGAGE CO.; SUMMIT INVESTMENTS LOAN
CORP. d/b/a E-ISLAND MORTGAGE; NASSER ALAMEDDIN;
MARC LAMASSA; JOSEPH CRAPANZANO; ANTHONY
BELLINI; CYNTHIA LAPERA, "JOHN DOE 26" and "JOHN
DOE 27",

Third-Party Defendants.

-----X

The following papers numbered 1 to 3 were submitted on this motion the 18th day of January, 2008:

	Pages Numbered
Order to Show Cause to Vacate Order of Foreclosure and Extend Time to Answer by Defendant/Third-Party Plaintiff Sharon Edwardsen, with Exhibits and Memorandum of Law (dated December 20, 2007).....	1
Affirmation in Opposition to Order to Show Cause by Plaintiff/Third-Party Defendant Fremont Investment & Loan, with Exhibits (dated January 4, 2008).....	2

Reply to Plaintiff's Opposition (dated January 16, 2008).....	3
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Upon the foregoing papers, defendant/third-party plaintiff's motion to vacate the Judgment of Foreclosure and Sale is granted.

This is an action for the foreclosure of a mortgage in which plaintiff/third-party defendant Fremont Investment & Loan (hereinafter "Fremont"), the lender, claims that defendant/third-party plaintiff Sharon Edwardsen, the borrower, is in default as a result of her having failed to make the required payments.

To the extent relevant, it appears that Fremont's loan in the amount of \$276,723.61 is secured by a mortgage on Ms. Edwardsen's property at 137 Fingerboard Road, Staten Island, New York, 10305. According to, *e.g.*, the "Truth-in-Lending Disclosure Statement" (Plaintiff's Exhibit "B"), the loan agreement was executed on or about June 28, 2006.

This foreclosure action was commenced by the filing and service of a summons and complaint on or about April 30, 2007. On or about September 5, 2007, Ms. Edwardsen attempted to serve an Answer, but it was rejected by Fremont as untimely. Shortly thereafter, on or about September 21, 2007, an order of reference was signed, and a Judgment of Foreclosure and Sale was granted on December 17, 2007. Ms. Edwardsen (hereinafter, defendant) claims that she first became aware that a Judgment had been entered on December 18, 2007.

Two days later, *i.e.*, on December 20, 2007, defendant filed this Order to Show Cause to vacate the judgment of foreclosure pursuant to CPLR 5015(a)(1), and sought an extension of her time to serve an answer pursuant to CPLR 2004. In opposition to the motion, Fremont argues that defendant has failed to offer either a reasonable excuse for her default or meritorious defense.

It is familiar law that on a motion to vacate a default pursuant to CPLR 5015(a)(1), a movant must demonstrate both a reasonable excuse for the default and a meritorious defense (*see, Bank of NY v. Segui*, 42 AD3d 555 [2nd Dept. 2007]; *Credit-Based Asset Servicing and Securitization, LLC*

v. Chaudry, 304 AD2d 708 [2nd Dept. 2003], *lv dismissed*, 7 NY 3d 915 [2006]). The determination of whether an excuse is reasonable is generally committed to the sound discretion of the Court (*SS Constantine and Helen's Romanian Orthodox Church of America v. Zindel*, 44 AD3d 744 [2nd Dept. 2007]; *Ahmad v. Aniolowski*, 28 AD3d 692 [2nd Dept. 2006]; *Carnazza v. Shoprite of Staten Island*, 12 AD3d 393 [2nd Dept. 2004]).

In support of defendant's motion to vacate her default, defense counsel affirms that she "was the only attorney in the Foreclosure Prevention Unit" for Legal Services on Staten Island, which is claimed to be "the only non-profit entity defending foreclosures on Staten Island." In addition, she attests that "[w]ith the growing foreclosure crisis, I already had as many cases as one attorney could handle" (Defendant's Attorney's Affirmation, para 6), and had "contacted plaintiff's attorneys three times and left messages from May 11 to June 12, 2007 to request an extension of time to file an answer" (*id.* at para 7). However, she was informed that plaintiff's attorney "did not give extensions in foreclosure actions" (*id.* at para 8). In opposition, Fremont contends that it "appears never to have occurred to" defendant's attorney that "every day any loan remains in foreclosure increases a foreclosing lender's actual damages... [which is why]... a lender [is loathe]... to give authority to its own counsel for consenting to such extensions of time" (Plaintiff's Attorney's Affirmation, para 10). Be that as it may, it is well settled that a court in proper circumstances has the discretion to accept law office failure as a reasonable excuse for vacating a default (*see, SS Constantine and Helen's Romanian Orthodox Church of America v. Zindel, supra; Cerrone v. Fasulo*, 245 AD2d 793 [3rd Dept. 1997]; *Michael William Printery, Inc. v. Qual Krom, Inc.*, 124 AD2d 277 [3rd Dept. 1986]).

In the instant case, while defendant's answer was clearly untimely, there is no evidence that the default was intentional, made in bad faith, or with an intent to abandon the defense of the action (*see, Ahmad v. Aniolowski, supra*). Moreover, there is a strong public policy in this State which favors the disposition of matters on their merits. Contrariwise, Fremont has failed to establish that its prosecution of the action would be prejudiced in this case by vacating the default and proceeding to trial (*ibid.*).

Here, annexed to defendant's motion papers is a copy of the rejected Answer (Defendant's Exhibit "A"), wherein defendant asserts various defenses and counterclaims against Fremont, including violations of the Truth-in-Lending Act, Real Estate Settlement Procedures Act, General Business Law §349, aiding and abetting fraud, and unjust enrichment. In support of these claims, defendant points out that "the broker[s] fee on the Fremont loan was \$12,589.50," of which defendant was required to pay two-thirds to Fremont's one-third, as well as her having to pay the closing agent an additional fee of \$1,150.00 (Defendant's Exhibit "A", page 9, paras 66-67). Defendant further points out that the loan application completed by third-party defendant Nasser Alameddin falsely lists her occupation as "optician" rather than an optician's assistant (*id.* at para 72), and states her income as being "over four times her actual income at the time" of the application (*id.* at para 74). As a result of these alleged "deceptive practices," defendant asserts that she was required to pay "excessive fees, interest and other charges, [and now] faces the possibility of losing her home" (*id.* at para 84). With respect to her claim of violating the Truth-in-Lending Act, defendant alleges that the "amounts and rates [on the Disclosure Statement] were inaccurate... [and that] the calculations included unreasonable and illegal charges, such as unreasonable and illegal broker fees, underwriting fees and closing... fees, among other charges" (*id.* at para 90).

In view of the above, a potentially meritorious defense to the foreclosure action has been demonstrated (*see, Ahmad v. Aniolowiski, supra*).

Finally, defendant moves for leave to serve a late answer. As intimated above, in light of (1) the lack of any prejudice to Fremont, (2) the non-deliberate nature of defendant's default, (3) the existence of a potentially meritorious defense, and (4) the public policy favoring the resolution of actions on their merits, defendant's motion pursuant to CPLR 2004 for leave to extend her time to answer is granted (CPLR 3012 [d]; *see, Nickell v. Pathmark Stores, Inc*, 44 AD3d 631 [2nd Dept. 2007]; *Nikita v. Parfomak*, 43 AD3d 892 [2nd Dept. 2007]; *Stuart v. Kushner*, 39 AD3d 535 [2nd Dept. 2007]; *Schonfeld v. Blue & White Food Products Corp*, 29 AD3d 673 [2nd Dept. 2006]; *Trimble v. SAS Taxi Co. Inc.*, 8 AD3d 557 [2nd Dept. 2004]).

Accordingly, it is

ORDERED that the motion by defendant Sharon Edwardsen is granted; and it is further

ORDERED that the Judgment of Foreclosure and Sale granted in this matter on December 17, 2007 is vacated and set aside; and it is further

ORDERED that the “Notice of Appearance, Verified Answer, Counterclaims and Third-Party Complaint” annexed to Ms. Edwardsen’s Order to Show Cause is deemed served; and it is further

ORDERED that the time to answer the counterclaims and third-party complaint is extended until twenty (20) days after the service upon plaintiff and third-party defendants of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that the Clerk mark his records accordingly.

ENTER

J.S.C.

Dated: February 26, 2008