

**Emigrant Mtge. Co., Inc. v Palmer**

2010 NY Slip Op 30285(U)

February 5, 2010

Supreme Court, Richmond County

Docket Number: 101795/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index. 101795/07  
Motion No.: 003

EMIGRANT MORTGAGE COMPANY, INC.,

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

ANNETTE PALMER A/K/A ANNETTE BLIZZARD,  
FRANCES BOYD, as decedent,  
ARROW FINANCIAL SERVICES, LLC,  
NYC ENVIRONMENTAL CONTROL BOARD

*Defendants*

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The following items were considered in the review of the following Motion by Order to Show Cause to Vacate Judgment of Foreclosure and Sale.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Sur Reply Affidavits	4
Sur-Sur Reply Affidavits	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant Annette Palmer a/k/a Annette Blizzard (hereinafter “Palmer”) moves by Order to Show Cause to vacate a default judgment of foreclosure and sale granted to Plaintiff Emigrant Mortgage Company, Inc., (hereinafter “Emigrant”) pursuant to CPLR §§ 5015 and 2005. Defendant’s motion is granted.

**PROCEDURAL HISTORY**

Emigrant commenced this action against Palmer by summons and complaint dated April 30, 2007 to begin foreclosure proceedings pursuant to a mortgage between the parties. By order dated

September 13, 2007, Emigrant was granted leave to amend the complaint and serve a supplemental summons on Frances Boyd (“Boyd”) by publication. The same order also appointed a Guardian ad Litem for any unknown defendants, including Boyd. The Court appointed guardian ad litem filed an answer on behalf of Boyd on October 4, 2007 that waived her rights with respect to all matters in this action. Palmer appeared Pro Se and interposed an Answer on June 22, 2007 denying the material allegations of Emigrant’s complaint, and asserting a counterclaim for violations of the Truth in Lending Act (“TILA”). Emigrant moved for summary judgment on February 5, 2008 to strike Palmer’s affirmative defenses and counterclaims and for the entry of a default judgment against all other defendants. Emigrant’s motion for summary judgment was granted on June 4, 2008 and a referee was appointed in the same order. On August 14, 2008, Emigrant moved for an order confirming the referee’s report and granting a judgment of foreclosure and sale. Emigrant’s motion for foreclosure and sale was granted by order dated January 15, 2009 based on Palmer’s failure to appear. This Order to Show Cause was filed on March 11, 2009.

### **FACTS**

This is an action to vacate a default judgment of foreclosure and sale previously granted to Emigrant due to the alleged neglect of Palmer’s prior counsel, Emigrant’s allegedly numerous disclosure violations of the Truth-In-Lending Act (“TILA”) and the Real Estate Settlement Procedures Act (RESPA), and Emigrant’s practice of predatory lending in violation of the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) at the time Palmer refinanced her existing mortgage.

Palmer is a fifty-one year old woman who owns a house located at 116 Crescent Avenue in Staten Island, New York, 10301. Boyd, Palmer’s mother and co-signatory to the mortgage documents, died in March 2008. In March 2006, Palmer sought to refinance her existing mortgage. Apex Financial Inc. (“Apex”) contacted her and acted as mortgage broker. Palmer provided Apex with information regarding her debts and income and arranged for Palmer to receive a mortgage through Emigrant. Emigrant offered Palmer an adjustable rate mortgage with a principal amount of

\$247,500.00 and an initial interest rate of 11.25%. The loan closed on May 15, 2006. In January, 2007, Palmer missed her first payment and Emigrant notified her of the default soon thereafter. In April, 2007, Emigrant filed a summons and complaint seeking to foreclose on Palmer's mortgage and completed service with regard to Palmer. Boyd was served by publication with permission of this Court by an Order dated September 13, 2007. In June, 2007, Palmer notified Emigrant in writing that she intended to exercise her right of rescission due to Emigrant's alleged violations of TILA. Soon thereafter, Palmer filed a pro se answer to the complaint that raised several affirmative defenses, including that Emigrant violated TILA by having failed to accurately disclose the financing charge of the loan and the amount financed.

After Emigrant's filing of its motion for summary judgment in February 2008, Palmer met with Staten Island Legal Services ("SILS") to arrange for representation. An attorney allegedly agreed to represent Palmer in the foreclosure action pro bono. There is no retainer evincing such a relationship. Palmer alleges that the attorney failed to keep her apprised of the proceedings which prevented her from appearing to defend against Emigrant's Motion for Summary Judgment and Motion for Judgment of Foreclosure and Sale. In January, 2009, Palmer received notice that a judgment of foreclosure and sale had been entered based on her failure to appear in the action.

### **DISCUSSION**

When a defendant seeks to vacate a default judgment pursuant to CPLR 5015(a)(1), he or she must demonstrate a reasonable excuse for the default and a meritorious defense to the action. The Court must use its sound discretion to determine the reasonableness of the excuse.<sup>1</sup>

The determination of whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the Court based on all relevant facts, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness,

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<sup>1</sup> *Delgado v. Velacela*, 56 A.D.3d 515 [2d Dept 2008]

and the strong public policy in favor of resolving cases on the merits.<sup>2</sup> Law office failure may be considered when determining whether a reasonable excuse exists.<sup>3</sup>

In this case, the defaulting Defendant alleges that her prior attorney failed to keep her abreast of the action pending before this Court. The Defendant argues that these inefficiencies led to her being prejudiced by an order granting summary judgment against her on default. This Court finds that these alleged inefficiencies are a reasonable excuse in determining whether a default judgment should be vacated.

On a motion to vacate a default by a defendant, clear and convincing proof of the existence of a meritorious defense is not required on the motion, even in cases where, at trial, the defense must be proved by that standard. On a motion to vacate default, it is sufficient if the defendant sets forth facts sufficiently establishing that such a defense is meritorious.<sup>4</sup>

Palmer asserts that Emigrant allegedly failed to serve Boyd, as co-signatory on the mortgage documents, with copies of any of the documentation required by TILA, including notice of Boyd's right to rescind the mortgage, prior to or after the closing. Palmer further alleges that, even though the Order dated September 13, 2007 allowed Emigrant to effectuate service by publication, Emigrant failed to properly serve, or make a genuine effort to serve, Boyd prior to resorting to service by publication. Boyd's guardian ad litem filed a Waiver of Notice of all proceedings on October 4, 2007 and declared that Boyd was a "stranger" to all matters alleged in Emigrant's complaint.<sup>5</sup>

In this case the Defendant alleges facts that set forth a meritorious defense. Whether these alleged defenses are successful remains to be seen. But, for the purposes of vacating a default

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<sup>2</sup> *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876 [2d Dept 2005]

<sup>3</sup> *Montalvo v. Nel Taxi Corp.*, 114 A.D.2d 494; 494 N.Y.S.2d 406 [2d Dept 1985]

<sup>4</sup> *Anamdi v. Anugo*, 229 A.D.2d 408 [2d Dept 1996]

<sup>5</sup> Plaintiff's Affirmation in Opposition Exhibit D

pursuant to CPLR 5015(a)(1), said allegations are sufficient.

### CONCLUSION

The decision as to the setting aside of a default in answering is generally left to the sound discretion of the Court.<sup>6</sup> It is the policy of the courts to favor disposition of claims on the merits and not by default judgment.<sup>7</sup> Here the Plaintiff's summary judgment motion for foreclosure and sale was granted on default due to law office failure. This, coupled with the meritorious defenses raised by Defendants call for the prior decision of this Court granting summary judgment to be vacated.

Given the Court's broad authority to exercise its inherent equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice, the default judgment, as it applies to Boyd, is also vacated.<sup>8</sup> The Court has the authority to vacate a default judgment if the interests of justice so require.<sup>9</sup> Though the proper course of action would have been for Palmer to raise its claims on behalf of Boyd in its initial Order to Show Cause, the interests of justice and the strong public policy that matters be resolved on the merits demand that Boyd's claims be heard.<sup>10</sup> Emigrant will not be prejudiced by allowing Palmer to file an Answer since the resolution of the issue sooner rather than later will serve the interests of both parties. Denial of this Order to Show Cause on purely procedural grounds will simply lead to a proper filing by Palmer on behalf of Boyd in the near future, given that Palmer is in the process of obtaining Letters of Administration for the purposes of this proceeding.

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<sup>6</sup> *MacMarty, Inc. v. Scheller*, 201 A.D.2d 706 [2d Dept 1994]

<sup>7</sup> *Bell v. Toothsavers, Inc.*, 213 A.D.2d 199 [1st Dept 1995]

<sup>8</sup> *Guardian Loan Co. V. Early*, 47 N.Y.2d 515, 419 N.Y.S.2d 56 [1979]

<sup>9</sup> *Gunther v. American Label Co., Inc.*, 243 A.D.528 [2d Dept 1934]; *Batista v. St. Luke's Hospital, Women's Hospital Division*, 46 A.D.2d 806 [2d Dept 1974]

<sup>10</sup> *Salch*, supra

Accordingly it is hereby:

ORDERED, that Defendants' motion to vacate the judgment of foreclosure is granted; and it is further

ORDERED, that Defendant Annette Palmer a/k/a Annette Blizzard shall obtain Letters of Administration from the Surrogate's Court forthwith and shall thereafter file and serve an amended answer by March 31, 2010.

All parties shall appear in DCM Part 3 on **Tuesday, May 18, 2010 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: February 5, 2010

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Joseph J. Maltese  
Justice of the Supreme Court