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SHORT FORM ORDER

INDEX NO. 3516/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF DECEMBER 1, 2006, GSAMP TRUST 2006-HE8
4828 Loop Central Drive
Houston, TX 77081

Plaintiff,

-against-

JOHN FARACCO, CAROL FERRARA, JAMES SHAUGHNESSEY, MICHAEL MARRON, THE NEW YORK GUARDIAN MORTGAGE CORP., THOMAS MARRON, WILLIAM WEINBERG, PATTY SPARACIRO,

Defendants.

ORIG. RETURN DATE: OCTOBER 29, 2009
FINAL SUBMISSION DATE: NOVEMBER 12, 2009
MTN. SEQ. #: 003
MOTION: MD

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REFEREE:
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Upon the following papers numbered 1 to 9 read on this motion TO VACATE JUDGMENT OF FORECLOSURE.
Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation in Opposition and supporting papers 5, 6; Memorandum of Law in Opposition 7; Reply Affirmation and supporting papers 8, 9; it is,

ORDERED that this motion by defendant WILLIAM WEINBERG ("defendant") for an Order, pursuant to CPLR 5015 (a) (1), vacating the Judgment of Foreclosure dated August 14, 2009 and entered on September 1, 2009, and filing an Amended Judgment in its place, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to the instant application from plaintiff.

This is an action to foreclose a mortgage held by plaintiff in connection with the real property commonly known as 143 Elm Street, Ronkonkoma, New York ("property"). On August 14, 2009, this Court granted plaintiff a Judgment of Foreclosure and Sale ("Judgment"), upon plaintiff's unopposed application. The Judgment ordered and decreed, among other things, that certain liens which were prior and adverse to the mortgage being foreclosed, including a lien held by defendant, were invalid and extinguished pursuant to RPAPL Article 15.

Defendant has now filed the instant application to vacate the Judgment. Defendant alleges that he has no objection to plaintiff's motion for judgment on its first cause of action in the complaint, which seeks to foreclose the subject mortgage on the property. However, defendant takes issue with plaintiff's application for judgment on its second cause of action, which seeks to invalidate and extinguish several prior liens on the property, including a lien held by defendant. Defendant indicates that his lien is based upon a 2004 money judgment against defendant JOHN FARACCO in the amount of $251,334.50, which remains unsatisfied. Defendant argues that his lien is not subject to extinguishment in this action to foreclose Mr. Faracco's mortgage, as the mortgage is not a purchase money mortgage within the meaning of CPLR 5203 (a) (2). Defendant indicates that Mr. Faracco obtained sole title to the property on

or about March 7, 2006, and that the subject mortgage was executed on or about August 9, 2006. As such, defendant argues that he has a meritorious defense to the second cause of action herein.

Moreover, defendant alleges that his default in opposing the motion for judgment occurred because of "law office error" within the meaning of CPLR 2005. Defendant informs the Court that on June 15, 2009, plaintiff served defendant with its motion for a judgment of foreclosure in this matter. Defendant claims that he attempted to forward the motion to his attorney via an attachment to an email, but that his attorney did not receive the motion until after it was granted due to an "email malfunction."

In opposition, plaintiff alleges that defendant failed to proffer any excuse for his default in answering the complaint herein. Plaintiff has submitted an affidavit of service executed in connection with service of the summons and complaint upon defendant, which indicates service was effectuated upon defendant on February 11, 2008, pursuant to CPLR 308 (2). Plaintiff contends that as defendant defaulted in appearing herein, he was not entitled to notice of plaintiff's motion for a judgment of foreclosure. With respect to defendant's failure to oppose the motion, plaintiff points out that defendant apparently failed to follow up with his attorney after he allegedly sent the email on June 15, 2009 and prior to receipt of the Judgment on September 18, 2009.

Plaintiff further alleges that defendant failed to demonstrate that he has a meritorious defense herein, in that defendant failed to show that: (1) the Judgment is a lien against the property; and (2) that the lien has priority over plaintiff's mortgage. Plaintiff indicates that at the closing of the loan given by plaintiff's assignor, defendant executed an affidavit indicating that there were no judgments or federal tax liens against him; that he had never lived at the address listed on defendant's judgment; and that the judgments listed on the title report were not against him but a person of similar name. As such, plaintiff argues that it is unclear whether defendant's judgment is against the "John Faracco" named as a defendant herein. Moreover, plaintiff alleges that plaintiff's mortgage is superior to defendant's lien based upon the doctrine of equitable subrogation, which permits the holder of a mortgage to assume the superior priority of a lien satisfied in good faith from the proceeds of the holder's loan. Here, plaintiff informs the Court that on or about August 9, 2006, plaintiff's assignor, SouthStar Funding LLC, gave Mr. Faracco a mortgage which paid off the existing purchase money mortgage, thereby becoming the first priority lien-holder under the doctrine

of equitable subrogation. Finally, plaintiff argues that it will suffer great prejudice if the Judgment is vacated, as it was awarded $372,582.61 in the Judgment, and the property was recently sold to plaintiff pursuant to the Judgment upon its successful bid in the amount of $297,918.

A motion to vacate a default judgment may be made upon a showing of a reasonable excuse and a meritorious defense within one year after service of a copy of the judgment with written notice of its entry, pursuant to CPLR 5015 (a) (1) (*see e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). In addition to showing that the default was excusable, the moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (*see* CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]).

In the instant application, the Court finds that defendant has proffered neither a reasonable excuse for his default, nor a meritorious defense to the action. Plaintiff has filed a duly executed affidavit of service which constitutes *prima facie* evidence of service of the summons and complaint upon defendant pursuant to CPLR 308 (2). Defendant fails to proffer a reasonable excuse for failing to appear or otherwise respond to the complaint; in fact, defendant failed to proffer any excuse for his default. Instead, defendant cites law office error for his failure to oppose plaintiff's application for a judgment of foreclosure and sale. However, the Court finds that defendant was not entitled to service of the motion after he defaulted in appearing herein (*see* CPLR 2103 [e]), and therefore needed to provide a reasonable excuse for his failure to answer the summons and complaint.

Furthermore, the Court finds that defendant has not asserted a meritorious defense to this action. As discussed, the mortgage given to Mr. Faracco by plaintiff's assignor satisfied a purchase money mortgage. Therefore, plaintiff was entitled to be subrogated to the rights of the holder of the purchase money mortgage. As held by the Court of Appeals:

> Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the

> position of the obligee or lien-holder. This principle applies to situations where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance

(*King v Pelkofski*, 20 NY2d 326 [1967]; *see Surace v Stewart*, 58 AD3d 715 [2009]; *Bank One v Mon Leang Mui*, 38 AD3d 809 [2007]; *Roth v Porush*, 281 AD2d 612 [2001]; *Pawling Sav. Bank v Hunt Props.*, 225 AD2d 678 [1996]).

Plaintiff has indicated that when its assignor gave Mr. Faracco the loan which paid off the existing purchase money mortgage, it relied upon the affidavit executed by Mr. Faracco stating that there were no judgments or federal tax liens against him; that he had never resided at the address listed on defendant's judgment; and that the judgments listed on the title report were not against him but a person of similar name. Under these circumstances, plaintiff's assignor became subrogated to the rights of the first priority lien-holder under the doctrine of equitable subrogation (*see King v Pelkofski*, 20 NY2d 326, *supra*). To hold otherwise, would unjustly enrich defendant to the detriment of plaintiff by providing defendant with an unjust windfall (*see Elwood v Hoffman*, 61 AD3d 1073 [2009]).

In view of the foregoing, this motion to vacate the Judgment, granted on August 14, 2009 and entered on September 1, 2009, is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 28, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court