

**Central Mtge. Co. v Elfassy**

2010 NY Slip Op 31926(U)

July 14, 2010

Supreme Court, Richmond County

Docket Number: 130758/09

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 No.: 130758/09  
Motion No.: 001**

**CENTRAL MORTGAGE COMPANY,**

*Plaintiff*

*against*

**MEITAL ELFASSY,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
INC. AS NOMINEE,  
FIRST NATIONAL BANK OF ARIZONA,  
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,  
and MARY COHEN**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of the following motion to dismiss by order to show cause.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

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

Defendant Meital Elfassy's motion by order to show cause to vacate a prior order of judgment of foreclosure and sale granted to Plaintiff Central Mortgage Company pursuant to CPLR §3012(d) is denied.

Defendant Meital Elfassy's motion by order to show cause to vacate a prior order of judgment of foreclosure and sale granted to Plaintiff Central Mortgage Company pursuant to CPLR § 5015(a)(1) is denied.

Defendant Meital Elfassy's motion by order to show cause to stay the foreclosure sale of Elfassy's residence pending completion of a mandatory settlement conference pursuant to CPLR § 3408 is denied.

## PROCEDURAL HISTORY

Plaintiff filed a summons and complaint to initiate foreclosure proceedings on May 20, 2009 after the defendant failed to make her scheduled monthly mortgage payments beginning on December 1, 2008. Judgment of Foreclosure and Sale was entered on default on March 26, 2010 as a result of the defendant's failure to appear in the foreclosure action.

The foreclosure sale was scheduled to take place on June 3, 2010. On June 2, 2010, this instant Order to Show Cause was filed, which effectively stayed the foreclosure sale.

## FACTS

This is a foreclosure action in which Defendant Elfassy seeks to vacate a prior judgment of foreclosure and sale and stay a foreclosure sale that was scheduled for June 3, 2010.

On September 28, 2006, Elfassy took out a mortgage loan in the amount of \$372,000 on her property located at 133 Keating Place, Staten Island, New York (the "Property"). Elfassy has defaulted on the loan by failing to make any payments since December 1, 2008. Plaintiff subsequently accelerated the mortgage and brought an action to foreclose its mortgage by filing a summons and complaint on May 20, 2009. Elfassy failed to file an Answer.

Process was served on May 20, 2009 at the Property by serving the middle-aged woman who answered the door and called herself Mary Cohen. Later, the process server double-checked the motor-vehicle database to confirm that the address was Elfassy's last known address. A license plate search also confirmed that the car parked in the driveway of the Property belonged to Elfassy.

Though Elfassy failed to appear in the foreclosure action, discussions between the parties occurred throughout the proceedings regarding the potential for a loan modification. Elfassy applied for hardship assistance, but provided the plaintiff with insufficient and conflicting documentation.

Two conferences were held, with the court as mediators. Despite the court's suggestion as to what documents to bring with her, Elfassy failed to bring the documents to court for either of the conferences. The conferences and separate discussions between the parties never resulted in a loan modification.

## DISCUSSION

Elfassy contends that under CPLR § 3012(d) she is entitled to vacate the default judgment and enter a pleading. CPLR § 3012(d) allows a party to receive an extension of time to appear or enter a pleading if a reasonable excuse for the delay or default in answering can be shown.

Elfassy mistakenly asserts that CPLR § 3012(d) allows this court to grant her an extension of time to appear or enter a pleading in this case. A default judgment has already been granted. Only once a default judgment has been vacated may CPLR § 3012(d) be used to extend the time to enter a pleading.<sup>1</sup> As such, the only available course of action is under CPLR § 5015(a)(1), which addresses the circumstances under which a defaulting party may vacate a default judgment.

In order to vacate a default judgment under CPLR § 5015(a)(1), the defendant must establish both a reasonable excuse for default and a meritorious defense.<sup>2</sup>

Elfassy fails to provide any excuse for her failure to appear in this action prior to default, let alone a reasonable one. Since Elfassy has failed to offer a reasonable excuse for her default, the Default Judgment of Foreclosure and Sale cannot be vacated.<sup>3</sup>

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<sup>1</sup> *Gainey v. Anorzej*, 2006 NY Slip Op 475 [2d Dept 2006]; *Ayres Mem'l Animal Shelter, Inc. v. Montgomery County SPCA*, 17 A.D.3d 904, 905 [3d Dept 2005]

<sup>2</sup> *Simmons First Notional Bank v. Mandracchia*, 248 A.D.2d 375 [2d Dept 1998]; *Berlin v. New Hope Holiness Church*, 93 A.D.2d 798 [2d Dept 1983]

<sup>3</sup> *Assael v 15 Broad St., LLC*, 2010 NY Slip Op 2077, 1 [2d Dept 2010]

Even assuming Elfassy had a reasonable excuse for her default, Elfassy nevertheless fails to set forth a meritorious defense. Elfassy asserts that the plaintiff lacks personal jurisdiction over her as a result of allegedly improper service under CPLR § 308(2), and that such improper service constitutes a meritorious defense.

Personal service under CPLR § 308(2) is complete when the summons and complaint are delivered to a person of suitable age and discretion at the usual place of abode of the defendant, and a copy of the summons and complaint are subsequently mailed to the defendant's last known address.

An affidavit of service in conformity with CPLR § 306 is prima facie evidence that process was properly served and creates a rebuttable presumption that such service was proper.<sup>4</sup> A mere denial of service is insufficient to rebut the prima facie evidence of proper service created by an affidavit of service.<sup>5</sup>

On May 20, 2009, a process server served a copy of the summons and complaint to a person of suitable age and discretion who answered the door at the Property. The process server went further, confirming through a motor vehicle search that the residence was Elfassy's registered address, and that the license plate of the car parked in the Property's driveway was that of Elfassy.<sup>6</sup> Additionally, the process server mailed a copy of the summons and complaint to the Property address once he confirmed it was Elfassy's residence. Such service satisfies the requirements of CPLR § 308(2). Elfassy failed to specifically refute the contents of the affidavit of service or to substantiate her conclusory allegation. Elfassy's mere assertion that she was not properly served is insufficient to successfully rebut the presumption that service of process was proper under CPLR § 308(2).<sup>7</sup>

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<sup>4</sup> *Maldonado v. County of Suffolk*, 229 A.D.2d 376 [2d Dept 1996]

<sup>5</sup> *Sando Realty Corp. v. Aris*, 209 A.D.2d 682, 683 [2d Dept 1994]

<sup>6</sup> Exhibit C, Plaintiff's Affirmation in Opposition

<sup>7</sup> *Maldonado*, supra

Elfassy's other defenses, namely, that the plaintiff did not provide her with a proper notice of default and that the plaintiff is not the holder of the note and mortgage, are similarly meritless and do not warrant a vacation of the duly entered Judgment of Foreclosure and Sale.

Even though there is a strong public policy to resolve cases on the merits, rather than on default, Elfassy fails to set forth a reasonable excuse for default and a meritorious defense.<sup>8</sup> The court is not unsympathetic to Elfassy's situation. However, such sympathy does not justify setting aside a duly entered judgment of foreclosure and sale absent a showing of a reasonable excuse for default and a meritorious defense.<sup>9</sup> Any sympathy which the mortgagor's situation might arouse cannot be permitted to undermine the stability of contractual obligations.<sup>10</sup>

This case has been conferenced twice with both parties appearing. The court advised the parties to bring all relevant documentation, including recent tax forms to establish income, so that a constructive meeting could take place with the end goal being a loan modification. The only income that Elfassy has that can be verified amounts to just over \$9,500, which would be insufficient under even the most generous modification.<sup>11</sup> It would be a waste of scarce judicial resources to hold yet another settlement conference given that Elfassy has failed to present any evidence of a source of additional income or the ability to repay when multiple opportunities to do so have already been provided.

Accordingly, it is hereby:

ORDERED, that Defendant Meital Elfassy's motion by order to show cause to vacate the judgment of foreclosure and sale entered in favor of Plaintiff Central Mortgage Company pursuant

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<sup>8</sup> *Bell v. Toothsavers, Inc.*, 213 A.D.2d 199 [1st Dept 1995]

<sup>9</sup> *Jamaica Sav. Bank v. Cohan*, 36 A.D.2d 743 [2d Dept 1971]

<sup>10</sup> *Key International Mfg., Inc. v. Stillman*, 103 A.D.2d 475 [2d Dept 1984]

<sup>11</sup> Exhibit J, Plaintiff's Affirmation in Opposition

to CPLR 3012(d) is denied; and it is further

ORDERED, that Defendant Meital Elfassy's order to show cause is denied in its entirety.

ENTER,

DATED: July 14, 2010

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Joseph J. Maltese  
Justice of the Supreme Court