

Emigrant Mtge. Co., Inc. v Abbey

2011 NY Slip Op 30600(U)

March 14, 2011

Supreme Court, Queens County

Docket Number: 4199/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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EMIGRANT MORTGAGE COMPANY, INC.,	Index No.: 4199/2010
Plaintiff,	Motion Date: 03/10/2011
- against -	Motion No.: 10
JANE E. ABBEY A/K/A/JANE ABBEY,et al.,	Motion Seq.: 1
Defendant.	

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The following papers numbered 1 to 8 were read on this motion by defendant JANE E. ABBEY for an order pursuant to CPLR 3012(d) granting the defendant leave to serve a late answer:

	<u>Papers Numbered</u>
Order to Show Cause-Affirmation-Exhibit(s)-Service.....	1 - 3
Affirmation in Opposition-Affidavit(s)-Exhibit(s).....	4 - 6
Reply Affirmation-Exhibit(s).....	7 - 8

This is a motion brought by defendant, Jane E. Abbey, by order to show cause, dated November 17, 2010, pertaining to the foreclosure of the property located at 21-24 & 21-26 29th Street, Astoria, New York. Based upon the record before this court the defendant defaulted on her mortgage when she failed to make her monthly mortgage payments beginning July 1, 2009.

The plaintiff subsequently accelerated the defendant's

mortgage and brought an action to foreclose its mortgage by filing a summons and complaint on February 19, 2010 and personally serving the defendant on February 24, 2010. Defendant failed to appear or file an answer in the foreclosure action. The defendant subsequently appeared at three residential foreclosure settlement conferences, the last one being on October 13, 2010, at which time the Referee noted that the case was not settled and was to proceed by motion for an order of reference. The Referee also noted that "defendant is actively attempting to sell the subject premises."

Subsequently, the plaintiff moved pursuant to RPAPL § 1321, for an order of reference appointing a referee to compute the sums owed. However, by order dated November 29, 2010, the court denied the plaintiff's application for an Order of Reference with leave to renew upon submission of an affirmation by counsel attesting to the factual accuracy of the submitted papers as required by section 202.12-a(f) of the Rules of the Chief Administrative Judge.

On November 17, 2010, the defendant filed the within Order to Show Cause seeking leave to file a late answer pursuant to CPLR3012(d). In support of the motion the defendant submits an affidavit stating that when she was served with the summons and complaint she called the law firm of Deutsch and Schneider, plaintiff's attorneys, and asked a representative what she should

do with the summons and complaint. The defendant claims that the representative told her, "that's your copy you don't have to do anything with it." Defendant states that at the time she was served with the summons and complaint she had been working with the plaintiff for a loan modification. She states that she relied upon the advice of plaintiff's counsel because she believed they were trying to help her keep her home. The defendant also states that when she recently visited a Foreclosure Prevention Walk-in Clinic, she learned that she is required to move to file a late answer in order to avoid a default.

In opposition, plaintiff's counsel Sabbir Ahmed, Esq., contends that the defendant has failed to present a reasonable excuse for her failure to file an answer and contest the foreclosure action. Counsel states that the defendant's allegations are meritless as "no one at the firm would ever advise an inquiring borrower, served with a summons and complaint, to completely ignore the papers." Further, counsel contends that the summons and complaint with attached notice plainly advises the defendant that she must answer the complaint. Counsel also states that the defendant attended four settlement conferences before the Court Referee between April and October 2010 and throughout the process the defendant indicated that she was not interested in modifying the loan and was seeking time to sell the premises. The plaintiff then offered the defendant a

forbearance plan whereby she would be given nine months to list the property for sale and enter into a contract. During the forbearance period the plaintiff would not proceed with the foreclosure action and the defendant would not have to make mortgage payments. However, as of October 2010, the defendant had not found a buyer nor signed the forbearance agreement. Counsel also opposed the motion on the ground that the defendant failed to attach a proposed answer and failed to indicate what, if any, meritorious affirmative defense she may have to the foreclosure action. Counsel contends that nowhere in the defendant's papers does she dispute the validity of the mortgage or note or claim that she has been compliant with mortgage payments.

The defendant submits a reply affidavit dated March 7, 2011, reiterating her claim that she was told by someone at Deutsch and Schneider that she did not have to do anything with the summons and complaint. Further she contends that since Oct 2009 she was working with plaintiff and seeking a loan remodification.

Upon review of the defendant's order to show cause, plaintiff's opposition and the defendant's reply thereto, this court finds that the defendant's motion for an order granting leave to file a late answer is denied.

Pursuant to CPLR 3012(d): "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may

be just and upon a showing of reasonable excuse for delay or default.”

The Courts have held that as a general rule, a defendant seeking to vacate a default judgment entered upon his failure to answer or appear, must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015[a][1]; 3012 [d]; U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]; also see Maspeth Federal Savings and Loan Association v McGown, 77 A.D.3d 890 [2d Dept. 2010]; Taddeo-Amendola v 970 Assets, LLC, 72 AD3d 677 [2d Dept. 2010]; Perfect Care, Inc. v Ultracare Supplies, Inc., 71 AD3d 752 [2d Dept. 2010]; Zarzuela v Castanos, 71 AD3d 880 [2d Dept. 2010]; Bank of N.Y. v Segui, 42 AD3d 555 [2d Dept. 2007]). Baldwin v Mateogarcia, 57 AD3d 594 [2d Dept. 2008]; Bekker v Fleischman, 35 AD3d 334[2d Dept 2006]).

Here the defendant proffered a justifiable excuse for failing to file an answer in that she was involved in active negotiations with plaintiff and the Referee in the Foreclosure Settlement Conference Part in attempting to find a buyer for her home. However, when the defendant could not find a buyer or agree to a remedification of the mortgage the Referee, in October, 2010, removed the case from the conference part and permitted the plaintiff to proceed by order of reference. It was only one month after the case was removed from the conference part and a

settlement could not be reached that the defendant moved by order to show cause for leave to file a late answer.

Thus, as the defendant had appeared in conferences and as parties were engaged in settlement negotiations with the plaintiff's counsel, and as the plaintiff's counsel did not move for an order of reference while the negotiations were ongoing, it was reasonable for the defendant to have failed to file an answer during this period. The defendant did not evince an intent to willfully ignore or neglect to proceed with the action (see Performance Constr. Corp. v Huntington Bldg., LLC, 68 A.D.3d 737 [2d Dept. 2009]; Scarlett v McCarthy, 2 AD3d 623[2d Dept 2003]; Lehrman v Lake Katonah Club, 295 AD2d 322[2d Dept. 2002]).

However, although the defendant offered a reasonable excuse for failing to answer the summons and complaint, the motion to file a late answer must be denied as the defendant failed to establish any defense to the plaintiff's claims for foreclosure and sale of the mortgaged premises. In her moving papers, the defendant has not submitted a proposed answer nor proffered any defense whatsoever to the mortgage foreclosure proceeding. The plaintiff has not, for example, alleged fraud, disputed the validity of the mortgage or the note, the service of the summons and complaint, the jurisdiction of the court, or contended that the mortgage was not in arrears at the time of the commencement of the action (see Ryan v Breezy Point Coop., Inc., 76 AD3d 523

[2d Dept. 2010]; Juseinoski v. Bd. of Educ., 15 AD3d 353 [2d Dept. 2005]).

Accordingly, the defendant's motion for an order pursuant to CPLR 3012(d) to extend the time to answer is denied.

Dated: March 14, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.