Deutsche Bank Natl. Trust Co. v Young
2012 NY Slip Op 32802(U)
November 19, 2012
Supreme Court, Suffolk County
Docket Number: 08-12426
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 08-12426

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

COPY

Mot. Seq. # 001 - MD
002 - MG
003 - MD

---X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF16, ASSET-BACKED CERTIFICATES, SERIES 2006-FF16, Plaintiff, - against - IVAN YOUNG; DEBRA A. CANTALUPO COMMISSIONER OF TAXATION & FINANCE; INTERNAL REVENUE SERVICE; "JOHN DOE #1-10" AND "JANE DOE #1-10", the names John Doe and Jane Doe being fictitious, their identities being unknown to the plaintiffs, it being the intention of Plaintiff to designate any and all unknown persons, including, but not limited to, the tenants, occupants, corporations, and judgment creditors, if any, holding or claiming some right, title, interest or lien in or to the mortgaged premises herein, Defendants.	DOONAN, GRAVES & LONGORIA, LLC Attorney for Plaintiff 100 Cummings Center, Suite 225D Beverly, MA 01915 IVAN E. YOUNG, ESQ., ProSe 80 Orville Drive, Suite 100 Bohemia, NY 11716

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Upon the following papers numbered 1 to 94 read on these motions to dismiss, for summary judgment, and to compel acceptance of late answer ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 29 - 48; 49 - 79 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 10 - 28; 80 - 94 ; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant Ivan Young for an order dismissing the complaint, the motion (002) by plaintiff for summary judgment, and the motion (003) by defendant to compel acceptance of a late answer and for a permanent injunction are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (001) by defendant Ivan Young for an order dismissing the complaint pursuant to CPLR 3211 (a)(1) and (a)(3) is denied; and it is further

ORDERED that the motion (002) by plaintiff for summary judgment on its complaint, an order of reference appointing a referee to compute the amount due and owing to plaintiff, and an amendment of the caption is granted; and it is further

ORDERED that the motion (003) by defendant Ivan Young to compel acceptance of a late answer and for a permanent injunction is denied; and it is further

ORDERED that John Howard Lynch, Esq. with an office at 4250 Veterans Memorial Highway, Suite 302 Holbrook, New York 11741 is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by deleting defendants "John Doe #1-10" and "Jane Doe #2-10" and by substituting Melanie Young in place of "Jane Doe #1"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
---X
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF16, ASSET-BACKED CERTIFICATES, SERIES 2006-FF16,

Plaintiff,

- against -

IVAN YOUNG; DEBRA A. CANTALUPO COMMISSIONER OF TAXATION & FINANCE; INTERNAL REVENUE SERVICE; and MELANIE YOUNG,

Defendants.
---X

This is an action to foreclose a mortgage on property known as 75 Princess Avenue, Bay Shore, New York. Defendant Ivan Young (Young), attorney pro se, obtained a refinancing loan from the lender, non-party First Franklin, a Division of National City Bank (First Franklin). He executed a note dated September 19, 2006 promising to pay the lender $331,500.00 at a yearly interest rate of 9.2 percent and monthly loan payments of $2,581.07. Defendant Young also executed a mortgage on his home, the subject property. The mortgage indicated First Franklin to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of First Franklin as well as the mortgagee of record for the purposes of recording the mortgage. Pursuant to the terms of the mortgage, defendant Young granted and conveyed the property to MERS, solely as nominee for the lender and the lender's successors in interest and MERS' successors in interest, subject to the terms of the mortgage. The mortgage was recorded on December 7, 2006 in the Suffolk County Clerk's Office. An assignment dated December 1, 2007 indicated that MERS, as nominee of First Franklin, had assigned the subject mortgage and note to plaintiff, Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF16, Asset-Backed Certificates, Series 2006-FF16 (Deutsche Bank).

Defendant Young defaulted on his loan payments for October 2007 through December 2007[1]. A letter dated December 27, 2007 addressed to defendant Young indicated a past due amount of $8,371.11 plus late charges of $464.58 and gave notice to cure on or before January 26, 2008.

Plaintiff, Deutsche Bank, thereafter commenced this action on March 31, 2008. Defendant Young was served with copies of the summons and complaint, notice of pendency and Help for Homeowners in Foreclosure notice pursuant to CPLR 308 (2) on April 5, 2008. On May 12, 2008, defendant Young signed a Repayment Plan agreement dated April 28, 2008 from First Financial Loan Services. The Repayment Plan agreement contained the following:

> In your discussion with a First Franklin Loan Services representative, you requested a modification or other change in the loan terms. As the representative discussed with you, First Franklin Loan Services agrees to complete a modification or other change in terms once you have demonstrated the ability to make consistent monthly payments. You have agreed to make monthly payments in the amounts and pursuant to the schedule set out below as a prerequisite to any modification or change to the terms of your loan.
>
> * * *
>
> You agree that if you do not make payments in accordance with this Plan or commit further breach of your mortgage loan, this agreement will immediately terminate and become null and void without further notice or demand on our part, and any foreclosure action we may have previously initiated will resume.
>
> * * *
>
> By executing this agreement, you agree that after the successful conclusion of the defined Repayment Plan, you will complete the agreed upon Modification and, subsequently, resume regular monthly payments on the Note and Mortgage.
>
> * * *
>
> Note that the following will render this Repayment Plan null and void requiring the immediate

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[1] Defendant Young explains in his affidavit of merit that the default occurred due to a temporary financial hardship when his wife lost her job on or about August 2007 and that the hardship ended on or about May 2008 when his wife was employed by the Town of Islip.

payment in full: 1) sending less than the agreed amount, 2) funds received by us after the agreed date 3) failure to sign and return this Repayment Plan 4) filing bankruptcy 5) default under any instrument or Agreement executed or delivered by you in favor of Lender.

* * *

In such an event, this agreement shall terminate immediately and without demand, notice or declaration; collections and/or foreclosure activities will resume from the point at which they were suspended without notice to you.

Defendant Young timely made the required three payments by wiring the first two payments by Western Union and sending a certified check for the last payment in July 2008. In August 2008, he was requested to provide updated financial information for both himself and his wife. Then, by letter dated December 4, 2008, First Franklin denied his request for a loan modification based on his failure to return a second pre-modification agreement[2].

On March 15, 2009, plaintiff, Deutsche Bank, moved for summary judgment on its complaint, an order of reference appointing a referee to compute the amount due and owing to plaintiff, and an amendment of the caption to substitute Melanie Young, a resident of the premises, in place of "Jane Doe # 1." None of the defendants answered or appeared.

On May 11, 2009, defendant Young moved to dismiss the complaint pursuant to CPLR 3211 (a)(1) on the ground that First Franklin breached the Repayment Plan agreement by refusing to approve his loan modification request and pursuant to CPLR 3211 (a)(3) on the ground that plaintiff, Deutsche Bank, lacked standing because all of defendant Young's interactions have been with First Franklin and he had not received any documentation or communication from First Franklin that it had assigned his loan to plaintiff. Plaintiff opposed the motion to dismiss noting that a request for an extension of time to appear and answer by motion or stipulation had not been discussed nor made by the parties. A vice president of plaintiff, Bryan G. Kusich, stated in his affidavit in support that he was fully familiar with the facts and circumstances of this foreclosure and had reviewed and was fully familiar with the documents relating to this action. In addition, he stated that plaintiff is the holder of the mortgage based on a corrective assignment of mortgage dated December 23, 2008 and recorded on March 12, 2009 in the Suffolk County Clerk's Office which corrected a scrivener's error in the name of the assignor and original lender. He also stated that defendant Young failed to timely and fully comply with the terms of the April 2008 Pre-Modification Agreement, was offered a second Pre-Modification Agreement but failed to comply with it, and failed to correct the default in payment pursuant to the notice to cure resulting in the acceleration of the debt and the foreclosure action.

The parties thereafter began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned 23 times beginning on August 5, 2009 and lasting until March 21, 2012[3].

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[2] Defendant Young asserts in his papers in support of his motions that the updated financial information that he provided was lost or mishandled by various employees of First Financial between August 2008 and November 2008. In addition, he asserts that First Financial's requirement that he enter a second pre-modification agreement was based on First Financial's failure to timely process his information and on erroneous purportedly outstanding property tax and homeowner's insurance arrears.

[3] The Court's computerized records indicate that foreclosure settlement conferences were conducted on April 15, 2010 and March 21, 2012.

On December 15, 2011, three years and nine months after the commencement of this action and during settlement negotiations, defendant Young moved by order to show cause pursuant to CPLR 2004 and CPLR 3012 (d) requesting that his proposed verified answer and counterclaims dated December 14, 2011 be accepted as timely and deemed served upon plaintiff and obtained a temporary restraining order restraining plaintiff from taking any action in this matter pending a determination of said request. The proposed answer alleges a first affirmative defense that plaintiff is not the true and lawful owner or holder of the note and mortgage inasmuch as MERS never had legal ownership or possession of the note or mortgage to assign to plaintiff and that plaintiff is using intrinsic fraud to obtain a default judgment; a second affirmative defense that plaintiff had full knowledge that the corrective assignment was fraudulent; and a third affirmative defense that plaintiff has full knowledge that it is not the true and lawful holder and/or owner of the note and mortgage pursuant to the terms of the Pooling and Servicing Agreement. In addition, the proposed answer contains a fourth affirmative defense that plaintiff's allegations of default in payments are fraudulent inasmuch as pursuant to the terms of the Pooling and Servicing Agreement plaintiff should have been repaid by the loan servicer for any defaults; a fifth affirmative defense that plaintiff failed to submit a proper affirmation required in residential foreclosure actions pursuant to the Administrative Order of the Chief Administrative Judge of the Courts; and a sixth affirmative defense and first counterclaim for rescission of the loan as a predatory mortgage loan. The proposed answer also contains a seventh affirmative defense and second counterclaim for damages alleging that plaintiff is barred from recovery by the doctrines of laches, waiver, unclean hands, accord and satisfaction, res judicata, statute of frauds, usury and collateral estoppel; an eighth affirmative defense and third counterclaim for damages for plaintiff's collection of unauthorized fees and charges; a ninth affirmative defense and fourth counterclaim for damages for plaintiff's breach of its implied obligation of good faith and fair dealing; and a tenth affirmative defense and fifth counterclaim for discovery.

The parties were unable to reach a settlement at the last conference on March 21, 2012. The Court now considers the pending motions.

Plaintiff is moving, in effect, for leave to enter a default judgment against all the defendants including defendant Young, an order of reference appointing a referee to compute the amount due and owing to plaintiff, and an amendment of the caption of this action to strike the names of the defendants "John Doe #1-10" and "Jane Doe #2- 10" and to substitute Melanie Young in place of "Jane Doe #1."

A defendant has made an appearance if he serves a notice of appearance or an answer or makes a motion which has the effect of extending his time to answer (see, CPLR 3211 [e]; Colbert v International Sec. Bureau Inc., 79 AD2d 448, appeal denied 53 NY2d 608). Plaintiff demonstrated its entitlement to leave to enter judgment against defendant Young based on its submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, the mortgage, the unpaid note, evidence of the default in payment of defendant Young, and an affirmation from its attorney regarding defendant's default in appearing and answering (see, CPLR 3215 [f]; Swedbank, AB v Hale Ave. Borrower, LLC, 89 AD3d 922; 599 Ralph Ave. Dev., LLC v 799 Sterling Inc., 34 AD3d 726; Giovanelli v Rivera, 23 AD3d 616).

Defendant Young is moving by notice of motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(3) and is moving by order to show cause to compel acceptance by plaintiff of his proposed verified answer and counterclaims as timely and duly served upon plaintiff pursuant to CPLR 2004 and CPLR 3012 (d) and for the issuance of a permanent injunction prohibiting plaintiff from taking any further action regarding the instant foreclosure action until the Court issues a determination with respect to his proposed answer.

In opposition to the motion to compel acceptance of the late answer, plaintiff's attorney contends that the

extremely late request for interposition of an answer and for discovery is most prejudicial to plaintiff which has negotiated in good faith over the past four years. He indicates in his affirmation that although defendant Young is an attorney duly admitted to practice law in this State since 2006 and whose practice includes foreclosure defense[4], no formal notice of appearance has yet been served upon plaintiff, its predecessor in interest or the office of plaintiff's attorney, and the possibility of a responsive pleading was not discussed until December 2011. Plaintiff's attorney contends that defendant Young has failed to provide good or reasonable cause for injunctive relief and has failed to provide a reasonable basis for his willful failure to interpose an answer on his behalf for almost four years. In addition, plaintiff's attorney contends that critically defendant Young fails to address his procrastination and indifference to the summons and complaint served upon him in April 2008, almost 14 months before the first settlement conference. According to plaintiff's attorney, during the settlement period both parties continuously participated in good faith negotiations, exchanging financial records, reviewing the financial health of defendant Young, the current status of the loan and the arrears, and attempted to reach a workout of the loan but based upon the incomplete financial information submitted by defendant Young as well as the accruing interest, costs and necessary disbursements, no mutually agreeable workout was reached.

Plaintiff's attorney argues that the defense of lack of standing is inaccurate and must be deemed waived pursuant to CPLR 3211 (e) and that it is curious that defendant Young who claims to have expertise in foreclosure matters would negotiate for more than two years with a party that he now claims lacks standing. Plaintiff's attorney adds that plaintiff would be prejudiced by the granting of defendant Young's motions inasmuch as defendant Young has not paid his mortgage loan, insurance or taxes on the premises since October 2007 and plaintiff meanwhile has not been paid interest or principle during said years and has disbursed payments for real estate taxes and property insurance which total more than $50,000. Plaintiff's attorney also argues that neither plaintiff nor his office knowingly, purposefully or unwittingly made any misrepresentation to defendant Young, the Court or the County Clerk in asserting its interest in the subject note and mortgage and that the pooling and servicing agreement is irrelevant to this action.

Moreover, plaintiff's attorney contends that the failure to settle was precipitated by defendant Young's response to advice on January 18, 2012 that a modification had not been ruled out but that timely and complete documents were required to be submitted to complete the Federal government program as well as plaintiff's proprietary relief programs. According to plaintiff's attorney, one month later defendant Young sent a "one-sided, gratuitous modification contract" rather than the required documents. He submits a letter dated February 28, 2012 from defendant Young annexing a proposed modification agreement purportedly based on a pilot program in effect in Queens and Nassau Counties and upstate New York by which lenders made modification offers that included a principal reduction, lower interest rates and/or an extension of the mortgage term prior to the homeowner having to submit any financial documents. In the letter, defendant Young indicated that the outstanding mortgage sum was approximately $600,000 whereas the current market value of his home was approximately $180,000 to $250,000 and that based on said difference in values there was no incentive for him to modify the loan but that plaintiff could benefit greatly by offering him the proposed modification. He concluded by stating that "The next settlement conference is [sic] in this action is on March 21, 2012. If your client decides to make me the modification offer I proposed above, please advise me in writing and I will submit the financial documents and information for myself only to you immediately. If not, then we can engage in motion practice to litigate the merits while the interest and penalties accrue on the house for as long as the litigation continues."

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[4] Plaintiff attaches a copy of defendant Young's firm's website.

Initially, it appears, pursuant to paragraph 42 of the affirmation in support of the order to show cause, and paragraph 20 of his proposed answer, that defendant Young desires at this juncture to withdraw his motion to dismiss. However, a motion may not be withdrawn after the return date without the consent of all parties or without leave of Court (see, People v Cabrera, 91 NY2d 984; Caplash v Rochester Oral & Maxillofacial Surgery Assocs., LLC, 48 AD3d 1139; Oshrin v Celanese Corp. of America, 37 NYS2d 548, affd 265 AD 923 ,affd 291 NY 170; Hoover v Rochester Printing Co., 2 AD 11). Inasmuch as defendant Young has not obtained the consent of all parties nor sought leave of Court, the motion to dismiss is not withdrawn.

Defendant Young was required to answer the complaint, appear, or move with respect thereto within 30 days of service of process on April 5, 2008, which he failed to do (see, CPLR 320 [a], 3211 [e]; U.S. Bank Natl. Assn. v Gonzalez, ___ AD3d ___, 2012 NY Slip Op 06596 [2d Dept 2012]). His motion pursuant to CPLR 3211 (a) (1) and (3) to dismiss the complaint was not made prior to the time by which he was required to serve an answer or notice of appearance (see, CPLR 320 [a]; 3211[e]; McGee v Dunn, 75 AD3d 624). In addition, his three-year and-nine-months delay in serving his motion to compel plaintiff to accept a late answer cannot be characterized as relatively short delay (compare, Arias v First Presbyterian Church in Jamaica, 97 AD3d 712 [less than two month delay]; Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737 [11-day delay]; Schonfeld v Blue & White Food Products Corp., 29 AD3d 673 [two-and-a-half-month-delay]; Chakmakian v Maroney, 78 AD3d 1103 [three weeks delay]; Stuart v Kushner, 39 AD3d 535, 833 NYS2d 187 [two month delay]). This lengthy delay must be considered together with the extreme prejudice to plaintiff which has been negotiating and paying the real estate taxes and insurance on the property during said period.

A defendant who has failed to appear or answer the complaint and who seeks to compel plaintiff to accept a late answer, must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid entry of a default judgment or to extend the time to answer (see, Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789; Ogman v Mastrantonio Catering, Inc., 82 AD3d 852, lv denied 18 NY3d 803; Equicredit Corp. of Am. v Campbell, 73 AD3d 1119; Maspeth Fed. Sav. & Loan Assn. v McGown, 77 AD3d 889). Notably, the affirmation in support of the motion to dismiss does not contain a request for an extension of time to answer or appear nor does it specifically address the untimeliness of the motion (see, CPLR 2004; U.S. Bank Natl. Assn. v Gonzalez, supra; Holubar v Holubar, 89 AD3d 802). Instead, the affirmation contains the following, "Defendant further submit [sic] this Motion to prevent and/or to oppose the issuance of any Ex-Parte Order in this foreclosure action because Defendant, as discussed below, has been communicating and/or negotiating with the lender directly as late as February 14, 2009 to resolve the instant action. During Defendant's communication with lender, Defendant was informed that the instant action will be on hold." In addition, defendant Young indicates in paragraph 14 of his affirmation in support of the order to show cause that "relying upon the verbal advice/assurance given to the Defendant by FIRST FRANKLIN that Defendant's loan servicer was actively seeking to amicably resolve the issue presented herein with the Defendant via a loan modification, Defendant wholly relied upon such advice/assurance in negotiating directly with FIRST FRANKLIN and not interposing an answer to Plaintiff's foreclosure complaint."

The determination of what constitutes a reasonable excuse lies within the sound discretion of the Court (see, Maspeth Fed. Sav. & Loan Assn. v McGown, supra; Star Indus., Inc. v Innovative Beverages, Inc., 55 AD3d 903; Antoine v Bee, 26 AD3d 306). In certain circumstances it has been held that a good faith belief in settlement, supported by substantial evidence, constitutes a reasonable excuse for default (see, Armstrong Trading, Ltd. v MBM Enterprises, 29 AD3d 835; Scarlett v McCarthy, 2 AD3d 623; Lehrman v Lake Katonah Club, 295 AD2d 322). Under the subject circumstances, defendant Young's excuse of active engagement in negotiations for loan modification or settlement has been rejected as not constituting a reasonable excuse for default (see, Mellon v Izmirligil, 88 AD3d 930; Kouzios v Dery, 57 AD3d 949; Majestic Clothing Inc. v East

Coast Storage, LLC, 18 AD3d 516; DeRisi v Santoro, 262 AD2d 270; Flora Co. v Ingilis, 233 AD2d 418). Notably, the circumstances of the case cited by defendant Young, Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737, differ greatly from those herein. In Performance, the defendant was actively engaged in settlement negotiations with the plaintiff's attorney, who failed to inform that he would be moving for leave to enter a default judgment. Here, defendant Young had notice by letter dated December 4, 2008 that "[y]our request for a modification of the loan referenced above has been denied ... Normal servicing and collection activities, up to and including foreclosure, if necessary, will continue on this loan" and instead of acting immediately with respect to appearing or answering the complaint, defendant Young sent a letter dated February 14, 2009 to Evan D. Hiersche, Loss Mitigation Agent of First Franklin Loan Services disputing the decision to deny his modification request. Plaintiff moved for a default judgment on March 15, 2009, one month after defendant's February 14, 2009 letter. Defendant Young also failed to demonstrate a reasonable excuse for the lengthy delay in moving to compel plaintiff to accept a late answer (see, Ogman v Mastrantonio Catering, Inc., supra), and specifically the almost 14 month delay between when he was first served and defaulted and the very first settlement conference held.

Inasmuch as defendant Young failed to demonstrate a reasonable excuse for his default, it is unnecessary to determine whether he demonstrated the existence of a potentially meritorious defense (see, Wells Fargo Bank, N.A. v Cervini, supra; HSBC Bank USA, N.A. v Roldan, 80 AD3d 566; Maspeth Fed. Sav. & Loan Assn. v McGown, supra). In any event, the documents submitted by defendant Young did not conclusively dispose of plaintiff's claims pursuant to CPLR 3211 (a)(1) and failed to demonstrate breach of the Repayment Plan agreement (compare, Turkat v Lalezarian Developers, Inc., 52 AD3d 595). First Franklin only agreed to modify the loan once defendant Young had "demonstrated the ability to make consistent monthly payments," which demonstration was not expressly limited by the agreement's terms to making the required payments therein. From the submissions, it appears that First Franklin sought updated financial information for that purpose and that the parties have spent the past four years negotiating with respect thereto. In addition, defendant Young waived any defense based on plaintiff's alleged lack of standing by failing to raise the defense in a timely answer or pre-answer motion to dismiss the complaint (see, Citibank, N.A. v Swiatkowski, 98 AD3d 555; U.S. Bank Natl. Assn. v Denaro, 98 AD3d 964; U.S. Bank Natl. Assn v Eaddy, 79 AD3d 1022; Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239). Moreover, the allegations of intrinsic fraud are conclusory (see, Archer Capital Fund, L.P. v GEL, LLC, 95 AD3d 800, lv to appeal dismissed 19 NY3d 1004; see also, Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553) and defendant Young failed to demonstrate that further discovery more than four years after the commencement of this action might lead to relevant evidence (see CPLR 3212[f]; Swedbank, AB v Hale Ave. Borrower, LLC, supra). Thus, plaintiff's motion, in effect, for leave to enter a default judgment against all the defendants in this action and for an order of reference is granted (see, HSBC Bank USA, N.A. v Roldan, supra), the motion of defendant Young to dismiss the complaint is untimely and cannot be considered (see, Holubar v Holubar, supra), and the motion by defendant Young to compel plaintiff to accept a late answer is denied (see, Ogman v Mastrantonio Catering, Inc., supra; HSBC Bank USA, N.A. v Roldan, supra). The request by defendant Young for a preliminary injunction is rendered academic by this determination.

Accordingly, plaintiff's motion is granted and the motions of defendant Young are denied.

Submit Order.

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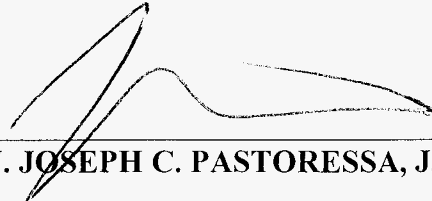
Dated: November 19, 2012



HON. JOSEPH C. PASTORESSA, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**