

<b>US Bank N.A. v Soroudi</b>
2015 NY Slip Op 32084(U)
February 20, 2015
Supreme Court, New York County
Docket Number: 111777/2009
Judge: Cynthia S. Kern
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** \_\_\_\_\_

Index Number : 111777/2009  
US BANK NATIONAL  
vs.  
SOROUDI, JILA  
SEQUENCE NUMBER : 007  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision:

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

FEB 23 2015

NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**  
FEB 23 2015  
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NYS SUPREME COURT - CIVIL

Dated: 2/20/15

\_\_\_\_\_  
\_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
US BANK NATIONAL ASSOCIATION, as trustee for  
MAST ALTERNATIVE LOAN TRUST 2005-6,

Plaintiff,

Index No. 111777/2009

-against-

**DECISION/ORDER**

JILA SOROUDI, BOARD OF MANAGERS OF THE  
EXECUTIVE PLAZA CONDOMINIUM, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU  
and IHOLA ISANDOR,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	<b>FILED</b>	Numbered
Notice of Motion and Affidavits Annexed.....	FEB 23 2015	1
Affirmations in Opposition .....		2
Replying Affidavits.....	NEW YORK	3
Exhibits.....	COUNTY CLERK'S OFFICE	4

Plaintiff commenced the instant action against defendants seeking to foreclose on its mortgage against the premises commonly known as 150 West 51<sup>st</sup> Street, Unit 8-35, New York, NY 10019 (the “mortgaged premises”). Defendant Jila Soroudi (“Soroudi”) now moves for an Order: (1) pursuant to CPLR § 5015 vacating the judgment of foreclosure and sale that was entered upon her default in appearing or answering; (2) vacating the referee’s deed; and (3) permitting her to amend her answer. For the reasons set forth below, Souroudi’s motion is denied in its entirety.

The relevant facts are as follows. Souroudi is the owner of the mortgaged premises. On or about April 1, 2009, Souroudi defaulted under the terms of her loan and mortgage agreement with plaintiff by failing to make her monthly installment payment. Thus, on August 18, 2009, plaintiff filed the instant action to foreclose on the mortgaged premises by filing a lis pendens, summons and complaint with the County Clerk.

In December 2009, plaintiff moved for default judgment against defendants for their failure to answer or otherwise appear in the action and for an order of reference. In an order dated December 10, 2009, Justice Diamond granted default against the defendants, including Souroudi, and appointed Linda Rzesniowiecki, Esq. as referee to ascertain and compute the amount due to plaintiff and to report whether the subject premises could be sold in separate parcels. Pursuant to Ms. Rzesniowiecki's report (the "Referee's Report"), she determined that the subject premises could not be sold in separate parcels and computed the amounts due to plaintiff, exclusive of attorney's fees, through February 10, 2010.

Thereafter, plaintiff moved for an order confirming the Referee's Report and directing a judgment of foreclosure and sale, which was granted by order dated June 8, 2010. In June 2011, plaintiff moved for an order pursuant to CPLR §§ 5019(a) and 2001 substituting the affidavit of merit and amount due *nunc pro tunc* in place of the affidavit attached to its initial motion papers dated June 28, 2011. Souroudi, for the first time, appeared in the action and through her attorney submitted opposition to plaintiff's motion. In a decision on the record, Justice Solomon denied plaintiff's motion.

In August 2012, after changing its attorney, plaintiff moved to vacate the prior order of reference dated December 16, 2009 and judgement of foreclosure and sale dated June 8, 2012,

and for an order of reference. In a decision dated January 28, 2013, this court granted plaintiff's motion without opposition and directed plaintiff to settle the order. The court thereafter executed plaintiff's order on April 5, 2013, and appointed Miriam M. Breier, Esq. as referee to ascertain and compute the amount due to plaintiff and to report whether the mortgaged premises could be sold in separate parcels. After obtaining Ms. Breier's report (the "Referee's Report"), plaintiff moved for an order confirming the Referee's Report and for a judgment of foreclosure and sale. By decision dated March 11, 2014, this court granted plaintiff's motion without opposition and directed plaintiff to settle the order. On November 3, 2014, plaintiff filed the notice of settlement, which is currently pending before the court. Soroundi now brings the instant motion for an order (1) pursuant to CPLR § 5105 vacating the judgment of foreclosure and sale; (2) vacating the referee's deed; and (3) pursuant to CPLR § 3025(b) permitting her to amend her answer.

As an initial matter, Soroundi's motion to vacate the referee's deed is denied as premature. To date, a sale of the mortgaged premises has not been conducted by the appointed referee. Thus, there is no referee's deed to vacate.

Additionally, Soroundi's motion pursuant to CPLR § 3025(b) to permit her to amend her answer is denied as it is procedurally improper. CPLR § 3025(b) is only applicable to the amendment of pleadings already filed. In the present case, Soroundi has never submitted an answer. Thus, Soroundi cannot seek to amend a pleading that was never filed.

Additionally, Soroundi's motion pursuant to CPLR § 5105(a)(1) to vacate the judgment of foreclosure and sale that was entered upon her default in appearing or answering the complaint is denied. It is well settled that a party seeking to vacate a default judgment under CPLR §

5015(a)(1) must establish a reasonable excuse for the default and a meritorious defense to the underlying action. *Mercado v. Allstate Life Ins. Co.*, 193 A.D.2d 476 (1<sup>st</sup> Dept 1993); *Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624 (1<sup>st</sup> Dept 1985).

In the present action, Soroundi has failed to provide a reasonable excuse for her default. Soroundi presents only her own self-serving and conclusory affidavit in support of her motion wherein she attests that she never received any notification of the appointment of a referee or the judgment of foreclosure and sale and that plaintiff acted in bad faith by failing to hold a foreclosure settlement conference and telling her that the foreclosure proceedings would be stopped if she obtained a modification of her loan. None of these assertions provide a reasonable explanation as to why it took Soroundi over four years to make the present motion to vacate her default and defend this action. As an initial matter, any contention that her default was due to the fact that she never received notice of the judgment of foreclosure and sale is completely belied by the fact that she admits she was aware of the proceedings as she was allegedly working with the bank to obtain a modification. Thus, lack of notice is not a reasonable excuse in this instance. Further, plaintiff's alleged bad faith simply cannot provide a reasonable explanation as to why it took Soroundi four years to appear and attempt to assert an answer in this action. Thus, there is no reasonable excuse for her default and the court need not even address whether she has a meritorious defense to the action.

Additionally, Soroundi's motion pursuant to CPLR § 5105(a)(3) to vacate the judgment of foreclosure and sale that was entered upon her default in appearing or answering the complaint is also denied. CPLR § 5105(a)(3) provides that the court may vacate a judgment on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party." Although there is no

express time limit for seeking relief from a judgment pursuant to CPLR § 5015(a)(3), a party is required to make the motion within a reasonable time. *Mark v. Lenfest*, 80 A.D.3d 426 (1<sup>st</sup> Dept 2011). Here, Soroundi's delay of more than four years after entry of the initial judgment of foreclosure and sale in moving to vacate the judgment, despite her obvious awareness of the proceedings and all relevant facts surrounding the issues, is unreasonable.

Further, even if the motion was made in a reasonable time, Souroundi still fails to articulate a fraud, misrepresentation or other misconduct by plaintiff warranting vacatur. Soroundi contends that plaintiff engaged in fraud and misconduct by failing to provide the requisite ninety day notice prior to making a motion for either a reference or a judgment of foreclosure and sale, telling her that this action would be stopped if she was granted a loan modification and failing to provide her with a foreclosure conference. However, Soroundi fails to present any authority supporting that these actions constitute fraud or a misrepresentation to warrant vacatur. Indeed, it is clear that these assertions are simply unsubstantiated and irrelevant assertions insufficient to establish that plaintiff procured the judgment of foreclosure and sale by fraud, misrepresentation or other misconduct.

Accordingly, based on the foregoing, Soroundi's motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 2/20/15

**FILED**  
FEB 23 2015  
NEW YORK  
COUNTY CLERKS OFFICE

Enter:

*JK*  
J.S.C.

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