

<b>U.S. Bank v Bukobza</b>
2015 NY Slip Op 32605(U)
April 6, 2015
Supreme Court, Kings County
Docket Number: 13170/13
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

U.S. BANK, as Trustee for the registered holders of asset  
Backed certificates, Series 2005-HE4,

Plaintiff(s),

-against-

ZIV BUKOBZA, 2801 CORTELYOU DEVELOPMENT  
CORP., SPEC-U VII, INC. et. al.,

Defendant(s).

Index No.: 13170/13  
Motion Calendar No.  
Motion Sequence No.

**DECISION / ORDER**

Present:

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this  
motion to: vacate the default judgment and cancel the lis pendens.**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1-2</u>
Order to Show cause and Affidavits Annexed.....	<u>          </u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>          </u>
Other:.....	<u>          </u>

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, Spec-U VII, Inc. ("Spec-U") by their attorney Raphael S. Berlin, has moved pursuant to CPLR § 317 and CPLR § 5015(a)(1) for an Order to vacate and set aside the default judgment upon the grounds that Spec-U's default was excusable and they have a meritorious defense to this action. Spec-U further moves that upon the vacatur of the default judgment, that the lis pendens filed on or about January 14, 2014 by the plaintiff, U.S. Bank, as Trustee for the registered holders of asset back certificates, Series 2005-HE4 ("U.S. Bank"), be cancelled. U.S.

Bank opposes the relief sought by Spec-U upon the grounds that the latter is in default by failing to serve and file an answer to the summons and complaint. U.S. Bank argues that the default should not be vacated as Spec-U has failed to set forth both a reasonable excuse for failing to appear and serve and file an answer, as well as a meritorious defense to the instant action.

Background:

Co-defendant, Ziv Bukobza, ("Mr. Bukobza") acquired title to the subject premises (217 East 28<sup>th</sup> Street a/k/a 2801-2805 Cortelyou Road, Brooklyn, New York) by deed dated May 20, 2005. Mr. Bukobza executed a mortgage agreement with a lender and non-party, Argent Mortgage Company LLC ("Argent"), on May 20, 2005, as well as a Note in the principal amount of \$427,500.00. It is undisputed that this mortgage was never recorded by the office of the Clerk of Kings County. On or about May 20, 2011, Argent assigned its rights, title and interest to the subject mortgage to the plaintiff, U.S. Bank.

A subsequent mortgage was executed between Mr. Bukobza as mortgagor/borrower and Spec-U, as mortgagee, in the principal amount of \$300,000.00. A note in the same amount was executed on the same date by Mr. Bukobza. This mortgage was recorded on June 7, 2007, in the office of the City Register of New York, County of Kings. Mr. Bukobza defaulted under the terms of this mortgage by failing to make the payment due on March 1, 2008, and has not made any payments subsequent thereto.

A foreclosure action was commenced on behalf of Spec-U under index no. 19339/10 on August 4, 2010. On or about October 18, 2012, Judge Partnow issued an Order of Reference and appointed a referee to compute and to determine if the property could be sold as one parcel. A Judgment of Foreclosure and Sale was subsequently awarded to Spec-U against defendant Mr. Bukobza by the Hon. Judge Partnow of this Court on February 26, 2014. Thereafter, an auction for the sale of the property was scheduled for June 5, 2014 and then adjourned until June 12, 2014. On June 3, 2014, U.S. Bank moved by Order to Show Cause, in which relief was sought to stay the auction as well as to obtain permission to intervene in that matter, as U.S. Bank sought to protect its' interest in an unrecorded mortgage originally made between Argent (plaintiff's predecessor) and Mr. Bukobza. Thereafter, on or about June 9, 2014, Judge Partnow signed the

Order to Show Cause, but denied the application of U.S. Bank for interim relief and permitted the foreclosure auction to proceed as scheduled on June 12, 2014. At the auction, the property was awarded to a successful bidder. (The closing has still not occurred due the fact that the bidder has not been able to obtain clear title as a result of the Notice of Pendency, which remains as a lien on the subject property). On June 24, 2014, Judge Partnow issued an Order which denied U.S. Bank’s motion to intervene as well as to vacate the Judgment of Foreclosure (see copy of Order annexed to the Notice of Motion as Exhibit “F”).

The underlying foreclosure action (under this index no. 13170/13) was commenced on or about July 23, 2013, by the plaintiff filing a summons and complaint with the Clerk of the Court. Defendants, Mr. Bukobza and 2801 Cortelyou Development Corp. appeared in this action. The summons and complaint were allegedly served upon Spec-U, by serving an authorized agent at their principal place of business at 3329 18<sup>th</sup> Avenue, Brooklyn, New York 11204. Defendant, Spec-U failed to answer or move to dismiss this action, which resulted in the plaintiff having moved for a default judgment. Thereafter, it appears that on or about November 13, 2013, counsel for the defendant contacted the office of plaintiff’s counsel, requesting an extension of time to file an answer to the complaint. It appears to be undisputed that counsel consented to the extension, however, despite being afforded additional time, Spec-U failed to answer.

Thereafter, counsel for Spec-U made a second request of plaintiff’s counsel for an extension of time in which to file an answer. It appears that a further consent by plaintiff’s counsel was conditioned on defendant agreeing to waive any personal jurisdictional defenses. When no agreement was reached on this condition, plaintiff moved for a default judgment against Spec-U, which request was granted by Judge Partnow in an Order dated October 23, 2014.

Defendant Spec-U’s contention:

Defendant contends that the default should be vacated as they have demonstrated both an excusable default and a potential meritorious defense to the action. Defendant maintains that their default occurred while they were corresponding with counsel for U.S. Bank. Mr. Berlin, counsel for defendant Spec-U, contends that on January 30, 2014 he received an e-mail correspondence from Danielle Light, Esq. of Houser & Allison, attorneys’ for U.S. Bank, to inform him that the

plaintiff had withdrawn their motion for a default judgment. Ms. Light also allegedly informed Mr. Berlin via telephone that the case was on hold and it was unnecessary for Spec-U to file and submit an answer. Mr. Berlin further contends that he and opposing counsel allegedly had subsequent conversations related to this matter and as a result Mr. Berlin was surprised that a request for a default judgment had been made by U.S. Bank and was awarded by the Court.

It is further contended by counsel for Spec-U that they were never properly served with the summons and complaint and that the individual that was allegedly served ("Diamond"), is not an authorized agent of Spec-U. Spec-U alleges that the first time that they learned of this action was when the motion for a default judgment was served upon their office.

Defendant Spec-U asserts that the determination of whether to vacate a default is within the sound discretion of the court (see Bouxsein v. Bialo, 35 AD2d 523, 313 NYS2d 426 [1970]). A court in determining whether a default should be vacated considers whether there was an excusable default, a meritorious defense, prejudice to the non-defaulting party and evidence of intent or lack of intent to deliberately default or abandon the action (see Arred Enterprises Corp., v. Indemnity Ins. Co. of North America, 108 AD2d 624, 485NYS2d 80 [1985]).

Spec-U maintains that their interest in the premises is superior to U.S. Bank, (who does not have a secured interest), because Spec-U lacked actual or constructive notice of Argent's mortgage at the time that Spec-U entered into a mortgage agreement with Mr. Bukobza. In Berger v. Polizotto, 148 AD2d 651, 539 NYS2d 401 [2<sup>nd</sup> Dept. 1989]), the Court held that the failure to properly record and index the subject instrument would preclude a party later from claiming that the instrument gave subsequent parties actual notice of the existence of the instrument.

Plaintiff's contention:

Plaintiff contends that the default judgment that was issued by this Court against Spec-U should not be vacated. Plaintiff asserts that Spec-U was properly served with the summons and complaint. A process server's affidavit which provides that delivery was made to a managing/designated agent, and which affidavit contains a description of that individual is prima facie evidence of proper service pursuant to CPLR §311(a) (see McIntyre v. Emanuel Church of God In Christ, Inc., 37 AD3d 562,830 NYS2d 261 [2<sup>nd</sup> Dept. 2007]). Plaintiff further asserts that

Spec-U had ample opportunity in which to serve and file an answer, in which the summons and complaint was served in July 2013. Plaintiff alleges that if they did not proceed to enter a judgment, the matter may have been dismissed for failure to prosecute.

In seeking to vacate a default pursuant to CPLR §5015(a), a party must demonstrate both an excusable default and a meritorious defense to the action. Plaintiff maintains that mere neglect will not be accepted as a reasonable excuse (see J.P. Morgan Chase Bank Nat. Ass'n v. Russo, 121 AD3d 1048, 996 NYS2d 68,70 [2<sup>nd</sup> Dept. 2014]). Additionally, plaintiff maintains that the defendant has not set forth a meritorious defense to the action.

The plaintiff further contends that the successful bidder at the auction is not a good faith purchaser because that bidder had notice of this action as well as the lis pendens that was recorded as to the subject property. In addition, the referee advised those in attendance at the foreclosure sale that there was litigation pending pertaining to the subject property.

Decision:

This Court has carefully considered the oral arguments of the respective attorneys made before the Court on March 26, 2015, the submissions of the parties and the applicable law in making its determination as to whether defendant's default should be vacated and upon vacatur whether the lis pendens filed by the plaintiff, U.S. Bank, should be cancelled.

In considering whether a default judgment should be vacated, a court may vacate the judgment pursuant to CPLR § 5015(a) if there is excusable neglect. Where a delay results from law office failure, a court may exercise its discretion to excuse that delay (see CPLR § 2005; Remote Meter Tech. of NY, Inc. v. Aris Realty Corp., 83 AD3d 1030, 1032, 922 NYS2d 440 [2<sup>nd</sup> Dept. 2011]). Here, it is undisputed that the attorneys for the parties were communicating with one another and there were discussions pertaining to the default and filing and serving of a late answer. The defendant has further set forth a meritorious defense in that it is seeking to enforce a recorded mortgage that is in default. There is a strong public policy that matters be disposed of on the merits in the absence of real prejudice to the plaintiff (see Moran v. Rynar, 39 AD2d 718, 332 NYS2d 138 [2<sup>nd</sup> Dept. 1972]). The Court finds that under the circumstances presented in this matter that it is well within its discretionary authority to vacate the default judgment that was

issued against the defendant.

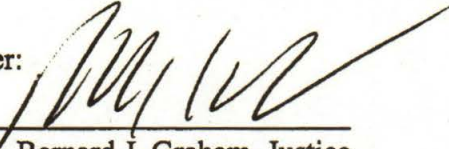
This Court has further considered the rulings and determinations made by Judge Partnow in the related matter. Judge Partnow, in considering plaintiff's Order to Show Cause to stay the auction of the subject premises, denied plaintiff's request for a stay of the auction, and instead permitted the foreclosure auction to proceed as scheduled. In addition, Judge Partnow, in an Order dated June 24, 2014, denied U.S. Bank's motion to intervene in the related case (under index # 19339/10). The auction resulted in a successful bidder, which bidder seeks to close title on the property since June 2014, but has been stymied as a result of the Notice of Pendency. The Notice of Pendency was placed on the property by plaintiff despite the fact that they are seeking to enforce an unsecured lien (unrecorded mortgage) and which lien is certainly inferior to the lien that Spec-U has sought to enforce and to which Spec-U did not have either constructive or actual notice of the U.S. Bank mortgage.

Conclusion:

The motion by defendant Spec-U to vacate a default judgment is granted. The defendant shall have twenty (20) days after entry of this Decision/Order within which to serve and file an answer. In addition, the Notice of Pendency which was filed by the plaintiff, U.S. Bank, with respect to the subject property, shall be cancelled. By removing the Notice of Pendency, this Court has ruled in a manner which is consistent with the prior ruling of Judge Partnow which denied U.S. Bank's request to stay the auction and directed the auction to proceed as scheduled.

This shall constitute the decision and order of the Court.

Dated: April 6, 2015  
Brooklyn, New York

Enter: 

Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

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