| **SRP Funding Trust 2011-5 v De La Cruz** |
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| 2017 NY Slip Op 30628(U) |
| March 30, 2017 |
| Supreme Court, New York County |
| Docket Number: 850139/14 |
| Judge: Manuel J. Mendez |
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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**PRESENT:** MANUEL J. MENDEZ **PART** 13
*Justice*

SRP FUNDING TRUST 2011-5,

Plaintiff

-Against-

LUIS DE LA CRUZ, 3472 BROADWAY REALTY CORP., CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants

INDEX NO. 850139 /14
MOTION DATE 02-08-2017
MOTION SEQ. NO 005
MOTION CAL. NO

The following papers, numbered 1 to 5 were read on this motion to Vacate judgment obtained by default.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-2 |
| Answering Affidavits — Exhibits | 3-4 |
| Replying Affidavits | 5 |

**Cross-Motion: Yes X No**

Upon a reading of the foregoing cited papers, it is ordered that this motion to vacate defendant's default on plaintiff's motion for summary judgment is granted, the portion of the court's order dated August 3, 2015 granting plaintiff's motion against the defendants 3472 Broadway Realty Corp., and Luis De La Cruz for summary judgment , striking their answer and dismissing their affirmative defenses is vacated, that portion of plaintiff's motion ( Motion Sequence 001) is restored to the court's calendar, and upon restoration, that portion of the motion is denied.

Plaintiff brought this action seeking to foreclose on a commercial mortgage which encumbers real property located at 3472 Broadway, New York, N.Y., identified as Block 2073, Lot 163. On October 29, 1997 3472 Broadway Realty Corp., executed and delivered to American Business Credit Inc., a promissory note and mortgage for $100,000 dollars which had a final payment date of November 1, 2012. Luis de la Cruz, as an individual, signed and delivered to American Business Credit, Inc., a surety agreement dated October 29, 1997 which identified him as a guarantor for the payment of the promissory note. On February 29, 2012, after a series of assignments, the mortgage and note were assigned and delivered to plaintiff.

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

Plaintiff moved against 3472 Broadway Realty Corp., and Luis De La Cruz (hereinafter collectively "defendants") for summary judgment, striking their answer and counterclaim, dismissing their affirmative defenses, appointing a Referee to Compute the amount owed and to ascertain whether the premises can be sold in one parcel. Plaintiff also sought a default judgment against the non-answering defendants and amendment of the caption.

Defendants 3472 Broadway Realty Corp., and Luis De La Cruz opposed the motion and cross-moved for an order of summary judgment dismissing the complaint. After the matter was fully submitted in the motion submission part ( Room 130), the motion was referred to this court. This court scheduled the motion for oral argument on July 1, 2015. Defendants' counsel failed to appear at oral argument and the court in a written decision and order dated August 3, 2015 granted the motion on default of the defendants and denied the cross-motion. Counsel for defendants at the time of the motion was Mr. Phillip C. Apovian, an attorney who practiced mainly in New Jersey.

Mr. Apovian submits an affidavit to the court stating that he was under the impression that once the motion was submitted it would be decided on the papers. He was unfamiliar with the New York e-track system and was not aware, and did not receive actual notice, of the oral argument date. He further states that the default was inadvertent and unintentional law office failure, which he respectfully requests the court to excuse. ( see Apovian Affidavit in moving papers). Mr. Apovian advised defendants that their interests would be better served by retaining an attorney who practiced full time in New York and defendants retained the services of Carlos Gonzalez, Esq. ( see signed Consent to Change attorney dated August 18, 2015 annexed to moving papers).

Mr. Gonzalez made motions by order to show cause to vacate the default judgment on September 14, 2015 ( motion sequence 002, NYSCEF #64 ) which was deemed abandoned on December 3, 2015, and on December 21, 2015 and January 4, 2016 ( motion sequence 003, NYSCEF #71& 77) which was denied on February 3, 2016 for Mr. Gonzalez' failure to appear at oral argument. Defendants have been unable to obtain an affidavit from Mr. Gonzalez explaining why he failed to appear at the oral argument date of February 3, 2016 and attribute the failure to appear to his neglect of the matter. Although defendants diligently sought to vacate their default by retaining new counsel, they were unaware that Mr. Gonzalez defaulted in appearing at argument on the motion. As soon as they learned that the default had not been vacated by Mr. Gonzalez the Defendants retained their current counsel in August 2016, who promptly made this motion to vacate the default judgment.

Defendants have submitted the affidavit of Mr. De La Cruz , together with documentation to show that they have a meritorious defense to this action and that summary judgment should not be granted to the plaintiff. The defendants have maintained the position throughout this litigation that the loan has been paid in full. In support of this argument they submit copies of bank statements to show the payments made on the mortgage, a copy of the invoice for November 2012 showing that at the time there were no late charges or past due amounts, and copies of the only default letters they allege to have received to prove that they were only late in payment on two occasions. Mr. De La Cruz maintains that plaintiff misapplied their payments and miscalculated the amount owed. Defendants allege that Mr. De La Cruz' affidavit, that of his previous attorney and the documents submitted establish a reasonable excuse

for the default, a meritorious defense, and an issue of fact precluding summary judgment. ( see moving papers Exhibit A through R).

Plaintiff opposes the motion on the grounds that defendants have previously moved to vacate the default and defaulted on their motions to vacate; and on the grounds that this motion is late as it is being made more than one year after the entry of the order ( see Notice of entry dated August 11, 2015).

A court may relieve a party from its default if the party provides the court with a reasonable excuse for the default and a meritorious defense to the action ( see CPLR 5015(a)(1)). "On a motion to vacate an order of default, it is within the court's sound discretion to determine whether the movant's excuse for the default is sufficient. The determination whether a reasonable excuse has been offered is sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits ( Chevalier v. 368 E. 148th Street Associates, LLC, 80 A.D.3d 411 [1st. Dept. 2011]).

Defendants default was not willful as it was due to the inadvertence of their counsel who was not familiar with the court's e-tracking system and did not know that he was to appear in court for oral argument. Defendants diligently sought the services of an attorney more familiar with the courts of the state of New York and when that attorney appeared to neglect the matter immediately sought the services of a more diligent and experienced attorney in this area, who immediately made the present motion to vacate the default. There was a short delay in moving to vacate the default, albeit by different counsel on more than one occasion, There has been no prejudice to the opposing party and the strong public policy favoring resolution of cases on the merits militate in favor of vacating the default. Defendants run the risk of losing a valuable property for an alleged default on a commercial $100,000 dollar loan which, according to the documents they have presented to the court, may have already paid in full.

Although the neglect of an attorney can at times be imputed to the client, a defendant who has not neglected the matter and upon discovering the default immediately retains new counsel to make a motion to vacate the default, has been found to have demonstrated a reasonable excuse for the default . In that situation the attorney's neglect of the matter cannot be imputed to the client ( see Gross v. Johnson, 102 A.D.3d 921, 958 N.Y.S.2d 751 [2nd. Dept. 2013). Although Mr. Gonzalez appears to have neglected defendants matter, the defendants have not. They have diligently sought to vacate this default in an effort to have this matter determined on the merits. As soon as they learned of Mr. Gonzalez apparent neglect they sought to retain new counsel to represent them. Defendants have been at all times active in the defense of this matter and Mr. Gonzalez' apparent neglect should not be imputed to them.

"A mortgage foreclosure action is equitable in nature and triggers the court's equitable powers. In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interest of substantial justice. The court retains its inherent discretionary power in situations that warrant vacatur but which the drafters of CPLR 5015(a) could not easily foresee. Under the unique circumstances of this case it is not an improvident exercise of the court's discretion to vacate the default ( see Hudson City Savings Bank v. Cohen, 120 A.D.3d 1304, 993 N.Y.S.2d 66 [2nd. Dept. 2014]).

Accordingly, it is ORDERED that the motion to vacate defendants' default on that portion of the plaintiff's motion against the defendants 3472 Broadway Realty Corp., and Luis De La Cruz for summary judgment , striking their answer and dismissing their affirmative defenses is granted and those portions of the motion are vacated and restored.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff provides copies of the promissory note, mortgage, surety agreement and the assignment of those documents to plaintiff on February 29, 2012. The affidavit of Kelly Marling, vice-president of Seneca Mortgage Servicing, plaintiff's loan servicer state that defendants defaulted in making payments on November 1, 2012, with $42,553.98 due on the principal balance of the note. It is plaintiff's contention that the principal balance remains unpaid and due under the note and mortgage. Plaintiff has established its prima facie case for summary judgment.

Defendants submit the affidavit of Luis De La Cruz with accompanying documentation to raise an issue of fact requiring a trial of this matter. Mr. De La Cruz states that the principal balance of the note has been paid in full, and that in fact defendants have been overcharged by the plaintiff. Mr. De La Cruz submits copies of invoices and bank statements to show that defendants made all the payments on the note, that they were only late on two occasions, that on those two occasions they made the required payments to be current on the note, and that on November 1, 2012 only the final payment was due on the note. Mr. De La Cruz claims that the defendants continued to make payments after November 2012 due to plaintiff's errors in calculation. He claims that instead of defendants owing plaintiff, it is plaintiff that owes defendants for the amounts that they have overpaid.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"( Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve ( Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

There are issues of fact that preclude the granting of summary judgment.

Accordingly, it is ORDERED that the motion to vacate the default judgment dated August 3, 2015 on the portion of the motion against the defendants 3472 Broadway Realty Corp., and Luis De La Cruz, which is for summary judgment, striking their answer, dismissing their affirmative defenses and appointing a Referee to compute, is granted, and it is further

ORDERED that the judgment of this court in favor of plaintiff and against the defendants 3472 Broadway Realty Corp., and Luis De La Cruz granting summary judgment, striking their answer, dismissing their affirmative defenses and appointing a Referee to compute as contained in this court's order dated August 3, 2015 is vacated, and it is further

ORDERED that plaintiff's motion against the defendants 3472 Broadway Realty Corp., and Luis De La Cruz for summary judgment, striking their answer, dismissing their affirmative defenses and appointing a Referee to compute is denied, and it is further

ORDERED that the orders of reference dated September 11, 2015 and September 8, 2015 are vacated, and it is further

ORDERED that defendants 3472 Broadway Realty Corp., and Luis De La Cruz answer is restored , and it is further

ORDERED that within 10 days from the date of entry of this order the defendants serve on the plaintiff, the General Clerk's Office Trial Support Clerk ( Room 119 and 158M) and the County Clerk ( Room 141B) a copy of this order with notice of entry who are directed to amend their records accordingly, and it is further

ORDERED that the parties are directed to appear for a Preliminary Conference at IAS part 13 located at 71 Thomas Street, Room 210, New York, N.Y. 10013 on May 24, 2017at 9:30 A.M.

ENTER:

Dated: March 30, 2017

J.S.C.

Manuel J. Mendez
*J.S.C.*

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE