

**AS Helios LLC v Chauhan**

2021 NY Slip Op 30923(U)

February 23, 2021

Supreme Court, New York County

Docket Number: 850023/2016

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32**

*Justice*

-----X  
AS HELIOS LLC,  
  
Plaintiff,

INDEX NO. 850023/2016  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

- v -

PUSHPA CHAUHAN, PAUL EATON, M&T BANK AKA  
MANUFACTURERS AND TRADERS TRUST COMPANY,  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,  
BOARD OF MANAGERS OF 200 RIVERSIDE BOULEVARD  
AT TRUMP PLACE CONDOMINIUM, JOHN DOE,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 127, 128, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents the motion and cross-motion are determined as follows:

This is an action to foreclose on a residential mortgage on a condominium located at 200 Riverside Boulevard, Unit 10C, New York, New York. A motion by Plaintiff AS Helios, LLC ("Helios") for summary judgment and an order of reference was granted by order of Justice Carol Edmead dated April 13, 2017. Further, in that order, the affirmative defenses raised in the answer of Mortgagor Defendants Pushpa Chauhan ("Chauhan") and Paul Eaton ("Eaton"), including ones challenging Plaintiff's standing and failure of notice pursuant to RPAPL §1304, were dismissed. Subsequently, a judgment of foreclosure and sale was issued dated July 14, 2017. Mortgagor Defendants filed notices of appeal of both decisions.

On December 18, 2017, a Justice of the Appellate Division, First Department granted Mortgagor Defendant's application for an interim stay of the foreclosure sale while the motion for a stay pending the appeal was decided. The motion for a stay was denied and the interim relief was vacated by order dated May 15, 2018.

Thereafter, while the appeals were pending, a foreclosure sale was scheduled and then conducted on August 22, 2018. The successful bidder at the sale was Defendant M&T Bank a/k/a Manufacturers and Traders Trust ("M&T"), a subordinate lien holder on the premises. On December 5, 2018, the referee executed a deed conveying title to the premises which was recorded on December 12, 2018.

On December 13, 2018, the Appellate Division, First Department reversed Justice Edmead's grant of summary judgment finding Mortgage Defendants had raised a "meritorious standing defense" and "a plausible notice defense regarding plaintiff's service of the requisite 90-day notice under RPAPL 1304" (*AS Helios LLC v Chauhan*, 167 AD3d 492 [1<sup>st</sup> Dept 2018]).

Subsequently, Defendant M&T moved, by order to show cause, for an order granting it a declaratory judgment pursuant to Article 15 of the Real Property Actions and Proceedings Law quieting its title to the premises in light of the Appellate Division, First Department's decision. Mortgage Defendants defaulted in opposing the motion which was granted without opposition in an order and judgment of Justice Arlene Bluth, dated April 18, 2019. Notice of entry of the order and judgment was filed on May 14, 2019.

On July 3, 2019, Mortgage Defendants commenced a plenary action against, *inter alia*, M&T and Helios wherein causes of action against all Defendants for declaratory judgment and unjust enrichment were pled (*see Chauhan, et al v AS Helios, LLC, et al.*, Sup Ct NY Cty, Index No 156579/2019). Additional causes of action titled monies had and received and slander of title were pled against Helios. As relief, Chauhan and Eaton, sought compensatory damages, to discharge M&T's deed and for a declaration that Chauhan and Eaton have absolute title to the premises.

Both M&T and Helios moved, pre-answer, to dismiss the Mortgage Defendants' complaint. By order dated January 21, 2020, Justice Bluth dismissed the complaint as against M&T finding her declaratory judgment order dated April 18, 2019 had "res judicata effect" which barred declaratory relief (Index No 156579/2019, NYSCEF Doc No 94). Justice Bluth also noted Mortgage Defendants' claims should have been raised in this action and faulted them for not explaining their default in opposing the underlying motion. Further, Justice Bluth dismissed Mortgage Defendants' unjust enrichment claim against M&T ostensibly on the basis that it failed to state a cause of action. The motion by Helios was denied as untimely as it was filed after their time to answer expired.

Nearly ten months later, Mortgage Defendants filed the within order to show cause wherein they seek, *inter alia*, to vacate their default in opposing Plaintiff's declaratory judgment motion and to vacate the foreclosure sale both pursuant to CPLR §5015[a][1] and in the interests of justice. Plaintiff cross-moves for the imposition of sanctions against Movants for engaging in frivolous conduct by making this motion.

Generally, to vacate a default in appearing in an action or opposing a motion pursuant to CPLR §5015[a][1], a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see CPLR §5015[a][1]; Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay*, 180 AD3d 504 [1<sup>st</sup> Dept 2020]; *Karimian v Karlin*, 173 AD3d 614 [1<sup>st</sup> Dept 2019]; *Estrada v Selman*, 130 AD3d 562, 562 [2<sup>nd</sup> Dept 2015]; *Needleman v Chaim Tornhein*, 106 AD3d 707 [2<sup>d</sup> Dept 2013]). "The determination of what constitutes a reasonable excuse lies within the trial court's discretion" (*Glauber v Ekstein*, 133 AD3d 713, 713 [2<sup>d</sup> Dept 2015]). Absent a reasonable excuse, the court need not determine whether the defendant has presented a meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1<sup>st</sup> Dept 2013]).

At the outset, the branch of the motion pursuant to CPLR §5015[a][1] is untimely as it was made some 17 months after notice of entry was filed by the movant (*see eg Barnett v Diamond Fin. Co., Inc.*, 187 AD3d 974 [2d Dept 2020]). Mortgagor Defendants were also plainly aware of the decision and their default as they attempted to collaterally attack Justice Bluth's order and judgment when they filed their declaratory judgment action less than two months later. Nothing prevented Mortgagor Defendants from making this motion simultaneously with their plenary action.

The sole excuse offered by Mortgagor Defendants in support of this branch of the motion is law office failure. It is within the court's discretion to credit a claim of law office failure but only where there is a detailed and credible explanation for the default (*see Hudson City Sav. Bank v Augustin*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 00841 [2d Dept 2021]). However, "mere neglect is not a reasonable excuse" (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). Movant's proof in this regard was insufficient as the affidavit of Chauhan was conclusory and based upon hearsay statements attributed to Movants' prior attorney which ultimately constituted nothing more than bare allegations of incompetence by former counsel (*see Vizelter v Strogov*, 170 AD3d 917 [2<sup>nd</sup> Dept 2019]; *Edwards v Feliz*, 28 AD3d 512 [2<sup>nd</sup> Dept 2006]; *Achampong v Weight*, 240 AD2d 247 [1<sup>st</sup> Dept 1997]).

Inasmuch as movant failed to demonstrate a reasonable excuse for its default, it is unnecessary to determine whether Movants have shown the existence of a potentially meritorious defense (*see Buro Happold Consulting Engrs., PC v RMJM*, 107 AD3d 602, 602 [1<sup>st</sup> Dept 2013]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1<sup>st</sup> Dept 2013]). Nevertheless, the Court will examine the merits of Mortgagor Defendants' claims *infra*.

In addition to CPLR §5015, "a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). However, the "court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], 'mistake inadvertence, surprise or excusable neglect'" (*McKenna v County of Nassau*, 61 NY2d 739, 741 [1984], quoting *Ladd v Stevenson*, 112 NY 325, 332 [1889]). Here, the purported neglect of prior counsel is not a sufficient basis for the court to justify resort to this Court's inherent power (*see IndyMac Bank, FSB v Izzo*, 166 AD3d 866 [2d Dept 2018]; *Quinn v Guerra*, 26 AD3d 872 [4<sup>th</sup> Dept 2006]). Moreover, Mortgagor Defendants' extended delay in moving here does not support vacatur (*see US Bank NA v Mitchell*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 00589 [2d Dept 2021]).

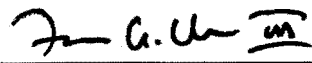
The underlying merits of Mortgagor Defendants' claim also do not support vacating the order and judgment. The decision of the Appellate Division, First Department reversing the grant of summary judgment to Plaintiff did not disturb the viability of M&T's title to the premises since it was a bona fide purchaser for value (*see Singh v Ahamad*, 154 AD3d 683 [2d Dept 2017]; *see also Da Saliva v Musso*, 76 NY2d 436 [1990]). M&T's knowledge of the appeal "is irrelevant" and although Mortgagor Defendants sought a stay of the sale, it was ultimately denied (*Sakow v 633 Seafood Rest., Inc.*, 1 AD3d 298 [1<sup>st</sup> Dept 2003]; *Aubrey Equities, Inc v Goldberg*, 247 AD3d 253 [1<sup>st</sup> Dept 1998]). While Mortgagor Defendants' assertion that issuance of a declaratory judgement is not available via motion is correct (*see eg*

Matter of Mount Olive Baptist Church of Manhasset, 178 AD3d 1051 [2d Dept 2019]), the procedural infirmity of the judgment is, in the end, meaningless as M&T's title is inviolable as a matter of law and, as a result, further proceedings in this matter would be wasteful (see Bronx Islamic Socy., Inc. v Ally, 158 AD3d 581 [1st Dept 2018]).

Accordingly, the motion by Defendants Pushpa Chauhan and Paul Eaton is denied.

Plaintiff's cross-motion for the imposition of sanctions is denied as the within motion was neither frivolous nor without basis in fact or law.

2/23/2021  
DATE

  
FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	NON-FINANCIAL ASSISTANCE
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

**HON. FRANCIS A. KAHN III  
J.S.C.**