

DECISION AND ORDER

FILED & ENTERED

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To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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EMIGRANT SAVINGS BANK - BRONX/WESTCHESTER,

Plaintiff,

MOTION DATE: 4/4/14
INDEX NO.: 51862/12

-against-

MARK HENNELLY,

Defendant.

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The following papers numbered 1 to 11 were read on this motion by defendant for an Order pursuant to CPLR 5015, subdivision (a), paragraph 1, etc.

Papers Numbered

Notice of Motion - Affirmation (Brodnick) - Affidavit (Hennelly) - Exhs. (A-O)	1-4
Answering Affirmation (Labeck) - Affidavit (Lynch) - Exhs. (A-I)	5-7
Answering Affirmations (Gierer)	8-9
Replying Affirmation (Brodnick) - Exh.	10-11

Upon the foregoing papers, it is Ordered that this motion by defendant for an Order pursuant to CPLR 5015, subdivision (a), paragraph 1, vacating the entered default judgment of foreclosure and sale, for an Order pursuant to RPAPL 231, subdivision 5,

setting aside the foreclosure sale and for a preliminary injunction enjoining plaintiff from transferring ownership of or encumbering the subject property is disposed of as follows:

The record at bar establishes that defendant had been late in making the payment due under the mortgage in July, 2010. At that time, a local bank branch had declined defendant's late tendered payment, advising him that the account had "gone to legal." Plaintiff personally had served defendant with a summons and complaint in this action, on February 19, 2013. A judgment of foreclosure and sale had been signed by this Court, on March 11, 2013. Notably said motion had been brought on notice to defendant and not opposed by him. A foreclosure sale subsequently had been conducted, on June 12, 2013, whereat plaintiff had been the successful bidder; plaintiff thereafter had assigned its bid to its subsidiary, Retained Realty, Inc., which had taken title to the subject property by referee's deed, dated August 19, 2013.

Defendant now brings this motion seeking to inter alia to vacate his default, claiming excusable default in that he had consulted regarding this foreclosure with attorney Michael Gierer, who had been representing defendant in an unrelated matter, in late September or October, 2011. Defendant avers that he had taken the complaint to Mr. Gierer, in February, 2012, and that he "would periodically stop by Mr. Gierer's office approximately every month to discuss the progress of the foreclosure action." According to defendant, Mr. Gierer had advised him "that he did not anticipate that there would be a problem with resolving the late payment." According to defendant, in August, 2013, he had received a telephone call from plaintiff advising that the house had been sold to plaintiff. Defendant claims that he thereupon had telephoned Mr. Gierer who had advised that he would have to file a motion. On February 4, 2014, defendant asserts that his wife had telephoned Mr.

Gierer "to ascertain the status of the foreclosure action," and that Mr. Gierer had telephoned the following day to advise that the house had been sold to a third party and he would "get back to [them] with respect to preparing whatever motion was required to rectify the situation." Defendant then had received a Notice to Quit, dated February 6, 2014. Shortly thereafter, defendant had hired attorney Andrew D. Brodnick to represent them herein, and the instant Order to Show Cause was brought on defendant's behalf, on March 12, 2014.

Defendant argues that he is entitled to relief herein based upon his "good faith" belief that attorney Gierer "was working towards a resolution of this action." Defendant further maintains that he has a meritorious defenses in that plaintiff improperly had accelerated the entire amount due on the loan, that his home "is worth well in excess of the debt due Plaintiff," and that he will lose his family's home in which he has invested hundreds of thousands of equity.

Plaintiff vigorously opposes the motion, arguing that defendant has not established excusable default nor a meritorious defense because defendant had in fact been served with the required 30-day notice. Attorney Gierer also has submitted his affirmation wherein he adamantly denies that he ever represented defendant herein, although he previously had been retained by defendant to handle a corporate formation for him, and that to the contrary he had advised defendant that he does not handle such matters without a retainer, that this could be "a serious issue" and that defendant should hire an attorney as soon as possible. Moreover, when defendant had returned to Mr. Gierer's office in February, 2014, "with documents he said he received regarding his foreclosure action," Mr. Gierer states that he again had advised defendant to retain an attorney as soon as

possible. Sometime in February, 2014, Mr. Gierer recalls having received a telephone call from another attorney, Patrique Denize, with whom he “briefly” had spoken at defendant’s request, which conversation had been followed up by defendant’s call to Mr. Gierer. Defendant then had stopped by Mr. Gierer’s office either that same or the following day, in February, 2014, at which time Mr. Gierer claims he again had advised defendant to retain an attorney. Thereafter, defendant’s current counsel, Andrew D. Brodnick had contacted Mr. Gierer. The Court will not herein restate these attorney’s proffered differing accounts as to what then had transpired, the Court finding that same is not necessary for determination of this motion. Suffice it to say that attorney Gierer feels that he wrongly is being set up as the fall guy herein

In order to vacate defendant’s default herein, defendant is required to demonstrate both a reasonable excuse for his default and a potentially meritorious defense. See Dela Cruz v. Keter Residence, LLC, __ A.D.3d __, 981 N.Y.S.2d 607 (2nd Dept. 2014); Shin v. ITCI, Inc., __ A.D.3d __, 981 N.Y.S.2d 603 (2nd Dept. 2014). Defendant has failed to do either.

Initially, the Court notes that personal jurisdiction over defendant had been obtained when he had been personally served, on February 2, 2012, and that no issue with respect thereto is being raised. While defendant maintains that he had a good faith belief that attorney Gierer thereafter had been protecting his interests in this foreclosure action because the two had discussed same on several occasions throughout the 2-year period of 2011 through 2013, the facts belie such.

Firstly, no retainer agreement has been submitted, and defendant certainly would know that a retainer agreement was necessary in order for an attorney to represent him,

particularly since he admits at or around the same time having "retained" Gierer on an unrelated matter, and attorney Gierer avers that he specifically had advised defendant that he would not represent him in this matter absent a retainer agreement and that he should retain an attorney to represent him. Notably, defendant does not submit any reply affidavit denying attorney Gierer's afore representations.

Secondly, defendant fails to address the fact that, shortly after personal service of the summons and complaint upon him, he had received from the Court notice of a foreclosure conference, scheduled for March 1, 2012. Notably, defendant does not explain why he did not appear thereat, nor does he claim that he ever had requested that attorney Gierer appear on his behalf thereat, nor that he even had advised Gierer of said conference. It necessarily appears that defendant simply chose to completely ignore the Court proceedings.

Upon defendant's appearance default on March 1, a second conference had been scheduled for March 24, 2012. Again, defendant had failed to appear thereat and, again, defendant fails to explain herein why he did not appear thereat, nor does he claim that he had requested Gierer to appear at said conference, nor that he even had advised Gierer of this scheduled conference. These facts of defendant's non-action necessarily establish defendant's wilful intention to ignore the Court proceedings.

Thirdly, defendant fails at bar to address why he thereafter had defaulted in opposing plaintiff's motion for a judgment of foreclosure and sale, which had been served upon him, on or about February 19, 2013. Notably, defendant does not swear that he had informed Gierer that he had been served with said motion, nor that he ever had asked Gierer to review same. Instead, the facts disclose that defendant again chose to

consciously disregard the on-going Court proceedings.

Fourthly, the record establishes that defendant thereafter had been served on May 2, 2013, with the judgment of foreclosure and sale. Defendant does not state that he took any action in response to his receipt of same, and he does not state that he had apprized attorney Gierer that same had been entered.

Fifthly, the record also makes clear that during this more than two year period when defendant first had been served with process herein until his having received a telephone call from plaintiff two years later advising that defendant's house had been sold to it, defendant did nothing more than his allegedly, vaguely, having "discuss[ed] the progress of the foreclosure action" "approximately every month" with attorney Gierer, which attorney Gierer in any event denies.

Based upon the foregoing, the Court finds it totally unreasonable for defendant to have had any good faith belief that attorney Gierer had been protecting his interests in this foreclosure action and that defendant instead wilfully defaulted herein. That attorney Gierer on one occasion had given defendant "a note" which solely states plaintiff's counsel's name, attorney Denize's name and telephone number, and this action's index number and caption does not change the result herein. Accordingly, the Court finds that defendant has failed to demonstrate any reasonable excuse for his default and thus that he is not entitled to vacature of the default judgment regardless of whether he has a meritorious defense. See Deutsche Bank Nat. Trust Co. v. Gutierrez, 102 A.D.3d 825 (2nd Dept. 2013); Arias v. First Presbyterian Church in Jamaica, 100 A.D.3d 940 (2nd Dept.

2012).¹

Upon finding that defendant is not entitled to relief from the judgment entered herein, his motion is denied and to the extent that he seeks further and additional relief herein also is denied in all respects.

Dated: April 9, 2014
White Plains, New York



MARY H. SMITH
J.S.C.

Stagg, Terenzi, Confusione & Wabnik, LLP
Attys. For Pltf.
401 Franklin Avenue, Suite 300
Garden City, New York 11530

Andrew D. Brodnick, Esq.
Atty. For Deft.
126 Barker Street
Mount Kisco, New York 10549

¹In any event, plaintiff has herein demonstrate that defendant in fact had been served with the 30-day notice required by the mortgage, which defendant notably has not denied receiving