

[*1]

Decided on May 9, 2008

Supreme Court, Queens County

U.S. Bank N.A., etc., Plaintiff

against

Sherreth F. Russell, et al., Defendant.

22322 2006

Jaime A. Rios, J.

Plaintiff U.S. Bank, N.A., as trustee on behalf of the Holders of the Asset Backed Securities Corporation Home Equity Loan Trust, Series AEG 2006-HE1 Asset Backed Pass-Through Certificates Series AEG 2006-HE1 (U.S. Bank) commenced this action, by filing the summons and complaint on October 12, 2006, for foreclosure based upon defendant Russell's default in payment of the monthly mortgage installment due on July 1, 2006. Plaintiff obtained a judgment of foreclosure and sale dated March 23, 2007 against defendant Russell upon her default in answering the complaint. A foreclosure sale was scheduled to be held on May 11, 2007. On the eve of the sale, defendant Russell filed a voluntary Chapter 13 petition in bankruptcy, thereby invoking the automatic stay (*see* 11 USC § 362). The foreclosure sale was cancelled. By order dated December 3, 2007, the United States Bankruptcy Court terminated the automatic stay with respect to U.S. Bank, permitting U.S. Bank to pursue foreclosure in relation to the subject premises. The Referee appointed pursuant to the judgment of foreclosure and sale thereafter conducted the foreclosure sale on January 25, 2008 and plaintiff was the successful bidder.

Defendant Russell seeks to set aside the sale, vacate the judgment of foreclosure and sale, vacate her default in answering the complaint, and serve a proposed answer denying the material allegations of the complaint and asserting affirmative defenses and counterclaims based upon fraud, and violations of the Banking Law. According to defendant Russell, she defaulted in timely answering the complaint, after having first consulted with an attorney who advised her

that she had no defense to the action, and that her only recourse was to file a bankruptcy petition [*2] in an attempt to save her home. Defendant Russell asserts that she never entered into a mortgage transaction with plaintiff, but rather entered into a mortgage transaction with Aegis Lending Corporation (Aegis). She further asserts that she has learned from another attorney, with whom she recently consulted, that Aegis violated New York Banking Law § 6-1(1)(d) which governs "High Cost Home Loans," when providing her with the financing. She claims she was the victim of fraudulent misrepresentations by Aegis.

Vacatur of a default judgment requires the moving defendant to establish both a reasonable excuse for the default and a meritorious defense (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Credit-Based Asset Servicing & Securitization v Chaudry*, 304 AD2d 708 [2003]; *Mary Immaculate Hosp. v New York Cent. Mut. Fire Ins. Co.*, 296 AD2d 385, 386 [2002]).

To the extent defendant Russell asserts that her default in answering should be excused because she was given erroneous legal advice, her assertion is unsubstantiated (*cf. Couture Fabrics, Ltd. v Phyliss Dee, Inc.*, 20 Misc 2d 399 [1959]). Defendant Russell provides no identifying information as to the attorney with whom she initially consulted, or any reference as to the date of the consultation. The affidavit of service upon defendant Russell indicates service was made by delivery, on October 19, 2006, of a copy of the summons and complaint upon a person of suitable age and discretion at defendant Russell's dwelling place within New York, and a mailing of a copy of such process to defendant Russell at the same address on October 23, 2006. Assuming that defendant Russell consulted with the attorney prior to the expiration of the statutory time period for answering, defendant Russell nevertheless waited until May 9, 2007 to file the petition in bankruptcy.

In addition, although defendant Russell asserts that she never entered into a mortgage transaction with plaintiff, she fails to claim that the Aegis mortgage was not subject to assignment and that plaintiff is not the assignee of the mortgage and underlying note. To the extent defendant Russell maintains that the Aegis mortgage loan was a high-cost home loan, she has failed to demonstrate that such loan exceeded one or more of the thresholds as defined in Banking Law § 6-1(g) (*see* Banking Law § 6-1[d]). Contrary to her assertion, while the initial interest rate set in the note was 9.110% per annum, and was variable thereafter such, does not in and of itself establish the threshold set forth in Banking Law § 6-1([g][I]). Defendant Russell, furthermore, has failed to offer evidence indicating she was not provided with disclosure regarding the mortgage loan prior to her execution of the mortgage documents.

Under such circumstances, vacatur of the default in answering is unwarranted under CPLR 5015 or in an exercise of the court's discretion. The motion is denied.

Dated: May 9, 2008

J.S.C.

