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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Washington Mutual BANK

-v-

SAINT NICHOLAS AVE HOLDINGS

INDEX NO. 601934/08

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion decided by attached Decision and Order.

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/16/09

EJG

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17

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WASHINGTON MUTUAL BANK,

Plaintiff,

Index No. 601934/08

-against-

SAINT NICHOLAS AVENUE HOLDINGS, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, "JOHN DOE NO. I" to "JOHN DOE NO. XXX," inclusive, the last thirty names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

The facts in this case, in their simplicity, illustrate the state of property foreclosures in New York and the economic relationship between banks and their borrowers, as well as the surrounding ironies.

The instant motion is brought by the owner of a six unit residential building in which the principal, Imar Hutchins (Hutchins), also maintains an office for the practice of law; it is located in Harlem. The Owner, (Defendant/Owner), fell behind on May and June 2008 mortgage payments in the amount of $3,730.94 each. In June, Plaintiff (Bank) prepared to commence legal action, and on June 30, 2008, Plaintiff did commence an action in this Court, filing a summons and complaint and request for the appointment of a Receiver. Thereafter a motion was made for the appointment of a Referee for the purpose

of an accounting and sale of Owner's building. Owner defaulted by not appearing in the action or interposing an answer.

The Owner now seeks to vacate this default. This decision addresses only the absence of opposition to the drastic remedy of foreclosure and whether that default should be vacated and an answer accepted.

The Plaintiff seeking to take possession of and presumably sell the property is Washington Mutual Bank. It is common knowledge that the Bank, once the nation's largest, failed late in 2008, but was rescued by the FDIC appointing a Receiver who sold it to Chase JPMorgan with extraordinary public assistance. In other words, the bank was "bailed out." See 12 USC 5211, 12 USC 5216 (2008)

The two late and rejected payments were, according to the affidavit of Hutchins, the Owner LLC's principal and property manager, due to residential tenants being unable to pay their rent. He soon tendered the payments plus legal fees, but his checks were rejected. He then presented sufficient funds to bring the account current by tendering a check in the sum of $17,446.50, including penalties, interest and legal fees. That, too, was rejected by the Bank. At some point, in an effort to meet the mortgage obligations, the Owner filed a complaint with the Banking Department about the Bank's procedures and about Owner's efforts. The Bank then chose to accelerate the entire loan requiring the payment of $470,000.00, plus penalties, interest and legal fees. Despite the Owner's undisputed efforts to pay the Bank, the Bank nevertheless brought proceedings to

foreclose because, as stated by Plaintiff's counsel at oral argument, "that's their choice."[1]

During Defendant's unavailing communications with the Bank, it is alleged - - and it is not disputed - - that Hutchins was never told about the incipient proceedings. The Bank's counsel points out that her client was under no obligation to give him advance notice of what was ahead. The motion of "fair play" was not considered relevant. By June 24, 2008, affidavits supporting a complaint were signed by Bank personnel, and on June 30, 2008, were filed in this Court.

The summons and complaint were served on the Secretary of State, pursuant to CPLR 303, and also on various government entities. A few days later they were allegedly served, but not on Hutchins, the principal and managing agent of Saint Nicholas Avenue Holdings, LLC, who, as pointed out above, has his office at the building in question as was obviously well known to the Bank. Instead, service was allegedly made upon John Doe/Bobby Simon described as a tenant in the building. Even if the Bank had no duty to alert Defendant to the possible litigation, and even if their service methods are permissible, they clearly elected not to affect the most reliable available service - - personal service - - suggesting bad faith by Washington Mutual, especially when taken with their refusal to accept payment after only two months of lateness, as well as their decision to accelerate te entire loan.

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[1]The Court admonishes the Bank's counsel for submitting papers, referring to the opposition papers of Owner's principal, a lawyer, as containing "fraud and deceit" and that his seeking to vacate the default and protect his property is "frivolous." These charges are not only disrespectful to another member of the Bar, it is not supported by his or her papers.

Defendant now moves based on lack of notice of the action and intended foreclosure which caused the default and necessitated this application to vacate.

He relies on the well established standards. CPLR 3102(d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for the delay or default." The court must consider whether the default was willful or the result of a pattern of delay and whether the delay has prejudiced the plaintiff. Bergida v Wassen, 186 AD2d 522 (1st Dept 1992). Where no default judgment exists, a meritorious defense need not be proved in the First Department, though may be accepted by the court. "While technically there was no need for defendants to set forth a meritorious defense in support of their motion to compel acceptance of their answer, since no default order or judgment had been obtained by plaintiff, we note that defendants have adequately set forth such a defense." Nason v Fisher, 309 AD2d 526 (1st Dept 2003), citing DeMarco v Wyndham Intl., Inc., 299 AD2d 209 (1st Dept 2002); see also Guzetti v City of New York, 32 AD3d 234(1st Dept 2006). This State's public policy favors determinations on the merits." Guzetti v City of New York, 32 AD3d at 234, citing CPLR 3012(d); Silverio v City of New York, 266 AD2d 129 (1st Dept 1999).

Here, the default is excusable and there is no evidence whatsoever that Defendant intended to ignore, neglect or default in this matter (and the above facts indicate the

contrary). Although a meritorious defense need not be shown, Defendant made numerous efforts to pay the two months that were late, and even attempted to pay more, but was rejected. He, perhaps, naively, believed that his communications with the Bank were in search of a resolution and he had no reason to believe that foreclosure was in the works. Defendant tendered all payments for the months that have now elapsed and stands ready to do so.

Accordingly, motion to vacate is granted; and it is

ORDERED that the Answer attached to moving papers be served upon Plaintiff Bank within twenty (20) days of Notice of Entry of this Decision..

This constitutes the Decision and Order of the Court.

Dated: July 10, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

JUL 17 2009

COUNTY CLERK'S OFFICE
NEW YORK