

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #003 Case Disp
R/D:08/23/10
S/D:08/27/10

AMERICA'S WHOLESALE LENDER,

Plaintiff,

-against-

RAMCES C. HERNANDEZ ET AL.,

Defendants.

PLTF'S/PET'S ATTY:
JORDAN S. KATZ, P.C.
395 North Service Road, Suite 401
Melville, New York 11747

DEFT'S/RESP'S ATTY:
PETROFF LAW FIRM, P.C.
1795 Coney Island Avenue, 3rd Floor
Brooklyn, New York 11230

Upon the following papers numbered 1 to 22 read on this motion for an order pursuant to CPLR Sec 5015 & 6301 _____ Notice of Motion/Order to Show Cause and supporting papers 1-5 _____; Notice of Cross Motion and supporting papers _____ Answering Affidavits and supporting papers 6-10 _____ Replying Affidavits and supporting papers 11-17 _____ Other 18-22 _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant RAMCES C. HERNANDEZ ("HERNANDEZ") brought on by Order to Show Cause (Molia, J.) seeking an order pursuant to CPLR Sections 5015, 6301 & 6312 vacating the Judgment of Foreclosure and Sale entered on February 11, 2008 and the Referee's Deed dated January 25, 2010 is denied.

Plaintiff commenced this mortgage foreclosure action in November, 2006 seeking to foreclose a \$600,000.00 mortgage executed by defendant "HERNANDEZ" on March 19, 2003. A Judgment of Foreclosure and Sale was entered on February 11, 2008. Three bankruptcy petitions filed in one year by defendant were dismissed by the United States Bankruptcy Court. The foreclosure sale was conducted on January 12, 2010.

Defendant's motion seeks an order vacating the Foreclosure Judgment and Sale and enjoining the transfer of the property. In support defendant submits an affidavit and an attorney's affirmation and claims that the plaintiff/lender has failed to negotiate in good faith to modify the mortgage loan. Defendant asserts that a settlement conference is required to resolve the action and to permit defendants to continue to reside in the premises.

In opposition plaintiff submits two affirmations of counsel and claims that defendant has failed to submit any reasonable explanation for his continuing default in making mortgage payments and has failed to demonstrate a meritorious defense. Plaintiff claims that good faith attempts were

made to modify the loan terms but that defendant failed to make the required payments due under the terms of the parties agreement. Plaintiff maintains that defendant was afforded a settlement conference on July 27, 2010. Plaintiff argues that no basis exists to grant defendant's application to vacate the Foreclosure Judgment and sale of the premises.

A preliminary injunction may be granted upon a clear showing of three things: 1) the likelihood of ultimate success on the merits; 2) irreparable injury to the movant absent the granting of the injunction; and 3) a balancing of the equities in defendant's favor (Albini v. Solork Associates, 37 AD2d 835, 325 NYS2d 150 (2nd Dept., 1985); Hudson Valley Tree, Inc. v. Barcana, Inc., 114 AD2d 400, 494 NYS2d 124 (2nd Dept., 1985)). Moreover in the exercise of its equitable powers a court may set aside a foreclosure sale where there is evidence of fraud, collusion, mistake or misconduct (Polish National Alliance v. White Eagle, 98 AD2d 400, 470 NYS2d 642 (2nd Dept., 1983); Crossland Mortgage Corp. v. Frankel, 192 AD2d 571, 596 NYS2d 130 (2nd Dept., 1993)).

Defendant has wholly failed to make the required showing sufficient to justify vacating the Judgment of Foreclosure and Sale of the mortgaged premises. The record is clear that defendant filed four bankruptcy petitions which were each dismissed causing a significant delay to plaintiff's ability to foreclose. Moreover defendant continues to reside in the premises despite not having made a mortgage payment since August, 2006. Under these circumstances the balancing of the equities, irreparable injury and the likelihood of success on the merits favors the mortgage lender who has been forced to incur significant delay by defendant's stalling tactics. Accordingly defendant's motion must be denied.

Dated: October 19, 2010

MELVYN TANENBAUM

J.S.C.