

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. EDWARD G. MCCABE
Justice

TRIAL/IAS PART 2
NASSAU COUNTY

LEND AMERICA

INDEX NO.: 4850/06

Plaintiff,

MOT. SEQ. NO.: 1

-against-

MOT. SUBMISSION
DATE: 10/31/06

ARTHUR SUESS and BAYRIDGE
SAVINGS BANK,

Defendants.

X

The following papers were reviewed on this application:

- Emergency Order to Show Cause to Stay the
Foreclosure Sale.....1
- Notice of Bankruptcy and Affirmation in Opposition.....2

The Defendant, Arthur Suess, (hereinafter referred to as Defendant), submits an application seeking an order, a.) pursuant to CPLR § 5015 and §317, vacating the default judgment of foreclosure with costs, vacating the order of reference and the Referee's report; b.) an order, pursuant to CPLR §3211 and §308, dismissing the action for lack of personal jurisdiction and c.) an order,

pursuant to CPLR §3012, permitting the Defendant to interpose an answer and defend this action for all purposes. On October 23, 2006 the Honorable Joseph A. DeMaro denied the Defendant's emergency application to stay the foreclosure sale, but granted a temporary stay of the transfer of the deed to the subject property pursuant to any foreclosure sale, pending the hearing and determination of this motion. Justice DeMaro's order further directed the Plaintiffs' attorneys to inform potential buyers of his order and provide them with a copy.

The Plaintiff, Lend America, opposes the application and advises the Court that the Defendant filed a bankruptcy petition under Chapter 13 on October 24, 2006. The Plaintiff correctly states upon the filing of the bankruptcy petition, this action is automatically stayed, pursuant to 11 U.S.C. §362 (a), which prohibits the continuation of any action against a debtor or property of the debtor's bankruptcy estate during the pendency of the bankruptcy petition. The Plaintiff cites Cara vs. McGriff, 8 A.D. 3d 420, 781 N.Y.S. 2d 34 (Second Dept. 2004) which held "The automatic stay, which is effective immediately upon the bankruptcy filing without any further action, is deemed one of the fundamental protections afforded to a debtor in bankruptcy". Inasmuch as a foreclosure action is an action against property of the bankruptcy estate, the automatic stay invoked by 11 USC §362 (a)

precludes further proceedings in this Court until such time as the stay is vacated.

Accordingly, based upon the foregoing, the Defendant's application is denied, without prejudice to renew, upon the vacatur of the automatic stay in the underlying bankruptcy proceeding reportedly filed on behalf of Arthur P. Sues, under petition number 8-006-72652-mlc in the Eastern District of New York.

The terms of Justice DeMaro's temporary order remain in full force and effect.

This constitutes the decision and order of the Court.

ENTER:

Dated: November 1, 2006
Mineola, NY



HON. EDWARD G. MCCABE
J.S.C.

ENTERED

NOV 08 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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