

LAW

PART 5M

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

WMC Mortgage Corp. _____X
 -against-
 Gabriel D. Aguilar _____X

Index No. 24572/04
 Hon. Alison Y. Tuitt
 Justice.

The following papers numbered 1 to 3 Read on this motion, OTSC Vacate Default
 Noticed on 3/8/10 and duly submitted as No. _____ on the Motion Calendar of 7/7/10

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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 BRONX COUNTY CLERK'S OFFICE

OCT - 4 2010

Upon the foregoing papers this order to show cause is
decided in accordance with this
Court's annexed memorandum
dated 9/12/10

MOTION IS RESPECTFULLY REFERRED TO:
 Justice:
 Dated:

Dated: 9/12/10

Hon. A Y Tuitt
 J.S.C.

Alison Y. Tuitt, J.S.C.

Law

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

WMC MORTGAGE CORP.,

INDEX NUMBER: 24572/06

Plaintiff,

-against-

Present:

GABRIEL D. AGUILAR,

HON. ALISON Y. TUITT

Justice

Defendants.

The following papers numbered 1 to 3,

Read on this Defendant's Order to Show Cause to Vacate Default Judgment

On Calendar of 7/7/10

Order to Show Cause-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's Order to Show Cause to vacate a default judgment and reversing, vacating and setting aside a foreclosure sale is granted for the reasons set forth herein.

Defendant brings the instant Order to Show Cause seeking to vacate a default judgment and reversing, vacating and setting aside a foreclosure sale of the premises known as 2011 Gildersleeve Avenue, Bronx, New York 10473. Defendant argues that he timely negotiated an accepted mortgage modification agreement and made payment with plaintiff's loan servicer prior to the foreclosure.

Defendant executed and delivered a note and mortgage to plaintiff on July 8, 2005 in the amount of \$365,750.00. The mortgage encumbered the aforementioned premises. Thereafter, defendant defaulted by failing to make the required monthly payments of principal and interest due on August 1, 2006. By reason of the default, plaintiff declared the loan immediately due and payment and initiated the instant action. The

Judgment of Foreclosure and Sale was signed by Justice Sallie Manzanet Daniels on September 10, 2007 and entered with the County Clerk on September 14, 2007. A foreclosure sale was held on October 27, 2008 and the property was sold to the plaintiff. On March 9, 2009, defendant brought an Order to Show Cause to vacate, reverse and set aside the foreclosure sale. The Order to Show Cause was denied by this Court on December 14, 2009 due to the non-appearance of defendant.

It is important to note that Justice Sallie Manzanet-Daniels had been the Judge assigned to this matter until she was appointed to the Appellate Division in or around October, 2009. Thereafter, all of Justice Manzanet-Daniels' cases had to be reassigned and during that time many pending motions were administratively adjourned numerous times pending reassignment of the cases. Consequently, when the motions were reassigned and calendared for oral argument, many motions were denied for the non-appearance of the movants. It came to the Court's attention through our Calendar Clerks' Office that numerous parties had not been advised of the oral argument dates for their motions. As a result, this Court has vacated many of those defaults.

A court has the inherent power, in the interest of justice, to vacate a prior order. Alvarez v. Fiat Realty Corp., 550 N.Y.S.2d 825 (1st Dept. 1990). Relief from a default judgment rests within the sound discretion of the motion court. Frenchy's Bar & Grill v. United Intern. Ins. Co., 675 N.Y.S.2d 31 (1st Dept. 1998); Horan v. New York Telephone Co., 765 N.Y.S.2d 788 (1st Dept. 2003). This State has a strong preference that disputes be resolved on their merits. Silverio v. City of New York, 698 N.Y.S.2d 669 (1st Dept. 1999); Richardson v. City of New York, 742 N.Y.S.2d 823 (1st Dept. 2002). It also has a liberal policy with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues. Sanford v. 27-29 W. 181st Street Association, 753 N.Y.S.2d 49 (1st Dept. 2002).

As a practical matter, this Court's denial of defendant's initial Order to Show Cause seeking to reverse, vacate and set aside the default judgment and foreclosure sale must be vacated. Thus, plaintiff's argument that the within motion is untimely holds no merit as the initial Order to Show Cause was timely brought on or about March 9, 2009.

With respect to the merits of the instant motion, this Court finds that plaintiff had in fact reached an agreement with defendant for a loan modification and notwithstanding defendant's compliance with the agreement, plaintiff erroneously moved forward with the foreclosure sale. The facts indicate that after

defendant defaulted on his mortgage payments, he contacted plaintiff's servicer, Litton Loan Servicing, LLP (hereinafter "Litton") to attempt to resolve the default. Defendant retained the services of Guayasamin Financial Solutions, Inc. (hereinafter "Guayasamin") to work on his behalf in obtaining a loan modification agreement for the aforementioned premises. Defendant states that he and Litton reached a Loan Modification Agreement dated October 1, 2008 wherein they agreed that the first monthly payment was to begin on December 1, 2008 and that defendant would make an initial payment of "\$3,511.34 in certified funds, made payable to Litton Loan Servicing LP" by "11/13/2008".

Defendant complied with these terms. Defendant signed the agreement and returned it to Litton by Express Mail with three money orders dated November 7, 2008 made payable to Litton Loan Servicing, LLP in the amount of \$3,511.34. Nonetheless, defendant's property was foreclosed on October 27, 2008. Subsequently, on November 13, 2008, Litton returned the money orders stating that the sum "is not enough to pay the full amount due on the referenced loan at this time." Plaintiff contends that loan modification package submitted to defendant was a mere proposal to modify the loan and that no modification was entered into given that defendant presented an unsigned copy of the modification documents. However, the affidavit of James Armellino, calls to question plaintiff's contention.

Mr. Armellino states that he was employed by Guayasamin in or about September, 2008 and was assigned together with another employee, Sandra Figueroa, to work with defendant and submit documents on his behalf in order to obtain a loan modification for his mortgage on the aforementioned premises. Mr. Armellino further states that upon receiving defendant's file a call was immediately placed to Litton informing it that Guayasamin was seeking to obtain a loan modification on defendant's behalf and requested information regarding what document would need to be submitted for consideration of the application. Litton purportedly requested, among other documents, current pay stubs, bank statements, recent tax returns, and a financial information form that it provided Guayasamin to fill out on defendant's behalf. Additionally, Litton requested that defendant provide additional documentation regarding rental income that he was receiving from leasing the premises.

All of the documents were submitted to Litton via facsimile and in November of 2008, defendant advised Mr. Armellino that he received the loan modification documents from Litton. Mr. Armellino then requested that defendant immediately go to his office with the documents so that either he or Ms. Figueroa

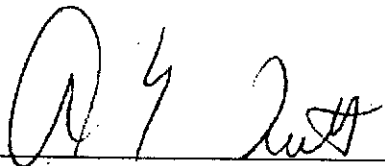
could review it in order to ensure that they were properly executed and submitted to Litton. Several days later, Ms. Figueroa met with defendant and went over the documents. Soon thereafter, defendant submitted an executed and notarized copy of the loan modification agreement with a check for \$3,511.24 to Litton. Mr. Armeillion also states that pursuant to the loan modifications documents, defendant was required to submit updated financial information together with his loan modification and the documents were submitted on November 14, 2008 together with the loan modification and check. The same documents had been previously submitted in September of 2008 in order to begin the application process for the loan modification.

Defendant argues that the doctrine of promissory estoppel requires that the foreclosure sale be vacated. Promissory estoppel may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he relied thereby sustaining injury. Steele v. Delverde S.R.L., 662 N.Y.S.2d 30 (1ST Dept. 1997). Here, as a result of Litton's promises, to which defendant relied upon to his detriment, plaintiff should have been estopped from foreclosing on defendant's premises. Despite plaintiff's contentions, defendant reasonably relied upon the loan modification agreement provided to him by Litton. Nowhere in those documents does it state that it was a "proposal" as plaintiff claims and that there would be no binding agreement until it had been signed by both parties. In the instant matter, defendant provided all of the requested documentation and thereafter Litton sent him the loan modification agreement papers. It was foreseeable, therefore, that defendant would accept the papers sent to him as an agreement by Litton to the loan modification..

The Court has the discretion to set aside a foreclosure sale when "fraud, collusion, mistake or misconduct casts suspicion on the fairness of the sale." Liberty Savings Bank, FSB v. Knab, 722 N.Y.S.2d 178 (2d Dept. 2001) quoting Polish National Alliance of Brooklyn v. White Eagle Hall Co., 470 N.Y.S.2d 642 (2d Dept. 1983). Here, the contradictory acts of Litton calls into question the fairness of this sale and therefore the instant motion must be granted and the foreclosure sale is reversed, vacated and set aside.

This constitutes the decision and order of this Court.

Dated: September 12, 2010



Hon. Alison Y. Tuitt