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Citimortgage, Inc. v Patello
2012 NY Slip Op 50662(U)
Decided on February 28, 2012
Supreme Court, Onondaga County
Greenwood, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on February 28, 2012

Supreme Court, Onondaga County

Citimortgage, Inc., Plaintiff,
against
Kathleen A. Patello, Defendant.

2009-7563

LARRY T. POWELL OF DAVIDSON FINK, LLP

For Plaintiff

MARY E. TRAYNOR, ESQ., OF LEGAL SERVICES OF CENTRAL

NEW YORK

For Defendant

Donald A. Greenwood, J.

The defendant moves for an order directing the plaintiff to accept service of a late answer in this mortgage foreclosure action, and provides a proposed answer. Upon the application of a party, this 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. *See, CPLR §3012(a)*. Public policy favors resolving cases on their merits and this Court possesses broad discretion when considering a motion to file a late answer. *See, Cleary v. East Syracuse Minoa Central School District*, 248 AD2d 1005 (4th Dept. 1998); *see also, Constable v. Matie*, 145 AD2d 987 (4th Dept. 1988). Such a motion should be granted when the movant establishes a reasonable excuse for the delay, a meritorious defense and a lack of prejudice to the other party. *See, Humphrey v. WIXT News Channel 9*, 12 AD3d 1087 (4th Dept. 2004).

The defendant has established a reasonable excuse here through her affidavit indicating that she believed no answer was required because after threatening foreclosure the plaintiff bank advised the defendant that there was no need to hire an attorney. Defendant has shown that she [*2] was actively engaged with the plaintiff bank for years to have her payments properly credited and that in late 2009 she received a letter from plaintiff's counsel threatening foreclosure. She responded by calling the bank, indicating that she had been making payments regularly at a higher rate than the monthly amount due. She asked if the matter was in foreclosure and if she should hire an attorney and was advised that there was no need "at this time." As a result, when she was served with the summons and complaint, she believed what she had been told. In addition, the defendant indicates that as a *pro se* litigant she believed that an answer must be filed by an attorney and that her ongoing negotiation and conversations with the plaintiff bank concerning the proper application of her payments constituted an answer. The *pro se* defendant's excuse is reasonable that she relied upon plaintiff's assurances that she did not have to answer the complaint if she continued discussions with respect to the outstanding debt. *See, Witzigman v. Drew*, 48 AD3d 1172 (4th Dept. 2008); *see also, Franklin Credit Management Corp. v. Wik*, 75 AD3d 1145 (4th Dept. 2010).

The defendant has also established a meritorious defense. She contends that there was no default because her payments, if properly credited, constitute payment in full. It is

important to note that plaintiff and counsel participated in ten settlement conferences over an eleven month period wherein the parties exchanged copies of money order receipts and accounting spreadsheets in an attempt to resolve and determine the actual balance due. Since that time, counsel has met with this Court on numerous occasions, continuing to resolve the issue. During those settlement conferences the defendant has submitted copies of money orders for payments of \$460.00 made every month between 2006 through November of 2009, when plaintiff began rejecting her payments and plaintiff has still not, after all of these conferences, established why those payments tendered and accepted each month were insufficient to pay the mortgage in full on a monthly basis. As such, the defendant has established a meritorious defense of full payment and no default. In addition, the plaintiff has suffered no prejudice since the plaintiff has delayed resolution of this case through repeated failures to produce documentation concerning the calculation of the debt due. Based upon the foregoing, the defendant's motion to compel the plaintiff to accept her late answer is granted. The defendant's further request seeking a hearing to determine the amount actually owed is denied at this time as premature, as both parties are entitled to discovery after the service of the answer.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion seeking an order directing plaintiff to accept service of the late answer is granted, and it is further

ORDERED, that defendant must serve her answer on plaintiff's law firm by first class mail by March 15, 2012, and it is further

ORDERED, that defendant's motion for a hearing to determine the amount owed is denied at this time without prejudice.

ENTER

Dated: February 28, 2012

Syracuse, New York DONALD A. GREENWOOD

Supreme Court Justice

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