

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

THE BANK OF NEW YORK MELLON,
AS TRUSTEE FOR THE CIT MORTGAGE
LOAN TRUST 2007-1,

Plaintiff,

Case No. 2011-CA-009778

v.

Division: D

ELENA ESTRADA and
RAFAEL ABREU, et al.,

Defendants,

**MOTION TO VACATE *EX PARTE* DEFAULT
AND FOR SANCTIONS**

Defendants, ELENA ESTRADA and RAFAEL ABREU, by and through their undersigned counsel, move this Court for entry of an Order vacating the Order of Default that this Court entered *ex parte*, without notice, and without hearing, and would show:

1. On September 2, 2011, Defendants, acting *pro se*, filed their Motion to Dismiss.
2. On January 3, 2012, the undersigned served a Notice of Appearance for Defendants. This notice was docketed on January 5, 2012.
3. On January 9, 2012, this Court entered an Order denying the Motion and directing Defendants to file an Answer.
4. On January 23, 2012, Defendants, through their undersigned counsel, served their Answer and Affirmative Defenses in this case (along with a First Set of Interrogatories and First Request for Production). For unknown reasons, these documents were not docketed. However, an additional copy of the Answer (with the Certificate of Service showing it was served on January 23, 2012) is attached hereto.

5. Having participated in this action, Defendants were entitled to notice and an opportunity to be heard prior to entry of a default. See Clark v. Perlman, 599 So.2d 710 (Fla. 1st DCA 1992); Connecticut General Development Corp. v. Guson, 477 So.2d 665 (Fla. 5th DCA 1985).

6. On February 10, 2012, Plaintiff served an *Ex Parte* Motion for Default. Defendants' undersigned counsel was not copied with this motion (and the Certificate of Service on said motion reflects that it was not served on the undersigned).

7. On February 15, 2012, this Court entered an Order of Default, *ex parte*, without notice and without hearing. This Order was not served on Defendants' undersigned counsel.

8. Defendants did not know about the Motion for Default or the entry of default until after the default was entered. As such, notwithstanding the above-cited cases, Defendants did not have a chance to cure any alleged default, point out the fact they had answered, or be heard at a duly-noticed hearing.

9. The Order of Default must be vacated, for three separate and independent reasons.

10. First, it was error to enter a default *ex parte*, without notice, and without hearing because Defendants had appeared and were defending this case. See Clark and Guson, supra.

11. Second, it was error to enter a default because Defendants served their Answer long before the default was entered. It is axiomatic that a default cannot be entered when Defendants have already served an Answer.¹

12. Third, the sanction of a default is grossly disproportionate to any offense committed (to the extent Defendants can be said to have even done anything wrong), particularly

¹ To the extent the Answer was not docketed, that is, as far as Defendants are concerned, a mistake by the clerk, not Defendants. Whoever was at fault, not docketing an Answer that was timely served certainly cannot give rise to a default.

where this sanction fails to consider or make findings regarding the factors set forth in Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) or Commonwealth Fed. Sav. and Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990).

13. In light of the foregoing, this Court's entry of a default was improper and should be vacated.

14. Defendants should not have had to incur attorneys' fees in the prosecution of this motion. Plaintiff's conduct in submitting the motion *ex parte*, without copying the undersigned, in the face of the legal authorities cited above, was egregious, bad-faith conduct justifying sanctions.² That sounds harsh, but Defendants should not have to incur fees in connection with a default when the default was so obviously improper.

WHEREFORE Defendants request relief in accordance with the foregoing.

² Respectfully, it is very disappointing this *ex parte* Order of Default was entered in the first place. After all, the instant motion is not the first time the undersigned has provided this Court with the above-cited cases (which stand for the proposition that a defendant who is defending a case cannot be defaulted without notice and hearing). When this happened previously, this Court vacated the default. Candidly, however, a motion for such relief should not have to be filed. Particularly since it has been shown these cases more than once now, this Court should ensure that the notice and hearing requirements are fulfilled before entering a default, especially if the Court is going to rule *ex parte* and without a hearing. In other words, if this Court is going to default a defendant out of court, without notice and without a hearing, is it really too much to ask that the Court ensure such a default is not so obviously improper?

Having litigated many foreclosure cases before this Court, there is very much an appearance that this Court will sign whatever documents a bank presents, *ex parte* and without hearing, even as bona fide (and sometimes unopposed) arguments by homeowners are closely scrutinized. The undersigned has little doubt that this Court does not want to harbor the impression of a double standard. That being the case, this Court should give careful consideration to the appearance that is created when *ex parte* defaults such as this are routinely entered, without a hearing, when they are plainly improper, whereas such intense scrutiny is given to anything done by homeowners. Perhaps the Court does not intend to harbor a double standard, but in the undersigned's eyes, that is very much the impression. To illustrate, the undersigned can hardly imagine a circumstance where this Court would default a bank out of court *ex parte* without notice or hearing, yet this has happened to the undersigned's clients on multiple occasions even when they were defending in a manner authorized by law. Respectfully, this is unseemly and unfair.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Marisol Morales, Esq., Morales Law Group, P.A., 14750 NW 77th Court, Suite 303, Miami Lakes, Florida 33016 on this 22nd day of February, 2012.

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