Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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U.S. Bank National Association, as Trustee for
GSAA 2007-9
3476 Stateview Boulevard
Ft. Mill, SC 29715

Index No.: 5216/2009
Motion Date: 1/9/13
Motion Cal. No.: 08
Motion Seq. No.: 01

Plaintiff,

-against-

Eric Yarbro, Grace Yarbro,
New York City Environmental Control Board;
New York City Transit Adjudication Bureau,
New York State Department of Taxation and Finance,
Paragon Federal Credit Union, United States of America
acting through the IRS,

John Doe (Said name being fictitious, it being the
intended of Plaintiff to designate any and all occupants
of the premises being foreclosed herein, and any parties,
corporations or entities, if any, having or claiming an
interest or lien upon the mortgaged premises.)

Defendants.

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The following papers numbered 1 to 15 read on this motion for an order pursuant to CPLR 3212(d), granting leave to defendants Grace Yarbro and Eric Yarbro to serve and file an answer and cross claims in this action substantially in the form of Exhibit B annexed to the moving affidavits.

	PAPERS NUMBERED
Order to Show Cause - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9

Affirmation in Opposition.....	10 - 12
Reply Affirmation.....	13 - 15

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants, Grace Yarboro and Eric Yarboro (collectively as "defendants"), move for an order pursuant to CPLR §3012(d) granting leave to defendants to serve and file an answer and cross-claims against Paragon Federal Credit Union.

Facts

Plaintiff brought the within action to foreclose a mortgage given by the defendants to Wells Fargo Bank, NA on property located at 240-45 43rd Avenue, Douglaston New York, 11363. The mortgage was dated May 10, 2007. The defendants also executed and delivered a note dated May 10, 2007.

Prior to the commencement of the within action, the mortgage was assigned by Wells Fargo to the plaintiff, U.S. Bank National Association ("US Bank"). Defendants defaulted on their payments, which became due on October 1, 2008.

Defendants' counsel contends that defendants were assured that if they were to default, "they would be awarded with a loan modification." Defendants counsel also contends that they did not respond to the complaint at the request of the plaintiff. Subsequently, defendants were denied a loan modification and defendants contend that the denial was based solely on an error by the plaintiff.

Eric Yarbro states in his affidavit that in 2008 his income drastically declined and he contacted Wells Fargo who told him that the bank can't consider a modification until he is in further arrears. Thereafter, the parties entered into loan modification discussions. At some point, Paragon filed an answer suggesting that it held the first mortgage on the premises. Defendants contend that

Wells Fargo did not record its first mortgage in time and Paragon recorded its Home Equity line of credit first. Defendants argue that it was Paragon's insistence that they held the first mortgage that caused the loan modification to fail.

Discussion

CPLR §3012(d) provides for acceptances of a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just." The defendant must demonstrate "both a reasonable excuse for his default in failing to serve a timely answer and the existence of a potentially meritorious defense to the action." (*Weinstein v. Schacht*, 98 A.D.3d 1106, 1107 [2nd Dept 2012]; *see Westchester Medical Center v. Allstate Ins. Co.*, 80 A.D.3d 695 [2nd Dept 2011].) "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court." (*Maspeth Federal Sav. and Loan Ass'n v. McGown*, 77 A.D.3d 890, 891 [2nd Dept 2010]; *Moriano v. Provident New York Bancorp*, 71 A.D.3d 747 [2nd Dept 2010].)

It is undisputed that the defendants were served with the Summons and Complaint on March 11, 2009. The within motion was brought in July of 2012, more than three years after the action was commenced. Defendants contend that their failure to file a timely answer was due to ongoing loan modification discussions. However, the modification was denied on April 21, 2010.

Case law is divided on the subject of whether ongoing settlement discussions warrants the acceptance of a late answer (*see Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 A.D.3d 784 [2nd Dept 2011][holding that ongoing settlement discussions does not warrant the acceptance of a late answer]; *see also Performance Constr. Corp. v Huntington Bldg.*, LLC, 68 A.D.3d 737 [holding that ongoing settlement discussions warranted the acceptance of a late answer

when the delay was *de minimis*][emphasis added]; *Klughaupt v Hi-Tower Contrs., Inc*., 64 A.D.3d 545 [2nd Dept 2009] [holding that de minimis delay along with settlement discussions warranted the acceptance of a late answer]; *Scarlett v McCarthy*, 2 A.D.3d 623 [2nd Dept 2003][holding that settlement discussions along with meritorious cause of action warranted acceptance of late answer].) Thus, the law requires more than mere settlement discussions to allow the acceptance of a late answer, specifically the delay in answering must be *de minimis* and defendants must set forth a meritorious cause of action. Defendants have failed to establish either. A three year delay in filing an answer is not a *de minimis* delay.

Furthermore, the excuse that "settlement discussions" have delayed the filing of an answer requires that settlement discussions be "ongoing." Eric Yarbro fails to set forth what settlement discussions took place in the three years following the filing of the within action. (*See Community Preservation Corp. v. Bridgewater Condominiums, LLC*, 89 A.D.3d 784 [2nd Dept 2011]; *Kouzios v. Dery*, 57 A.D.3d 949 [2nd Dept 2008].)

In addition, Eric Yarbro simply states that "[m]y attorney told me that I can show that I did not answer the foreclosure because I was told by Wells Fargo that it was unnecessary to do so." In addition, Eric Yarbro states that an attorney, by the name of Dominick Sarna ("Sarna"), claiming he worked for Wells Fargo told him he would not have to file an answer. Eric Yarbro later admits that Sarna did not work for Wells Fargo, but instead he worked for the title company that insured the Wells Fargo loan.

Defendants also failed to set forth a meritorious cause of action. *(Diuccio v. Soren 96 A.D.3d 994* [2nd Dept 2012]; *Beneficial Homeowner Service Corp. v. Charles*, 95 A.D.3d 1049 [2nd Dept 2012]; *Intervest Nat. Bank v. Ashburton 70, LLC*, 87 A.D.3d 617 [2nd Dept 2011].)

Defendants do not dispute the fact that they are in default and blamed their inability to pay the mortgage on a drastic decrease in Eric Yarbro's income. In addition, Eric Yarbro asserted in his affidavit that "[m]y attorney states that I was lied to at the closing when the lenders failed to make proper disclosure under the lending laws." However, Eric Yarbro's "vague assertions," as told to him by his attorney that the lenders failed to make "proper disclosure," is insufficient to establish a meritorious cause of action. (*See generally 2261 Palmer Ave. Corp. v. Malick*, 91 A.D.3d 853 [2nd Dept 2012]; *Spencer v. Sanko Holding USA, Inc.*, 247 A.D.2d 532 [2nd Dept 1998].) Furthermore, counsel's affirmation lacks personal knowledge of the facts and has no probative value. (*Allen v. Allstate Ins. Co.*, 78 A.D.3d 872 [2nd Dept 2010]; *Shickler v. Cary*, 59 A.D.3d 700 [2nd Dept 2009].)

Conclusion

For the reasons set forth above, defendants' order to show cause for leave to serve and file a late answer and cross-claims is denied.

Dated: March 22 , 2013

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Bernice D. Siegal, J. S. C.