

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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TRIBECA LENDING CORP.,

Plaintiff

-against-

DECISION AND ORDER

Index No. 6779/05

LINDA CRAWFORD, STEVEN DIROCCO, and
MELISSA DIROCCO,

Defendants

-----X
Margaret Garvey, J.

The following papers, numbered 1 to 5, were considered in connection with *Defendant's* (LINDA CRAWFORD) motion for an Order: (1) setting aside and vacating the Judgment of Foreclosure and Sale (executed on July 25, 2006 and entered on August 10, 2006); (2) dismissing the Complaint; (3) or, in the alternative, permitting her to interpose an Answer and defend the action; and (4) granting such other and further relief that the Court deems to be just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
ORDER TO SHOW CAUSE/AFFIRMATION/AFFIDAVIT/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBITS	2
REPLY AFFIDAVIT IN SUPPORT OF MOTION/EXHIBIT	3
REPLY AFFIRMATION IN SUPPORT OF MOTION/EXHIBITS	4
AFFIRMATION FROM COUNSEL	5

Upon the foregoing papers, the Court now rules as follows:

Before this Court is an Order to Show Cause, whereby *Defendant* LINDA

CRAWFORD seeks to set aside the Judgement of Foreclosure and Sale, dated July 25, 2006, and to dismiss the Complaint. The motion consists of an affirmation from counsel, an affidavit from *Defendant* CRAWFORD, and various exhibits. One exhibit, which is relied upon heavily by movant, is a copy of a Complaint in a lawsuit that *Defendant* CRAWFORD brought against *Plaintiff* (and others) in the U.S. District Court, Southern District, New York. That Complaint, however, is not signed by *Defendant* CRAWFORD, nor is it verified by her. Therefore, it has no evidentiary value other than to demonstrate that there actually is a federal court action involving these same two parties.

The stated basis for the instant motion is that *Defendant* CRAWFORD was not properly served with process in this matter; hence, she opines that there is no *in personam* jurisdiction over her. Alternatively, *Defendant* CRAWFORD posits that: her default was excusable; there was fraud and/or misconduct on the part of *Plaintiff*; and she has a meritorious defense. *Plaintiff* opposed the motion and demonstrated that an attorney, Robert S. Lewis, had filed a Notice of Appearance, dated March 15, 2006, indicating that he was representing *Defendant* CRAWFORD. In her Reply, *Defendant* CRAWFORD categorically denied that Mr. Lewis was her attorney in this matter and averred that his filing of the Notice of Appearance was not authorized by her. By Interim Order (4/14/09), the Court adjourned the motion for Mr. Lewis to provide this Court with a sworn statement on the issue of his representation of *Defendant* CRAWFORD. The Court is now in receipt of a sworn statement from Mr. Lewis and will now rule on the motion.

The main thrust of *Defendant* CRAWFORD'S motion is that jurisdiction over her person has not been obtained. The affidavit of service which was filed in this matter, indicates that *Defendant* CRAWFORD was served, at the subject premises, 40 Paradise Avenue, Piermont, New York on September 24, 2005, by delivery of the Summons and Complaint to a person of suitable age and discretion [CPLR § 308 (2)]. In order to utilize that portion of the statute, a named defendant must be served through a person of suitable age and discretion at his/her

"...actual place of business, dwelling place or usual place of abode...". However, *Defendant* CRAWFORD avers that, at the time of the purported service, she was in attendance medical school in the Dominican Republic and was, in fact, residing there. Hence, she argues that service upon her at the subject premises here in New York was improper and it did not gain jurisdiction over her person.

Alternatively, movant posits that, should the Court find that jurisdiction has been obtained over her person, the Judgment should be vacated pursuant to *CPLR § 317* and/or *CPLR Rule 5015*. In arguing for relief under *CPLR § 317*, *Defendant* CRAWFORD posits that she qualifies for same because she was not served by personal delivery and she has a meritorious defense, in that the alleged transaction was a sham and the mortgage documents were "created" from a signature exemplar which she supplied, along with personal financial information. As for moving pursuant to *CPLR Rule 5015*, *Defendant* CRAWFORD states that she has both a reasonable excuse for her default and a meritorious defense. Her proffered excuse for not appearing is that she was never served with process and her stated meritorious defense is the same as was set forth in support of her application under *CPLR § 317*.

Plaintiff opposes the motion and requests that sanctions be imposed against *Defendant* CRAWFORD. Essentially, *Plaintiff* posits that jurisdiction has, in fact, been obtained over the person of *Defendant* CRAWFORD because she appeared in this action by attorney Lewis. *Plaintiff* also objects to the presence in this case of the attorney who presented the Order to Show Cause because he is not the attorney of record. Additionally, *Plaintiff* sets forth that *Defendant* CRAWFORD'S position that the mortgage transaction was a sham is incredible and not in consonance with the facts of this case. On this point, *Plaintiff* states that *Defendant* CRAWFORD reaped the benefits of the transaction when the proceeds of the loan were used to pay-off her then existing mortgage, which was in foreclosure at the time. *Plaintiff* also argues that *Defendant* CRAWFORD is obviously an intelligent person and too sophisticated to have simply given signature samples and sensitive personal/financial information without knowing

for what purpose that information was needed. In *Plaintiff's* words, *Defendant* CRAWFORD "...knowingly and willingly entered the mortgage contract with Tribeca Lending Corporation in order to save her property from foreclosure auction.". Finally, *Plaintiff* opines that *Defendant* CRAWFORD'S claims regarding the mortgage transaction are time-barred.

Faced with a filed Notice of Appearance from an attorney who stated that he represented *Defendant* CRAWFORD and her statements that she did not authorize any attorney to appear for her in this action, the Court directed the "appearing" attorney to file a sworn statement regarding the issue. Mr. Lewis did provide a statement to the Court. Also, in the Reply papers, *Defendant* CRAWFORD did supply a fully-executed Consent to Change of Attorney, thereby substituting mr. Lewis with counsel on the motion.

The issue of whether or not *Defendant* CRAWFORD was represented by counsel in this matter, thereby constituting an appearance on her part, is fraught with issues of credibility. In reviewing the papers before it, the Court is mindful of the general rule that credibility cannot, ordinarily, be assessed on papers. However, there are times that certain indicia are present in those papers that permits an assessment of who is more likely telling the truth and this matter is one of those instances.

In his affirmation, Attorney Lewis makes certain very telling comments which shed some light upon the issues before the Court. According to Mr. Lewis, he "...took steps, with Ms. Crawford's knowledge, to appear..." in this action. Additionally, in correspondence to *Plaintiff's* counsel, dated August 11, 2006, Mr. Lewis stated (in reference to the Decision and Order confirming the Referee's report and for Judgment of Foreclosure and Sale): "The Decision and Order referred to above was provided to me by my client.". Yet, *Defendant* CRAWFORD avers that she did not learn of the Judgment until July 15, 2008.

On each and every mortgage foreclosure that is assigned to this Court, it makes sure that copies of all orders, decisions, and correspondence are sent to each named defendant, regardless of whether or not that party is in default. In this matter, then, the Court personally

sent its first written Decision and Order (12/5/05), which denied the application for the appointment of a Referee, to *Defendant* CRAWFORD. Subsequently, again following its own unconditional practice, this Court sent *Defendant* CRAWFORD a copy of the Decision and Order (7/25/06) stating that the Judgment of Foreclosure and Sale had been executed.

When the foregoing information is viewed in the light of Mr. Lewis' sworn statement that he received a copy of the Judgment from *Defendant* CRAWFORD, his statement rings true. On the other hand, when *Defendant* CRAWFORD'S disavowal of knowledge of the Judgment until mid-2008 is juxtaposed with both the Court's statement that it sent a copy of the Decision and Order to her and with Attorney Lewis' statement that he received a copy of that Decision and Order from her, it is clear that she is being less than forthright with the Court.

In his affidavit, Mr. Lewis was careful to state that he had never received a retainer from *Defendant* CRAWFORD and did not, in fact, charge her for services rendered in this matter. However, the failure of an attorney to charge a fee is not dispositive of whether or not there is an attorney client relationship. Certainly, on many occasions there are other, sometimes stronger indicia of whether or not an attorney/client relationship exists.

Here, Attorney Lewis filed a Notice of Appearance and that act was accomplished with the knowledge of *Defendant* CRAWFORD. The Notice of Appearance which was filed does not bear any notations that it was to be only for a limited purpose. The Court notes that, on numerous occasions, Bankruptcy counsel communicate with the lawyers for lenders and the Court. They do not, however, file a Notice of Appearance when they are not, in fact, actually appearing in that matter. Thereafter, under the authority of that Notice of Appearance, Attorney Lewis communicated with *Plaintiff's* counsel and, more importantly, his client, *Defendant* CRAWFORD, provided him with documents that the Court sent directly to her.

Based upon the foregoing, it is the opinion of this Court that *Defendant* CRAWFORD did, in fact appear through counsel in this matter, thereby waiving the affirmative defense that jurisdiction had not been obtained over her person. It is also the belief of this

Court that *Defendant* CRAWFORD and her attorney had notice of the judgment for more than two years before she brought the instant motion and, for a reason, or reasons, unknown to this Court, no earlier attempt was made to vacate the Judgment. Therefore, the Court is not inclined to grant *Defendant* CRAWFORD relief under either *CPLR § 317* or *CPLR Rule 5015*.

The Court is mindful, though, of the federal lawsuit [*U.S. Southern District No. 1:08-CV-6293*] that *Defendant* CRAWFORD is pursuing against *Plaintiff* (and others) in that forum. It should be noted that *Defendant* CRAWFORD did not offer a proposed Answer with her moving papers, but this Court assumes that, if offered, it would include the same allegations of fraud and deceit which are set forth in the federal Complaint. It is without question that the charges stated in the federal lawsuit are serious and are typical of the horror stories that have surfaced since the mortgage crisis exploded in this country. In the federal action, *Defendant* CRAWFORD has asked for certain relief, including a declaration that the underlying mortgage transaction be deemed null and void and that all foreclosure proceedings be permanently enjoined. It is the opinion of this Court that it would be a travesty of justice if *Defendant* CRAWFORD was successful in that action, only to have lost her home in this one.

Therefore, the Court will stay the Judgment of Foreclosure and Sale, pending the outcome of the federal suit. Should *Defendant* CRAWFORD develop, through the use of discovery devices or trial testimony, proof of her allegations of fraud, she may then make a motion before this Court to vacate the Judgment on that basis. Such a motion would be directed not to *CPLR § 317* or *CPLR Rule 5015*, but to the Court's inherent power "...to relieve an aggrieved party from a judgment entered upon his default..." [*Allen, et al. V. Preston*, 123 AD2d 303 (Second Department, 1986)]. However, should *Defendant* CRAWFORD not diligently pursue the federal matter, *Plaintiff* should inform this Court of same and request permission to move to lift the stay.

Accordingly, it is hereby

ORDERED that *Defendant's* (LINDA CRAWFORD) motion is denied; and it is

further

ORDERED that, pending the outcome of federal lawsuit, LINDA D. CRAWFORD v. FRANKLIN CREDIT MANAGEMENT CORPORATION, TRIBECA LENDING CORPORATION, LENDERS FIRST CHOICE AGENCY, INC. [*U.S. Southern District No. 1:08-CV-6293*], the Judgment of Foreclosure and Sale (7/25/06) is stayed and *Plaintiff* shall cease all other foreclosure efforts regarding the subject property.

The foregoing constitutes the Order fo this Court

Dated: New City, New York
November 20, 2009


HON. MARGARET GARVEY
Justice of the Supreme Court

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