

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL DIVISION**

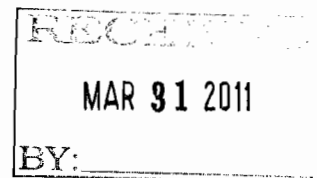
**INDYMAC FEDERAL BANK, F.S.B. AS  
SUCCESSOR IN INTEREST TO INDYMAC  
BANK, F.S.B.,  
Plaintiff,**

**Case No.: 09-001358CI-20  
UCN: 522009CA001358XXCICI**

v.

**LYNN N. RICHARDS and MARIANNE  
GOOSSENS, UNKNOWN PERSON(S)  
IN POSSESSION OF THE SUBJECT  
PROPERTY; BANK OF AMERICA, N.A.,  
Defendants.**

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**ORDER GRANTING MOTION TO VACATE FINAL JUDGMENT**

**THIS MATTER** came before the Court for consideration of Defendants Lynn N. Richards and Marianne Goossens' "Emergency Motion to Set Aside Default and Motion for Leave to Amend to Add Affirmative Defenses," filed on August 17, 2009; and "Defendants' Supplemental Memorandum of Law in Support of Defendant's Motion to Vacate Final Judgment," filed on October 5, 2010. Having considered the motion, memorandum, argument of counsels, the record, and applicable law, the Court finds as follows:

**Procedural History**

On January 26, 2009, IndyMac Federal Bank, F.S.B. as successor in interest to IndyMac Bank, F.S.B. (the Bank) filed a Complaint seeking to reestablish a promissory note and for foreclosure. Copies of the note and mortgage were attached to the Complaint. On February 11, 2009, a return of non-service was filed for the unknown persons in possession of the property with a notation that the residence was vacant. On February 24, 2009, Defendants filed a pro se letter with the Court that was treated as an answer. On March 31, 2009, the Bank filed a Motion for Default against co-defendant Bank of America, N.A. The default was entered by the Clerk of Court against

Bank of America on April 2, 2009. The Bank did not move for a default against the Defendants because they had filed an answer to the complaint.

On March 31, 2009, the Bank filed a motion for summary judgment with affidavits in support of attorney's fees. On April 29, 2009, a Notice of Filing the affidavit of indebtedness was filed with a certificate of service of April 24, 2009. On May 18, 2009, the Bank supplied the Court with the original note and mortgage. On May 26, 2009, a hearing was conducted on the motion for summary judgment. On May 27, 2009, the Uniform Final Judgment of Foreclosure was entered and a foreclosure sale was scheduled for August 25, 2009.

On August 17, 2009, the unsworn "Emergency Motion to Set Aside Default and Motion for Leave to Amend to Add Affirmative Defenses" was filed which sought to set aside the final summary judgment. A hearing scheduled on the motion was cancelled.

The Bank cancelled the foreclosure sale several times as the parties were negotiating a settlement. The case was then referred to mediation. There was an impasse and no settlement was reached. On October 5, 2010, the unsworn "Defendants' Supplemental Memorandum of Law in Support of Defendant's Motion to Vacate Final Judgment" was filed. A hearing was conducted on January 20, 2011. There was no testimony or documentary evidence presented at the hearing.

### **Analysis**

Former counsel for the Defendants filed the "Emergency Motion to Set Aside Default and Motion for Leave to Amend to Add Affirmative Defenses." As noted above, a default was not entered against Mr. Richards or Ms. Goossens. In the motion, the Defendants request that the final summary judgment be vacated pursuant to Florida Rule of Civil Procedure 1.540(b)(3) and (4) based on fraud, misrepresentation, or other misconduct by an adverse party and based on a claim that the judgment is void. The motion claims that the Bank's "misrepresentations to Defendant [in reference to] the loan modification and short sale approval" amount to misconduct. Further, without elaboration, the Defendants state they have meritorious defenses including unfair trade practices. The affidavit of Mr. Richards was filed in support of the motion.

The memorandum in support of the motion has been filed by new counsel for the Defendants. The memorandum discusses four legal theories to support vacation of the *final summary judgment*.

**Argument One:** Counsel for the Defendants argues that under rule 1.540(b)(1), the motion to vacate the final summary judgment should be granted because the motion was timely filed and the Defendants have exhibited excusable neglect.

It is asserted that the excusable neglect is demonstrated because the Defendants honestly, but mistakenly believed that U.S. Settlement was representing them in settlement negotiations with the Bank with respect to a loan modification. Allegedly, this mistaken belief was represented to the Court in their pro se answer to the complaint. It is asserted that the Defendants exhibited a reasonable understanding regarding settlement negotiations which were the grounds for setting aside defaults in both Gables Club [Marina, LLC v. Gables Condominium and Club Association, 948 So. 2d 21 (Fla. 3d DCA 2007)] and Elliott [v. Aurora Loan Services, LLC, 31 So. 3d 304 (Fla. 4th DCA 2010)]."

**Argument Two:** Counsel for the Defendants argues that the final summary judgment was improperly entered because in the motion for summary judgment the Bank did not responded to the Defendants' "affirmative defense and because Equitable Defenses exist."

The Defendants assert that the statement in the Answer that the parties were in settlement negotiations should be treated as an affirmative defense. The memorandum states that the Answer presents the defense "that the parties were in settlement negotiations" regarding a loan modification workout. The Bank never responded to this "affirmative defense." Further it is asserted that the Answer provides "equitable defenses," or that foreclosure would be unconscionable when the Defendants believed that foreclosure would be stalled pending the outcome of the loan modification workout.

The Defendants' entire answer states:

We, Lynn N. Richards and Marianne Goossens, received a lis pendens. We hired US Settlement Services, Inc. to help us achieve a loan modification with our lender in order to keep our home.

US Settlement Services has established contact with IndyMac Bank and submitted a Third Party Authorization and documents referred to as a loan

modification workout packet. Our lender has stated that this process would take anywhere from 60-120 days. During the process we also continued to have the property for sale. Currently there is an offer on the house and we are waiting for the lender's approval.

US Settlement can be reached at the following:  
Lisa Hammons [telephone, facsimile, and e-mail address]

Please postpone any further foreclosure activity while our situation is currently in review with our lender.

Thank you for your assistance in this matter.

If any further information is needed, please don't hesitate to contact us.

The motion for summary judgment filed on March 31, 2009, does not address the Defendant's allegation that there was a settlement offer/workout packet that had been submitted to the Bank that allegedly was under review. The statement in the Answer that the Bank had responded that "this process would take anywhere from 60-120 days," is an allegation that the "offer" was being considered.

The affidavits in support of the Bank's motion for summary judgment filed on March 31, 2009, and April 29, 2009, concern the amount of indebtedness owed to the Bank, the time and effort expended by counsel for the Bank, and an affidavit as to a reasonable attorney's fee. The affidavits do not address or refute the Defendants' allegation that the loan workout paperwork was in the process of being considered at the time the Answer was filed on February 24, 2009; or that the Defendants had been told that the process would take from 60 to 120 days.

#### **Conclusion**

The Court concludes that based on the Answer and Affidavit in support of the motion to vacate, the Defendants have exhibited excusable neglect for failing to respond to the Motion for Summary Judgment filed by the Bank based on their reliance that settlement negotiations were proceeding.

Further, in the motion for summary judgment and in the supporting affidavits, the Bank failed to address the Defendants' allegation in their Answer that a loan workout/settlement negotiation was in process. The Bank failed to factually refute the affirmative defense or established that it was legally insufficient. Summary judgment

was not properly entered for the Bank. See *Francel v. Gries Inv. Fund, LLC*, 36 Fla. L. Weekly D 256 (Fla. 2d DCA Feb. 2, 2011).

The Defendants have demonstrated that the Final Summary Judgment entered on May 27, 2009, should be set aside.

The Court shall not address the remaining arguments raised by the motion and memorandum because the Defendants have received the relief they seek.

Accordingly, it is

**ORDERED AND ADJUDGED** that the Defendants Lynn N. Richards and Marianne Goossens' Motion to Vacate Final Judgment is **GRANTED**.

**IT IS FURTHER ORDERED AND ADJUDGED** that the Uniform Final Judgment of Foreclosure entered on May 27, 2009, is hereby **VACATED**. This matter shall proceed accordingly.

**DONE AND ORDERED** in Chambers, in Clearwater, Pinellas County, Florida, this \_\_\_\_ day of \_\_\_\_\_, 2011.

**TRUE COPY**  
Original Signed

**MAR 29 2011**

**GEORGE M. JIROTKA**, Circuit Judge

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