

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32896
G/kmb

_____AD3d_____

Argued - October 24, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2010-07296

DECISION & ORDER

Bank of America, etc., respondent, v John Faracco,
et al., defendants, William Weinberg, appellant.

(Index No. 3516/08)

Eric W. Berry, P.C., New York, N.Y., for appellant.

Thomas G. Sherwood, LLC, Garden City, N.Y., and Stevens & Lee, P.C., New York,
N.Y. (Bradley L. Mitchell of counsel), for respondent (one brief filed).

In an action, inter alia, to foreclose a mortgage, the defendant William Weinberg appeals from an order of the Supreme Court, Suffolk County (Farneti, J.), dated May 28, 2010, which denied his motion, inter alia, pursuant to CPLR 5015(a)(1) to vacate a judgment of foreclosure and sale of the same court dated August 14, 2009, entered upon his default in appearing or answering the complaint, and upon his failure to oppose the plaintiff's motion for the execution of a judgment of foreclosure and sale.

ORDERED that the order is affirmed, with costs.

In order to prevail on his motion to vacate the judgment of foreclosure and sale entered, in part, upon his default, the defendant William Weinberg was required to demonstrate both a reasonable excuse for his default in appearing or answering the complaint and the existence of a potentially meritorious defense to the action (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141; *Cohen v Romanoff*, 83 AD3d 989). Weinberg proffered an excuse for his failure to oppose the motion for the execution of a judgment of foreclosure and sale, but not for his failure to appear or answer the complaint in the first instance (*see Lane v Smith*, 84

AD3d 746, 748; *Maida v Lessing's Rest. Servs., Inc.*, 80 AD3d 732, 733; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890; *Abdul v Hirschfield*, 71 AD3d 707, 709; *Trotman v Aya Cab Corp.*, 300 AD2d 573). Accordingly, the Supreme Court did not improvidently exercise its discretion in denying that branch of Weinberg's motion which was pursuant to CPLR 5015(a)(1) to vacate the judgment of foreclosure and sale. Moreover, in view of Weinberg's lack of a reasonable excuse for failing to appear or answer the complaint, it is unnecessary for us to consider whether Weinberg sufficiently demonstrated the existence of a potentially meritorious defense (*see Abdul v Hirschfield*, 71 AD3d at 709; *Segovia v Delcon Constr. Corp.*, 43 AD3d 1143, 1144; *Mjahdi v Maguire*, 21 AD3d 1067, 1068).

Weinberg's remaining contentions are either without merit or not properly before this Court.

SKELOS, J.P., BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court