

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

D33279
W/kmb

_____AD3d_____

Submitted - November 10, 2011

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
ANITA R. FLORIO
THOMAS A. DICKERSON, JJ.

2010-09901

DECISION & ORDER

US National Bank Association as Trustee, respondent,
v Glen Harlan Melton, appellant.

(Index No. 7257/06)

Walter T. Ramsey, Brooklyn, N.Y., for appellant.

Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Owen M. Robinson of
counsel), for respondent.

In an action to foreclose a mortgage, the defendant appeals from an order of the Supreme Court, Nassau County (Adams, J.), entered August 9, 2010, which denied his motion, inter alia, pursuant to CPLR 5015(a)(4) to vacate a judgment of foreclosure and sale of the same court entered April 15, 2008, upon his default in answering the complaint or otherwise appearing in the action.

ORDERED that the order is affirmed, with costs.

This action was commenced in early May 2006. According to the affidavit of service, the defendant was served with copies of the summons and complaint at his home on May 8, 2006, by delivery of a copy of the summons and complaint to Angelica Guevara, referred to as a cotenant, and by the mailing of a second copy of the summons and complaint to his home, all pursuant to CPLR 308(2). The defendant neither answered the complaint nor otherwise appeared in the action. On April 15, 2008, a judgment of foreclosure and sale (hereinafter the judgment) was entered against him. On November 17, 2008, a copy of the judgment was served upon the defendant with notice of entry. On May 5, 2009, a foreclosure auction was held, and the mortgaged property was sold. In May 2010 the defendant moved, inter alia, pursuant to CPLR 5015(a)(4) to vacate the judgment

December 13, 2011

Page 1.

US NATIONAL BANK ASSOCIATION as TRUSTEE v MELTON

entered upon his default. In support, he submitted an affidavit stating, in conclusory fashion, that he was never personally served with a copy of the summons and complaint, and that he did not have “a precise recollection” as to whether he received a copy of the summons and complaint in time to defend against the action. The defendant’s attorney, in an affirmation made without any personal knowledge of the facts, asserted that Guevara did not speak or understand English, and that a hearing was necessary on the issue of whether she gave a copy of the summons and complaint to the defendant with enough time to answer. The Supreme Court denied the defendant’s motion concluding, inter alia, that his affidavit was conclusory and failed to rebut the process server’s affidavit. We affirm.

The Supreme Court properly denied that branch of the defendant’s motion which was pursuant to CPLR 5015(a)(4) to vacate the judgment. The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) (*see Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989), and the defendant’s unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service (*id.*). A hearing is not required where, as here, the defendant fails to swear to specific facts rebutting the statements in the process server’s affidavit (*see U.S. Bank, N.A. v Arias*, 85 AD3d 1014, 1015; *Scarano v Scarano*, 63 AD3d 716). Furthermore, the affirmation of an attorney which is not based upon personal knowledge of the facts is of no probative or evidentiary significance (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456).

To the extent that the defendant moved pursuant to CPLR 5015(a)(1) to vacate the judgment, the motion was untimely since it was not made within one year after a copy of the judgment was served upon him with notice of entry (*see CPLR 5015[a][1]*). Moreover, the defendant was not entitled to relief pursuant to CPLR 5015(a)(1), as he failed to set forth any reasonable excuse for his default (*see Tribeca Lending Corp. v Crawford*, 79 AD3d 1018, 1020). Finally, even if the defendant’s motion were treated as one made pursuant to CPLR 317, he both failed to demonstrate that he did not receive notice of the action in time to defend and made his motion in May 2010, more than one year after a copy of the judgment was served upon him with notice of entry (*see Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1082).

The defendant’s remaining contentions either are without merit or have been rendered academic by our determination.

DILLON, J.P., ANGIOLILLO, FLORIO and DICKERSON, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court