

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

D55917
T/htr

_____AD3d_____

Argued - February 27, 2018

LEONARD B. AUSTIN, J.P.
SHERI S. ROMAN
ROBERT J. MILLER
FRANCESCA E. CONNOLLY, JJ.

2016-02100

DECISION & ORDER

Wells Fargo Bank, N.A., respondent, v Moshe
Atedgi, appellant, et al., defendants.

(Index No. 28337/09)

Joseph A. Altman, P.C., Bronx, NY, for appellant.

Frenkel Lambert Weiss Weisman Gordon, LLP, Bayshore, NY (Barry M. Weiss of
counsel), for respondent.

In an action to foreclose a mortgage, the defendant Moshe Atedgi appeals from an order of the Supreme Court, Queens County (Duane A. Hart, J.), dated December 16, 2015. The order denied that defendant's motion pursuant to CPLR 5015(a)(1) to vacate (a) a prior order of the same court dated February 25, 2015, granting the plaintiff's motion for leave to enter a default judgment and for an order of reference and denying that defendant's cross motion, in effect, to vacate his default in answering or appearing and to dismiss the complaint insofar as asserted against him or, in the alternative, to compel the plaintiff to accept a late answer, and (b) an order of reference of the same court dated February 25, 2015, and upon vacatur, to deny the plaintiff's motion and grant his cross motion.

ORDERED that the order dated December 16, 2015, is affirmed, with costs.

The Supreme Court denied the motion of the defendant Moshe Atedgi (hereinafter the defendant) pursuant to CPLR 5015(a)(1) to vacate two prior orders of the court, both dated February 25, 2015, finding that the defendant failed to proffer a reasonable excuse for his default or a potentially meritorious defense. We affirm, albeit on a different ground.

Contrary to the defendant's contention, the orders dated February 25, 2015, were not

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entered upon the defendant's default, but were decided based upon the defendant's opposition and cross motion and, thus, constituted determinations on the merits. Accordingly, CPLR 5015(a)(1) was not an appropriate vehicle to seek relief from the prior orders.

The defendant's remaining contentions are academic in light of our determination.

AUSTIN, J.P., ROMAN, MILLER and CONNOLLY, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court