Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

DEUTCHE BANK NATIONAL TRUSTEE COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL INC., TRUST 2006-HE3

Plaintiff,

-against-

ADITIA SINGH, et al.

Defendants.

Index No: 8442/09

Motion Date: 9/29/16

Motion Seq. No.: 4

The following papers numbered 1 to read on this motion by defendant, Aditia Singh, pursuant to CPLR 5015(4) for an Order vacating the default judgment and dismissing the complaint on the grounds of lack of personal jurisdiction, or, in the alternative, pursuant to CPLR 317 and 5015(1) vacating his default and allowing him to appear and defend on the merits.

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Order to Show Cause-Affidavits-Exhibits	1 - 6
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Upon the foregoing papers it is ordered that this motion is determined as follows.

This action was commenced on April 2, 2009 to foreclose a mortgage, dated January 26, 2006, given by defendant, Aditia Singh, to plaintiff's predecessor in interest, to secure repayment of a note, evidencing a loan in the principal amount of $307,000.00, with interest. Plaintiff alleges that the defendant defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing beginning on July 1, 2008, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt. The defendant failed to answer or otherwise appear in the action and is in default.

The defendant now moves to dismiss the complaint pursuant to CPLR 5015(a)(4) lack of personal jurisdiction; or, in the alternative, to vacate their default CPLR 5015(a)(1) excusable default and meritorious defense and in the interest of justice.

A defendant seeking to vacate judgment entered upon default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see; Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986] ; Gray v. B.R. Trucking Co., 59 NY2d 649 [1983]). When vacature is sought under CPLR 317 the defendant must show, inter alia, that he "did not personally receive notice of the summons in time to defend" and demonstrate a meritorious defense (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., supra at 141-142). However, when moving to vacate a judgment entered on default pursuant to CPLR 5015(a)(4) lack of personal jurisdiction, the movant need not demonstrate a reasonable excuse for the default and a potentially meritorious defense (see Toyota Motor Credit Corp. v Lam, 93 AD3d 713, 713-714 [2012]; Deutsche Bank Natl. Trust Co. v Pestano, 71 AD3d 1074 [2010]; Harkless v Reid, 23 AD3d 622, 622-623 [2005]).

When a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1), (4) and 317 raises a jurisdictional objection "the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacature of the default under CPLR 5015(a)(1) (see HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1045 [2014] quoting Canelas v Flores, 112 AD3d 871, 871 [2013]).

The affidavit of service avers that service upon the defendant was made pursuant to CPLR 308(2), on April 6, 2009 at 6:26 a.m. at 91-06 104th St., 1st Floor, Richmond Hill, NY. by delivering a copy of the summons and complaint and required notice to Drupattie Shanker, co-occupant, a person of suitable age and discretion, and an additional copy mailed to defendant at the same address.

In support of his motion, the defendant submitted his affidavit asserting that the alleged service at 91-06 104th St., his home, was insufficient to confer personal jurisdiction because his wife, Drupattie Shanker, did not answer the door on that date and time, that only he would have answered the door, no one came to his home, the description given in the affidavit of service does not accurately describe his wife and he knows no one would have been at his home who fits the description.

The process server's sworn affidavit of service constitutes prima facie evidence of proper service pursuant to CPLR 308(2) see U.S. Natl. Bank Assn. v Melton, 90 AD3d 742; Wells Fargo Bank, N.A. v Christie, 83 AD3d 824, 825; Deutsche Bank Natl. Trust Co. v. Hussain, 78 AD3d 989 [2010]).

Although a sworn denial of receipt generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (see Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 139 [1986]), no hearing is required where the defendants fail to swear to specific facts to rebut the statements in the process server's affidavits (see NYCTL 2009-A Trust v Tsafatinos, 101 AD3d 1092 [2012]; Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983, 984-985 [2010]Sando Realty Corp. v Avis, 209 AD2d 682 [1994]; Genway Corp. v. Elgut, 177 AD2d 467 [1991]; Colon v Beekman Downtown Hospital, 111 AD2d 841 [1985]).

In the absence of an affidavit of the his wife, the defendant's self-serving affidavit amounts to nothing more than bare conclusory denial of service which is insufficient to rebut the presumption of proper service or to raise an issue of fact warranting a hearing (see Chichester v Alal-Amin Grocery & Halal Meat, 100 AD3d 820 [2012]; Toyota Motor Credit Corp. v Lam, 93 AD3d 713, 714 [2012]). The claimed discrepancies between the appearance of the defendant's wife and the description in the process server's affidavits were minor and insufficiently substantiated to warrant a hearing (see Indymac Federal Bank, FSB v Hyman, 74 AD3d 751 [2010]; Wells Fargo Bank, N.A. v McGloster, 48 AD3d 457 [2008]; Simmons First Nat. Bank v Mandracchia, 248 AD2d 375 [1998]). The defendant's conclusory assertion without any probative facts is insufficient to raise an issue of fact that no person fitting that description in the affidavit of service was or could have been at the premises or to contradict any other material factual allegation in the affidavit of service which would warrant a traverse hearing (see (see Wells Fargo Bank, N.A. v Kohn, 137 AD3d 897, 898 [2016]; Roberts v Anka, 45 AD3d 752, 754 [2007] lv. to appeal dismissed, 10 NY3d 789 and 10 NY3d 851 [2008]; Public Adm'r of County of N.Y. v Markwoitz, 163 AD2d 100 [1990]).

Inasmuch as the court has determined that defendant was properly served pursuant to CPLR 308(2) and defendant has offered no other reasonable excuse for his default of over 7 years (see SASS MUNI IV DTR v Braxter, 143 AD3d 798, 799 [2016]; Deutsche Bank Nat. Trust Co. v Matos, 77 AD3d 606, 607 [2010]; Tadco Constr. Corp. v Allstate Ins. Co., 73 AD3d 1022, 1023 [2010];

Jefferson v. Netusil, 44 AD3d 621, 622 ; Sime v Ludhar, 37 AD3d 817 [2007]), the defendant has failed to establish his entitlement to vacature of his default under to CPLR 5015(a)(1).

Defendant has also failed to demonstrate entitlement to relief pursuant to CPLR 317 as he failed to demonstrate that he did not receive notice of this action in time to defend. The court file reflects that on May 14, 2009, the court and plaintiff's attorney separately, by letter mailed to the defendant at 91-06 104th St., 1st Floor, Richmond Hill, NY. the mortgaged premises which defendant admitted is his home, notified the defendant of the residential foreclosure settlement conference to be held on July 2, 2009. Defendant failed to appear. The file also shows that the plaintiff served defendant, at the same address, on October 21, 2009 the Notice of Entry of the Order of Reference, on May 13, 2010 the Notice of Entry of the Judgment of Foreclosure and Sale, on August 21, 2013 the Notice of Motion seeking to substitute the affidavit of merit. The motion was submitted without opposition and Plaintiff served defendant with Notice of Entry of the resulting Order on May 2, 2016. Defendant's mere denial of receipt and conclusory, unsubstantiated assertion that he did not receive notice of this action until the recent service of the Order dated May, 2015[1] is insuffcient to establish a lack of notice of the action in time to defend (see Lange v. Fox Run Homeowners Ass'n, Inc., 127 AD3d 823 [2015]; Stevens v Charles, 102 AD3d 763, 764 [2013]).

Since the defendant failed to demonstrate either a reasonable excuse for a default or that he did not receive notice in time to defend, it is unnecessary to determine whether he demonstrated the existence of a potentially meritorious defense (see Mannino Development, Inc. v. Linares, 117 AD3d 995 [2014]; Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789, 790 [2011]).

Nor is vacature of the judgment in the interest of substantial justice warranted under the circumstances in this case (see Woodson v Mendon Leasing Corp., 100 NY2d 62 [2003]; Katz v Marra, 74 AD3d 888 [2010]). The subject note and mortgage are dated January 26, 2006 and the defendant defaulted in making the payment due on the loan commencing July 1, 2008. The defendant's failure to make any payments on the loan for over eight years and ignoring this action for over seven years without offering a reasonable excuse for his exorbitant delay in moving to vacate his default, evinces an intentional default rather than inadvertence or excusable neglect (see Abdul v Hirschfield, 71 AD3d 707 [2010]; Ujeta v Wu, 303 AD2d 676 [2003]; Jamieson v

[1]There is no Order dated May, 2015. Notice of entry of an Order dated September 24, 2015, however, was served on May 2, 2016.

Roman, 36 AD3d 861 [2007]; Kyriacopoulos v Mendon Leasing Corp., 216 AD2d 532 [1995]).

Accordingly, the defendant's motion is denied.

Dated: January 4, 2017
D# 55

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J.S.C.