

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,  
SECOND JUDICIAL DEPARTMENT**

**Bank of Am., N.A. v. Martin**

2020 NY Slip Op 06081 (N.Y. Ct. App. 2020) · No. 2018-07237 · Decided October 28, 2020

**SUMMARY**

The Appellate Division, Second Department affirmed the denial of Wilkie Martin's motion to vacate a foreclosure judgment, dismiss the complaint for lack of personal jurisdiction, and enjoin eviction proceedings. The court held that although the defendant was not required to show a reasonable excuse or meritorious defense when challenging jurisdiction, his allegations did not sufficiently rebut the process server's affidavit or warrant a hearing.

**CASE DETAILS**

|                              |                                                                                                                                                                                                                             |
|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>COURT</b>                 | Supreme Court of the State of New York, Appellate Division, Second Judicial Department                                                                                                                                      |
| <b>WRITING FOR THE COURT</b> | Mark C. Dillon, J.P.; Joseph J. Maltese, J.; Betsy Barros, J.; Francesca E. Connolly, J.                                                                                                                                    |
| <b>JURISDICTION</b>          | New York                                                                                                                                                                                                                    |
| <b>DECIDED</b>               | October 28, 2020                                                                                                                                                                                                            |
| <b>DOCKET</b>                | 2018-07237                                                                                                                                                                                                                  |
| <b>DISPOSITION</b>           | affirmed                                                                                                                                                                                                                    |
| <b>PROCEDURAL POSTURE</b>    | Defendant appealed from an order denying his motion to vacate a judgment of foreclosure and sale for lack of personal jurisdiction, dismiss the complaint insofar as asserted against him, and enjoin eviction proceedings. |
| <b>STANDARD OF REVIEW</b>    | The Appellate Division reviewed the denial of vacatur for lack of personal jurisdiction under CPLR 5015(a)(4) and whether the defendant's submissions warranted a hearing on service of process.                            |
| <b>PRECEDENTIAL VALUE</b>    | Published appellate opinion                                                                                                                                                                                                 |
| <b>PARTIES</b>               | Wilkie Martin v. Bank of America, N.A.                                                                                                                                                                                      |

**TOPICS**

foreclosure

personal jurisdiction

service of process

appellate procedure

civil procedure

## PRACTICE AREAS

Civil procedure

Mortgage foreclosure

Personal jurisdiction

Service of process

Appellate procedure

## QUESTIONS PRESENTED

1. Whether the Supreme Court improperly required Martin to establish a reasonable excuse for his default before addressing his claim that the court lacked personal jurisdiction.
2. Whether Martin's submissions rebutted the process server's affidavit and required a hearing to determine the validity of service.
3. Whether the judgment of foreclosure and sale should be vacated under CPLR 5015(a)(4).

## HOLDINGS

1. A defendant seeking vacatur of a default under CPLR 5015(a)(4) on the ground of lack of personal jurisdiction is relieved of the ordinary requirements of showing a reasonable excuse and a meritorious defense.
2. A hearing is warranted only when the defendant's denial of service is substantiated by specific, detailed facts contradicting the process server's affidavit. Martin's allegations were insufficient to rebut the affidavit or require a hearing.

## KEY QUOTATIONS

*“Although a party moving to vacate a default must normally demonstrate a reasonable excuse and a meritorious defense[,] the movant is relieved of that obligation when lack of personal jurisdiction is asserted as the ground for vacatur” (at \*1)*

*“In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service” (at \*2)*

## FACTUAL BACKGROUND

Bank of America sought to foreclose a mortgage against Wilkie Martin and others. A process server's affidavit stated that Martin was personally served at an address where he resided. Martin later challenged jurisdiction, but did not expressly deny that he had been served, did not deny residing at the service address, and did not identify another location where he was present at the claimed date and time. Alleged discrepancies between his age and appearance and the process server's description were minor.

## PROCEDURAL HISTORY

Bank of America commenced a mortgage-foreclosure action in September 2011. Martin failed to appear or answer; the Supreme Court granted an order of reference in June 2014 and entered a judgment of foreclosure and sale on September 28, 2015. Martin moved in July 2017 under CPLR 5015(a)(4), but the Supreme Court denied the motion without a hearing. The Appellate Division affirmed.

## DISPOSITION

affirmed

#### CASES CITED

- Velez v. Forcelli, 125 A.D.3d 643, 644 (N.Y. App. Div. 2015)
- Toyota Motor Credit Corp. v. Hardware Lam, 93 A.D.3d 713, 714 (N.Y. App. Div. 2012)
- Bethpage Fed. Credit Union v. Grant, 178 A.D.3d 997, 998 (N.Y. App. Div. 2019)
- JPMorgan Chase Bank, N.A. v. Daar, 161 A.D.3d 835, 836 (N.Y. App. Div. 2018)
- Wells Fargo Bank, N.A. v. Colace, 178 A.D.3d 1119, 1120 (N.Y. App. Div. 2019)
- JPMorgan Trust Bank, N.A. v. Hoffmann, 154 A.D.3d 699, 700 (N.Y. App. Div. 2017)
- Wells Fargo Bank, NA v. Spaulding, 177 A.D.3d 817, 819 (N.Y. App. Div. 2019)

#### OPINION

#### PER CURIAM.

Bank of Am., N.A. v Martin (2020 NY Slip Op 06081) Bank of Am., N.A. v Martin 2020 NY Slip Op 06081 Decided on October 28, 2020 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on October 28, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

JOSEPH J. MALTESE BETSY BARROS FRANCESCA E. CONNOLLY, JJ. 2018-07237 (Index No. 28309/11) [\*1]Bank of America, N.A., etc., respondent, vWilkie Martin, appellant, et al., defendants. Michael Kennedy Karlson, New York, NY, for appellant. Frenkel Lambert Weiss Weisman & Gordon LLP, Bay Shore, NY (Ruth O'Connor of counsel), for respondent. DECISION & ORDER In an action to foreclose a mortgage, the defendant Wilkie Martin appeals from an order of the Supreme Court, Suffolk County (Arthur G. Pitts, J.), dated January 10, 2018.

The order denied that defendant's motion, in effect, pursuant to CPLR 5015(a)(4) to vacate a judgment of foreclosure and sale of the same court dated September 28, 2015, to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction, and to enjoin the plaintiff from initiating eviction proceedings against him. ORDERED that the order is affirmed, with costs.

In September 2011, the plaintiff commenced this action against the defendant Wilkie Martin (hereinafter the defendant), among others, to foreclose a mortgage. The defendant failed to appear or answer the complaint. In June 2014, the Supreme Court granted the plaintiff's motion for an order of reference. Thereafter, upon the plaintiff's motion, the court issued a judgment of foreclosure and sale dated September 28, 2015.

In July 2017, the defendant moved, *inter alia*, in effect, pursuant to CPLR 5015(a)(4) to vacate the judgment of foreclosure and sale. In an order dated January 10, 2018, the court denied the motion. The defendant appeals.

The defendant's motion sought, among other things, vacatur of the judgment of foreclosure and sale pursuant to CPLR 5015(a)(4). "Under CPLR 5015(a)(4), a default must be vacated once a movant demonstrates lack of personal jurisdiction" (*Velez v Forcelli*, 125 AD3d 643, 644 [citations omitted]). "Although a party moving to vacate a default must normally demonstrate a reasonable excuse and a meritorious defense[,] the movant is relieved of that obligation when lack of personal jurisdiction is asserted as the ground for vacatur" (*id.* at 644 [internal quotation marks omitted]).

Thus, it was erroneous for the Supreme Court to consider whether the defendant had provided a reasonable excuse for his default before considering his contention that the court lacked personal jurisdiction over him. Nevertheless, we agree with the court's determination to deny, without a hearing, that branch of the defendant's motion which was pursuant to CPLR 5015(a)(4) to vacate the judgment of foreclosure and sale entered upon his failure to appear or answer.

"While [a] process server's sworn affidavit of service ordinarily constitutes *prima facie* evidence of proper service, where there is a sworn denial that delivery to the defendant was [\*2]accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing" (*Toyota Motor Credit Corp. v Hardware Lam*, 93 AD3d 713, 714 [citations and internal quotation marks omitted]).

"In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service" (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 998 [internal quotation marks omitted]).

Here, the defendant's allegations were insufficient to rebut the content of the process server's affidavit (see *JPMorgan Chase Bank, N.A. v Daar*, 161 AD3d 835, 836). The defendant did not expressly deny that service was effectuated upon him.

In fact, he did not deny that he resided at the address where the process server claimed to have served him personally, and he did not suggest any other location where he might have been on the date and time of the purported service (*cf. Wells Fargo Bank, N.A. v Colace*, 178 AD3d 1119, 1120).

Moreover, the discrepancies between the defendant's age and appearance and the description of him provided in the process server's affidavit were minor and insufficient to warrant a hearing (see *JPMorgan Chase Bank v Daar*, 161 AD3d at 836; *JPMorgan Trust Bank, N.A. v Hoffmann*, 154 AD3d 699, 700; *cf. Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819).

The defendant's remaining contentions either are without merit or need not be addressed in light of our determination. DILLON, J.P., MALTESE, BARROS and CONNOLLY, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court

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