

# REFEREE/RECEIVER NEWSLETTER

## PART 36 (SEPTEMBER, 2020 PART 1 OF 2)

Welcome to the first edition of our Newsletter where we share exciting case developments with you in the legal area of receivers and Referees focusing on real estate. Most of the cases we brief have decisions that encompass much more than just these two legal areas, but our Newsletter will not be discussing them. Thus, if you have some time, we recommend you read the complete decision for a full understanding at [www.greenbergmerola.com/Referee.php](http://www.greenbergmerola.com/Referee.php) Hayley Greenberg, Editor; Alina Ladyzhinskaya, Research Assistant.

### FORECLOSURE – BUSINESS RECORDS/HEARSAY

Nationstar Mortg., LLC v. Durane-Bolivard, 175 A.D.3d 1308, 1311, 109 N.Y.S.3d 99, 103 (2019)

Appellate Court rejected the Referee's report as he based his findings on Plaintiff's employee's affidavit who averred based on her review of Plaintiff's business records that Defendant defaulted by failing to make the payment due on May 1, 2010, and all subsequent payments. However, this was inadmissible hearsay, since **the records themselves were not provided to the Referee.**

But, even if the records has been provided, a proper foundation would have had to been laid.

Here, the affiant did NOT say her employer was the maker of the promissory note, only that they had received it. Moreover, the affiant did NOT say the records were incorporated into her

employer's records and routinely relied upon or kept in the ordinary course of business. This was fatal.

Thus, a proper foundation was not laid by Plaintiff for the business records the affiant relied upon.

*Referees: When you get your documents from the Plaintiff, don't only look at the affidavit they also provide-make sure the supporting documents provide a basis for the affidavit. Editor's Note*

Nationstar Mortg., LLC v. Cavallaro, 181 A.D.3d 688, 117 N.Y.S.3d 866 (2020)

Defendant appealed from the confirmation of the Referee Report which relied on Plaintiff's document execution specialist to show what amounts were due. But, the specialist did not include any of the business records that he relied upon. Thus, the Referee

had nothing to support his calculations on.

When you get the Plaintiff's documents and read what their expert says, check that at least some supporting documentation is provided: mortgage, note, payment history, billing history, excel spreadsheet of calculations, something that shows HOW the calculations were done, etc.

*Editor's Note*

HSBC Bank USA, Nat'l Ass'n v. Cherestal, 178 A.D.3d 680, 680-83, 113 N.Y.S.3d 206, 206-09 (2019)

Appellate Court reversed the confirmation of the Referee's Report because the findings were not substantially supported by the record.

Referee included about \$530,000 for tax and insurance as part of what was due to Plaintiff, but this was calculated without any

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business records supporting that amount.

*Often times, the bank gives you papers with a total for taxes and insurance without the bills and/or paid invoices. But, it is usually substantially less than the \$530,000 here. I wonder if they would have appealed if the amounts had been lower (i.e. closer to the norm). A better practice would be to just get the tax printouts from the Country and/or the paid invoices or cancelled checks. Editor's Note*

U.S. Bank Nat'l Ass'n v. Calabro, 175 A.D.3d 1451, 1451–52, 109 N.Y.S.3d 126, 126–27 (2019)

Again, the Referee's Report should not have been confirmed as it was based on unproduced business records.

#### **FORECLOSURE – PLAINTIFF'S EXPENSES**

N.Y. Mellon v. Gitit Graffi, 172 A.D.3d 1148, 1149, 102 N.Y.S.3d 61)

Appellate Court agreed the Referee's report should be confirmed.

Referee's Report awarded Bank of NY funds including default interest, late charges, insurance payments, tax payments, property preservation costs, etc.

But, the lower court disallowed these based on the objection of a subordinate mortgagee. The mortgagee claimed a lengthy delay in foreclosing and Appellate Court agreed.

The lower court also disallowed some expenses as they were only supported by a conclusory unsubstantiated affidavit without supporting documentation

Regarding attorney fees, the lower court found Plaintiff did not substantiate the performance of service, the time and rate, the reasonableness, etc. so they were disallowed.

*I don't think it is a Referee's job to decide if a delay is lengthy so if proper supporting information is provided for expenses your inquiry should end and your report should include compensation for them. If someone objects claiming a "lengthy delay" the Judge will have to decide. Editor's Note*

#### **FORECLOSURE – REFEREE/RECEIVER PAYMENT**

Citibank, N.A. v. Dulfon, 171 A.D.3d 697, 97 N.Y.S.3d 217 (2019)

Appellate Court sustained giving the Referee less compensation than requested.

Referee sought extra fees above the \$950 additional compensation

the court awarded him. He also received \$500 from the property sale which sold for \$577,000.

He has asked for additional payment for 20.25 hours he worked. Plaintiff objected saying this was excessive.

The lower court awarded him \$500 for the computation stage minus \$50 he had received, a \$250 cancellation fee, and \$250 for time spent on phone calls.

Appellate Court said he failed to show the services were unusual or exceptional. Also, they stated the \$500 for the cancellation and phone work exceeded the statutory rate as well as the amount the Referee would have received at his usual billing rate.

*This does not add up. If he spent 20.25 hours on the matter and only received \$950, that equals approximately \$45 per hour. Editor's note.*

Appellate Court also said that the other services done by the Referee were within the scope of the order for which compensation was provided.

*However, it is unclear how many hours were spent on each separate duty and it should be irrelevant since he only received \$450 for this stage. Editor's note.*

Finally, Appellate Court acknowledged the services were

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protracted but not affected by the amount of work or that there was any complex or novel issues that would warrant additional compensation.

*I would be curious to know the exact breakdown of what work was done for each stage and WHY it took 20.25 hours. In any event, if this was reasonable and not the Referee's fault, the monetary award is clearly inadequate. Editor's note.*

Vogel v. Vogel, 172 A.D.3d 464, 464–66, 100 N.Y.S.3d 231, 231–33 (2019)

Various fees were awarded to parties as referees and receivers and also to their law firms.

Receiver's awarded was lowered from \$10,000 to \$7,162.50. She was also awarded \$750 as successor Referee which was confirmed.

Original Referee was awarded \$3,869.66 which was confirmed.

Receiver's law firm was awarded \$8,372 which was CHANGED TO 0.

Appellate Court said the Referee's fee could be set beyond the statutory rate. Also, they referred to the Receiver's invoice which showed an hourly rate and the number of hours worked. The invoice was not objected to.

*So, why did they lower the Receiver's commission to \$7,162.50?. Editor's note.*

Appellate Court was not happy with the \$8,372 awarded to the lawfirm as they violated the Rules of the Chief Judge. You can't hire a lawfirm you're part of or own or... to be your attorney if you're the Receiver unless there is a compelling reason to do so.

The court went on to state that even IF the lawfirm had been appointed it still would not have been entitled to compensation as the services rendered were not extraordinary.

Services that are supposed to be done by the Receiver should be done by them-not appointees. To get an outside lawfirm paid you need to show extensive special and extraordinary legal services which extend beyond what a receiver would do. Here, the lawfirm billed for recording deeds, preparing deeds, disbursing money, etc. which is exactly why the court appointed the Receiver.

#### **FORECLOSURE – REFEREE CONFLICT OF INTEREST & WAIVER OF OBJECTIONS**

Citibank, Nat'l Ass'n as Tr. for  
GSAA Home Equity Tr. 2007-9,  
Asset-Backed Certificates Series  
2007-9 v. Feustel, 64 Misc. 3d  
1211(A), 116 N.Y.S.3d 870 (N.Y.  
Sup. Ct. 2019)

Appellate Court said Referee would remain despite Defendant's claim of a conflict of interest because the Referee lived nearby and, at a social function, had told the Defendant she was the Referee. No claim was made that the Referee said or did anything wrong.

Defendant also claimed the Referee's report had incorrect calculations but did not provide any facts or proof regarding this. Moreover, the court's prior Order required Defendant to file objections with the Referee which Defendant did not do. Thus, Defendant's claim failed.

A hearing was not required as the computation consisted solely of determining the amount of interest due.

Appellate Court also noted that where no order had been issued, a defendant mortgagor is not entitled to a hearing before a Referee on the principal sum due, where he submitted his contentions to the Supreme Court, which found the contentions to be without merit

*Defendant was losing her home, what else can be said. Editor's Note*

Napoli v. Bern, 172 A.D.3d 592, 592–93, 98 N.Y.S.3d 832 (2019)

Defendant's request to disqualify fails. Referee found his

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impartiality would not be impacted and had even notified the parties he was withdrawing as counsel for a law firm in an unrelated matter before said law firm represented Plaintiff.

Defendant showed no credible evidence of the alleged judicial bias.

### FORECLOSURE-SUMMARY JUDGMENT

1077 Madison St., LLC v. Daniels, 954 F.3d 460, 462–65 (2d Cir. 2020)

Appellate Court held that the Referee did not have to hold a hearing to determine the default date, as it was admitted in the answer.

Secondly, the 24% default interest rate was not usurious, as the 16% statute does not apply to defaulted obligations.

Finally, it is appropriate to apply the default interest rate from the date of default instead of the date of acceleration, as the loan documents said.

Capital One, NA v. Amid, 174 A.D.3d 494, 495, 104 N.Y.S.3d 186, 188 (2019)

Again, no hearing required by the Referee when Defendant defaulted.

### Long standing law. Editor's Note

### CO-OP DISPUTE – COVID IN PERSON HEARING

Ciccone v. One W. 64th St., Inc., 171 A.D.3d 481, 98 N.Y.S.3d 21 (2019)

In this highly contentious fight, Plaintiff sued the co-op board for various claimed breaches of the proprietary lease. Eventually, the court found her conduct vindictive and appointed a Special Referee to conduct a legal fee hearing.

The hearing began prior to Covid but then was unable to be completed. The Special Referee requested guidance on having a virtual hearing as Plaintiff objected with a litany of reasons.

None were successful and the court found the hearing could be done virtually without any unfairness.

*Judge Gerald Lebovitz gave a very lengthy detailed opinion citing many Federal cases-worth the read. Editor's Note*

### PARTITION-NEED FOR REFEREE

Wardally v. Wardally, 126 N.Y.S.3d 378, (Mem)–379 (App. Div. 2020)

Lower court denied Plaintiff's request for referee.

Appellate Court said Defendants did not dispute Plaintiffs' ownership/ possessory rights. Thus, Plaintiffs were entitled to a partition and calculations needed to be done. But, before that could be done, the Referee would need to be appointed to issue a report.

*WHY would the Supreme Court deny the request? If Defendants admitted Plaintiffs' ownership what was going to happen if a Referee was not appointed? I'd be interested in seeing Defendants' opposition. Editor's Note*

### FORECLOSURE – RELITIGATING

Fed. Nat'l Mortg. Ass'n v. Syversen, 181 A.D.3d 1010, 120 N.Y.S.3d 512 (2020)

In this convoluted proceeding property was transferred several times. Defendants argued that a 2014 Referee deed was invalid but they were precluded from this argument as it had already been raised in the prior foreclosure proceeding.

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