

# REFEREE/RECEIVER NEWSLETTER

## PART 36 (DECEMBER, 2020 PART 2 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 – HEARING

Bank of New York Mellon v. George, 127 N.Y.S.3d 310, (Mem)–312 (App. Div. 2020)

Appellate Court held that even though the Order of Reference was not timely served and Referee did not give timely notice of a hearing, these were not fatal issues.

Defendant was not prejudiced by the failure to hold a hearing as he could submit evidence directly to the Court and then they could evaluate it.

U.S. Bank Nat'l Ass'n v. Alvarez, 64 Misc. 3d 1226(A), 117 N.Y.S.3d 804 (N.Y. Sup. Ct. 2019)

Defendant claimed Referee should have held a hearing. Court confirmed it is not required when the sole issue is computing the amount of interest due.

Bank of New York Mellon v. Viola, 181 A.D.3d 767, 767–70, 122 N.Y.S.3d 55, 56–58 (2020)

Referee failed to give notice of a hearing or hold one. However, Defendant was not prejudiced as evidence could have been submitted directly to the court.

*I don't know why this notice problem keeps recurring. In my letter issued before the report is issued, it says that you can send objections if you want and if you don't or if you don't request a hearing, it's waived. Doesn't everyone's letter say that?*  
*Editor's Note*

HSBC Bank USA, Nat'l Ass'n v. Tigani, 185 A.D.3d 796 (N.Y. App. Div. 2020)

Appellate Court found several problems with the Referee's report: First, the Defendant should have had notice of a hearing. Just sending a letter

advising them that they could submit documents to the Referee is not adequate. Said letter did NOT say submitting the documents would be in lieu of a hearing.

Second, the Referee calculated the total amount due by relying on records which were unproduced.

Third, the report also failed to state what was the basis for saying the mortgaged premises should be sold in one parcel.

*The third problem is troubling: In almost every report that the Referee gets that is prepared by Plaintiffs it contains the conclusory statement that the premises should be sold in one parcel without going into more detail. Does this mean these standard conclusory statements will no longer suffice? Editor's Note*

To get this Legal Update via email, just send a request to [RefereeHayley@greenbergmerola.com](mailto:RefereeHayley@greenbergmerola.com)

You may also view this Legal Update with the FULL opinions at: [www.greenbergmerola.com/Referee.php](http://www.greenbergmerola.com/Referee.php)



521 Fifth Avenue, Suite 1700, New York, NY 10175  
2280 Grand Avenue, Suite. 202, Baldwin, NY 11510

Additional conference offices: Brooklyn, Queens,  
Bronx, Nassau, Suffolk, Westchester

[www.greenbergmerola.com](http://www.greenbergmerola.com)

(212) 593-6111 / (516) 887-1975 / (877) LAW-NEED

## FORECLOSURE – REFEREE AUTHORITY

Aurora Loan Servs., LLC v. Tobing, 172 A.D.3d 975, 101 N.Y.S.3d 438 (2019)

Appellate Court held a Referee could hear and determine a contested factual issue.

The lower court appointed a referee to ascertain if a 30 Day Notice of Default (on the mortgage) was properly served on Defendant. The conclusion was it was not.

Plaintiff appealed saying it was improper for the Referee to hear and determine a contested factual issue. However, parties may agree to this and here Plaintiff waived its right to object by failing to object to the reference and by actively participating in the hearing.

Appellate court stated that a "party who does not object to a reference on the ground that the reference was not authorized "cannot put in his [or her] evidence and take [a] chance that he [or she] will win and, upon his [or her] failure, claim that the reference was illegal"

*Proposition: No playing, losing, and then crying foul. Editor's Note*

## FORECLOSURE – PERSONAL JURISDICTION

Fed. Nat'l Mortg. Ass'n v. Poretz, 174 A.D.3d 860, 860–61, 103 N.Y.S.3d 305, (Mem)–306 (2019)

Defendants disputed service and the Referee was appointed to conduct a hearing. Then Referee issued a report finding service good. Service was done under CPLR 308(2) which requires mailing. But, NO proof of mailing

was submitted at the hearing so how could the Referee say service was good?

The lower court should not have confirmed the Referee's report.

*It may have been Plaintiff's job to produce the evidence at the hearing (not the Referee's, but if the Plaintiff couldn't produce it, the report should not have been issued saying service was valid. I'm curious to know what happened here as I'm sure the Referee knew for nail and mail, you needed the mail. Editor's Note*

## FORECLOSURE – HOW LONG ARE YOU APPOINTED FOR

Herrmann v. Bank of Am., N.A., 170 A.D.3d 1438, 1438–42, 97 N.Y.S.3d 344, 345–48 (2019)

In 2008 an auction sale was had and MERS was the high bidder. MERS transferred its interest to WaMu. Referee signed a deed to WaMu but it was lost and never filed. But other documents were filed with the court reflecting the sale to WaMu.

In 2016, at Plaintiff's request, Referee signed an amended assignment of bid from MERS to a different party (Defendant) along with an amended sale report and different Referee's deed, notwithstanding the 2008 conveyance to WaMu.

Appellate Court held that although the Referee had a good faith belief, his authority ended in 2008.

**FORECLOSURE – FRAUD**  
NYCTL 2012 A-Tr. v. 1698 Lex Corp., 169 A.D.3d 577, 577–78, 95 N.Y.S.3d 65, 66–67, leave to appeal dismissed, 34 N.Y.3d 1013, 138 N.E.3d 1091 (2019)

Defendant wanted a foreclosure sale vacated as it suspected fraud with some of the bidders. The court appointed a referee and the Referee found no fraud. The court confirmed the report with one sentence and that was adequate. It was not necessary to state all the facts.

## APPROPRIATENESS OF RECEIVER

Shaw Funding, LP v. Archibald Bennett, 185 A.D.3d 857, 125 N.Y.S.3d 567 (Mem), 2020 N.Y. Slip Op. 03936

Defendant objected to the Receiver's appointment which the lower court had granted. The Appellate Court held it was proper discretion as the documents the Defendant signed provided for this. Further, Defendant did not prove that Plaintiff's request to appoint a receiver was not appropriate.

Matter of Cassini, 180 A.D.3d 773, 773–75, 118 N.Y.S.3d 661, 661–63 (2020)

In this estate case, the deceased had several profitable businesses and the heirs were at odds. Appellate Court held the appointment of a receiver to run the day to day business operations was proper since the movant showed conserving the property was needed.

4042 E. Tremont Café Corp v. Sodono, 177 A.D.3d 456, 456–59, 112 N.Y.S.3d 122, 124–26 (2019)

Long convoluted case where a receiver was appointed pursuant to CPLR 5228(a). There was a judgment that had remained unsatisfied for 6+ yrs. Appellate Court said the fact that the

Receiver was unrelated to a party would increase the chance that the judgment will be satisfied. They also noted the risk of fraud or insolvency if a receiver is not appointed.

Manning-Kranes v. Manning-Franzman, 175 A.D.3d 1403, 1403–04, 109 N.Y.S.3d 434, 435–36 (2019)

In this partition case, Plaintiff sought a receiver which the lower court granted. The Appellate Court reversed because Plaintiff failed to show a clear evidentiary need to appoint one and that the property was in danger of being materially injured or destroyed.

Cellino v. Cellino & Barnes, P.C., 175 A.D.3d 1120, 1120–23, 107 N.Y.S.3d 216, 217–20 (2019)

In this proceeding to dissolve a law firm PC and divide assets, the lower court appointed a receiver and the Appellate Court confirmed.

They found the lower court did not abuse its discretion. The appointment was for a limited purpose of overseeing the corporations separation, calculating monies owed, and separating clients. Under article 11 of the Business Corporation Law, the court could make orders to preserve the property. Also, a danger of irreparable loss was shown.

Mangra v. Mangra, 170 A.D.3d 1156, 1156–59, 97 N.Y.S.3d 153, 155–57 (2019)

In this divorce proceeding the court appointed the Plaintiff receiver of the property and the Defendant. appealed. Appellate Court confirmed saying that the appointment of a receiver was up to the court's sound discretion. Here, the Defendant had not followed a prior court Order to transfer the property.

#### **FORECLOSURE – PUBLIC/PRIVATE SALE**

Macklowe v. Macklowe, 181 A.D.3d 475, 475–77, 121 N.Y.S.3d 37, 37–39 (2020)

In this divorce proceeding the parties amassed a large collection of artwork. The lower court appointed a receiver to coordinate the sale at public auction. The Wife objected and wanted a private sale between the parties but the Appellate Court sustained the public auction. They said her request was a settlement solution which the Husband had not agreed to.

#### **RECEIVER-PAYMENT**

Laffey v. Laffey, 174 A.D.3d 582, 582–86, 103 N.Y.S.3d 564, 565–68 (2019)

A temporary receiver was appointed to supervise a business and a Special Referee recommended payment of \$1,841,164 (5% of sums received and disbursed). Objection was made when a party moved to confirm the report. The Court requested updated time records and rejected the above figure as excessive. Thereafter, the records were submitted and the

Court awarded \$519,108.50 (1.4%) plus disbursements.

CPLR 8004 provides that a receiver is entitled to up to five per cent. Thus, it is not always this amount but can be less. The court should consider the value and size of the assets, the quantity, nature and complexity of the services rendered, and reasonableness. Also, the receiver fees should be fair and reasonable. Thus, the court should consider “ “[the] time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved” (*Matter of Freeman*, 34 N.Y.2d 1, 9, 355 N.Y.S.2d 336, 311 N.E.2d 480).

#### **FORECLOSURE-RECEIVER-DEFAULT**

Phoenix Grantor Tr. v. Exclusive Hosp., LLC, 172 A.D.3d 926, 926–27, 98 N.Y.S.3d 752 (2019)

Plaintiff moved to have a receiver appointed to manage the Defendant's hotel and the lower court denied this and we affirm. The mortgage documents provided that the Plaintiff may apply for a receiver if the borrower defaults. In this case, the issue of the default was under controversy.

