Nationstar Mtge., LLC, respondent v. Durane-Bolivard, appellant, et. al., defendants
2019 NY Slip Op 06502
Decided on September 11, 2019
Appellate Div., 2nd Dept. 2018-05250
(Index No. 6017/14)

DECISION & ORDER
In an action to foreclose a mortgage, the defendant Marie Durane-Bolivard appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered February 28, 2018. The order and judgment of foreclosure and sale, upon an order of the same court entered September 13, 2016, inter alia, granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against that defendant and dismissing her first, third, and fourth affirmative defenses, and to appoint a Referee to compute the amount due to the plaintiff, granted the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, confirmed the Referee's report, and directed the sale of the subject property.
ORDERED that the order and judgment of foreclosure and sale is reversed, on the law, with costs, the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale is denied, the Referee's report is rejected, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings consistent herewith.
The plaintiff commenced this action against the defendant Marie Durane-Bolivard (hereinafter the defendant), among others, to foreclose a mortgage. The defendant interposed an answer in which she asserted various affirmative defenses, including lack of standing, failure to comply with RPAPL 1304, and failure to comply with a condition precedent set forth in the subject mortgage requiring that the plaintiff tender the defendant a notice of default prior to accelerating the mortgage. In an order entered September 13, 2016, the Supreme Court, inter alia, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and dismissing her first, third, and fourth affirmative defenses, and to appoint a Referee to compute the amount due to the plaintiff. In an order and judgment of foreclosure and sale entered February 28, 2018, the court granted the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, confirmed the Referee's report, and directed the sale of the subject property. The defendant appeals from the order and judgment of foreclosure and sale. The appeal from the order and judgment of foreclosure and sale brings up for review the order entered September 13, 2016 (*see* CPLR 5501[a][1]; *Nationstar Mortgage, LLC v Durane-Bolivard*, ___ AD3d ___ [Appellate Division Docket No. 2017-00437; decided herewith]).
"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106). The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see* RPAPL 1304[2]). "By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20-21 [internal quotation marks omitted]; *see Bank of Am., N.A. v Bittle*, 168 AD3d 656, 658; *Wells Fargo Bank, NA v Mandrin*, 160 AD3d 1014, 1016).
Contrary to the defendant's contention, the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on the issue of compliance with RPAPL 1304 by submitting evidence that it mailed the RPAPL 1304 notice to the defendant at her last known address by both certified and first-class mail. The plaintiff submitted an affidavit of a person employed by the plaintiff as a document execution specialist, who described the procedure by which the RPAPL 1304 notice was mailed to the defendant by both certified and first-class mail. The plaintiff also submitted, inter alia, a copy of an envelope addressed to the defendant bearing a certified mail 20-digit barcode, and a copy of an envelope bearing a first-class mail 10-digit barcode, along with copies of the RPAPL 1304 notices sent to the defendant (*see Nationstar Mtge., LLC v LaPorte*, 162 AD3d 784, 786; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 827). In opposition, the defendant failed to raise a triable issue of fact (*see Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 900). The plaintiff also established, prima facie, that it complied with section 22 of the mortgage, which required service of a specified default notice as a condition precedent to acceleration of the loan, and the defendant failed to raise a triable issue of fact in opposition (*see HSBC Bank USA, N.A.*

v Ozcan, 154 AD3d at 827; *OneWest Bank, FSB v Simpson*, 148 AD3d 920, 922; *Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 1022).

The plaintiff further established, prima facie, its standing to commence the action, as evidenced by its attachment of a copy of the note, endorsed in blank, to the summons and complaint at the time the action was commenced (*see Nationstar Mtge., LLC v LaPorte*, 162 AD3d at 785; *US Bank N.A. v Coppola*, 156 AD3d 934, 934; *Deutsche Bank Natl. Trust Co. v Carlin*, 152 AD3d 491, 492; *Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312, 1313; *U.S. Bank N.A. v Saravanan*, 146 AD3d 1010, 1011; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645). In opposition, the defendant failed to raise a triable issue of fact.

The defendant does not otherwise dispute the plaintiff's entitlement to summary judgment on the complaint insofar as asserted against the defendant. Accordingly, we agree with the Supreme Court's determination to grant those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and dismissing her first, third, and fourth affirmative defenses, and for the appointment of a Referee to compute the amount due to the plaintiff.

However, the Supreme Court should have denied the plaintiff's subsequent motion to confirm the Referee's report and for a judgment of foreclosure and sale.

"The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility" (*Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791; *see JNG Constr., Ltd. v Roussopoulos*, 170 AD3d 1136; *Thomas v Thomas*, 21 AD3d 949, 949). The Referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute (*see Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678).

Here, with respect to the amount due to the plaintiff, the Referee based his findings [*2]on an affidavit of Theresa Robertson, an employee of the plaintiff, who averred, based on her review of the plaintiff's business records, that the defendant defaulted by failing to make the payment due on May 1, 2010, and "all subsequent payments." However, as the defendant correctly contends, Robertson's assertions in that regard constituted inadmissible hearsay (*see Hypo Holdings, Inc. v Feuer*, 68 AD3d 722, 722), since the records themselves were not provided to the Referee (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 208-209; *Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768-769). Moreover, even if the records had been provided, " [a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures'" (*Federal Natl. Mtge. Assn. v Marlin*, 168 AD3d 679, 681, quoting *Citibank, N.A. v Cabrera*, 130 AD3d 861, 861). Nothing in Robertson's affidavit, in which she averred that the plaintiff received the original note on May 13, 2013, indicated that the plaintiff was the maker of the records relating to the defendant's alleged initial default in May 2010 and her alleged failure to make payments for some period of time thereafter. Robertson also did not aver that the records provided by the maker were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its own business (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d at 209-210). Therefore, the plaintiff failed to lay a proper foundation for the business records on which Robertson relied with respect to the amount due to the plaintiff. Contrary to the plaintiff's contention, under the circumstances presented, the Supreme Court's error in relying on the hearsay evidence was not harmless (*see Citimortgage, Inc. v Kidd*, 148 AD3d at 768-769; *cf. 33-37 Farrington, LLC v Global Universal Group, Ltd.*, 165 AD3d 1018, 1020; *Barracato v Camp Bauman Buses*, 217 AD2d 677, 678).

Accordingly, we reverse the order and judgment of foreclosure and sale, deny the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, and remit the matter to the Supreme Court, Nassau County, for a new report computing the amount due to the plaintiff in accordance herewith, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter.

SCHEINKMAN, P.J., COHEN, MALTESE and LASALLE, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

Bank of N.Y. Mellon v Gitit Graffi

Bank of N.Y. Mellon v Gitit Graffi 2019 NY Slip Op 03942 Decided on May 22, 2019 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 May 22, 2019 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department
WILLIAM F. MASTRO, J.P.
CHERYL E. CHAMBERS
ROBERT J. MILLER
LINDA CHRISTOPHER, JJ.
2017-07882
(Index No. 704482/14)

[*1]Bank of New York Mellon, etc., appellant,

v

Gitit Graffi, et al., defendants, Stewart Title Insurance Company, respondent.

Stern & Eisenberg, P.C., Depew, NY (Anthony P. Scali and Stacey Weisblatt of counsel), for appellant.
Thomas G. Sherwood, LLC, Garden City, NY (James P. Truitt III and Amy E. Abbandondelo of counsel), for respondent.

DECISION & ORDER

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), dated May 11, 2017. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for default interest, late charges, other property-related expenses, escrow funds, and attorney's fees.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action to foreclose a mortgage given by the defendant Gitit Graffi as security for a note in the sum of $372,000. Following the issuance of an order of reference, the Referee issued a report finding that the plaintiff was due the amount of $741,491.83, inclusive of a principal balance of $365,794.39. The plaintiff moved to confirm the Referee's report, for a judgment of foreclosure and sale, and for an award of attorney's fees (see RPAPL 1351; CPLR 4403). The defendant Stewart Title Insurance Company (hereinafter Stewart) opposed the motion. By order dated May 11, 2017, the Supreme Court granted the motion to the extent of granting a judgment of foreclosure and sale and confirming the Referee's report, "with the exception that plaintiff's request for default interest, initial escrow balance, late charges, insurance payments, tax payments, property preservation costs, fees and disbursements and attorney's fees, is denied." The plaintiff appeals.

"The Referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" (Citimortgage, Inc. v Kidd, 148 AD3d 767, 768; see Excel Capital Group Corp. v 225 Ross St. Realty, Inc., 165 AD3d 1233, 1236-1237; Aurora Loan Servs., LLC v Taylor, 114 AD3d 627, 630; CPLR 4403). "The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility" (Flagstar Bank, F.S.B. v Konig, 153 AD3d 790, 790-791; see 33-37 Farrington, LLC v Global Universal Group, Ltd., 165 AD3d 1018, 1019-1020; Nationstar Mtge., LLC v Vordermeier, 165 AD3d 822, 823; 41st Rd. Props., LLC v Wang Real Prop., LLC, 164 AD3d 455, 459). Contrary to the plaintiff's contention, Stewart may challenge the Referee's findings based on its status as a subordinate mortgagee (see RPAPL 1351[3]; 1354[3]; 1361[2]).

In view of the lengthy delay in foreclosing the subject mortgage, we agree with the Supreme Court's determination that the plaintiff should not recover any default interest or late charges (see BAC Home Loans Servicing, L.P. v Jackson, 159 AD3d 861, 863; Greenpoint Mtge. Corp. v Lamberti, 155 AD3d 1004, 1005; Deutsche Bank Trust Co., Ams. v Stathakis, 90 AD3d 983, 984-985; Dayan v York, 51 AD3d 964, 965).

We also agree with the Supreme Court's denial of the plaintiff's request for other property-related expenses and escrow funds, as the request was supported only by the conclusory, unsubstantiated affidavit of a representative of the plaintiff's loan servicer without any supporting documentation (see Citimortgage, Inc. v Kidd, 148 AD3d at 768-769).

We also agree with the Supreme Court's denial of the plaintiff's request for attorney's fees, as the plaintiff failed to substantiate the performance of certain services, to establish the time and rate for the services, and to demonstrate the reasonableness of the attorney's fees requested (see Beece v Beece, 289 AD2d 352, 353; Gordon v Gordon, 202 AD2d 634; cf. Vigo v 501 Second St. Holding Corp., 121 AD3d 778; see generally Citicorp Trust Bank, FSB v Vidaurre, 155 AD3d 934, 935-936; SO/Bluestar, LLC v Canarsie Hotel Corp., 33 AD3d 986, 988).

MASTRO, J.P., CHAMBERS, MILLER and CHRISTOPHER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Citibank, N.A. v Dulfon
Annotate this Case
Citibank, N.A. v Dulfon 2019 NY Slip Op 02496 Decided on April 3, 2019 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 April 3, 2019 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department
REINALDO E. RIVERA, J.P.
JEFFREY A. COHEN
ROBERT J. MILLER
BETSY BARROS, JJ.
2016-12682
(Index No. 39205/07)

[*1]Citibank, N.A., etc., respondent,

v

Peter Dulfon, et al., defendants; Howard B. Greenberg, etc., nonparty-appellant.

Howard B. Greenberg, New York, NY, nonparty-appellant pro se.
Kozeny, McCubbin & Katz, LLP (Reed Smith LLP, New York, NY [Zalika T. Pierre], of counsel), for respondent.

DECISION & ORDER
In an action to foreclose a mortgage, the court-appointed Referee, nonparty Howard B. Greenberg, appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated November 3, 2016. The order granted the appellant's motion to compel the payment of a fee for his services only to the extent of awarding him additional compensation of $950.
ORDERED that the order is affirmed, with costs.
The plaintiff commenced this action to foreclose a mortgage on real property and, in an order of reference dated October 7, 2008, the appellant was appointed as Referee to determine the amount due on the subject note and mortgage, among other things. The order of reference did not set forth the basis or method for determining the appellant's fees. In a judgment of foreclosure dated November 10, 2010, the appellant was appointed as Referee to sell the subject property at public auction, pay out of the proceeds of sale certain liens upon the property, execute a deed to the purchaser, and pay the amount due to the plaintiff and certain expenses out of the remaining proceeds. The judgment of foreclosure awarded fees to the appellant in the sum of $500 for such services. The appellant conducted the public auction of the subject property on July 29, 2016, wherein the property was sold to the highest bidder for $577,000. Thereafter, the appellant moved to compel the payment of a fee for the services he performed as Referee on the ground that he spent 20.25 hours of work on the matter and had been paid the sum of only $550. The plaintiff opposed the motion on the ground that, inter alia, the fees sought were excessive. In an order dated November 3, 2016, the Supreme Court directed that the appellant be paid an additional $950, consisting of $500 for the computation of the amount due under the note and mortgage, minus the $50 he already received; a $250 cancellation fee for the plaintiff's adjournment of the foreclosure sale; and $250 for time spent on certain telephone calls.
Where, as here, an order of reference does not "determine the basis and method of computing the Referee's fees and provide for their payment" (CPLR 4321[1]), a Referee is entitled to be paid $50 for each day spent working in the business of the reference, unless a different amount of compensation is fixed by the court or agreed upon by the parties in writing (see CPLR 8003[a]; NYCTL 1996-I Trust v Zarum, 292 AD2d 577, 577; Pittoni v Boland, 278 AD2d 396, 397; Al [*2]Moynee Holdings v Deutsch, 254 AD2d 443, 444; Green Point Sav. Bank v Miller, 233 AD2d 292, 295). However, the court may provide for the payment of additional compensation where the Referee renders unusual or exceptional services (see Gapihan v Hemmings, 121 AD3d 1397, 1400; Gamman v Silverman, 98 AD3d 994, 995; NYCTL 1996-I Trust v Zarum, 292 AD2d at 577; Matter of Blake Terrace Assoc. v Sommers, 176 AD2d 394, 395; see also CPLR 8003[b]).
Here, the fee awarded to the appellant was appropriate. Compensation for services the appellant rendered in connection with the sale of the property was directed in the judgment of foreclosure. In the

order dated November 3, 2016, the Supreme Court provided compensation to the appellant for services rendered in connection with the order of reference, as well as additional compensation for the last-minute cancellation by the plaintiff of a scheduled auction of the property and for telephone conversations the appellant had with the court. The total sum of $500 awarded for the cancellation of the auction and telephone conversations exceeded the statutory rate (see CPLR 8003[a]), as well as the amount the appellant would have received at his typical hourly billing rate. The remainder of the services rendered were within the scope of the order of reference and judgment of foreclosure for which compensation was provided to the appellant. Although protracted, there is no indication that the delays affected the amount of work performed by the appellant or that the matter otherwise involved any complex or novel issues that would warrant additional compensation (see Gamman v Silverman, 98 AD3d at 995; cf. Gapihan v Hemmings, 121 AD3d at 1400; Matter of Blake Terrace Assoc. v Sommers, 176 AD2d at 395). Accordingly, the court providently exercised its discretion in rendering its fee award to the appellant.
RIVERA, J.P., COHEN, MILLER and BARROS, JJ., concur.
ENTER:
Aprilanne Agostino
Clerk of the Court

172 A.D.3d 464
Supreme Court, Appellate Division, First Department, New York.
Winston D. VOGEL, Plaintiff–Appellant,
v.
Ruth VOGEL, also known as Ruth Vogel Lipkis, Defendant.
Lisa Breier Urban, Nonparty Respondent.
9236Index 112665/08
ENTERED: MAY 7, 2019

**232 Doron Zanani Law Office, New York (Doron Zanani of counsel), for appellant.
Kossoff, PLLC, New York (Matthew E. Eiben of counsel), for respondent.
Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.
*464 Order, Supreme Court, New York County (Debra A. James, J.), entered March 10, 2018, which, insofar as appealed from as limited by the briefs, awarded nonparty Lisa Breier Urban a commission of $ 10,000 as receiver and compensation of $ 750 as successor Referee, nonparty Miriam Breier (the original Referee) compensation and disbursements of $ 3,869.66, and nonparty Kossoff, PLLC (Urban's firm) attorneys' fees and disbursements of $ 8,372.95, and directed that the above sums be paid out of the proceeds from the sale of plaintiff's share of a condominium unit, unanimously modified, on the law, to modify the commission award to Urban as receiver to $ 7,162.50, to vacate the award to Kossoff, and to direct that defendant pay the first $ 15,000 of Breier's and Urban's fees and that the parties equally bear any amount over $ 15,000, and otherwise affirmed, without costs.
1The order awards the amounts listed above without explanation. Apparently, the court issued a decision on the record on March 13, 2018, but the transcript is not part of the record. By submitting an invoice, which showed her time entries, Urban *465 established that she performed receiver-related services worth $ 7,162.50, which should be the commission awarded to her.
The award of $ 3,869.66 to Breier (the original Referee) was proper. CPLR 8003(a) permits the court "to set a Referee's fees beyond the statutory rate" (*Garay v. Soling,* 169 A.D.2d 616, 618, 564 N.Y.S.2d 755 [1st Dept. 1991], *clarified on other grounds* 172 A.D.2d 342, 568 N.Y.S.2d 873 [1st Dept. 1991]). Breier submitted an invoice from which one can determine the work she performed and the expenses she incurred. Plaintiff does not claim that Breier's hourly rate was unreasonable or that her hours were excessive.
The award of $ 750 to Urban as successor Referee was also proper. The June 2015 order appointing Urban as successor Referee directed her to "prepare and file ... a final report and application for the payment of all fees and disbursements incurred to date by [her], including all fees and disbursements previously incurred by ... Breier." Kossoff's invoice shows that Urban performed $ 1,190 worth of Referee-related (as opposed to receiver-related) tasks.
2Kossoff (as opposed to Urban) was not entitled to an award. The Rules of the Chief Judge provide, **"No receiver ... shall be appointed as ... her own counsel, and no person associated with a law firm of that receiver ... shall be appointed as counsel to that receiver ... unless there is a compelling reason to do so" (**22 NYCRR 36.2[c][8]). Unlike the situation in *David Realty & Funding, LLC v. Second Ave. Realty Co.,* 14 A.D.3d 450, 788 N.Y.S.2d 371 [1st Dept. 2005], Urban did not move for permission to retain her own law firm. Even if the court had appointed Kossoff as Urban's counsel, Kossoff would not be entitled to compensation, because the services it rendered were not extraordinary in any sense (*see Strober v. Warren Prop. Co.,* 84 A.D.2d 834, 836, 444 N.Y.S.2d 475 [2d Dept. 1981]; Rules of the Chief Judge [22 NYCRR] § 36.4[c][4] ["Appointees who serve as counsel to a ... receiver shall not **233 be compensated as counsel for services that should have been performed by the ... receiver"]). Unlike the law firm in *David Realty,* Kossoff did not "perform[ ] extensive special and extraordinary legal services ... which extended well beyond the customary legal duties connected with a receiver's tenure" (14 A.D.3d at 451, 788 N.Y.S.2d 371). On the contrary, the tasks for which Kossoff billed (e.g., recording the correction deed, preparing and recording a receiver's deed, and disbursing part of the proceeds from the sale of plaintiff's interest in the condominium unit to pay his former counsel) are exactly the tasks that the court appointed Urban—a lawyer—to perform.
Pursuant to the settlement agreement between the parties, defendant is responsible for the first $ 15,000 of Breier's and *466 Urban's fees, and the parties shall bear any amount over $ 15,000 in equal shares. Urban lacks standing to argue that the settlement agreement was modified, because that argument will benefit defendant (*see Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]). Even if we were to consider the argument, we would find it unavailing.

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

Citibank, N.A. v Feustel
Annotate this Case
[*1] Citibank, N.A. v Feustel 2019 NY Slip Op 51119(U) Decided on July 10, 2019 Supreme Court, Suffolk County Quinlan, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 10, 2019
Supreme Court, Suffolk County

Citibank, National Association as Trustee for GSAA Home Equity Trust 2007-9, Asset-Backed Certificates Series 2007-9, Plaintiff,

against

Noel Feustel; Victoria Peterson; Bruce A. Rich as Trustee of the Village of Saltaire, Suffolk County, Capital One Bank USA, Na, George Roy Hill III, Hillary Richard as Trustee of the Village of Saltaire, Suffolk County; Jennifer Friedberg; Midland Funding of Delaware LLC as Successor in Interest to a Chase Account, Patricia Lama; Robert Lynn Cox II as Trustee of the Village of Saltaire, Suffolk County; Scott S. Rosenblum as Mayor of the Village of Saltaire, Suffolk County Susan Okon, the Incorporated Village of Saltaire, Suffolk County, Wells Fargo Bank, N.A., Defendant(s).

35293-2012

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PAMELA J. GREENE, ESQ.
Court Appointed Referee

110 Connetquot Road Bayport, NY 11705
Robert F. Quinlan, J.
Upon the following papers numbered 1 to 125 read on this motion by plaintiff to confirm the report of the Referee and for judgment of foreclosure and sale and supporting papers: 1-69; stipulations by parties to adjourn motion and any cross-motion: 70-76; defendant's cross-motion to "contest the Referee's report oath and computations," for a hearing upon the Referee's report, to discharge and substitute the Referee, and in opposition to the judgment of foreclosure and sale and supporting papers: 77-94; and plaintiff's notice of rejection of defendant's cross-motion; 95-125; it is
ORDERED that defendant Noel Feustel's cross-motion to "contest the Referee's report oath and computations," for a hearing upon the Referee's report, to discharge and substitute the Referee, and for a reduction of interest chargeable to defendant (Mot. Seq. #007) is denied; and it is further
ORDERED that the plaintiff's motion to confirm the report of the Referee and for a judgment of foreclosure and sale (Mot. Seq. #006) is granted; and it is further
ORDERED that plaintiff's proposed order for a judgment of foreclosure and sale, as modified by the court, is signed contemporaneously with this decision.
PROCEDURAL HISTORY
This is an action to foreclose a mortgage on residential real property known as 39 South Snedecor Avenue, Bayport, Suffolk County, New York ("the property") given by defendants Noel Feustel and Victoria Petersen ("defendant-mortgagors") to Wells Fargo Bank, N.A. ("Wells"), a predecessor in interest to plaintiff Citibank, National Association as Trustee for GSAA Home Equity Trust 2007-9, Asset-Backed Certificate Series 2007-9 ("plaintiff") on May 23, 2007 to secure a note given the same day to Wells by defendant Noel Feustel ("defendant"). The prior history of this action is set forth in the court's decision after trial dated May 9, 2018, which held that plaintiff had established the mailing of the RPAPL § 1304 notices, resulting in the dismissal of defendant's remaining affirmative defense and the granting of

summary judgment to plaintiff dismissing and striking defendant's answer and the appointment of a Referee to compute pursuant to RPAPL § 1321. The court's decision noted that as the court had previously marked the proposed order submitted by plaintiff as "Not Signed" in denying the original motion for summary judgment by its decision placed on the record after oral argument on August 11, 2016 (Mot. Seq. #001), plaintiff was to submit a new order of reference, which was to include additional terms set forth by the court in the decision of May 9, 2018, included among those terms were the following: "ORDERED that as the court had marked plaintiff's prior proposed order of reference "not signed" after denying its prior motions for summary judgment, plaintiff is directed to serve a new order of reference in conformity with this decision within 45 days of the date of the decision, which in addition to the usual language, shall include the following language:ORDERED that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the Referee and thereafter file the affidavits of service with the Clerk of the Court; and it is furtherORDERED that within 60 days of the date of this order, plaintiff is to provide the Referee, and defendants who have appeared, all papers and documents necessary for the Referee to perform the determinations required by this order, "plaintiff's submissions"; defendant(s) may submit written objections and proof in support thereof, "defendant's objections," to the Referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the Referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the Referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is further ORDERED that the Referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the Referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the Referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the Referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendant's objections raise issues as to the proof of amounts due and owing the Referee is to provide advisory findings within his/her report; and it is furtherORDERED that if defendant's objections have been submitted to the Referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendant's objections to the Referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendant's objections made before the Referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion;ORDERED that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined."

The court's records show that on June 14, 2018, plaintiff submitted the new order of reference, and that on July 20, 2018 defendant's present counsel was substituted for his former counsel. On August 16, 2018 the court signed plaintiff's order of reference, which included the above language, and adjourned a status conference originally scheduled for September 26, 2018 to December 19, 2018. Three status conferences were held on December 19, 2018, February 6, 2019 and March 27, 2019 as the parties were engaged in active loss mitigation attempts. When these attempts failed plaintiff filed Mot. Seq. # 006, originally returnable March 28, 2019.

Among plaintiff's submissions is a copy of a stipulation executed by counsel for the parties, to adjourn the original submission of Mot. Seq. #006 to May 9, 2019, and including therein a further agreement that defendant was to file any opposition or cross-motion seven days before the return date.

Defendant filed his cross-motion and opposition, which is stamped on defendant's counsel's "blue back" by the Supreme Court Clerk's office on June 13, 2019. Plaintiff's counsel filed a "Notice of Return and Rejection" dated June 6, 2019 arguing that defendant's time to [*2]oppose and cross-move had expired on May 9, 2019, with plaintiff's counsel stating in her affirmation "While Defendant requested an adjournment Plaintiff never received a fully executed stipulation of adjournment and pursuant to the Court Clerk the Stipulation to Adjourn had not been filed." It appears from this statement that plaintiff's counsel was aware of a second stipulation to adjourn, but believed that it was never duly executed by defendant's counsel, nor filed with the court.

Contrary to plaintiff's assertion, the court has in its file a faxed copy of the stipulation of adjournment executed by both counsel, dated May 2, 2019, adjourning the submission of the motion until June 13, 2019 and which states that defendant's opposition and any cross-motion were to be served "on of before June 3, 2019;..." It further states that a "copy, PDF or facsimile of this stipulation shall be considered as effective and valid as the original." The copy of the stipulation was faxed to chambers by defendant's counsel on May 7, 2019 consistent with Part 27's published rules. Therefore, as this is a non-"e-filed"

action, plaintiff's counsels "notice of rejection" is inaccurate, and defendant's cross-motion and opposition were timely filed pursuant to the second stipulation, the court must consider defendant's cross-motion and opposition. In apparent reliance upon the notice of rejection, plaintiff filed neither opposition to the cross-motion or a reply.

The court notes an anomaly in defendant's filing, as both counsel's affirmation and defendant's affidavit are dated June 3, 2019, but the affidavit of mailing by an employee of defendant's counsel states that she deposited the papers with the U.S.P.S. on June 1, 2019, the same day that defendant's counsel notarized the her affidavit of mailing. The court finds this to be an error that can be ignored pursuant to CPLR 2001.

DEFENDANT'S CROSS-MOTION IS DENIED

Although unopposed, defendant's cross-motion is denied, as defendant and his counsel make a number of claims that have no merit, are unsupported by evidentiary proof in admissible form and are based, at best, upon supposition.

REFEREE HAS NO CONFLICT OF INTEREST

Defendant's claim that the Referee has a "conflict of interest," that her report must be disregarded as a result of this "conflict" and a new Referee appointed lacks any substance or merit. The claim is based upon the assertion in defendant's affidavit that the Referee "lives close to my home," that he and his wife attend social functions which she also attends, and "that on at least one occasion" she mentioned to defendant her involvement as Referee in his foreclosure . Defendant makes no claim that the Referee said or did anything wrong, that she discussed the facts of the case and her duties with him, that she attempted to influence him in any manner or that she claimed to do anything in regards to her position as Referee that was influenced positively or negatively by the fact that they are "neighbors." Defendant's foreclosure action is a public record. All the papers, submissions, documents and financial information filed therein, other than items that are required to remain confidential such as bank account numbers, social security numbers, etc., are available for view by the public. The fact that a neighbor is aware of his foreclosure action is not a reason to discharge the Referee, absent any other facts.

The Referee, Pamela J. Greene, Esq., an attorney in good standing approved by the Office of Court Administration as eligible to serve as a Referee in foreclosure actions, acts as a quasi-judicial officer in her capacity. Just as with a judge, she has to exercise her best discretion to [*3]determine if there is an actual conflict in her holding the office to which she was appointed. A judge, or Referee, must exercise his/her own judgment to determine if there is a conflict; merely knowing a litigant is not enough to require a judge to recuse him or herself from a case. If a judge, or a quasi judicial officer such as a Referee, believes that the relationship is not of such a nature that it would effect how the case is decided before her, she is not required to recuse herself.

CPLR 4312 sets forth qualifications for a Referee, the Rules of the Chief Judge set forth the disqualifications from appointment by the court and the Rules of the Chief Administrator of the Courts set specific circumstances where a judicial officer must disqualify themselves (see 22 NYCRR §§ 36.2 [c], [d] [appointments by the court]; 100.3 [E] [judges]; 122.10 [judicial hearing officers]); those standards require more than just being a neighbor who knows about a case for recusal. Defendant makes no attempt to present facts that would rise to a level that would require the Referee to disqualify herself. As set forth in the rules cited above, an officer must disqualify herself if she has a personal bias or prejudice, personal knowledge of the actual facts in controversy, that she had served as a lawyer in the controversy or a lawyer with which she is associated did so, that she has an economic interest in the controversy, that she or the her spouse is related to the sixth degree of consanguinity with a party who has an interest in the case, that she or her spouse has a fourth degree of relationship to a person who is acting as a lawyer in the case or their spouse. Defendant brings forward no such claims, let alone proof, that any of these disqualifying events have occurred in this case which would require the Referee to be disqualified.

Here the Referee executed her oath on February 8, 2019 and swore to faithfully and fairly determine the questions referred to her and make a just and true report. From defendant's statement, Ms. Greene was apparently aware that defendant was her neighbor when she so swore. She found no reason in her conscience to recuse herself from her assigned duties and defendant has provided no proof to contradict her undertaking of this obligation. Further, the court notes defendant's cross-motion, although seeking the removal of Ms. Greene, does not appear to have been served upon her, which would have allowed her to address the allegations. Defendant's application is denied.

FAILURE TO COMPLY WITH TERMS OF ORDER WAIVES OBJECTIONS

As to defendant's claim that the Referee's report does not accurately reflect the amounts due plaintiff, defendant fails to provide any facts to support the allegations of which he was purportedly "advised." Defendant raises no direct challenges to the validity of the expenses claimed in plaintiff's submissions to the Referee and the court, nor does he provide any proof that the amounts provided are inaccurate. More significantly, the court's order of May 9, 2018, and the order of reference signed August 16, 2018, contain specific language and direction as to how the order of reference is to proceed, as well as setting the authority and duties of the Referee. The orders set up a schedule for the submission of the order of reference, and the submission of objections by defendant to plaintiff's submissions to the Referee; it also limited the authority of the Referee to report, and required that defendant submit his objections to the Referee and upon the motion for a judgement of foreclosure and sale he was to submit those same objections to the court to allow the court to make a determination as to their validity. The order provided that failure of defendant to submit [*4]objections to the Referee would be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale and that failure to raise and submit defendant's objections made before the Referee in opposition to plaintiff's application for a judgment of foreclosure and sale would also constitute a waiver of those objections before the court on the motion.

Defendant's counsel makes no claim of not having received a copy of the order of reference, or the submissions made by plaintiff to the Referee. There is no proof that defendant complied with the directive of the order to submit objections to the Referee. Defendant had ample opportunity to raise any insufficiencies or errors in the submissions by plaintiff to the Referee in compliance with the procedures set out in the orders, instead defendant raises his non-specific objections for the first time in his cross-motion and opposition. Pursuant to the terms of the order of reference, he has waived his claims, if he had any valid specific claims. Under the circumstances of this case the Referee was not required to hold a hearing before issuing her report (see Deutsche Bank National Trust Co. v Jackson, 68 AD3d 805 [2d Dept 2009]; Deutsche Bank National Trust Co. v Zlotoff, 77 AD3d 702 [2d Dept 2010]; Deutsche Bank National Trust Co. v Williams, 134 AD3d 981 [2d Dept 2015]; Bank of NY Mellon v Hoshmand, 158 AD3d 600 [2d Dept 2018]). Where the computation consists solely of determining the amount of interest due, a hearing before the Referee is not required (see Blueberry Invs. Co. v Ilana Realty, 184 AD2d 906 [3rd Dept 1992] cited with approval in LBV Props. v Greenport Dev. Co., 188 AD2d 588 [2d Dept 1992]; Capital One, N.A. v Knollwood Properties II, LLC, 98 AD3d 707 [2d Dept 2012]; Wachovia Mtg. Corp. v Lopa, 129 AD3d 830 [2d Dept 2015]).

As indicated above, by failing to follow the order and direction of the court that defendant submit his objections to the Referee, defendant violated those orders and by their terms effectively waived any objections to plaintiff's submissions that he may have had, including the nature of the evidentiary proof submitted in support thereof. As with other matters in litigation, once a party fails to object to hearsay statements or submissions, that party has waived the hearsay objection. The court recognizes that if defendant had followed the procedure set forth in its orders and made even the non-specific, general objections he now submits in opposition to the motion for a judgment of foreclosure and sale to the Referee, the court could have found plaintiff's submissions insufficient to establish the property- related expenses claimed (see Bank of New York Mellon v Graffi, 172 AD3d 1148 [2d Dept 2019]), but not the simple computation of the interest due on the note (see Blueberry Invs. Co. v Ilana Realty, supra, cited with approval in LBV Props. v Greenport Dev. Co., supra; Capital One, N.A. v Knollwood Properties II, LLC, supra; Wachovia Mtg. Corp. v Lopa, supra). Even in situations where no order had been issued as here, 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, the ultimate arbiter, as the court found the contentions to be without merit (see Stein v American Mtg. Banking, Ltd, 216 AD2d 458 [2d Dept 1995]; NYCTL 1996-1 Trust v Westmoreland Assoc., 33 AD3d 900 [2d Dept 2006]; Aurora Loan Services v Taylor, 114 AD3d 627 [2d Dept 2014]; affd 25 NY3d 355[2015]).

The court notes that defendant's claims that plaintiff's presentation as to property related expenses are without any support or direct reference to "errors," they are merely speculative. An example of this speculative approach is that defendant merely claims that the taxes claimed paid are incorrect, but fails to provide any proof of that claim which could be easily obtained from the [*5]Town of Islip's Receiver of Taxes, a public record.

As to the claim that plaintiff is seeking counsel fees well in excess of the agreed upon flat rate set between plaintiff and its counsel, there is no issue. When plaintiff's submissions advise of such a flat rate fee, but counsel seeks a larger fee based upon claimed "extra work," this court has always applied the flat fee and not authorized a larger fee based upon counsel's claims. Here the agreed upon counsel fee is controlling and that is all that will appear in the judgment signed by the court. Therefore, there is no prejudice to defendant by plaintiff failing to provide evidence of the work performed to entitle it to "enhanced counsel fees." Defendant's counsel erroneously refers to CPLR § 4321 as controlling as to

counsel fees, but that statute is used to determine fees that may be claimed by a Referee, not plaintiff's counsel.
As to defendant's claim of "error" in the interest calculation because he cannot determine how the Referee reached the interest calculation, defendant again relies upon speculation with no proof. Defendant does not dispute the balance claimed owed pursuant to the term of the mortgage of $724,001.06, nor the interest rate set in the mortgage of 6.875% per year. The court performed its own calculations by figuring the number of years defendant was in default at the interest rate given (six years from July 1, 2010 through June 30, 2016) and then applying a "per diem" amount to the remaining days in default to January 26, 2017. The court's calculations of the interest came to a figure slightly more than that calculated by the Referee; in deference to defendant the court will use the lower figure set by the Referee.

NO PROOF OF LACK OF GOOD FAITH NEGOTIATIONS TO REDUCE INTEREST
Finally, defendant makes a belated argument concerning "bad faith" negotiations and the "good faith" required by CPLR 3408. Defendant and plaintiff may undertake further negotiations at any time in an attempt to avoid a foreclosure sale, but this action has long left the Foreclosure Settlement Conference Part. CPLR 3408 requires that parties at mandatory foreclosure settlement conferences negotiate in good faith to reach a mutually agreeable resolution (see U.S. Bank v Smith, 123 AD3d 914 [2d Dept 2014]; Wells Fargo Bank v Meyers 108 AD3d 9 [2d Dept 2013]; Wells Fargo Bank v Miller, 138 AD3d 1024 [2d Dept 2016]). Even if the court was to determine that defendant's cross-motion was a belated attempt at seeking a hearing on plaintiff's lack of good faith in negotiating pursuant to CPLR 3408, defendant has failed to submit admissible evidence to establish such a claim. To determine if plaintiff failed to negotiate in good faith the totality of circumstances must show plaintiff did not conduct a meaningful effort to reach a resolution (see U.S. Bank, N.A. v Sarmiento, 121 AD3d 187 [2d Dept 2014]; Citimortgage , Inc. v. Pugliese, 143 AD3d 659 [2d Dept 2016]; PNC Bank, N.A. v Campbell, 142 AD3d 1147 [2d Dept 2016]; Citimortgage v Rockefeller, 155 AD3d 998 [2d Dept 2017]). In order to be entitled to a hearing on the issue of failing to negotiate in good faith, defendant must sufficiently show that the totality of circumstances demonstrated that plaintiff's conduct did not constitute a meaningful effort at reaching a resolution (see US Bank, N. A. v Cohen, 156 AD3d 844 [2d Dept 2017]). Here defendant's submissions provide no evidentiary basis to support a conclusion which would require a hearing to determine if some penalty should be measured against plaintiff for failing to negotiate in good faith (see IndyMac Bank, FSB v. Yano-Horoski, 78 AD3d 895 [2d Dept 2010]; Citimortgage, Inc. v Nimkoff, 159 AD3d 869 [2d Dept 2018]). Therefore, the court can find no basis for a reduction in the amount of interest that plaintiff is entitled to collect, as sought by defendant.
Further, the history of the action indicates that much of the delay in its resolution can be chargeable to defendant. Defendant's unopposed cross-motion is therefore denied.

JUDGMENT OF FORECLOSURE AND SALE GRANTED
The court has reviewed plaintiff's submissions, the submissions by the Referee appointed pursuant to RPAPL § 1321 and defendant's opposition to plaintiff's motion. The court finds that these submissions entitle plaintiff to a judgment of foreclosure and sale in line with the court's decision set forth above. The court signs plaintiff's proposed judgment of foreclosure and sale submitted with the motion, as modified by the court, contemporaneously with the signing of this decision and order.
Finally, the court asks the parties to review the amendment to the caption granted earlier by the court, and if any future submissions in this action are made, that the amended caption, as indicated in the caption used herein, be used.
This constitutes the Order and decision of the Court.

Dated: July 10, 2019

Hon. Robert F. Quinlan, J.S.C.

172 A.D.3d 592
Supreme Court, Appellate Division, First Department, New York.
Paul J. NAPOLI, Plaintiff–Respondent,
v.
Marc J. BERN, Defendant–Appellant.
9409NIndex 159576/14
ENTERED: MAY 23, 2019
Law Offices of Michael S. Ross, New York (Michael S. Ross of counsel), and Robert & Robert PLLC, Uniondale (Clifford S. Robert of counsel), for appellant.
Quinn Emmanuel Urquhart & Sullivan, LLP, New York (Luke Nikas of counsel), for respondent.
Renwick, J.P., Manzanet–Daniels, Kahn, Moulton, JJ.

*592 Order, Supreme Court, New York County (Mark C. Zauderer, Referee), entered August 22, 2017, which denied defendant's motion to disqualify the Referee, unanimously affirmed, with costs.
The Referee did not abuse his discretion in finding that his impartiality would not be reasonably questioned such that he should recuse himself from this matter (22 NYCRR 100.3[E][1]; *People v. Moreno,* 70 N.Y.2d 403, 405–407, 521 N.Y.S.2d 663, 516 N.E.2d 200 [1987]; *R & R Capital LLC v. Merritt,* 56 A.D.3d 370, 868 N.Y.S.2d 183 [1st Dept. 2008]). The **Referee notified the parties that he was withdrawing as counsel for a law firm in an unrelated matter "effective immediately" before plaintiff's new counsel, an attorney at said firm, even filed his notice of appearance. Defendant points to no credible *593 evidence, such as adverse rulings or other actions evidencing the alleged judicial bias (*see *R & R Capital, LLC,* at 370, 868 N.Y.S.2d 183).**
Furthermore, as part of the settlement agreement naming Zauderer, an attorney with an active private practice, as Referee in this action winding up the parties' legacy firm, the parties explicitly agreed to waive any such conflict.
We have considered defendant's remaining contentions and find them unavailing.

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

U.S. Bank N.A. v Alvarez
Annotate this Case
[*1] U.S. Bank N.A. v Alvarez 2019 NY Slip Op 51328(U) Decided on August 13, 2019 Supreme Court, Suffolk County Quinlan, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 13, 2019
Supreme Court, Suffolk County

U.S. Bank National Association, Plaintiff,

against

Yunior Alvarez, JORGE CORRALES A/K/A JORGE CORALES, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, TOWN SUPERVISOR TOWN OF BABYLON, CHRISTIAN CRUZ, EMILIO HERNANDEZ, CARMEN RODRIQUEZ, FIORDALIZA RODRIQUEZ, Defendants.

605751-2015

RAS BORISKIN, LLC

Attorney for Plaintiffs

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Westbury, NY 11590

RONALD D. WEISS

Attorney for Defendant-YUNIOR ALVAREZ, JORGE CORRALES A/K/A JORGE CORALES

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Melville, NY 11747
Robert F. Quinlan, J.
Upon the following papers read on plaintiff's application for an order confirming the Referee's oath and report and for judgment of foreclosure and sale and defendants' cross-motion to dismiss the action and in opposition: plaintiff's notice of motion and supporting papers (NYSCEF Docs # 86-109); defendants' notice of cross-motion to dismiss, opposition and supporting papers (NYSCEF Docs # 112-117); and plaintiff's papers in opposition and reply (NYSCEF Docs # 118-119); it is
ORDERED that plaintiff U.S. Bank National Association's application for an order confirming the Referee's oath and report and for judgment of foreclosure and sale (Mot. Seq. #004) is granted; and it is further
ORDERED that plaintiff's proposed judgment of foreclosure and sale, as modified by the court, is signed contemporaneously with this order; and it is further
ORDERED that defendants Yunior Alvarez and Jorge Corrales' cross-motion to dismiss the action for plaintiff's failure to comply with the mailing of the notices required by the mortgage and RPAPL § 1304 (Mot. Seq. #005) is denied.
PRIOR PROCEEDINGS
This is an action to foreclose a mortgage on residential real property known as 7 Cedar Road, Amityville, Suffolk County, New York given by defendants Yunior Alvarez and Jorge Corrales ("defendants") to plaintiff U.S. Bank National Association ("plaintiff'). The prior history of this action is set forth in the court's decision and order placed on the record on September 11, 2017 after oral argument of plaintiff's motion for summary judgment, appointment of a Referee to compute pursuant to RPAPL § 1321and other associated relief (Mot. Seq. #001) and defendants' cross-motion to compel discovery (Mot. Seq. #002), which granted plaintiff's [*2]partial summary judgment dismissing all of defendants' affirmative defenses except their 11th affirmative defense which raised issues of compliance with the mailing of the notices

required by RPAPL § 1304 and the mortgage, setting those issues for a limited issue trial pursuant to CPLR3212 (g), granted plaintiff's application to amend the caption and substitute certain defendants, set and fixed the default of the non-appearing, non-answering defendants, denied the appointment of a Referee, allowed for a limited period of discovery, directed the filing of a note of issue, and authorized successive summary judgment motions within thirty days of the filing of the note of issue; as well as the court's decision of July 6, 2018 granting plaintiff's unopposed successive summary judgment motion (Mot. Seq. #003), dismissed defendants' 11th affirmative defense, struck defendants' answer and appointed a Referee to compute.

JUDGMENT OF FORECLOSURE GRANTED

The order of July 6, 2018 granting summary judgment and the appointment of a Referee to compute contained the following directives:

"ORDERED that within 60 days of the date of this order, plaintiff is to provide the Referee, and defendants who have appeared, all papers and documents necessary for the Referee to perform the determinations required by this order (plaintiff's "submissions"); defendant(s) may submit written objections and proof in support thereof (defendant's "objections") to the Referee within 14 days of the mailing of plaintiff's submissions; and it is furtherORDERED that the Referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the Referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is furtherORDERED that the Referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the Referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the Referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the Referee's report is merely advisory and the court is the ultimate arbiter of the issues, if the objections by defendant(s) raise issues as to the proof of amounts due and owing the Referee is to provide advisory findings within his/her report; and it is furtherORDERED that if defendant(s) has submitted objections and proof to the Referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit objections to the Referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit the objections made before the Referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute [*3]a waiver of those objections on the motion; and it is furtherORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further"

In compliance with the order of July 6, 2018, plaintiff now moves for a judgment of foreclosure and sale, which is opposed by defendants, along with their cross-motion. Other than defendants' cross-motion to dismiss, which is discussed below, defendants grounds for objecting to the granting of a judgment of foreclosure are that the affirmation of plaintiff's counsel in support of the application is vague and defective, as is the attorney's affirmation is support of the law firms' application for fees, and that the application is defective in other ways, including that plaintiff's counsel failed to include a copy of the Referee's report with the submission.

The court finds the objection to both attorney's affirmations to be without merit. The court further notes that the affirmation which requests fees of $870.00 for the law firm, which was an agreed upon "flat fee" between plaintiff and its counsel, to be justified by the submission and that fee is ratified and approved by the court in this decision.

The court's order of July 6, 2018, and the order of reference of the same date, contained specific language and direction as to how the order of reference was to proceed, as well as setting the authority and duties of the Referee. The orders set up a schedule for the submission of the order of reference, and the submission of objections by defendants to plaintiff's submissions to the Referee; it also limited the authority of the Referee to report, and required that defendants submit their objections to the Referee and that upon the motion for a judgment of foreclosure and sale they were to submit those same objections to the court to allow the court to make a determination as to their validity. The order provided that failure of defendants to submit objections to the Referee would be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale and that failure to raise and submit defendants' objections made before the Referee in opposition to plaintiff's application for a judgment of foreclosure and sale would also constitute a waiver of those objections before the court on the motion.

Defendants' counsel makes no claim of not having received a copy of the decision of July 6, 2018, the order of reference, or the submissions made by plaintiff to the Referee. The court notes that the order of reference and the decision of July 6, 2018 are contained in NYSCEF as Docs. #82 and 83. There is no

proof that defendants complied with the directives of those orders to submit objections to the Referee. Defendants had ample opportunity to raise any insufficiencies or errors in the submissions by plaintiff to the Referee in compliance with the procedures set forth in the orders, instead defendants raise non-specific objections for the first time in their cross-motion and opposition. Pursuant to the terms of the order of reference, they have waived their claims, if they had any valid specific claims. Under the circumstances of this case the Referee was not required to hold a hearing before issuing his report (see Deutsche Bank National Trust Co. v Jackson, 68 AD3d 805 [2d Dept 2009]; Deutsche Bank National Trust Co. [*4]v Zlotoff, 77 AD3d 702 [2d Dept 2010]; Deutsche Bank National Trust Co. v Williams, 134 AD3d 981 [2d Dept 2015]; Bank of NY Mellon v Hoshmand, 158 AD3d 600 [2d Dept 2018]). Where the computation consists solely of determining the amount of interest due, a hearing before the Referee is not required (see Blueberry Invs. Co. v Ilana Realty, 184 AD2d 906 [3rd Dept 1992] cited with approval in LBV Props. v Greenport Dev. Co., 188 AD2d 588 [2d Dept 1992]; Capital One, N.A. v Knollwood Properties II, LLC, 98 AD3d 707 [2d Dept 2012]; Wachovia Mtg. Corp. v Lopa, 129 AD3d 830 [2d Dept 2015]).

Further, although defendants' counsel correctly points out that plaintiff failed to submit a copy of the Referee's report (Exhibit "O") with plaintiff's motion, and goes to the pain of printing out as Exhibit "A" to defendants' cross-motion and opposition a copy of the list of documents filed in NYSCEF system under this docket number, both counsel fail to fully review those filings. Although this motion (NYSCEF Docs # 86-109) fails to contain the Referee's report, defendant and plaintiff, seem to miss the fact that plaintiff had filed the executed Referee's report in NYSCEF on September 27, 2018 (NYSCEF Doc. # 85), forty-six (46) days before this motion was filed. The court has reviewed that filing and finds that it is the same document as the original submitted by plaintiff in reply, along with counsel's mea culpa for failing to submit it along with the other twenty exhibits attached thereto. As argued by plaintiff this was an obvious oversight or error by plaintiff's law firm, which in the opinion of the court may have been otherwise fatal to the motion for a judgment of foreclosure, but for the NYSCEF filing of Doc # 85. Absent the application of e-filing to this case, the court may have been compelled to apply the general principle that a party cannot make-up the deficiency in what should have been originally submitted in a reply (see Duran v Milord, 126 AD3d 932 [2d Dept 2015]; Bank of America, N.A. v Moody, 147 AD3d 712 [2d Dept 2017]; Wells Fargo Bank, N.A. v Osias, 156 AD3d 942 [2d Dept 2017]; U.S. Bank N.A. v Laino, 172 AD3d 947 [2d Dept 2019]). But here, as it is clear by the filing of NYSCEF Doc. # 85, that plaintiff had the Referee's report, had filed it with the court and that an administrative error occurred in compiling the 21 documents that should have been submitted in support of the motion, the court can apply the saving provisions of CPLR 2001. CPLR 2001 allows a court, at any stage, to disregard a party's mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced, (see U.S. Bank, N.A. v Eaddy, 109 AD3d 908 [2d Dept 2013]; Deutsche Bank National Trust Company v Lawson, 134 AD3d 760 [2d Dept 2015]). The court will exercise the discretion given to it by CPLR 2001, and ignore the apparently unintentional error of plaintiff to attach the Referee's report which it had already filed with the court, as no substantial right of defendants has been prejudiced. To hold otherwise would to put form over substance, as defendants and their counsel had access to the Referee's report through the NYSCEF system which defendants' counsel referenced.

Accordingly, plaintiff has established its entitlement to a judgment of foreclosure and sale on its submissions in support of the motion, including the Referee's findings and report (see HSBC Bank USA, N.A. v Simmons, 125 AD3d 930 [2d Dept. 2015]; US Bank N.A. v Saraceno, 147 AD3d 1005 [2d Dept. 2017]; Bank of New York Mellon Trust Company v Loodus, 160 AD3d 797 [2d Dept 2018]).

Plaintiff's proposed order, as modified by the court, is signed contemporaneously herewith.

DEFENDANTS' CROSS-MOTION DENIED

Defendants' defaulted in opposing plaintiff's authorized successive motion for summary judgment dismissing their 11th affirmative defense, which defense raised compliance with the mailing requirements of a notice of default in the mortgage and the notices required by RPAPL § 1304 (Mot. Seq. # 003). Although unopposed, in the decision of July 6, 2018 the court found that plaintiff's submissions has established proof of mailing and dismissed that remaining affirmative defense, granting summary judgment and the appointment of a Referee.

Without vacating their default in opposing plaintiff's motion, defendants have no ability to now argue against what has been established as the "law of the case" by the decision of July 6, 2018. In order to vacate a default in opposing a motion the defendants are required to demonstrate a reasonable excuse for their default and a potential meritorious defense (see Aurora Loan Services v Ahmed, 122 AD3d 557 [2d Dept 2014]; New Century Mtge. Corp v Chimmiri, 146 AD3d 893 [2d Dept 2017]; Hudson City Sav. Bank v Bomba, 149 AD3d 704 [2d Dept 2017]; Bank of New York Mellon v Sukhu; 163 AD3d 748 [2d

Dept 2018]; Nationstar Mtg, LLC v Rodriguez, 166 AD3d 990 [2d Dept 2018]; Bank of New York Mellon v Ruci, 168 AD3d 799 [2d Dept 2019]). Defendants make no effort to provide a detailed, credible account as to why they defaulted in opposing the motion (see Aurora Loan Services v Ahmed, supra), merely acting as is they could move as of right to dismiss. As they have not established a reasonable excuse for their default, as with any other discretionary vacatur, where there is failure to provide a reasonable excuse, the court need not consider claims of meritorious defenses (see HSBC Bank USA v Miller, 121 AD3d 1044 [2d Dept 2014]; One W. Bank FSB v Valdez, 128 AD3d 655 [2d Dept, 2015]).

In any event, defendants raise no meritorious defenses. Even if the arguments defendants present had been timely submitted as a cross-motion to dismiss to Mot. Seq. #003, they in and of themselves would be insufficient to grant such motion. Their counsel's claims of defects in the RPAPL § 1304 notices themselves are without merit, as can be seen from a review of his own submissions. The only other basis for dismissal is the affidavit of one defendant, Yunior Alvarez, who merely states that she did not receive the notices by mail; such a claim is insufficient to require dismissal (see LNV Corp. v Sofer, 171 AD3d 1033 [2d Dept 2019]; Deutsche Bank Natl. Trust Co. v Starr, 173 AD3d 836 [2d Dept 2019]). Further, as set forth in the decision of July 6, 2018, plaintiff's proof had established mailing of the notices.

Defendants' cross-motion and opposition appear to be meritless attempts to forestall the foreclosure, conduct which parties and their counsel are cautioned from repeating.

Defendants' cross-motion is denied.

This constitutes the Order and decision of the Court.

Dated: August 13, 2019

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Hon. Robert F. Quinlan, J.S.C.

1077 MADISON STREET, LLC, Plaintiff-Appellee, v. Leaford DANIELS, Myrtle G. Daniels, Mary R. Carter, City of New York Environmental Control Board, City of New York Parking Violations Bureau, John and Jane Doe 1 through 10, Inclusive, the Last Ten Named Persons Being Unknown to Plaintiff, the Persons and Parties Intended Being the Tenants, Occupants, Person, Entities or Corporations, if any, Having or Claiming any Interest in the Premises Located at 9905 194th Street, Hollis, Defendants, Donovan March, Defendant-Appellant.

Docket No. 17-2903-cv
August Term, 2018
Argued: August 23, 2018
Decided: March 30, 2020

Before: Parker, Hall, and Lohier, Circuit Judges. Written Per Curiam.

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

Per Curiam:
Donovan March appeals from an August 28, 2015 order, revised on October 26, 2015, of the United States District Court for the Eastern District of New York (Gleeson, *J.*) granting summary judgment in favor of 1077 Madison Street, LLC ("Madison Street") and a November 6, 2015 order of that court denying March's related motion for reconsideration; a March 29, 2017 order of that court (Azrack, *J.*) confirming the report of a court-appointed Referee; a June 12, 2017 judgment of foreclosure and sale; and an August 22, 2017 order of the court denying March's motion (1) for reconsideration of the order confirming the Referee's Report or (2) to amend the judgment of foreclosure and sale.
I.
In August 2007, in refinancing a mixed-use property in Hollis, New York, Donovan March took out a mortgage for $211,000 with Flushing Savings Bank ("FSB"). In April 2013, FSB assigned the mortgage to Hayden Asset IX, LLC, which then assigned the mortgage to 99-05 194th Street, LLC in February 2014. March defaulted, the mortgage was accelerated, and a notice of default was served *463 on March in May 2014. The following month, 99-05 194th Street, LLC assigned the mortgage to Madison Street. In July 2014, Madison Street initiated a foreclosure action against March and others, alleging a default date of February 1, 2008.
One year later, Madison Street filed a motion for, *inter alia*, summary judgment and the appointment of a Referee to compute and report the amount due. Because March did not file a responsive counterstatement of facts challenging Madison Street's statement of facts and because Madison Street's facts were supported by record evidence, the District Court (Gleeson, *J.*) deemed those facts to be admitted for the purposes of the motion for summary judgment. The District Court granted Madison Street's motion for summary judgment, holding that Madison Street established a *prima facie* case for foreclosure and that March's affirmative defenses were meritless. March then filed a motion for reconsideration, which the District Court denied.
After the District Court ruled on the motion for reconsideration, it appointed a Referee to compute the amount due to Madison Street on the note and mortgage. In his Report, the Referee found the amount due as of January 15, 2016 to be $596,715.05; $383,736.00 of this sum was interest owed, calculated at the default interest rate provided in the loan documents of 24 percent per year. The Report also explained that the *per diem* interest owed from January 15, 2016 to the date of judgment of foreclosure and sale would be $133.99, and that Madison Street was owed $12,000.00 in legal fees. March challenged the Report and requested a hearing to dispute the February 1, 2008 default date used by the Referee in his calculations. The Magistrate Judge assigned to the case denied the challenge. Madison Street then moved to confirm the Referee's Report and moved for a judgment of foreclosure and sale; March opposed the motion on ten different grounds. The District Court (Azrack, *J.*) rejected all but one of March's arguments and confirmed the findings of the Referee's Report except as to the legal fees owed to Madison Street. Three months later, the District Court entered a judgment of foreclosure and sale. March then moved for additional relief, including reconsideration or amendment of the judgment, which the District Court denied. March appealed each of these adverse rulings against him.
II.

12We review *de novo* the District Court's grant of summary judgment, taking the facts in the light most favorable to the non-moving party. *Bethpage Water Dist. v. Northrop Grumman Corp.*, 884 F.3d 118, 124 (2d Cir. 2018). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review for abuse of discretion a district court's denial of additional time to conduct discovery under what is now Rule 56(d). *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994).
III.
34On appeal, March challenges Madison Street's authority to maintain this action and contends that summary judgment was thus improperly granted in its favor. March first argues that Madison Street failed to establish *prima facie* standing to foreclose because it did not establish that it holds the mortgage to the subject property. We disagree. A plaintiff establishes standing in a foreclosure action by demonstrating that it was "either the holder or assignee of the underlying note" *464 at the time the foreclosure action was commenced. *OneWest Bank, N.A. v. Melina*, 827 F.3d 214, 222 (2d Cir. 2016) (quotation marks omitted). Here, Madison Street demonstrated that it was the holder of the note by attaching to its Complaint the note and an allonge endorsing it as payee. *See U.S. Bank Nat'l Ass'n v. Saravanan*, 45 N.Y.S.3d 547, 548–49, 146 A.D.3d 1010 (2017). It also submitted an affidavit averring that Madison Street was the current note holder. This evidence established Madison Street's standing as the holder of the note.[1]
5March further complains that the District Court's refusal to grant additional discovery prevented him from refuting evidence provided as to Madison Street's ownership of the note and mortgage at the time the action was commenced and to March's default date. Although March raised his concerns about discovery in his memorandum of law opposing summary judgment, he failed to file an affidavit or declaration explaining the need for additional discovery. *See* Fed. R. Civ. P. 56(d). This failure "is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Paddington Partners*, 34 F.3d at 1137.
6March next argues that he established an affirmative defense based on Madison Street's purported violation of the New York City Administrative Code. Specifically, he contends that Madison Street is a "debt collection agency" and is therefore precluded from maintaining this action without first obtaining a debt collection license from the New York City Department of Consumer Affairs. *See, e.g.*, N.Y.C. Admin. Code §§ 20-489, 20-490. This argument fails. Whether or not Madison Street qualifies under the New York City Administrative Code's broadly worded definition of "debt collection agency," failure to obtain such a license does not necessarily bar Madison Street from foreclosing the mortgage and collecting on the debt at issue. Assuming without deciding that Madison Street's activity requires it to have a license, the remedy provided for Madison Street's unlicensed activity is the imposition of a "penalty of not less than seven hundred dollars nor more than one thousand dollars for each violation ... [and] an additional penalty of one hundred dollars for each instance in which contact is made with a consumer in violation of" the licensure requirements. N.Y.C. Admin. Code § 20-494(a) (providing penalties for operating as an unlicensed debt collection agency). The City's Administrative Code nowhere provides, or even suggests, that operating as an unlicensed debt collection agency automatically renders the debt uncollectable by that agency.[2]
For these reasons, we affirm the District Court's grant of summary judgment in favor of Madison Street.
IV.
March also challenges on three grounds the District Court's order confirming the *465 interest calculations of the court-appointed Referee. None has merit.
7First, March argues that the District Court erred by confirming the Referee's Report because the Referee failed to hold a hearing to determine the default date. But March admitted the February 1, 2008 default date in his answer and, in any event, at the summary judgment stage he failed to proffer evidence refuting that date. Under these circumstances, the Referee was not required to hold a hearing. *See Blueberry Inv'rs Co. v. Ilana Realty Inc.*, 184 A.D.2d 906, 585 N.Y.S.2d 564, 566 (1992) (holding hearing unnecessary where defendants admitted in their answer they owed interest from a date certain).
89Second, March contends that the 24 percent default interest rate applied by the Referee violates New York's civil usury statute, which caps interest rates at sixteen percent. *See* N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a. That statute, however, "do[es] not apply to defaulted obligations." *Manfra, Tordella & Brookes, Inc. v. Bunge*, 794 F.2d 61, 63 n.3 (2d Cir. 1986); *see also Kraus v. Mendelsohn*, 97 A.D.3d 641, 948 N.Y.S.2d 119, 120 (2012) ("The defense of usury does not apply where the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity." (internal quotation marks, alterations, and citation omitted)).

Third, March argues that the Referee erred by applying the default interest rate from the date of default rather than from the date of acceleration. But the relevant loan documents, including the note and the mortgage agreement, clearly foreclose this argument. *See* App. at 37 ("Upon the occurrence of any default hereunder, the Note and all other sums secured hereby shall bear interest at the Default Rate."); App. at 54 ("[T]he Lender shall be entitled to interest at the Default Rate ... from the time of said default to the sale of the premises following foreclosure ..."). We therefore affirm the District Court's order confirming the Referee's Report.

V.

10Finally, we conclude that the District Court did not abuse its discretion by declining to reconsider or adjust its award of *per diem* interest to Madison Street based on the delayed "entry of judgment." *NYCTL 1998-2 Tr. v. Wagner*, 61 A.D.3d 728, 876 N.Y.S.2d 522, 523 (2009). March has not shown that Madison Street's two-month delay in submitting a revised proposed judgment was unexplained or unreasonable.

* * *

We have considered March's remaining arguments and conclude that they are either forfeited or without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

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

174 A.D.3d 494
Supreme Court, Appellate Division, Second Department, New York.
CAPITAL ONE, NA, etc., respondent,
v.
Farah Maleki AMID, appellant, et al., defendants.
2017–07126(Index No. 17916/10)
Argued - February 21, 2019July 3, 2019

Contrary to the defendant's further contention, under the circumstances here, the Referee was not required to conduct a hearing prior to issuing his report to the Supreme Court (*see Deutsche Bank Natl. Trust Co. v. Williams,* 134 A.D.3d 981, 20 N.Y.S.3d 907; *Deutsche Bank Natl. Trust Co. v. Zlotoff,* 77 A.D.3d 702, 908 N.Y.S.2d 612).

DECISION & ORDER
*494 In an action to foreclose a mortgage, the defendant Farah Maleki Amid appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered April 3, 2017. The order and judgment of foreclosure and sale granted the plaintiff's motion to confirm a Referee's report and directed the sale of the subject property. The appeal brings up for review an order of the same court entered November 18, 2015, which denied that defendant's motion pursuant to CPLR 5015(a)(1), in effect, to vacate her default in opposing the plaintiff's motion for summary judgment on the complaint insofar as asserted against her, to strike her answer, and for an order of reference, and to dismiss the complaint insofar as asserted against her.
ORDERED that the order and judgment of foreclosure and sale is affirmed, with costs.
The plaintiff commenced this action against, among others, Farah Maleki Amid (hereinafter the defendant), to foreclose a mortgage given by her on real property in Old Brookville. The defendant answered the complaint. Thereafter, the plaintiff moved for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference. The defendant failed to file timely opposition to the motion.
In two orders, both dated February 20, 2015, the Supreme Court granted the plaintiff's motion and referred the matter to a Referee to compute the amount due to the plaintiff. The defendant subsequently moved, in effect, to vacate her default in opposing the plaintiff's motion and to dismiss **188 the complaint insofar as asserted against her. By order entered November 18, 2015, the court denied the defendant's motion.
The Referee subsequently issued a report as to the amounts due to the plaintiff, and the plaintiff moved, inter alia, to confirm the report. On April 3, 2017, the Supreme Court entered an order and judgment of foreclosure and sale granting the plaintiff's motion and directing the sale of the subject property. The defendant appeals.
123"In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion" (*Hudson City Sav. Bank v. Bomba,* 149 A.D.3d 704, 705, 51 N.Y.S.3d 570 [internal quotation *495 marks omitted]; *see NYCTL 1998–2 Trust v. McGill,* 138 A.D.3d 1077, 1079, 30 N.Y.S.3d 308; *Aurora Loan Servs., LLC v. Ahmed,* 122 A.D.3d 557, 557, 996 N.Y.S.2d 92).
"The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (*Deutsche Bank Natl. Trust Co. v. Saketos,* 158 A.D.3d 610, 612, 72 N.Y.S.3d 167 [internal quotation marks omitted]; *see Hudson City Sav. Bank v. Bomba,* 149 A.D.3d at 705, 51 N.Y.S.3d 570; *Aurora Loan Servs., LLC v. Ahmed,* 122 A.D.3d at 557–558, 996 N.Y.S.2d 92). A court has the discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation, although mere neglect is not a reasonable excuse (*see Ki Tae Kim v. Bishop,* 156 A.D.3d 776, 777, 67 N.Y.S.3d 655; *Onewest Bank, FSB v. Singer,* 153 A.D.3d 714, 716, 59 N.Y.S.3d 480; *Servilus v. Walcott,* 148 A.D.3d 743, 48 N.Y.S.3d 494).
4Here, the Supreme Court providently exercised its discretion in denying the defendant's motion, inter alia, in effect, to vacate her default in opposing the plaintiff's motion.
The defendant's unsubstantiated claim of law office failure by prior counsel was insufficient to establish a reasonable excuse for her default (*see Bank of N.Y. Mellon v. Ruci,* 168 A.D.3d 799, 89 N.Y.S.3d 914; *LaSalle Bank, N.A. v. LoRusso,* 155 A.D.3d 706, 706, 64 N.Y.S.3d 102; *U.S. Bank N.A. v. Barr,* 139 A.D.3d 937, 938, 30 N.Y.S.3d 576; *M & T Bank v. Morris,* 138 A.D.3d 939, 28 N.Y.S.3d 623). Since the defendant failed to establish a reasonable excuse for her default, it is not necessary to determine whether she demonstrated a potentially meritorious opposition to the motion (*see LaSalle Bank, N.A. v. LoRusso,* 155 A.D.3d at 706, 64 N.Y.S.3d 102; *Bank of N.Y. Mellon v. Colucci,* 138 A.D.3d 1047, 1048, 30 N.Y.S.3d 667; *M & T Bank v. Morris,* 138 A.D.3d at 940, 28 N.Y.S.3d 623).

Contrary to the defendant's further contention, under the circumstances here, the Referee was not required to conduct a hearing prior to issuing his report to the Supreme Court (*see Deutsche Bank Natl. Trust Co. v. Williams,* 134 A.D.3d 981, 20 N.Y.S.3d 907; *Deutsche Bank Natl. Trust Co. v. Zlotoff,* 77 A.D.3d 702, 908 N.Y.S.2d 612).

The defendant's remaining contentions are without merit.

RIVERA, J.P., DILLON, ROMAN and DUFFY, JJ., concur.

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

2020 WL 5362065
Supreme Court, New York County, New York.
Madonna CICCONE, Plaintiff,
v.
ONE WEST 64TH STREET, INC., Defendant.
651748/2016
Decided September 4, 2020
Shaw & Binder, P.C., New York, NY (Stuart F. Shaw of counsel), for plaintiff.
Holland & Knight LLP, Philadelphia, Pa. (Benjamin R. Wilson of counsel), for defendant.

Opinion

Gerald Lebovits, J.
*1 This is the latest in a series of orders relating to defendant One West 64th Street's entitlement to collect legal fees it incurred in this action. This court in July 2019 first held that defendant is entitled to fees from plaintiff Madonna Ciccone and referred the matter to a Special Referee to hear and report on an appropriate fee award. (*See Ciccone v. One W. 64th St., Inc.*, 2019 WL 3429393 [Sup. Ct., N.Y. County July 26, 2019].) It is now September 2020—yet through no fault of the Special Referee assigned to this matter, the fee hearing still remains in its initial stages.
Plaintiff now suggests that only an in-person hearing will adequately vindicate her due-process rights—and thus that the fee hearing should be stayed over defendant's objection for some indefinite period until it is safe for in-person hearings and trials to resume in the New York City courts. Ordinarily, an in-person hearing is preferable to conducting the hearing remotely, whether by video or by telephone. But given the continuing risks posed by the COVID-19 pandemic, these are no ordinary times.
The court concludes, upon considering the parties' submissions, that in the present, extraordinary circumstances, the fee hearing in this case must go forward by videoconference. Holding the hearing in this manner will permit the Special Referee to make a proper, informed recommendation on the fees to be awarded, will sufficiently protect the parties' due-process rights, and will prevent the fees issue in this case from continuing to languish for months to come. This court exercises the authority conferred upon it by Judiciary Law § 2-b(3) to direct the parties to appear for further hearing dates on the issue of attorney fees, with the hearing to be conducted by videoconference. A failure by plaintiff to appear for the hearing will result in entry of default against her and the matter being set down for an inquest before the Special Referee.
BACKGROUND
This action began in 2016 over a dispute between plaintiff and her residential cooperative apartment building about restrictions imposed under the co-op's proprietary lease. Plaintiff challenged certain actions taken by the co-op as ultra vires and sought the co-op's books and records in support of that claim. In September 2017, this court held that plaintiff's challenge to the co-op's actions was time-barred. (*See Ciccone v. One W. 64th St.*, 2017 N.Y. Slip Op. 32001[U], 2017 WL 4180170 [Sup. Ct., N.Y. County Sept. 21, 2017], *affd* 171 A.D.3d 481, 98 N.Y.S.3d 21 [1st Dept. 2019].) Yet plaintiff did not drop her distinct books-and-records claim intended to support that challenge. Rather, plaintiff went so far as to move (unsuccessfully) for summary judgment on that claim in the spring of 2018. (*See Ciccone v. One W. 64th St.*, 2018 N.Y. Slip Op. 31372[U], 2018 WL 3201912 [Sup. Ct., N.Y. County June 29, 2018].) And she continued to maintain the claim until this court dismissed it in November 2018. (*See Ciccone*, 2019 WL 3429393, at *2.) In July 2019, this court determined that plaintiff had "brought and continued to pursue her claims in this action in bad faith" within the meaning of the co-op lease—and therefore that defendant was entitled to its reasonable attorney fees incurred in defending the action. (*Id.*) The court referred the amount of defendant's attorney fees to a Special Referee to hear and report.
*2 After the matter was referred to the Special Referee's Part, the parties differed about the nature and scope of the proceeding before the Special Referee. Defendant took the position that the matter could be adequately dealt with on papers. (*See* NYSCEF No. 135.) Plaintiff, on the other hand, contended that a 3-to-5-day oral hearing was required, involving testimony from up to *20* witnesses—evidently all attorneys from defendant's retained law firm (Holland & Knight LLP) who had billed any time on the matter. (*See* NYSCEF No. 133 at 2, 4.)
A hearing was scheduled by the Special Referee's Part for October 10, 2019. On October 9, plaintiff brought on a motion by order to show cause to enable plaintiff to take the deposition in Connecticut of a former Holland & Knight partner who had worked on this case when he was still with the firm. Plaintiff also sought to adjourn the hearing date until after that attorney's deposition was completed. (*See* NYSCEF Nos. 138-144.) Given this OSC, the parties stipulated to adjourn the hearing date from October 10 to

October 28, 2019. (NYSCEF No. 137.) This court heard argument on the motion on October 11 and issued a decision on the record that day resolving the dispute over the former partner's deposition. The court declined, however, to stay the fee hearing pending completion of the deposition. (*See* NYSCEF No. 152.)

On October 25, the parties wrote to the court to inform it that in light of this court's October 11 ruling, the parties had entered into settlement negotiations. The parties requested that in light of these negotiations the fee hearing be adjourned further, to December 6, 2019. (*See* NYSCEF No. 157.) This court so-ordered the parties' adjournment stipulation. (*See* NYSCEF No. 159.) The parties' settlement negotiations were unsuccessful.

In early October 2019, in addition to seeking to take the deposition of the former Holland & Knight partner, plaintiff had also served subpoenas on every current and former Holland & Knight attorney who had worked on this action. The subpoenas sought not only these attorneys' testimony at the fee hearing, but also the production of all their "notes, time records, emails, and other correspondence or documents regarding this action," including "unredacted time records" and "unredacted intra-office communications" with other Holland & Knight attorneys. (*See* NYSCEF No. 162 [attaching subpoenas].)

In late November 2019, after settlement negotiations broke down, defendant moved by order to show cause for a protective order. Defendant sought to quash all of plaintiff's subpoenas directed to all Holland & Knight attorneys (current and former) other than Benjamin R. Wilson, Esq., who is the firm partner handling the case. Following oral argument on the motion, this court granted defendant's requested protective order in full. (*See Ciccone v. One W. 64th St.*, 2019 N.Y. Slip Op. 33595[U], 2019 WL 6615456 (Sup. Ct., N.Y. County Dec. 5, 2019].)

After this court's ruling, the fee hearing was calendared for January 13, 2020. The parties stipulated to adjourn that hearing date until February 13, 2020. (*See* NYSCEF No. 175.) The hearing began on February 13 as scheduled, before Special Referee Hon. Phyllis Sambuco. The hearing proved contentious, and as a result was not completed that day. The next scheduled hearing date was March 12, 2020. Unfortunately, due to the advent of COVID-19 (and the resultant disruptions to the normal operations of the New York State courts), the hearing did not go forward in March. In effect, the hearing was stayed for several months on account of COVID-19. (*See* NYSCEF No. 177 at 1-2.)

*3 At the end of July 2020, Referee Sambuco contacted counsel for the parties about resuming the hearing on a "virtual" basis by videoconference. Defendant indicated that it was willing to proceed virtually. Plaintiff objected vehemently to a virtual hearing, and the parties exchanged several emails on the subject in August. Given the parties' disagreement on this point, Referee Sambuco submitted an interim report and recommendation to this court, referring "the issue of whether this matter should continue by virtual hearing" to the court for resolution. (NYSCEF No. 177 at 3.) Upon receiving the Referee's interim report, this court sought and received further submissions from the parties on this issue. (*See* NYSCEF Nos. 178-182.) The current disagreement between the parties over how to conduct the hearing going forward is thus ripe for resolution.

DISCUSSION

I. Factors to be Considered in Deciding Whether to Direct a Virtual Hearing

The current dispute requires this court to balance weighty considerations. The judicial system traditionally prefers to conduct proceedings in person—a point that has particular force in a fact-finding hearing such as the one at issue here, for which credibility could conceivably prove relevant. The parties and the court each have vital and complementary interests in seeing actions resolved expeditiously and fairly after a proper opportunity for all sides to be heard. And, of course, in light of the COVID-19 pandemic (and the havoc it has wreaked worldwide), the New York court system owes a responsibility to avoid putting lives at risk by resuming in-person proceedings court prematurely.

Plaintiff proposes one way to balance these various factors. This proposal takes into account the need for safety in this time of COVID-19 and emphasizes the value of holding hearings in person rather than virtually. Plaintiff would have this court adjourn the fee hearing without date until such time as the Unified Court System determines that it is safe for the courts in New York City again to hold in-person hearings and trials in civil cases—whenever that should be.[1]

This court is reluctant to adopt plaintiff's proposed course. To be sure, plaintiff is correct that the matter before this court and Referee Sambuco is limited to the issue of appropriate attorney fees to be awarded—a collateral matter limited to a dispute over money. Yet although this issue may be less pressing than some (questions, for example, about litigants' personal liberty, or their shelter, or their parental rights), that does not make it trivial. Defendant is entitled to collect legal fees because this court squarely held, more than a year ago, that plaintiff brought and continued this action in bad faith. The prosecution of a vexatious and harassing lawsuit over several years is no small matter. This court is loath to permit plaintiff to continue to drag out proceedings to avoid paying the costs of the legal work that she forced defendant and its counsel to undertake needlessly. Indeed, but for the time spent litigating and

adjudicating plaintiff's repeated efforts to obtain extensive and burdensome discovery in an *attorney-fee proceeding*, the fee hearing would likely have been completed before COVID-19 even became an issue.
*4 This court's reluctance to wait for in-person hearings to resume, though, does not end the inquiry. The question remains whether conducting the fee hearing in this case virtually is a viable alternative—*i.e.*, whether this mode of proceeding is not only safe and expeditious but also fair to the parties, and whether this court has the authority to require the parties to participate even over objection.
This court is aware of only one New York case addressing the issue of virtual hearings since the beginning of the pandemic. In *A.S. v. N.S.*, Justice Tandra L. Dawson of Supreme Court, New York County, carefully considered the issue and held that under the circumstances of the case before her (a contentious custody dispute), holding a virtual hearing was feasible, fair, and preferable to further postponing trial. (*See* —— Misc.3d ——, —— N.Y.S.3d ——, 2020 N.Y. Slip Op. 20161, 2020 WL 3978761 [Sup. Ct., N.Y. County July 1, 2020].) For the reasons below, this court agrees with Justice Dawson.[2]

II. This Court's Authority to Direct a Virtual Hearing

Judiciary Law § 2-b(3) confers power on this court "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This statutory provision "explicitly authorize[s] the courts' use of innovative procedures where "necessary to carry into effect the powers and jurisdiction possessed by" the court. (*People v. Wrotten*, 14 N.Y.3d 33, 37, 896 N.Y.S.2d 711, 923 N.E.2d 1099 [2009] [internal quotation marks omitted].) And the Court of Appeals and the Appellate Division, First Department, have repeatedly held that one such procedure that courts may employ, albeit in exceptional circumstances, is the use of video testimony—including by a complainant in a criminal trial (*see Wrotten*, 14 N.Y.3d at 37-38, 896 N.Y.S.2d 711, 923 N.E.2d 1099[3]); by an expert witness at a civil-commitment hearing (*see State v. Robert F.*, 25 N.Y.3d 448, 454, 13 N.Y.S.3d 319, 34 N.E.3d 829 [2015][4]); and by defendants at a jurisdictional hearing before a Special Referee (*see Am. Bank Note Corp. v. Daniele*, 81 A.D.3d 500, 501-502, 916 N.Y.S.2d 112 [1st Dept. 2011]).[5]
*5 In considering whether this case presents exceptional circumstances warranting the exercise of this court's authority under § 2-b(3), this court is guided not only by the decision in *A.S. v. N.S.* but also by rulings from federal trial courts across the country that consider how to proceed during the COVID-19 pandemic. These courts have consistently determined that given the pandemic, it is necessary, appropriate, and fair to hold bench trials entirely by videoconference.[6]

III. Recent Federal Precedents Analyzing Whether to Direct Virtual Trials and Hearings

The federal trial courts considering the issue have acknowledged that "[c]onducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder," and that "[c]ertain features of testimony useful to evaluating credibility and persuasiveness, such as the immediacy of a living person can be lost with video technology." (*Matter of RFC & RESCAP Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020) [internal quotation marks omitted]. At the same time, these courts have found that given "advances in technology," the "near-instantaneous transmission of video testimony" permits the court "to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration." (*Id.* [internal quotation marks and alteration omitted]; *accord Gould Elec. Inc. v. Livingston County Rd. Commn.*, —— F.Supp.3d ——, ——, 2020 WL 3717792, at 6 (E.D. Mich. June 30, 2020) [same]; *United States v. Donziger*, 2020 WL 5152162, at *3 n 4 (S.D. N.Y. Aug. 31, 2020) [noting that "the Court has used video technology in several other criminal matters, and it has proven to be 'highly-effective' in allowing viewers to 'observe the speaker in real-time and visually assess his or her demeanor' "] [quoting prior order].
Federal courts have also found that given the "unprecedented nature of the circumstances faced by our society at present" due to the COVID-19 pandemic, compelling reasons exist to conduct trials virtually. (*Flores v. Town of Islip,* 2020 WL 5211052, at *2 [E.D. N.Y. Sept. 1, 2020]; *accord RFC*, 444 F. Supp. 3d at 972 [concluding that "COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony"].) And given the court closures required by the pandemic, "the months' long delay" that has resulted," and the continuing lack of clarity about when it will be safe to resume normal in-person operations, the courts have concluded that "it is 'absolutely preferable' to conduct the bench trial via such 'contemporaneous transmission' ... rather than to delay the trial indefinitely." (*Argonaut Ins. Co. v. Manetta Enters., Inc.*, 2020 WL 3104033, at *2 [E.D. N.Y. June 11, 2020], quoting *RFC*, 444 F. Supp. 3d at 927.)
*6 This court finds the conclusions and reasoning of these courts to be persuasive. We are in the midst of the worst pandemic in a century—a pandemic that has inflicted devastating harm on New York City and has halted most in-person court operations in civil cases in this city for going on six months now. And as noted above, although the New York courts have continued to operate and ably discharge their judicial

functions in these difficult times, it remains unclear when state courts in New York City hearing civil cases will be able safely to resume doing so in person, rather than remotely.

Additionally, current technology enables the court and litigants to participate in reliable, real-time videoconferencing with high image quality using readily available computer programs. A hearing conducted virtually by videoconference will allow for cross-examination of witnesses and for both counsel and the court to assess the witnesses' demeanor and credibility through seeing them up close on-screen.[7] Such a hearing may not be equivalent to hearing testimony and cross-examination in person. But it is more than adequate to ensure that both sides have a full opportunity to be heard and that Referee Sambuco can make a properly informed report and recommendation following the hearing.

Indeed, the particular context of this hearing makes it especially amenable to being conducted virtually. The issue before Referee Sambuco, namely the amount of defendant's reasonable attorney fees, is discrete and straightforward. That issue will be heavily based on documentary evidence in the form of defendant's counsel's invoices and billing records, and—as this court concluded in quashing plaintiff's testimonial subpoenas—will require comparatively little testimony from live witnesses.

This court therefore concludes, in the exercise of its discretion under Judiciary Law § 2-b(3), that this case presents extraordinary and compelling circumstances in which it is both necessary and appropriate to require the parties to participate in a hearing conducted by videoconference.

IV. Plaintiff's Objections to a Virtual Hearing

Plaintiff raises several objections to conducting the hearing in this manner.[8] (*See* NYSCEF No. 178 at 3-6, 9-10; NYSCEF No. 182.) None is persuasive.

As an initial matter, there is no merit to plaintiff's attacks on Benjamin Wilson's veracity and credibility. Plaintiff asserts that Wilson sought to mislead Referee Sambuco during the February 13, 2020, hearing date; and also that going forward, Wilson might deceive both opposing counsel and the Referee about the content of exhibits he is submitting as evidence. (*See* NYSCEF No. 178 at 3-4, 9.) Suffice to say that this court, having reviewed the relevant hearing transcript for itself, does not agree with plaintiff's characterization of the statements made by Wilson (and by Referee Sambuco) during the February 13 hearing date. And this court does not discern any basis in the record for plaintiff's suggestion that Wilson would lie to plaintiff's counsel about whether he was submitting the same exhibit to the court that he had provided to opposing counsel.[9]

*7 Plaintiff suggests that proceeding by video will preclude her counsel and the court from meaningfully assessing the demeanor and credibility of witnesses, and hinder any cross-examination, to such a degree as to violate due process. For the reasons set forth above, this court does not agree.[10] Nor does the court agree that proceeding by video will sacrifice the “ceremony of trial and the presence of the factfinder” as a “powerful force for truthtelling.” (NYSCEF No. 178 at 6 [quotation marks omitted].) As noted by the district court in *Gould*, the “formalities ... will be observed, and the [Special Referee], as well as counsel, will be visible to witnesses.” That “witnesses will be testifying remotely does not render them unaccountable for the veracity of their statements, as they will be under oath.” (—— F.Supp.3d at ——, 2020 WL 3717792, at *6.)

Plaintiff asserts that no particular exigent circumstances require going forward with the fee hearing now. (*See* NYSCEF No. 178 at 4.) But as discussed above, this court first rejected plaintiff's principal claim for relief nearly three years ago. This court held that plaintiff was proceeding in bad faith, awarded defendant fees, and directed a fee hearing more than a year ago. The fee hearing has still not been completed. And on plaintiff's position, the hearing cannot be completed until some indefinite time months in the future. The court declines to countenance further needless delay.

Finally, plaintiff says that her counsel “does not presently have skype capabilities” and apparently cannot obtain such capabilities without incurring meaningful costs. (NYSCEF No. 178 at 3, 9.) This court is not persuaded by this argument. As the district court noted in *Argonaut Insurance*, the “technology used for video-conferencing is straightforward [and] easy to use”; and “[a]ll that is required to participate in a trial by video-conference is a computer and Internet access,” which should be readily available to counsel. (2020 WL 3104033, at *2.) To the extent that plaintiff's counsel perceives any technical obstacles to participating in a virtual hearing, this court sees no reason why counsel cannot fully address those obstacles through consultation with Wilson and Referee Sambuco.

For all these reasons, this court concludes that the fee hearing before Referee Sambuco should go forward by videoconference, rather than by submission on papers or being adjourned without date until it is possible to conduct the hearing in person. Both sides must participate in the hearing. Failure to participate will result in the denial of the fee application (if defendant does not appear) or entry of a default and resolution of the fee issue at an inquest (if plaintiff does not appear), with any inquest to be conducted by Referee Sambuco.

Accordingly, it is hereby

ORDERED that Referee Sambuco's interim recommendation dated August 18, 2019, is accepted and adopted by this court; and it is further
ORDERED that the fee hearing being conducted by Referee Sambuco pursuant to an order of reference from this court shall proceed virtually by videoconference, going forward, and that Referee Sambuco shall preside over future virtual hearing dates; and it is further
ORDERED that all parties are required to appear for future virtual hearing dates (and to participate in the hearing), and that a party's failure to appear and participate will result in denial of the motion for fees if movant-defendant fails to appear or the entry of a default against plaintiff and the resolution of defendant's fee application at an inquest before Referee Sambuco if plaintiff fails to appear; and it is further
*8 ORDERED that the parties shall promptly consult with Referee Sambuco to determine an appropriate further hearing date and, consistent with Unified Court System policies then in effect, a videoconference platform.

127 N.Y.S.3d 310 (Mem)
Supreme Court, Appellate Division, Second Department, New York.
BANK OF NEW YORK MELLON, etc., respondent,
v.
Denise L. GEORGE, et al., defendants,
Feinmore St. Realty, Inc., appellant.
2017–09255(Index No. 23817/11)
Submitted—May 19, 2020August 19, 2020
Avi Rosenfeld, Lawrence, NY, for appellant.
Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bay Shore, N.Y. (Ruth O'Connor of counsel), for respondent.
RUTH C. BALKIN, J.P., SYLVIA O. HINDS–RADIX, COLLEEN D. DUFFY, VALERIE BRATHWAITE NELSON, JJ.

*311 DECISION & ORDER
In an action to foreclose a mortgage, the defendant Fenimore St. Realty, Inc., appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Noach Dear, J.), dated March 28, 2017.
The order and judgment of foreclosure and sale, upon an order of the same court, also dated March 28, 2017, inter alia, denying those branches of that defendant's cross motion which were, in effect, to reject the Referee's report and to toll and cancel accrued interest, granted the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, confirmed the Referee's report, and directed the sale of the subject property.
ORDERED that the order and judgment of foreclosure and sale is affirmed, with costs.
On July 24, 2006, the defendants Denise L. George and Euhart Thompson executed a note in the sum of $445,200, which was secured by a mortgage on real property located on Fenimore Street, in Brooklyn. On October 20, 2011, the plaintiff commenced an action to foreclose the mortgage. The plaintiff filed a notice of pendency with respect to the subject property on the same date. On February 3, 2014, Fenimore St. Realty, Inc. (hereinafter Fenimore), purchased the subject property from George and Thompson. The plaintiff re-filed the notice of pendency on September 29, 2014. On February 20, 2015, the Supreme Court granted the plaintiff's motion for an order of reference upon the default of the defendants, and appointed a Referee to compute the amount due to the plaintiff. The Referee executed her report on January 6, 2016, finding, inter alia, that the plaintiff was due the total sum on the note and mortgage of $620,157.75, as of July 31, 2015, including, inter alia, principal and accrued interest.
In March 2016, the plaintiff moved to confirm the Referee's report and for a judgment of foreclosure and sale. Fenimore cross-moved to be added to the action as a party defendant as the successor in interest to George and Thompson, and for permission to oppose the plaintiff's motion. Fenimore asked the Supreme Court, in effect, to reject the Referee's report due to the plaintiff's failure to timely serve the order of reference and the Referee's failure to provide notice of a hearing before preparing her report. Fenimore also asked the court to toll and cancel the accrued interest. In an order dated March 28, 2017, the court, inter alia, granted those branches of Fenimore's cross motion which were to be added to the action as a party defendant and for permission to oppose the plaintiff's motion, but denied those branches of Fenimore's cross motion which were, in effect, to reject the Referee's report and to toll and cancel the accrued interest. In an order and judgment of foreclosure and sale, also dated March 28, 2017, the court granted the plaintiff's motion, confirmed the Referee's report, and directed the sale of the subject property. Fenimore appeals.
We agree with the Supreme Court's determination denying that branch of Fenimore's cross motion which was, in effect, to reject the Referee's report.
It is undisputed that, as Fenimore asserts, the plaintiff did not timely serve the order of reference, and the Referee failed to provide *312 notice of, or hold a hearing on, the issues addressed in the Referee's report. Nonetheless, Fenimore, which purchased the subject property after the plaintiff filed a notice of pendency with respect to the property, is bound by all proceedings taken in the action after the filing of the notice of pendency to the same extent as a party (*see* CPLR 6501; *Sharestates Invs., LLC v. Hercules,* 178 A.D.3d 1112, 1114, 116 N.Y.S.3d 299; *Novastar Mtge., Inc. v. Mendoza,* 26 A.D.3d 479, 479, 811 N.Y.S.2d 411). Moreover, "as long as a defendant is not prejudiced by the inability to submit evidence directly to the Referee, a Referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed" (*Bank of N.Y. Mellon v. Viola,* 181 A.D.3d 767, 770, 122 N.Y.S.3d 55; *see Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.,* 165 A.D.3d 1233, 1236, 87 N.Y.S.3d 604; *Deutsche Bank Natl. Trust Co. v. Zlotoff,*

77 A.D.3d 702, 908 N.Y.S.2d 612). "Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the Referee's report, the defendant is not prejudiced by any error in failing to hold a hearing" (*Bank of N.Y. Mellon v. Viola,* 181 A.D.3d at 770, 122 N.Y.S.3d 55; *see Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.,* 165 A.D.3d at 1236, 87 N.Y.S.3d 604; *Deutsche Bank Natl. Trust Co. v. Zlotoff,* 77 A.D.3d at 702, 908 N.Y.S.2d 612).

Furthermore, we agree with the Supreme Court's determination to deny that branch of Fenimore's cross motion which was, in effect, to toll and cancel accrued interest. A foreclosure action is equitable in nature and triggers the equitable powers of the court (*see Notey v. Darien Constr. Corp.,* 41 N.Y.2d 1055, 396 N.Y.S.2d 169, 364 N.E.2d 833; *Rajic v. Faust,* 165 A.D.3d 716, 717, 85 N.Y.S.3d 470; *U.S. Bank N.A. v. Losner,* 145 A.D.3d 935, 937, 44 N.Y.S.3d 467). "Once equity is invoked, the court's power is as broad as equity and justice require" (*U.S. Bank N.A. v. Losner,* 145 A.D.3d at 938, 44 N.Y.S.3d 467 [internal quotation marks omitted]). "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*BAC Home Loans Servicing, L.P. v. Jackson,* 159 A.D.3d 861, 862, 74 N.Y.S.3d 59 [internal quotation marks omitted]; *see Breskin v. Moronto,* 172 A.D.3d 1298, 1300, 102 N.Y.S.3d 85; *Citicorp Trust Bank, FSB v. Vidaurre,* 155 A.D.3d 934, 934, 65 N.Y.S.3d 237), such as where the plaintiff's conduct has prejudiced the defendant (*see BAC Home Loans Servicing, L.P. v. Jackson,* 159 A.D.3d at 863, 74 N.Y.S.3d 59). Here, Fenimore failed to show that the plaintiff engaged in any wrongdoing. Nor did Fenimore show that the plaintiff engaged in any lengthy unexplained delay in prosecution that would warrant the limitation of interest (*cf. Danielowich v. PBL Dev.,* 292 A.D.2d 414, 415, 739 N.Y.S.2d 408).

Fenimore's remaining contention is without merit.

BALKIN, J.P., HINDS–RADIX, DUFFY and BRATHWAITE NELSON, JJ., concur.

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

181 A.D.3d 767
Supreme Court, Appellate Division, Second Department, New York.
BANK OF NEW YORK MELLON, etc., Respondent,
v.
Raymond VIOLA, Appellant, et al., Defendants.
2017–05382, 2017–05385, 2017–11580, 2017–11581(Index No. 2138/15)
Argued—November 21, 2019March 18, 2020

Hutchinson & Hutchinson, P.C., Oyster Bay, N.Y. (Richard L. Hutchinson of counsel), for appellant.
Stern & Eisenberg, P.C., Depew, N.Y. (Anthony P. Scali of counsel), for respondent.
REINALDO E. RIVERA, J.P., JOSEPH J. MALTESE, FRANCESCA E. CONNOLLY, VALERIE BRATHWAITE NELSON, JJ.
**57 DECISION & ORDER
*768 ORDERED that the appeals from the orders entered February 15, 2017, and October 5, 2017, are dismissed; and it is further,
ORDERED that the order and judgment of foreclosure and sale is affirmed; and it is further,
ORDERED that one bill of costs is awarded to the plaintiff.
1The appeals from the orders entered February 15, 2017, and October 5, 2017, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeals from the orders are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501[a][1]; *Matter of Aho*, 39 N.Y.2d at 248, 383 N.Y.S.2d 285, 347 N.E.2d 647).
On July 29, 2004, the defendant Raymond Viola (hereinafter the defendant) executed a note in the sum of $348,000, which was secured by a mortgage on real property in Hicksville. On September 24, 2009, the plaintiff commenced an action to foreclose the mortgage. That action was discontinued on July 25, 2014.
The plaintiff commenced this mortgage foreclosure action on March 10, 2015. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference. The defendant cross-moved pursuant to CPLR 3211(a)(1) and (5) to dismiss the complaint insofar as asserted against him and for summary judgment dismissing the complaint insofar as asserted against him. In an order entered February 15, 2017, the Supreme Court, inter alia, granted those branches of the plaintiff's motion and denied the defendant's cross motion. In a second order entered February 15, 2017, the court, inter alia, appointed a Referee to compute the amount due to the plaintiff.
The plaintiff subsequently moved to confirm the Referee's report and for a judgment of foreclosure *769 and sale, and the defendant cross-moved to reject the Referee's report. In an order entered October 5, 2017, the court granted the plaintiff's motion and denied the defendant's cross motion. On October 5, 2017, the court entered an order and judgment of foreclosure and sale granting the plaintiff's motion, denying the defendant's cross motion, confirming the Referee's report, and directing the sale of the subject property. The defendant appeals.
2We agree with the Supreme Court's determination denying that branch of the defendant's cross motion which was to dismiss the complaint insofar as asserted against him as time-barred. The defendant contends that the plaintiff accelerated the mortgage debt on June 16, 2008, by a **58 letter of default that Countrywide Home Loans Servicing, LP (hereinafter Countrywide), the servicer of the subject loan, sent to the defendant. The letter of default stated that if the default was not cured by July 21, 2008, “the mortgage payments **will be accelerated**.” Contrary to the defendant's contention, this language “was merely an expression of future intent that fell short of an actual acceleration” (*Milone v. U.S. Bank N.A.*, 164 A.D.3d 145, 152, 83 N.Y.S.3d 524; *see U.S. Bank N.A. v. Gordon*, 176 A.D.3d 1006, 111 N.Y.S.3d 30).
As the plaintiff contends, acceleration of the full amount of the debt occurred on September 24, 2009, when the plaintiff filed the summons and complaint that commenced the prior foreclosure action (*see Milone v. U.S. Bank N.A.*, 164 A.D.3d at 153, 83 N.Y.S.3d 524). As such, this action, which was commenced on March 10, 2015, is timely, as it was commenced less than six years later. Since the defendant failed to meet his initial burden of demonstrating that the action was untimely, the burden never shifted to the plaintiff to raise a question of fact as to whether the action was timely (*see U.S. Bank N.A. v. Greenberg*, 170 A.D.3d 1237, 1240, 97 N.Y.S.3d 133). Therefore, the issue of whether the plaintiff's

voluntary discontinuance of the prior action amounted to a revocation of the initial acceleration is academic.

3The plaintiff established, prima facie, that it had standing to commence this action by submitting in support of its motion a copy of the note, endorsed in blank, that was annexed to the complaint at the time the action was commenced (*see U.S. Bank N.A. v. Offley*, 170 A.D.3d 1240, 1241; *cf. U.S. Bank N.A. v. Duthie*, 161 A.D.3d 809, 811, 76 N.Y.S.3d 226). In opposition, the defendant failed to raise a triable issue of fact as to the plaintiff's standing.

45It is undisputed that the Referee failed to provide notice to the defendant pursuant to CPLR 4313, or to hold a hearing on *770 the issues addressed in the Referee's report. However, as long as a defendant is not prejudiced by the inability to submit evidence directly to the Referee, a Referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed (*see Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.*, 165 A.D.3d 1233, 1236, 87 N.Y.S.3d 604; *Deutsche Bank Natl. Trust Co. v. Zlotoff*, 77 A.D.3d 702, 908 N.Y.S.2d 612). **Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the Referee's report, the defendant is not prejudiced by any error in failing to hold a hearing (*see Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.*, 165 A.D.3d at 1236, 87 N.Y.S.3d 604; *Deutsche Bank Natl. Trust Co. v. Zlotoff*, 77 A.D.3d at 702, 908 N.Y.S.2d 612). Therefore, the defendant failed to establish that the court erred in confirming the Referee's report and awarding the plaintiff a judgment of foreclosure and sale on the ground that the Referee failed to provide notice of a hearing or hold a hearing.**

RIVERA, J.P., MALTESE, CONNOLLY and BRATHWAITE NELSON, JJ., concur.

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

126 N.Y.S.3d 378 (Mem)
Supreme Court, Appellate Division, Second Department, New York.
Ricky WARDALLY, et al., Appellants,
v.
Tanya WARDALLY, Respondent.
2019–07385(Index No. 517663/17)
Submitted—March 9, 2020August 5, 2020

Richard J. Soleymanzadeh, P.C., Carle Place, NY, for appellants.
ALAN D. SCHEINKMAN, P.J., RUTH C. BALKIN, CHERYL E. CHAMBERS, PAUL WOOTEN, JJ.
DECISION & ORDER
In an action for the partition and sale of real property, the plaintiffs appeal from an order of the Supreme Court, Kings County (Loren Baily–Schiffman, J.), dated May 16, 2019.
The order denied the plaintiffs' motion pursuant to RPAPL 911 for the appointment of a Referee to ascertain and report the rights, shares, and interests of the parties in the subject property.

ORDERED that the order is reversed, on the law, with costs, the plaintiffs' motion for the appointment of a Referee to ascertain and report the rights, shares, and interests of the parties in the subject property is granted, and the matter is remitted to the Supreme Court, Kings County, for the appointment of a Referee pursuant to RPAPL 911 and 913.
The plaintiffs commenced this action for the partition and sale of certain real property which they owned as tenants-in-common with the defendant.
The plaintiffs subsequently moved pursuant to RPAPL 911 for the appointment of a Referee to ascertain and report the rights, shares, and interests of the parties in the subject property. The Supreme Court denied the motion. The plaintiffs appeal.
The plaintiffs are tenants-in-common with the defendant with respect to the subject property, and each party owns a one-third interest in the property. The defendant has not disputed the plaintiffs' ownership and possessory rights and, therefore, the plaintiffs are prima facie entitled to partition of the property (*see Holley v. Hinson–Holley*, 101 A.D.3d 1084, 1085, 956 N.Y.S.2d 513; *Dalmacy v. Joseph*, 297 A.D.2d 329, 330, 746 N.Y.S.2d 312). The defendant did not raise a triable issue of fact regarding the plaintiffs' right to possession of the subject property.
However, before a partition may be directed, a determination must be made as to the "rights, shares, or interests of the parties, and whether partition may be had without great prejudice" (*Lauriello v. Gallotta*, 70 A.D.3d 1009, 1010, 895 N.Y.S.2d 495; *see* RPAPL 911, 915; *Wolfe v. Wolfe*, 187 A.D.2d 628, 629, 590 N.Y.S.2d 504; *Grossman v. Baker*, 182 A.D.2d 1119, 583 N.Y.S.2d 92; *George v. Bridbord*, 113 A.D.2d 869, 871, 493 N.Y.S.2d 794). Further, it must be determined whether there are any creditors with liens on the subject property (*see* RPAPL 913).
Accordingly, we reverse the order appealed from, grant the plaintiffs' motion, and remit the matter to the Supreme Court, Kings County, to appoint a Referee to determine the parties' respective interests in the subject property *379 and to determine whether there are any creditors with liens on the property.
SCHEINKMAN, P.J., BALKIN, CHAMBERS and WOOTEN, JJ., concur.

185 A.D.3d 796
Supreme Court, Appellate Division, Second Department, New York.
HSBC BANK USA, NATIONAL ASSOCIATION, etc., respondent,
v.
Teri TIGANI, et al., defendants,
Two Edgewood Partners, LLC, appellant.
2018-098272018-09828(Index No. 66387/16)
Argued—December 5, 2019July 15, 2020

MARK C. DILLON, J.P., JEFFREY A. COHEN, COLLEEN D. DUFFY, FRANCESCA E. CONNOLLY, JJ.
DECISION & ORDER
*1 In an action to foreclose a mortgage, the defendant Two Edgewood Partners, LLC, appeals from (1) an order of the Supreme Court, Westchester County (Mary H. Smith, J.), dated July 11, 2018, and (2) a judgment of foreclosure and sale of the same court also dated July 11, 2018. The order granted the plaintiff's motion to confirm a Referee's report and for a judgment of foreclosure and sale. The judgment of foreclosure and sale, upon an order of the same court dated May 3, 2017, inter alia, granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Two Edgewood Partners, LLC, to strike that defendant's answer, and to appoint a Referee to compute the amount due to the plaintiff, and upon the order dated July 11, 2018, inter alia, confirmed the Referee's report and directed the sale of the subject property.
ORDERED that the appeal from the order dated July 11, 2018, is dismissed; and it is further,
ORDERED that the judgment of foreclosure and sale is reversed, on the law, the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale is denied, the Referee's report is rejected, the order dated July 11, 2018, is modified accordingly, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith; and it is further,
ORDERED that one bill of costs is awarded to the defendant Two Edgewood Partners, LLC.
The appeal from the order dated July 11, 2018, must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment of foreclosure and sale (*see Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment of foreclosure and sale (*see* CPLR 5501[a][1]).
On September 16, 2005, the defendant Teri Tigani executed a note in the sum of $760,000 in favor of GreenPoint Mortgage Funding, Inc. The note was secured by a mortgage executed by Tigani encumbering certain real property located in Rye Brook (hereinafter the premises). Tigani later transferred title to the premises to the defendant Two Edgewood Partners, LLC (hereinafter TEP).
In October 2016, the plaintiff commenced this action against Tigani and TEP, among others, to foreclose the mortgage. A copy of the subject mortgage and note, which contained an undated endorsement to the plaintiff, was annexed to the complaint. The complaint alleged, among other things, that Tigani did not comply with the terms of the note and mortgage inasmuch as she failed to make a payment that was due on June 1, 2009, and subsequent payments. Tigani failed to answer the complaint; however, TEP answered the complaint, raising, inter alia, the affirmative defenses of lack of standing and failure to comply with RPAPL 1304. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against TEP, to strike TEP's answer, for leave to enter a default judgment in its favor against the remaining defendants, and to appoint a Referee to compute the amount due to the plaintiff. TEP opposed the motion. In an order dated May 3, 2017, the Supreme Court granted the plaintiff's motion. The next day, the Supreme Court issued an order, inter alia, striking TEP's answer and appointing a Referee. Thereafter, the plaintiff moved to confirm the Referee's report and for a judgment of foreclosure and sale. TEP opposed the motion. By order dated July 11, 2018, the court granted the plaintiff's motion. A judgment of foreclosure and sale was issued that same date, inter alia, confirming the Referee's report and directing the sale of the subject property.
*2 123As a threshold matter, we reject TEP's contention that summary judgment was premature because discovery has not been completed. “A party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Reale v. Tsoukas,* 146 A.D.3d 833, 835, 45 N.Y.S.3d 148 [internal quotation marks omitted]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*HSBC Bank USA, N.A. v. Armijos,* 151 A.D.3d 943, 944, 57 N.Y.S.3d 205 [internal quotation marks omitted]). Here, TEP failed to satisfy its burden (*see Wells Fargo Bank, N.A. v. Gonzalez,* 174 A.D.3d 555, 557–558, 104 N.Y.S.3d 167; *Wells Fargo Bank, N.A. v. Sasson,* 167 A.D.3d 818, 819, 90 N.Y.S.3d

72; *Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.,* 165 A.D.3d 1233, 1235–1236, 87 N.Y.S.3d 604).

456"Where, as here, a defendant raises lack of standing as a defense, the plaintiff bears the burden of demonstrating its standing" (*U.S. Bank N.A. v. Echevarria,* 171 A.D.3d 979, 980, 97 N.Y.S.3d 708; *see Bank of N.Y. Mellon v. Gordon,* 171 A.D.3d 197, 203, 97 N.Y.S.3d 286). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d 355, 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *U.S. Bank N.A. v. Echevarria,* 171 A.D.3d at 980, 97 N.Y.S.3d 708; *Nationstar Mtge., LLC v. Rodriguez,* 166 A.D.3d 990, 992, 89 N.Y.S.3d 205). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v. Echevarria,* 171 A.D.3d at 980, 97 N.Y.S.3d 708; *see Nationstar Mtge., LLC v. Rodriguez,* 166 A.D.3d at 992, 89 N.Y.S.3d 205).

7Here, contrary to TEP's contention, the plaintiff established its standing by attaching a copy of the note, endorsed to the plaintiff, to the complaint, thereby "demonstrating that it had physical possession of the note when it commenced the action" (*U.S. Bank N.A. v. Fisher,* 169 A.D.3d 1089, 1090–1091, 95 N.Y.S.3d 114; *see U.S. Bank N.A. v. Combs,* 177 A.D.3d 1014, 1016, 113 N.Y.S.3d 171; *U.S. Bank N.A. v. Echevarria,* 171 A.D.3d at 980, 97 N.Y.S.3d 708; *JPMorgan Chase Bank, N.A. v. Roseman,* 137 A.D.3d 1222, 1223, 29 N.Y.S.3d 380). In opposition, TEP failed to raise a triable issue of fact as to whether the plaintiff had standing. Inasmuch as the mortgage "passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 754, 890 N.Y.S.2d 578; *see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d at 362, 12 N.Y.S.3d 612, 34 N.E.3d 363), TEP's arguments regarding the validity and timing of various assignments of the mortgage are irrelevant to the issue of standing (*see Aurora Loan Servs., LLC v. Taylor,* 23 N.Y.3d at 362, 991 N.Y.S.2d 9, 14 N.E.3d 362; *U.S. Bank N.A. v. Combs,* 177 A.D.3d at 1016, 113 N.Y.S.3d 171; *Bank of N.Y. Mellon v. Hosein,* 172 A.D.3d 798, 799, 100 N.Y.S.3d 360; *U.S. Bank N.A. v. Echevarria,* 171 A.D.3d at 981, 97 N.Y.S.3d 708; *Bank of N.Y. Mellon v. Gordon,* 171 A.D.3d 197, 204, 97 N.Y.S.3d 286).

8TEP's contention that the plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 is without merit. The notice requirements of RPAPL 1304 were enacted for the benefit and protection of borrowers who are "natural person[s]" (RPAPL 1304[6][a][1][i]). Although TEP, as the alleged current owner of the premises, is a proper party to this foreclosure action, the statutory defense created by RPAPL 1302(2) for noncompliance with RPAPL 1304 is a " 'personal defense' which could not be raised by [TEP], a stranger to the note and underlying mortgage" (*Bank of N.Y. Mellon Trust Co., NA v. Obadia,* 176 A.D.3d 1020, 1024, 111 N.Y.S.3d 59, quoting *Greene v. Rachlin,* 154 A.D.3d 814, 816, 63 N.Y.S.3d 78). Accordingly, we agree with the Supreme Court's determination to grant those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against TEP, to strike TEP's answer, and to appoint a Referee to compute the amount due to the plaintiff.

*3 TEP's contention regarding execution of the out-of-state affidavits is without merit (*see* CPLR 2309; Real Property Law § 309–b).

910However, the Supreme Court should not have confirmed the Referee's report in the absence of a hearing on notice to TEP (*see* CPLR 4313; *Aurora Loan Servs., LLC v. Taylor,* 114 A.D.3d 627, 629, 980 N.Y.S.2d 475, *affd* 25 N.Y.3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363; *243 W. 98th Condominium v. Shapiro,* 12 A.D.3d 591, 592, 786 N.Y.S.2d 67). Although the notice accompanying the plaintiff's proposed Referee's oath notified TEP of the due date for the submission of documents to the Referee, it did not indicate that the submission of such papers would be in lieu of a hearing (*see Excel Capital Group Corp. v. 225 Ross St. Realty, Inc.,* 165 A.D.3d at 1236, 87 N.Y.S.3d 604). Further, the Supreme Court erred in rejecting TEP's contention, raised in opposition to the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, that " '[t]he Referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records' " (*U.S. Bank N.A. v. Calabro,* 175 A.D.3d 1451, 1452, 109 N.Y.S.3d 126, quoting *Citimortgage, Inc. v. Kidd,* 148 A.D.3d 767, 768–769, 49 N.Y.S.3d 482; *see Nationstar Mtge., LLC v. Durane–Bolivard,* 175 A.D.3d 1308, 1310–1311, 109 N.Y.S.3d 99; *Bank of N.Y. Mellon v. Gitit Graffi,* 172 A.D.3d 1148, 1149, 102 N.Y.S.3d 61).

Moreover, the Referee's report also failed to identify any documents or other sources upon which the Referee based her finding that the mortgaged premises should be sold in one parcel (*see Citimortgage, Inc. v. Kidd,* 148 A.D.3d at 769, 49 N.Y.S.3d 482).

Accordingly, we reverse the judgment of foreclosure and sale, deny the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, modify the order dated July 11, 2018, accordingly, remit the matter to the Supreme Court, Westchester County, for a hearing and a new report

computing the amount due to the plaintiff in accordance herewith and determining whether the subject premises can be sold in one parcel, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter.
DILLON, J.P., COHEN, DUFFY and CONNOLLY, JJ., concur.

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

Aurora Loan Servs., LLC v Tobing

2019 NY Slip Op 03751

Decided on May 15, 2019

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 May 15, 2019 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department
REINALDO E. RIVERA, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
ROBERT J. MILLER, JJ.

2017-05945
(Index No. 103567/08)

[*1]Aurora Loan Services, LLC, appellant,

v

Sylvia Tobing, respondent, et al., defendants.

Sandelands Eyet LLP, New York, NY (Margaret S. Stefandl and Tiffany L. Maldonado of counsel), for appellant.

DECISION & ORDER
In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Richmond County (Philip J. Minardo, J.), dated March 13, 2014. The order, upon a decision of the same court (Peter G. Geis, Ct. Atty. Ref.), dated December 18, 2013, in effect, denied the plaintiff's motion for summary judgment on the complaint and for an order of reference, and searched the record and awarded summary judgment in favor of the defendant Sylvia Tobing dismissing the complaint.
ORDERED that the order is modified, on the law, by deleting the provision thereof searching the record and awarding summary judgment in favor of the defendant Sylvia Tobing dismissing the complaint; as so modified, the order is affirmed, without costs or disbursements.
In August 2008, the plaintiff commenced this action to foreclose a mortgage given by the defendant Sylvia Tobing (hereinafter the defendant), encumbering certain real property on Staten Island (hereinafter the mortgaged premises). The complaint, and the subsequently filed amended complaint, both alleged that the defendant defaulted under the terms of the note and mortgage by failing to make certain required monthly payments that were due on May 1, 2008, and thereafter. The complaint and the amended complaint both stated that, given the defendant's default, the plaintiff elected "to call due the entire amount secured by the mortgage."
The defendant interposed a verified answer in response to the plaintiff's allegations. As relevant here, the defendant asserted one affirmative defense which alleged that "[t]he plaintiff failed to satisfy a condition precedent prior to the commencement of this action."
The plaintiff subsequently moved for summary judgment on the complaint and for an order of reference. The defendant opposed the plaintiff's motion. The defendant argued that paragraph 22 of the subject mortgage required the plaintiff to provide her with written notice of her default at least 30 days before the plaintiff was permitted to accelerate the loan. The defendant argued that the plaintiff's motion for summary

judgment should be denied because there was "a genuine issue of material fact as to whether the Plaintiff accelerated the Mortgage pursuant to the terms of the Mortgage." The defendant also argued, among other things, that she was entitled to summary judgment dismissing the complaint.

In an amended order dated October 18, 2013, the Supreme Court directed a Court Attorney Referee (hereinafter the Referee) to hear and determine "[w]hether the 30-day Notice [of default] was properly sent" in accordance with the terms of the subject mortgage. In a decision dated December 18, 2013, the Referee determined that the 30-day notice relied upon by the plaintiff had not been sent to the mortgaged premises as required by the terms of the mortgage. Accordingly, the Referee concluded that "the 30 day notice was not properly sent."

In the order appealed from, the Supreme Court, upon the determination of the Referee, in effect, denied the plaintiff's motion for summary judgment on the complaint and for an order of reference, and searched the record and awarded summary judgment in favor of the defendant dismissing the complaint.

The plaintiff contends, inter alia, (1) that the Supreme Court improperly referred the matter to the Referee to hear and determine a contested factual issue, and (2) that the Supreme Court erred in searching the record and awarding the defendant summary judgment because the 30-day notice of default is a condition precedent to acceleration, not a condition precedent to commencing a foreclosure action. We modify.

"In a court which has jurisdiction over the subject matter of the litigation, the parties may agree, within broad limits, as to the mode of trial" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY 416, 419; *accord* CPLR 4317[a]). "Statutory procedures and, indeed, even the constitutionally protected right to a jury trial may be waived by the parties' acquiescence in the procedure adopted" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 419-420; *see Matter of Powley v Dorland Bldg. Co.*, 281 NY 423, 429). "The appointment of a Referee to hear and determine, made by a court fully vested with jurisdiction, relates only to the form of trial and, if upon consent, is unassailable" (*Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 420 [citation omitted]).

Here, the plaintiff waived its right to object to the Supreme Court's authority to order a reference to determine whether the 30-day notice of default was properly sent in accordance with the terms of the subject mortgage by failing to object to the reference and by actively participating in the hearing before the Referee (*see S. Nicolia & Sons Realty Corp. v A.J.A. Concrete Ready Mix, Inc.*, 137 AD3d 994, 994; *Winopa Intl., Ltd. v Woori Am. Bank*, 59 AD3d 203, 204; *Cogen v Robin Klinger Children's Entertainment*, 17 AD3d 619, 620; *587 Dev., Inc. v Pizzuto*, 8 AD3d 5, 5). 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" (*Matter of Powley v Dorland Bldg. Co.*, 281 NY at 429; *see Matter of Wolf v Assessors of Town of Hanover*, 308 NY at 420; *S. Nicolia & Sons Realty Corp. v A.J.A. Concrete Ready Mix, Inc.*, 137 AD3d at 994).

The plaintiff's remaining contention with respect to the determination of the Referee is without merit. Inasmuch as the complaint purports to accelerate the loan and seeks to recover the entire outstanding amount of the loan, the Referee's determination that the plaintiff had not complied with a condition precedent to acceleration required the denial of the plaintiff's motion for summary judgment on the complaint and for an order of reference (*see Wilmington Sav. Fund Socy. FSB v Yisroel*, 166 AD3d 1056, 1056-1057; *Emigrant Bank v Myers*, 147 AD3d 1027, 1027-1028; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153; *cf. Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 659). However, the plaintiff's failure to demonstrate that it properly accelerated the entire amount of the loan prior to the commencement of this action does not, as a matter of law, necessarily preclude the plaintiff from recovering on the unpaid installments which have already come due. "With respect to a mortgage payable in installments, separate causes of action accrue[ ] for each installment that is not paid" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982; *see Fulton Holding Group, LLC v Lindoff*, 165 AD3d 1053, 1055-1056; *see also* 2 Bergman on New York Mortgage Foreclosures § 17.02). In New York, "partial foreclosure exists as a form of judicial foreclosure" (2 Bergman on New York Mortgage Foreclosures § 17.01; *accord* RPAPL 1351[2]), [*2]and permits a lender to recover unpaid installments that have become due, without accelerating the remaining portion of the debt (*see Golden v Ramapo Improvement Corp.*, 78 AD2d 648, 650-651; *see also* 2 Bergman on New York Mortgage Foreclosures § 17.03). Accordingly, as the plaintiff correctly contends, compliance with the conditions of acceleration contained in paragraph 22 of the subject mortgage is not a condition precedent to commencing this foreclosure action to the extent that the plaintiff seeks to recover unpaid amounts that have already come due under the terms of the note and mortgage (*see Golden v Ramapo Improvement Corp.*, 78 AD2d at 650-651). Under these circumstances, the Supreme Court should not have searched the record and awarded summary judgment in favor of the defendant dismissing the complaint (*see* CPLR 3212[b]; *see generally Goetz v Trinidad*, 168 AD3d 688).

RIVERA, J.P., BALKIN, CHAMBERS and MILLER, JJ., concur.

ENTER:
Aprilanne Agostino
Clerk of the Court

181 A.D.3d 688
Supreme Court, Appellate Division, Second Department, New York.
NATIONSTAR MORTGAGE, LLC, Respondent,
v.
Peter CAVALLARO, Appellant.
2017-069742017-06975Index No. 64280/13
Argued—December 5, 2019March 11, 2020

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

DECISION & ORDER
*688 In an action to foreclose a mortgage, the defendant appeals from (1) an order of the Supreme Court, Suffolk County (Arthur G. Pitts, J.), dated May 2, 2017, and (2) an order and judgment of foreclosure and sale (one paper) of the same court, entered May 8, 2017.
The order granted the plaintiff's motion to confirm a Referee's report and for a judgment of foreclosure and sale. The order and judgment of foreclosure and sale, inter alia, granted the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, confirmed the Referee's report, and directed the sale of the subject property.
ORDERED that the appeal from the order is dismissed; and it is further,
ORDERED that the order and judgment of foreclosure and sale is reversed, on the law, the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale is denied, the Referee's report is rejected, the order is modified accordingly, and the matter is remitted to the Supreme Court, Suffolk County, for a new report computing the amount due to the plaintiff, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter; and it is further,
ORDERED that one bill of costs is awarded to the defendant.
The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501[a][1]).
"The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility" (**867 *Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768, 49 N.Y.S.3d 482; *see Matter of Cincotta*, 139 A.D.3d 1058, 32 N.Y.S.3d 610; *689 *Hudson v. Smith*, 127 A.D.3d 816, 4 N.Y.S.3d 894). Here, contrary to the plaintiff's contention, the affidavit of its document execution specialist, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records he purportedly relied upon in making his calculations (*see generally Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 208–209, 97 N.Y.S.3d 286). Under the circumstances, the Referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record (*see U.S. Bank N.A. v. Calabro*, 175 A.D.3d 1451, 109 N.Y.S.3d 126; *Citimortgage, Inc. v. Kidd*, 148 A.D.3d at 768–769, 49 N.Y.S.3d 482).
In view of our determination, we need not reach the defendant's remaining contention.
Accordingly, we reverse the order and judgment of foreclosure and sale, deny the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale, modify the order accordingly, and remit the matter to the Supreme Court, Suffolk County, for a new report computing the amount due to the plaintiff in accordance herewith, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter.
SCHEINKMAN, P.J., HINDS–RADIX, BARROS and WOOTEN, JJ., concur.

Nationstar Mortg., LLC v. Cavallaro, 181 A.D.3d 688, 688–89, 117 N.Y.S.3d 866, (Mem)–867 (2020)

181 A.D.3d 1010
Supreme Court, Appellate Division, Third Department, New York.
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent,
v.
Robert SYVERSEN et al., Appellants, et al., Defendants.
527447
Calendar Date: January 15, 2020Decided and Entered: March 5, 2020

Robert Syverson and Vicki Syversen, DPO AA, appellants pro se.
Goldberg Segalla LLP, Buffalo (Marc W. Brown of counsel), for respondent.
Before: Lynch, J.P., Clark, Devine, Pritzker and Colangelo, JJ.
MEMORANDUM AND ORDER
Per Curiam.
*1010 Appeals (1) from an order of the Supreme Court (Mackey, J.), entered December 28, 2017 in Albany County, which denied a motion by defendants Robert Syversen and Vicki Syversen for dismissal of the complaint against them, and (2) from an order of said court, entered April 13, 2018 in Albany County, which granted plaintiff's motion for summary judgment.
In 2008, as part of a mortgage foreclosure action commenced by Countrywide Home Loans, Inc. against DBR Holdings, LLC, Donovan B. Rhoden, Alicia Kratt and others, Supreme Court (Teresi, J.) entered a default judgment of foreclosure and sale directing, among other things, that certain residential real property LOCATED in Albany County be sold at public auction. In 2013, in response to Administrative Orders AO/548/10 and AO/431/11 of the Chief Administrative Judge of the Courts, Countrywide moved to ratify and confirm the judgment of foreclosure and sale. Rhoden and Kratt opposed the motion and cross-moved to vacate the judgment of foreclosure and sale (*see* CPLR 5015). By order entered in November 2013, Supreme *1011 Court denied both motions.[1] Countrywide thereafter proceeded with a foreclosure sale, and the property was ultimately purchased by plaintiff in April 2014 for $216,000. The resulting Referee's deed was recorded in June 2014.
In May 2014, DBR Holdings, Rhoden and Kratt moved to vacate the foreclosure sale, arguing that Countrywide had failed to comply with the applicable Administrative Orders. By order entered in December 2014, Supreme Court (McDonough, J.) denied the motion, finding that Countrywide **513 had complied with the Administrative Orders. Rhoden subsequently appealed from the December 2014 order, and this Court ultimately affirmed, albeit on different grounds (*Countrywide Home Loans, Inc. v. DBR Holdings, LLC,* 149 A.D.3d 1360, 1360–1361, 53 N.Y.S.3d 219 [2017]).
In March 2015, despite their knowledge of the 2014 foreclosure sale, Kratt and DBR Holdings executed a quitclaim deed purporting to convey the property to Rhoden for the sum of $10. Thereafter, in August 2016, Rhoden executed a quitclaim deed purporting to convey the property to “Robert Rustad Syversen, Estate” for nominal consideration.[2] Based upon this ostensible conveyance, defendants Robert Syversen and Vicki Syversen (hereinafter collectively referred to as defendants) moved into the property with their children.
In September 2017, after learning that defendants had taken possession of the property, plaintiff commenced this RPAPL article 15 action to, among other things, quiet title to the property. Without answering, defendants moved – pro se – for dismissal of the complaint. By a December 2017 order, Supreme Court (Mackey, J.) denied the motion. Defendants then answered and asserted various affirmative defenses and a counterclaim for failure to state a claim. Plaintiff subsequently moved for summary judgment quieting title to the subject property. In April 2018, Supreme Court granted plaintiff's motion for summary judgement and dismissed defendants' affirmative defenses and counterclaim. Defendants appeal from both the December 2017 order and the April 2018 order.
Initially, defendants' appeal from the nonfinal December 2017 order must be dismissed, inasmuch as defendants' right to appeal therefrom terminated upon entry of the final April 2018 order granting summary judgment to plaintiff (*see U.S. Bank Trust, N.A. v. Lynch,* 168 A.D.3d 1242, 1243, 92 N.Y.S.3d 443 [2019]; *1012 *Augusta v. Kwortnik,* 161 A.D.3d 1401, 1403, 78 N.Y.S.3d 726 [2018]). Although defendants' appeal from the April 2018 final order brings the December 2017 order up for review (*see* CPLR 5501[a][1]), defendants have affirmatively abandoned their appeal from the December 2017 order and, thus, have abandoned any arguments that could have been made with respect to that order (*see GM Broadcasting, Inc. v. Cornelius Enters., LLC,* 156 A.D.3d 1038, 1039, 66 N.Y.S.3d 548 [2017]).
Turning to the merits, to establish its entitlement to summary judgment, plaintiff bore the burden of demonstrating that it holds title to the property (*see Town of Fowler v. Parow,* 144 A.D.3d 1444, 1446, 42 N.Y.S.3d 416 [2016]; *White Sands Motel Holding Corp. v. Trustees of Freeholders & Commonalty of Town of E. Hampton,* 142 A.D.3d 1073, 1074, 37 N.Y.S.3d 583 [2016]).

To that end, plaintiff submitted the 2008 judgment of foreclosure and sale directing that the property be sold at public auction, the November 2013 order denying Rhoden and Kratt's motion to vacate the judgment of foreclosure and sale, the April 2014 Referee's deed conveying title to the property to plaintiff (recorded in June 2014), the December 2014 order denying Rhoden and DBR Holdings' motion to vacate the foreclosure sale, this Court's decision affirming the December 2014 order (*Countrywide Home Loans, Inc. v. DBR Holdings, LLC,* 149 A.D.3d 1360, 53 N.Y.S.3d 219 [2017], *supra*), and the **514 March 2015 and August 2016 quitclaim deeds. Together, these submissions demonstrated that plaintiff holds valid title to the property and, thus, satisfied plaintiff's burden of demonstrating a prima facie case of entitlement to judgment as a matter of law (*see Herbold v. LaBarre,* 152 A.D.3d 1028, 1028–1029, 59 N.Y.S.3d 201 [2017]; *Bergstrom v. McChesney,* 92 A.D.3d 1125, 1126, 938 N.Y.S.2d 663 [2012]).

In opposition, defendants failed to satisfy their burden of raising a triable issue of fact precluding summary judgment (*see Bergstrom v. McChesney,* 92 A.D.3d at 1126, 938 N.Y.S.2d 663).

Defendants argued that the 2014 Referee's deed was invalid as a result of procedural flaws in the foreclosure sale. However, the 2014 Referee's deed had already been unsuccessfully challenged on this ground in the context of the prior foreclosure action and, thus, defendants were precluded from relitigating that issue in this action (*see Buechel v. Bain,* 97 N.Y.2d 295, 304–305, 740 N.Y.S.2d 252, 766 N.E.2d 914 [2001], *cert denied* 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 [2002]; *Parker v. Blauvelt Volunteer Fire Co.,* 93 N.Y.2d 343, 349–350, 690 N.Y.S.2d 478, 712 N.E.2d 647 [1999]). Accordingly, as plaintiff established that it holds title to the property by virtue of the valid 2014 Referee's deed and that, therefore, the grantors in the 2015 and 2016 quitclaim deeds had no interest in the property to convey, Supreme Court properly determined that plaintiff was entitled to summary judgment quieting title to *1013 the property (*see1259 Lincoln Place Corp. v. Bank of N.Y.,* 159 A.D.3d 1004, 1005, 74 N.Y.S.3d 575 [2018]; *Bergstrom v. McChesney,* 92 A.D.3d at 1126–1128, 938 N.Y.S.2d 663).

To the extent that we have not expressly addressed any of defendants' arguments, they have been reviewed and found to be without merit.

Lynch, J.P., Clark, Devine, Pritzker and Colangelo, JJ., concur.

ORDERED that the appeal from the order entered December 28, 2017 is dismissed, without costs.

ORDERED that the order entered April 13, 2018 is affirmed, without costs.

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

178 A.D.3d 680
Supreme Court, Appellate Division, Second Department, New York.
HSBC BANK USA, NATIONAL ASSOCIATION, etc., Respondent,
v.
Antoine Y. CHERESTAL, Appellant, et al., Defendants.
2016–118382018–07536(Index No. 511359/14)
Argued—September 19, 2019December 4, 2019

**207 Berg & David, PLLC, Brooklyn, N.Y. (Abraham David, Madeline Greenblatt, and Sholom Wohlgelernter of counsel), for appellant.
Hogan Lovells U.S. LLP, New York, N.Y. (David Dunn, Chava Brandriss, Leah Rabinowitz Lenz, Lisa J. Fried, and Leah Edmunds of counsel), for respondent.
ALAN D. SCHEINKMAN, P.J., REINALDO E. RIVERA, CHERYL E. CHAMBERS, VALERIE BRATHWAITE NELSON, JJ.
DECISION & ORDER
*680 In an action to foreclose a mortgage, the defendant Antoine Y. Cherestal appeals from (1) an order of the Supreme Court, Kings County (Noach Dear, J.), dated September 6, 2016, and (2) an order and judgment of foreclosure and sale (one paper) of the same court dated March 27, 2018. The order denied the motion of the defendant Antoine Y. Cherestal pursuant to CPLR 317 to vacate his default and to compel the plaintiff to accept his late answer. The order and judgment of foreclosure and *681 sale, upon an order of the same court dated March 27, 2018, inter alia, denying that branch of the cross motion of the defendant Antoine Y. Cherestal which was to reject the Referee's report, inter alia, granted the plaintiff's motion for a judgment of foreclosure and sale, confirmed the Referee's report, and directed the sale of the subject property.
ORDERED that the appeal from the order dated September 6, 2016, is dismissed; and it is further,
ORDERED that the order and judgment of foreclosure and sale is reversed, on the law, the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale is denied, that branch of the cross motion of the defendant Antoine Y. Cherestal which was to reject the Referee's report is granted, the Referee's report is rejected, the order dated March 27, 2018, is modified accordingly, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith; and it is further,
ORDERED that one bill of costs is awarded to the defendant Antoine Y. Cherestal.
The appeal from the order dated September 6, 2016, must be dismissed as the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale (*see Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from that order are brought up for **208 review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501[a][1]).
In December 2014, the plaintiff commenced this action against the defendant Antoine Y. Cherestal (hereinafter the defendant), among others, to foreclose a mortgage on real property located in Brooklyn. The defendant failed to timely appear or answer the complaint. In May 2016, the defendant moved to vacate his default and to compel the plaintiff to accept his late answer. By order dated September 6, 2016, the Supreme Court denied the defendant's motion. The court subsequently referred the matter to a Referee to ascertain and compute the amount due to the plaintiff.
In April 2017, the plaintiff moved to confirm the Referee's report and for a judgment of foreclosure and sale. The defendant cross-moved, inter alia, to reject the Referee's report. By order dated March 27, 2018, the Supreme Court denied that branch of the defendant's cross motion and, on the same day, issued an order and judgment of foreclosure and sale, inter alia, confirming the Referee's report and directing the sale of the subject property.
123We agree with the Supreme Court's denial of the defendant's *682 motion pursuant to CPLR 317 to vacate his default and to compel the plaintiff to accept his late answer. CPLR 317 permits a defendant who has been served with a summons and complaint other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons and complaint in time to defend and has a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.,* 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116; *Taron Partners, LLC v. McCormick,* 173 A.D.3d 927, 929, 103 N.Y.S.3d 485; *Wassertheil v. Elburg, LLC,* 94 A.D.3d 753, 754, 941 N.Y.S.2d 679). Although it is not necessary for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for his or her delay (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.,* 67 N.Y.2d at

141, 501 N.Y.S.2d 8, 492 N.E.2d 116), “to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action” (*Taron Partners, LLC,* 173 A.D.3d at 929, 103 N.Y.S.3d 485 [internal quotation marks omitted]; *Wassertheil v. Elburg, LLC,* 94 A.D.3d at 754, 941 N.Y.S.2d 679 [internal quotation marks omitted]).

4Here, the defendant was not entitled to relief pursuant to CPLR 317, as he failed to show that he did not receive notice of the action in time to defend himself against it (*see Citimortgage, Inc. v. Kowalski,* 130 A.D.3d 558, 558, 13 N.Y.S.3d 468). The mere denial of receipt of the summons and complaint is insufficient to establish a lack of actual notice for the purpose of CPLR 317 (*see Citimortgage, Inc. v. Kowalski,* 130 A.D.3d at 558, 13 N.Y.S.3d 468; *U.S. Bank N.A. v. Hasan,* 126 A.D.3d 683, 684–685, 5 N.Y.S.3d 460). Moreover, the defendant failed to establish a potentially meritorious defense based on lack of standing, since the plaintiff annexed the note, indorsed in blank, to the complaint at the time the action was commenced (*see U.S. Bank, N.A. v. Nathan,* 173 A.D.3d 1112, 1114, 104 N.Y.S.3d 144; *Wells Fargo Bank, N.A. v. Ballard,* 172 A.D.3d 1440, 1441–1442, 102 N.Y.S.3d 229; *U.S. Bank, N.A. v. Fisher,* 169 A.D.3d 1089, 1090, 95 N.Y.S.3d 114).

567However, the Supreme Court should have granted that branch of the defendant's cross motion which was to reject **209 the Referee's report. “The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility” (*Flagstar Bank, F.S.B. v. Konig,* 153 A.D.3d 790, 790–791, 60 N.Y.S.3d 360; *see JNG Constr., Ltd. v. Roussopoulos,* 170 A.D.3d 1136, 1141, 96 N.Y.S.3d 655; *Citimortgage, Inc. v. Kidd,* 148 A.D.3d 767, 768, 49 N.Y.S.3d 482). “The Referee's findings and recommendations are advisory only and have no binding effect on the court, which *683 remains the ultimate arbiter of the dispute” (*Citimortgage, Inc. v. Kidd,* 148 A.D.3d at 768, 49 N.Y.S.3d 482; *see Shultis v. Woodstock Land Dev. Assoc.,* 195 A.D.2d 677, 678, 599 N.Y.S.2d 340).

Here, in addition to the outstanding principal amount of the loan, along with accrued interest and charges, the Referee included $507,095.35 in “Tax Disbursements” and $27,705.00 in “Hazard Insurance Disbursements” as part of the total amount due to the plaintiff. The defendant correctly objected to the inclusion of these disbursements on the ground that they were calculated based on business records that were never produced by the plaintiff or submitted to the Referee (*see* CPLR 4518[a]; *Citimortgage, Inc. v. Kidd,* 148 A.D.3d at 768–769, 49 N.Y.S.3d 482; *see also Bank of N.Y. Mellon v. Gordon,* 171 A.D.3d 197, 205–206, 97 N.Y.S.3d 286).

The parties' remaining contentions are without merit.

Accordingly, we reverse the order and judgment of foreclosure and sale, deny the plaintiff's motion to confirm the Referee's report and for a judgment of foreclosure and sale; grant that branch of the defendant's cross motion which was to reject the Referee's report, modify the order dated March 27, 2018, accordingly, and remit the matter to the Supreme Court, Kings County, for a new report computing the amount due to the plaintiff in accordance herewith, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter (*see Citimortgage v. Kidd,* 148 A.D.3d at 769, 49 N.Y.S.3d 482).

SCHEINKMAN, P.J., RIVERA, CHAMBERS and BRATHWAITE NELSON, JJ., concur.

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)

175 A.D.3d 1451
Supreme Court, Appellate Division, Second Department, New York.
U.S. BANK NATIONAL ASSOCIATION, etc., Respondent,
v.
Daniel CALABRO, etc., et al., Appellants, et al., Defendant.
2017-03873(Index No. 25109/11)
Argued—April 5, 2019September 18, 2019

Charles H. Wallshein, Melville, NY, for appellants.
Shapiro, DiCaro & Barak, LLC, Rochester, N.Y. (Austin T. Shufelt of counsel), for respondent.
MARK C. DILLON, J.P., ROBERT J. MILLER, SYLVIA O. HINDS–RADIX, FRANCESCA E. CONNOLLY, JJ.
**127 DECISION & ORDER
*1451 ORDERED that the order and judgment of foreclosure and sale is reversed insofar as appealed from, on the law, with costs, the plaintiff's motion to confirm the Referee's report is denied, and the Referee's report is rejected.
The plaintiff commenced this action to foreclose a mortgage secured by real property owned by the defendants Daniel Calabro and Joanne Calabro (hereinafter together the defendants), alleging that they defaulted on their loan payments. The plaintiff moved, inter alia, for summary judgment. Upon reargument and renewal, the plaintiff was awarded summary judgment, and a Referee was appointed to compute the amount due. In an order and judgment of foreclosure and sale entered *1452 January 30, 2017, the Supreme Court, inter alia, granted the plaintiff's motion to confirm the Referee's report and directed the sale of the subject property. The defendants appeal.
12We agree with the Supreme Court's conclusion that the plaintiff established its standing to commence this action by annexing to the complaint a copy of the note, endorsed to the plaintiff (*see U.S. Bank N.A. v. Fisher*, 169 A.D.3d 1089, 95 N.Y.S.3d 114; *Nationstar Mtge., LLC v. Rodriguez*, 166 A.D.3d 990, 992, 89 N.Y.S.3d 205; *Wells Fargo Bank, N.A. v. Frankson*, 157 A.D.3d 844, 845, 66 N.Y.S.3d 529; *Deutsche Bank Natl. Trust Co. v. Carlin*, 152 A.D.3d 491, 492, 61 N.Y.S.3d 16; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 645, 37 N.Y.S.3d 286; *JPMorgan Chase Bank, N.A. v. Roseman*, 137 A.D.3d 1222, 1223, 29 N.Y.S.3d 380). “[W]here the note is affixed to the complaint, it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date” (*U.S. Bank N.A. v. Fisher*, 169 A.D.3d at 1091, 95 N.Y.S.3d 114 [internal quotation marks omitted]; *see Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Deutsche Bank Natl. Trust Co. v. Logan*, 146 A.D.3d 861, 863, 45 N.Y.S.3d 189; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d at 645, 37 N.Y.S.3d 286).
3However, the Supreme Court should have denied the plaintiff's motion to confirm the Referee's report. “[T]he Referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records” (*Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768–769, 49 N.Y.S.3d 482; *see Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 208–209, 97 N.Y.S.3d 286).
The parties' remaining contentions are either without merit or need not be addressed in light of our determination.
DILLON, J.P., MILLER, HINDS–RADIX and CONNOLLY, JJ., concur.

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)

174 A.D.3d 860
Supreme Court, Appellate Division, Second Department, New York.
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent,
v.
Faygah PURETZ, et al., Appellants, et al., Defendants.
2017–04073(Index No. 131066/13)
Submitted—April 8, 2019July 31, 2019

Abraham Hoschander, Brooklyn, NY, for appellants.
Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Lijue T. Philip of counsel), for respondent.
JOHN M. LEVENTHAL, J.P., HECTOR D. LASALLE, BETSY BARROS, VALERIE BRATHWAITE NELSON, JJ.
DECISION & ORDER
*860 In an action to foreclose a mortgage, the defendants Faygah Puretz and Aron Puretz appeal from an order of the Supreme Court, Richmond County (Desmond A. Green, J.), dated February 15, 2017. The order granted the plaintiff's motion to confirm a Referee's report dated March 31, 2016, and, in effect, denied the motion of the defendants Faygah Puretz and Aron Puretz to vacate a judgment of foreclosure and sale of the same court dated March 20, 2015, and to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction.
ORDERED that the order is reversed, on the law, with costs, the plaintiff's motion to confirm the Referee's report dated March 31, 2016, is denied, and the motion of the defendants Faygah Puretz and Aron Puretz to vacate the judgment of foreclosure and sale dated March 20, 2015, and to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction is granted.
On October 25, 2013, this action to foreclose a mortgage was commenced against, among others, the defendants Faygah Puretz and Aron Puretz (hereinafter together the defendants). On March 20, 2015, the Supreme Court issued a judgment of foreclosure and sale in favor of the plaintiff. On July 15, 2015, the defendants moved by order to show cause to vacate the judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction.
The court directed a hearing to determine the validity of service of process, which was held before a Referee on November 17, 2015. On March 31, 2016, the Referee issued a report finding that the defendants were properly served and personal jurisdiction had been obtained over them. On November 23, 2016, the plaintiff moved to confirm the Referee's report. In an order dated February 15, 2017, the court granted the plaintiff's motion to confirm the Referee's **306 report and, in effect, denied the defendants' motion to vacate the judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against them. The defendants appeal.
*861 **"The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility"** (*Citimortgage, Inc. v. Kidd,* 148 A.D.3d 767, 768, 49 N.Y.S.3d 482; *see Matter of Cincotta,* 139 A.D.3d 1058, 32 N.Y.S.3d 610; *Hudson v. Smith,* 127 A.D.3d 816, 4 N.Y.S.3d 894). **Here, as the defendants correctly contend, the Supreme Court should not have confirmed the Referee's report. The plaintiff failed to submit any evidence at the hearing of compliance with the mailing requirement of CPLR 308(2) and, thus, failed to demonstrate that personal jurisdiction had been obtained over the defendants (*see Josephs v AACT Fast Collections Servs., Inc.,* 155 A.D.3d 1010, 1012, 66 N.Y.S.3d 17; *Washington Mut. Bank v. Murphy,* 127 A.D.3d 1167, 1174–1175, 10 N.Y.S.3d 95; *Gray–Joseph v. Shuhai Liu,* 90 A.D.3d 988, 989, 934 N.Y.S.2d 868).**
Accordingly, the Supreme Court should have denied the plaintiff's motion to confirm the Referee's report and granted the defendants' motion to vacate the judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction.
LEVENTHAL, J.P., LASALLE, BARROS and BRATHWAITE NELSON, JJ., concur.

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

170 A.D.3d 1438
Supreme Court, Appellate Division, Third Department, New York.
Jacob HERRMANN, Appellant,
v.
BANK OF AMERICA, N.A., Respondent.
525526
Calendar Date: February 14, 2019Decided and Entered: March 28, 2019
Mann Law Firm, PC, Latham (Matthew J. Mann of counsel), for appellant.
Winston & Strawn LLP, New York City (Jason R. Lipkin of counsel), for respondent.
Before: Clark, J.P., Mulvey, Aarons, Rumsey and Pritzker, JJ.
MEMORANDUM AND ORDER
Pritzker, J.
*1438 Appeal from an order of the Supreme Court (McNally Jr., J.), entered July 28, 2017 in Rensselaer County, which, among other things, granted defendant's motion to dismiss the complaint.
In 2002, Mortgage Electronic Registration Systems Inc. (hereinafter MERS) initiated a foreclosure action against plaintiff, among others, based on a mortgage that was secured by property in Rensselaer County (hereinafter the property). Washington Mutual Bank (hereinafter WaMu) serviced the loan at the beginning of the foreclosure action and, subsequently, servicing of the loan transferred to Countrywide Home *1439 Loans, Inc.[1] In 2003, Supreme Court (Griffin, J.) issued a judgment of foreclosure and sale in favor of MERS. On September 3, 2008, Joseph B. Liccardi, the appointed Referee, conducted the foreclosure sale at which MERS was the highest bidder; however, by way of an assignment of bid, the property was conveyed to WaMu.
Thereafter, Liccardi executed a Referee's report of sale and a Referee's deed to that effect, although, according to counsel for MERS, a signed version of the deed does not exist because it was lost and never recorded. Eight years later, in May 2016, after a request by defendant, Liccardi executed an amended assignment of bid from MERS to defendant, an amended Referee's report of sale and a new and different Referee's deed transferring title to defendant, notwithstanding the 2008 conveyance to WaMu. All of this occurred without an assignment from WaMu or court approval.
In August 2016, defendant commenced an eviction proceeding against plaintiff seeking a final judgment awarding defendant possession of the property and a warrant to remove plaintiff. Plaintiff subsequently commenced, by a summons with notice, a real property action seeking a determination that plaintiff had acquired **346 title to the property through adverse possession. By order of Supreme Court (Elliott, J.), the eviction proceeding and real property action were consolidated. After plaintiff unsuccessfully moved for a default judgment, he served defendant with a verified complaint asserting that he was the rightful owner of the property based upon adverse possession. Subsequently, plaintiff moved to dismiss the eviction proceeding due to lack of standing, and defendant moved, by order to show cause, to dismiss the real property action and grant the eviction. In July 2017, after oral argument, Supreme Court (McNally Jr., J.), among other things, denied plaintiff's motion to dismiss the eviction petition, granted the eviction in its entirety, but stayed the execution or enforcement of the warrant for several months, and granted defendant's motion to dismiss plaintiff's real property action, with prejudice. Plaintiff now appeals.[2]
We turn first to plaintiff's contention that defendant lacks standing to bring the eviction proceeding. We agree. The record contains a copy of a Referee's report of sale signed by Liccardi on September 3, 2008 and received by the Rensselaer County Clerk's office in July 2009. According to this report, MERS was *1440 the highest bidder at the foreclosure sale and its bid was assigned to WaMu. A copy of an assignment of bid, signed by the agent for MERS on September 3, 2008 and reflecting the same thing, is also contained in the record. There is also a conformed copy of a Referee's deed, signed by Liccardi and notarized on September 3, 2008, between Liccardi and WaMu (hereinafter the 2008 deed). There is no dispute that this deed was not recorded.
At oral argument, Liccardi testified that he was appointed as Referee in the foreclosure action in 2003 and, consistent with the aforementioned documents, he conducted an auction of the property in September 2008 at which MERS was the successful bidder. Liccardi testified that an agent of MERS provided an assignment to WaMu and that is why he conveyed the property to WaMu and not MERS. Liccardi also explained that the agent for MERS had him execute a deed at the time of the sale and provided him with a “half-conformed” copy, which he retained in his files. Liccardi also confirmed that “the bank” sent him a copy of a Referee's report,[3] which he reviewed, signed and sent back to WaMu. Liccardi testified that the Referee's report was truthful and accurate at the time that he signed it. Liccardi testified that, thereafter, in 2016, he received a letter from defendant's counsel that was accompanied by an amended deed (hereinafter the 2016 deed), an amended Referee's report and an assignment from MERS

to defendant. Liccardi explained that, prior to executing the 2016 deed, he did not receive any kind of affidavit or consent, in writing, from WaMu or JP Morgan Chase Bank[4] to transfer the property. However, Liccardi testified that he inquired as to why he was being asked to execute the new deed, and defendant's counsel told him that the 2008 deed was lost and that it had never been transferred to WaMu, which was no longer in the picture, and that defendant's counsel was requested (presumably by his client) to have the deed transferred to defendant. **347 After this inquiry, Liccardi signed the 2016 deed naming defendant as the grantee and executed the amended Referee's report provided by defendant's counsel. Liccardi testified that he believed that he had authority to execute the 2016 deed.

1**Despite Liccardi's good faith belief, we do not find that he had authority to execute the 2016 deed.** Rather, we find that here, Liccardi's authority as Referee, which was granted by *1441 virtue of the 2003 judgment of foreclosure and sale, was exhausted upon the execution and delivery of the 2008 deed (*see Geddes Fed. Sav. & Loan Assn. v. Ferrante,* 226 A.D.2d 1099, 1099, 642 N.Y.S.2d 109 [1996]; *Mullins v. Franz,* 162 App.Div. 316, 318, 147 N.Y.S. 418 [1914]).[5] Whether the original deed was incorrect, lost or not recorded is irrelevant, as Liccardi had no authority to issue the 2016 deed to defendant eight years after the sale (*see Blumberg v. Giorgio,* 239 App.Div. 799, 800, 264 N.Y.S. 1 [1933], *affd* 262 N.Y. 650, 188 N.E. 105 [1933]; *Mullins v. Franz,* 162 App.Div. at 318, 147 N.Y.S. 418; *see generally Geddes Federal Sav. & Loan Ass'n v. Ferrante,* 226 A.D.2d at 1099, 642 N.Y.S.2d 109). Accordingly, Supreme Court erred in finding that defendant had standing to bring the eviction proceeding (*see* RPAPL 721) and, as such, defendant's eviction petition should have been dismissed due to lack of standing.

23456We turn next to plaintiff's argument that Supreme Court improperly granted defendant's motion to dismiss the real property action. We disagree. “To demonstrate adverse possession ..., [the] plaintiff[ ] must show by clear and convincing evidence that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years” (*Wilcox v. McLean,* 90 A.D.3d 1363, 1364, 935 N.Y.S.2d 220 [2011] [internal quotation marks and citations omitted]; *see* RPAPL 501; *Ray v. Beacon Hudson Mtn. Corp.,* 88 N.Y.2d 154, 159, 643 N.Y.S.2d 939, 666 N.E.2d 532 [1996]). “ ‘Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the [purchaser] a cause of action in ejectment against the occupier throughout the prescriptive period’ ” (*Ray v. Beacon Hudson Mountain Corp.,* 88 N.Y.2d at 159, 643 N.Y.S.2d 939, 666 N.E.2d 532, quoting *Brand v. Prince,* 35 N.Y.2d 634, 636, 364 N.Y.S.2d 826, 324 N.E.2d 314 [1974]). Here, it would not have been until the time of the sale that the purchaser would have had the right to bring an eviction proceeding against plaintiff (*see Ray v. Beacon Hudson Mountain Corp.,* 88 N.Y.2d at 159, 643 N.Y.S.2d 939, 666 N.E.2d 532; *Brand v. Prince,* 35 N.Y.2d at 636, 364 N.Y.S.2d 826, 324 N.E.2d 314 [1974]). Moreover, it was not until the sale that plaintiff was actually divested of title and his right of redemption was cut off (*see* 3 Bergman on New York Mortgage Foreclosures § 27.01[5] [2018]). Therefore, we find that the statutory 10–year period did not commence until the time of the 2008 sale, rather than in 2003 when the judgment of foreclosure and sale was signed, as asserted by plaintiff (*see generally* *1442 *Prudence Co. v. 160 W. 73rd St. Corp.,* 260 N.Y. 205, 210–211, 183 N.E. 365 [1932]).[6] **348 Because 10 years had not yet passed since the time of the sale when plaintiff commenced the real property action in 2016, Supreme Court properly granted defendant's motion to dismiss. However, because this dismissal is based upon plaintiff's failure to state a claim (*see* CPLR 3211[a][7]) rather than a determination on the merits, Supreme Court's dismissal should have been without prejudice (*see generally Matter of Congdon v. Congdon,* 200 A.D.2d 836, 837, 606 N.Y.S.2d 794 [1994]; *Factory Point Natl. Bank v. Wooden Indian,* 198 A.D.2d 563, 564, 603 N.Y.S.2d 216 [1993]; *compare Stiles v. Graves,* 143 A.D.3d 1215, 1216–1217, 40 N.Y.S.3d 620 [2016]). We have examined plaintiff's remaining contentions and find them to be without merit.

Clark, J.P., Mulvey, Aarons and Rumsey, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion to dismiss defendant's eviction proceeding and dismissed plaintiff's complaint with prejudice; plaintiff's motion to dismiss granted and eviction proceeding dismissed, and plaintiff's complaint dismissed without prejudice; and, as so modified, affirmed.

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

169 A.D.3d 577
Supreme Court, Appellate Division, First Department, New York.
NYCTL 2012 A-TRUST, et al., Plaintiffs,
v.
1698 LEX CORPORATION, Defendant–Appellant,
Residential Funding Corporation, et al., Defendants,
Tower Lexington Inc., et al., Intervenor Defendants–Respondents.
8497Index 155415/13
ENTERED: FEBRUARY 26, 2019

Kossoff PLLC, New York (Stacie Bryce Feldman of counsel), for appellant.
Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York (David K. Fiveson of counsel), for respondents.
Sweeny, J.P., Manzanet–Daniels, Webber, Oing, Singh, JJ.

*577 Defendant 1698 Lex Corp. seeks an order vacating the sale of its property at an auction held following foreclosure on a tax lien, on the ground that the price realized was unconscionably low and that the principals of intervenor defendants, Louis Zazzarino and Yossef Azour, may have improperly colluded to suppress bidding. **The matter was referred to a Referee to hear and report on the issue of whether Zazzarino and Azour "engaged in fraud, collusion and/or misconduct at the Sale, [so] *578 as to cast suspicion upon the fairness of the Sale, thereby mandating its vacatur."**
The Referee concluded that defendant failed to establish fraud, collusion or misconduct by Zazzarino and Azour, and recommended dismissing the action.
67 1 Contrary to defendant's contention, the one-sentence order on appeal confirming the Referee's report is not deficient for failing to "state the facts it deems essential" (CPLR 4213). CPLR 4213 is not applicable, because the order was not issued after a nonjury trial. The applicable provision is CPLR 2219(a), which governs the time and form of an order determining a motion and provides that the judge shall "give the determination ... in such detail as the judge deems proper." 2Defendant failed to demonstrate that the Referee exceeded her authority or that the report was otherwise inadequate. The Referee recommended that the matter be dismissed, having concluded, after hearing testimony, that Zazzarino and Azour did not engage in fraud or collusion—the very issue that was referred to her (*see* CPLR 4311). The report, which referred to an intermediate order considering intervenor-defendants' motion for a directed verdict, adequately complies with the requirements of CPLR 4320.**
We have considered defendant's remaining arguments and find them unavailing.

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)

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185 A.D.3d 857
Supreme Court, Appellate Division, Second Department, New York.
SHAW FUNDING, LP, Respondent,
v.
Archibald BENNETT, Appellant, et al., Defendants.

The Yitzhak Law Group, Great Neck, N.Y. (Lavinia A. Acaru of counsel), for appellant.
Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, N.Y. (Megan K. McNamara of counsel), for respondent.
CHERYL E. CHAMBERS, J.P., JEFFREY A. COHEN, VALERIE BRATHWAITE NELSON, ANGELA G. IANNACCI, JJ.

DECISION & ORDER
In an action to foreclose a mortgage, the defendant Archibald Bennett appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered November 9, 2018.
The order granted the plaintiff's motion to appoint a receiver for the rents and profits of the mortgaged premises.

ORDERED that the order is affirmed, with costs.
On September 6, 2007, the defendants Archibald Bennett and Lorna Spence (hereinafter together the borrowers) executed a note in favor of the defendant David A. Cantor and Barry H. Levites, promising to repay a loan in the amount of $350,000 (hereinafter the 2007 note). The 2007 note was secured by a mortgage, signed only by Spence, encumbering certain real property located in Queens. Thereafter, on May 15, 2009, the borrowers executed a note in favor of the plaintiff in the amount of $500,000 (hereinafter the 2009 note). That same date, the borrowers executed a consolidation and extension agreement (hereinafter the CEA), pursuant to which the 2007 note and a loan made by the plaintiff to the borrowers in the principal sum of $150,000 were consolidated into a single debt, as evidenced by the 2009 note in the principal sum of $500,000. The CEA further provided that the mortgage executed by Spence securing the 2007 note “shall hereafter constitute a valid first Mortgage” securing the principal sum of $500,000. The borrowers also executed a rider to the CEA, in which the parties agreed that, upon the borrowers' default, the plaintiff may “cause a receiver of the rents and profits of the Mortgaged *568 Property to be appointed without notice to [the borrowers].”
In May 2016, the plaintiff commenced this mortgage foreclosure action against, among others, the borrowers, alleging that the borrowers had defaulted on the payment obligations under the 2009 note. The plaintiff subsequently moved to appoint a receiver for the rents and profits of the mortgaged premises. Bennett opposed the motion. In an order entered November 9, 2018, the Supreme Court granted the plaintiff's motion and appointed a receiver for the rents and profits of the mortgaged premises. Bennett appeals.
Contrary to Bennett's contention, the Supreme Court providently exercised its discretion in granting the plaintiff's motion to appoint a receiver for the rents and profits of the mortgaged premises, as the rider to the CEA provided for such an appointment upon the borrowers' default (*see* Real Property Law § 254[10]; *Nechadim Corp. v. Simmons,* 171 A.D.3d 1195, 1197, 96 N.Y.S.3d 891; *CSFB 2004–C3 Bronx Apts LLC v. Sinckler, Inc.,* 96 A.D.3d 680, 680–681, 949 N.Y.S.2d 21; *Citibank, N.A. v. Van Brunt Props., LLC,* 95 A.D.3d 1158, 1159, 945 N.Y.S.2d 330; *Maspeth Fed. Sav. & Loan Assn. v. McGown,* 77 A.D.3d 889, 889–890, 909 N.Y.S.2d 403**). Although a court of equity may exercise its discretion to deny an application for the appointment of a receiver** (*see ADHY Advisors LLC v. 530 W. 152nd St. LLC,* 82 A.D.3d 619, 619, 918 N.Y.S.2d 721; *Essex v. Newman,* 220 A.D.2d 639, 640, 632 N.Y.S.2d 636; *366 Fourth St. Corp. v. Foxfire Enters.,* 149 A.D.2d 692, 692, 540 N.Y.S.2d 489**), Bennett failed to show that denial was appropriate here** (*see GEMC 2007–C1 Ditmars Lodging, LLC v. Mohola, LLC,* 84 A.D.3d 1311, 1312, 924 N.Y.S.2d 531**). Furthermore, contrary to Bennett's contention, inasmuch as the plaintiff did not seek the appointment of a receiver pursuant to CPLR 6401, that statute is inapplicable to this case.**
Accordingly, we decline to disturb the Supreme Court's determination to grant the plaintiff's motion to appoint a receiver for the rents and profits of the mortgaged premises.
CHAMBERS, J.P., COHEN, BRATHWAITE NELSON and IANNACCI, JJ., concur.

All Citations

185 A.D.3d 857, 125 N.Y.S.3d 567 (Mem), 2020 N.Y. Slip Op. 03936

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 App. Ct. sustained the public auction. They said her request was a settlement solution which the Husband had not agreed to.

181 A.D.3d 475
Supreme Court, Appellate Division, First Department, New York.
Linda MACKLOWE, Plaintiff–Appellant,
v.
Harry MACKLOWE, Defendant–Respondent.

Richter, J.P., Oing, Moulton, González, JJ.

*475 Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 12, 2019, which granted defendant's motion to appoint a receiver to coordinate the sale of Schedules II and III of the parties' art collection at public auction, to the extent of stating that the court "shall" do so in accordance with a forthcoming order appointing the receiver, unanimously affirmed, without costs.

During their marriage, the parties amassed a large collection of artwork, which is their most valuable marital asset. At the divorce trial, plaintiff wife asked the court to award the artwork to her and award the parties' real estate interests to defendant husband, with a cash distributive award to the husband to equalize any discrepancy. The husband argued that the artwork should be sold and the proceeds distributed equally. After trial, the court issued a decision wherein it divided the artwork into three "Schedules." The **38 court awarded the wife all of the artwork on Schedule I, and awarded the husband an equalizing credit for his 50% marital share. The court ordered that the artwork on Schedules II and III (the art collection) be "sold" with "the net proceeds distributed 50% to *476 each party." A judgment was subsequently entered containing similar provisions.

The wife appealed and argued, inter alia, that the court erred in directing a sale of the art collection. She proposed instead that the collection be valued and distributed to her, with an equalizing payment to the husband. In unanimously affirming the judgment, this Court rejected the wife's approach, concluding that the trial court had "providently exercised its discretion in directing that [the art collection] be sold and the net proceeds distributed equally between the parties" (*Macklowe v. Macklowe,* 176 A.D.3d 470, 470, 112 N.Y.S.3d 95 [1st Dept. 2019]).

In its trial decision, the court concluded that it was in the parties' best interest to appoint a receiver to sell the art collection. The parties thereafter became embroiled in various disputes over who the receiver would be and the terms of retention, and whether the art collection should be disposed of by way of a public auction, private sales, or an internal auction between the parties.

The husband moved to appoint a receiver to sell the art collection at public auction. The court granted the husband's motion "to the extent that the court shall appoint a receiver to coordinate the sale of [the art collection] at public auction in accordance with the forthcoming order appointing the receiver."

On appeal, the wife argues that the motion court erred in ordering a public auction instead of an internal auction. In an internal auction, each of the parties would submit sealed bids for each piece of art in the collection, and the highest bidder would be awarded the item. At the end of the process, each party's total asset value would be determined by the sum of his or her winning bids. The party with the highest total asset value would then pay the other party one-half of the difference between the two asset values in order to purportedly effect an equal distribution.

We find no basis for reversal. In the divorce judgment, which was affirmed on appeal, the trial court equitably distributed the art collection by ordering that it be "sold" with each party receiving "50% of the net proceeds from the sale." The internal auction proposed by the wife is inconsistent with the judgment in two respects. First, it is not a "sale," as that term is commonly understood, and second, it will not generate "net proceeds" that will be evenly distributed between the parties. The wife has failed to adequately explain how an internal auction effectuates these core provisions of the judgment. Indeed, in her appellate brief on the earlier appeal, the wife stated that an internal auction between the parties "would obviate *477 the need for a sale," thus recognizing that her suggested method of distributing the artwork is not a sale.

Essentially, the wife is proposing an in-kind distribution of the art collection, where the art is split between the parties, and the party that ends up with the greater value of art pays the other a distributive award. However, this approach was rejected by this Court on the earlier appeal when it affirmed the trial court's decision that the art collection be sold. The wife should not be permitted to relitigate this issue under the

guise of an internal auction. Moreover, the internal auction approach could lead to other inequities. After the divorce, neither party was left with the cash necessary to buy the art collection from the other. Under the internal auction approach, the losing party, who would **39 be owed a distributive award, would likely have to wait until the winning party sells the art, or otherwise raises the money required to pay the award. We find unpersuasive the wife's contention that the motion court rejected the internal auction proposal without proper consideration. Since an internal auction is not a sale, the motion court appropriately characterized it as a “settlement solution,” and, because the husband did not agree to it, the court properly declined to require the receiver to consider it as an available method of disposition. Even if we were to accept the wife's argument that the motion court had the power to order an internal auction, no basis exists to reverse. Under the specific circumstances here, the court did not abuse its discretion in choosing a public auction as the method to sell the art collection.
We have considered the wife's remaining arguments and find them unavailing.
Motion for stay pending appeal denied as academic.

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

180 A.D.3d 773
Supreme Court, Appellate Division, Second Department, New York.
In the MATTER OF Oleg CASSINI, Deceased.
Marianne Nestor Cassini, Petitioner-Appellant;
Peggy Nestor, Respondent-Appellant;
v.
John J. Barnosky, etc., et al., Objectants-Respondents.

ALAN D. SCHEINKMAN, P.J., JOHN M. LEVENTHAL, JEFFREY A. COHEN, SYLVIA O. HINDS–RADIX, JJ.
**662 DECISION & ORDER
*773 In a probate proceeding in which Marianne Nestor Cassini petitioned for judicial settlement of her intermediate account of the estate of Oleg Cassini and Christina Cassini petitioned, inter alia, to revoke letters testamentary issued to Marianne Nestor Cassini, Marianne Nestor Cassini appeals, and Peggy Nestor separately appeals, from an order of the Surrogate's Court, Nassau County (Edward W. McCarty III, S.), dated August 3, 2015. The order, insofar as appealed from, granted that branch of the objectants' motion pursuant to CPLR 6401 which was to appoint a temporary receiver of any and all property belonging to Oleg Cassini, Inc., and Cassini Parfums, Ltd., to the extent of appointing Jeffrey DeLuca, the Public Administrator of Nassau County, to run the day-to-day business operations of Oleg Cassini, Inc., and Cassini Parfums, Ltd.
Motion by the objectants-respondents to dismiss the appeals on the ground that they have been rendered academic. By decision and order on motion of this Court dated April 3, 2017, the motion was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.
Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal and the submission of the separate appeal, it is
ORDERED that the motion to dismiss the appeals is denied; and it is further,
ORDERED that the order dated August 3, 2015, is affirmed insofar as appealed from; and it is further,
ORDERED that one bill of costs is awarded to the objectants-respondents.
This appeal is one of several arising out of a protracted and *774 vigorously contested probate proceeding involving the estate of the internationally renowned fashion designer Oleg Cassini (hereinafter the decedent), who died in March 2006. He was survived by his wife, Marianne Nestor Cassini (hereinafter Marianne), and two daughters from his prior marriage to Gene Tierney, Daria Cassini (hereinafter Daria) and Christina Cassini (hereinafter Christina) (*see Matter of Cassini,* 120 A.D.3d 799, 992 N.Y.S.2d 93). Marianne, who was nominated in the decedent's will as the executor of his estate, was issued letters testamentary.
Christina subsequently commenced a proceeding, inter alia, to revoke the letters testamentary issued to Marianne, alleging that Marianne had breached her fiduciary duties. Christina also moved, inter alia, pursuant to CPLR 6401 to appoint a temporary receiver for any and all property belonging to Oleg Cassini, Inc. (hereinafter OCI), and Cassini Parfums, Ltd. (hereinafter CPL). Following Christina's death in 2015, attorney John J. Barnosky and Alexandre Cassini Belmont (hereinafter together the objectants) were substituted into the proceeding as executors of the estate of Christina and as successor administrators of the estate of Daria, who died in 2010. Marianne, and her sister Peggy Nestor who had been nominated in the decedent's will as a successor executor, now separately appeal from so much of an order dated August 3, 2015, as granted that branch of the objectants' motion which was **663 to appoint a temporary receiver to the extent of appointing Jeffrey DeLuca, the Public Administrator of Nassau County (hereinafter the Public Administrator), to run the day-to-day business operations of OCI and CPL.
The objectants move to dismiss the appeals on the ground that they have been rendered academic in light of a subsequent order dated July 1, 2016.
That order, in effect, granted a cross motion by the objectants pursuant to CPLR 6401 to appoint a receiver for any and all property belonging to OCI and CPL, upon Marianne's default in opposing the cross motion, and appointed a receiver. Marianne filed a notice of appeal from the order dated July 1, 2016, but this Court dismissed that appeal, as no appeal lies from an order entered upon the appellant's default. **However, on a related appeal decided herewith (*Matter of Cassini,* 182 A.D.3d 13, 120 N.Y.S.3d 103 [Appellate Division Docket No. 2018–00747]), we reverse the denial of Marianne's motion to vacate the July 1, 2016, order, and vacate such order, providing further that the receiver appointed pursuant to the July 1, 2016, order is to continue as temporary receiver pending a new determination of the objectants' cross motion to appoint a receiver.**

*775 12“ ‘In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment’ ” (*Matter of Gonzalez v. Annucci,* 32 N.Y.3d 461, 470, 93 N.Y.S.3d 236, 117 N.E.3d 795, quoting *Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400, 409 N.E.2d 876). While the portion of the order dated August 3, 2015, that is being appealed from was effectively superseded by the order dated July 1, 2016, the order dated July 1, 2016, has been vacated. Since the order dated July 1, 2016, no longer supercedes the order dated August 3, 2015, that is appealed from herein, and we cannot say that the August 3, 2015, order will be without enduring consequences to the parties, we deny the motion to dismiss the instant appeals as academic.

While this Court could hold these appeals in abeyance pending the new determination to be made by the Surrogate's Court with respect to the cross motion to appoint a receiver, we perceive that the interest in bringing a conclusion to these appeals warrants our determination of the merits of these appeals, irrespective of whether a receiver is ultimately appointed.

On the merits, we conclude that the Surrogate's Court providently exercised its discretion in granting that branch of the objectants' motion which was to appoint a temporary receiver to the extent of appointing the Public Administrator to run the day-to-day business operations of OCI and CPL. The objectants made a clear evidentiary showing of the necessity for conserving the property at issue and protecting their interests (*see* CPLR 6401[a]; *Matter of Defelice–Levine,* 295 A.D.2d 512, 744 N.Y.S.2d 853).

SCHEINKMAN, P.J., LEVENTHAL, COHEN and HINDS–RADIX, JJ., concur.

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

177 A.D.3d 456
Supreme Court, Appellate Division, First Department, New York.
In re 4042 EAST TREMONT CAFÉ CORP., Assignor-Appellant,
v.
Anthony SODONO, III, Assignee-Appellant.
Tosca Café, Inc. et al., Nonparty Appellants.
In re Frank Berisha, Petitioner-Respondent,
v.
4042 East Tremont Café Corp., doing business as Tosca Café, etc., et al., Respondent-Appellants.
Frank Berisha, Plaintiff-Respondent,
Maria Berisha, Plaintiff,
v.
Tosca Café, Inc., et al., Defendants-Appellants,
4042 East Tremont Café Corp., Nonparty Appellant.

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

Opinion

*456 Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about February 8, 2018, in index no. 301469/08, which denied the motions by defendants Tosca Café, Inc. and Tosca Coal Burning Oven Inc. (Tosca Coal) and nonparty 4042 East Tremont Café Corp. (4042 East Tremont) to vacate a judgment entered on or about August 12, 2013 against Tosca Café, Inc. and Tosca Coal (the Tosca corporations) pursuant to CPLR 5015(a)(3), unanimously affirmed, without costs. Order, same court (Howard H. Sherman, J.), entered on or about April 19, 2018, in index no. 260677/16, which, upon petitioner's motion, inter alia, set aside the transfers of the assets, property, and business of the Tosca Café to Tosca Coal and 4042 East Tremont, granted petitioner leave to attach or levy execution upon the same, granted petitioner's application for attorneys' fees and costs as against respondent Hasim “Eddie” Sujak and referred the amount to a Referee, and appointed nonparty Bernard D'Orazio as the receiver of the business, assets, property, and income of the Tosca Café, unanimously modified, on the law, to delete the setting aside of the transfer of the assets, property, and business of the Tosca Café to 4042 East Tremont and the grant of leave to petitioner to attach or levy execution upon the assets, property, and business of the Tosca Café, without prejudice to his amending the petition to add allegations pertaining to alter *457 ego liability, and to delete the grant of petitioner's application for attorneys' fees and costs against Sujak, without prejudice to petitioner's amending the petition to try to pierce the corporate veil and/or add allegations that Sujak aided and abetted the fraudulent conveyances, and otherwise affirmed, without costs. Tosca Coal's appeal from said order unanimously dismissed, without costs. Order, same court and Justice, in index no. 260292/17, which denied the assignee's petition to commence an assignment for the benefit of 4042 East Tremont's creditors, granted creditor Frank Berisha's cross motion to dismiss the proceeding, and severed Berisha's claim for costs and sanctions and referred it to a Referee, unanimously modified, on the law and the facts and in the exercise of discretion, to deny Berisha's motion as to sanctions, and otherwise affirmed, without costs.
1Supreme Court providently exercised its discretion in denying the Tosca corporations' and 4042 East Tremont's 2017 motions to vacate the August 2013 judgment against the Tosca corporations pursuant to CPLR 5015(a)(3) on the ground that they were not made within a reasonable time after discovering the alleged fraud (*see Nash v. Port Auth. of N.Y. & N.J.*, 22 N.Y.3d 220, 225, 980 N.Y.S.2d 880, 3 N.E.3d 1128 [2013]; *Mark v. Lenfest*, 80 A.D.3d 426, 914 N.Y.S.2d 141 [1st Dept. 2011]).
**125 2More fundamentally, plaintiff Frank Berisha “did not obtain the default judgment through fraud or through any other wrongdoing” (*Amalgamated Bank v. Helmsley–Spear, Inc.,* 109 A.D.3d 418, 419, 970 N.Y.S.2d 522 [1st Dept. 2013], *affd on other grounds* 25 N.Y.3d 1098, 14 N.Y.S.3d 312, 35 N.E.3d 480 [2015]). Rather, the August 2013 judgment resulted from the Tosca corporations' decisions not to pay their first lawyer and not to obtain new counsel in time for the trial (*see id.* at 419–420, 970 N.Y.S.2d 522). By defaulting, the Tosca corporations admitted liability (*see e.g. Brown v. Rosedale Nurseries*, 259 A.D.2d 256, 257, 686 N.Y.S.2d 22 [1st Dept. 1999]). Therefore, Berisha's testimony about the incident in which he was injured was unnecessary to establish liability (*compare Oppenheimer v. Westcott*, 47 N.Y.2d 595, 419 N.Y.S.2d 908, 393 N.E.2d 982 [1979] [default judgment vacated where the plaintiff testified falsely about damages]).

34Tosca Coal's appeal from the April 2018 order is dismissed because Tosca Coal defaulted in Supreme Court (*see* CPLR 5511; *Citibank, N.A. v. Kallman*, 172 A.D.3d 489, 97 N.Y.S.3d 863 [1st Dept. 2019]).
Because both of the Tosca corporations are judgment debtors, it does not matter—except for the issue of attorneys' fees, which will be discussed below—if the transfer of the Tosca Café from Tosca Café, Inc. to Tosca Coal in 2006 was fraudulent. Rather, as Supreme Court recognized, the key is whether there was a fraudulent conveyance from a judgment debtor to 4042 East Tremont.
*458 Under the current allegations of the petition, there was no conveyance from either judgment debtor to 4042 East Tremont. Although 4042 East Tremont entered into a lease with nonparty Tremont Realty LLC for the same space that Tremont Realty had previously rented to Tosca Coal, the lease was not an asset that created a substantial income for Tosca Coal (*see Mutual Life Ins. Co. of N.Y. v. 160 E. Seventy–Second St. Corp.*, 49 N.Y.S.2d 927 (Sup. Ct., N.Y. County 1944)). On the contrary, it created a liability for Tosca Coal—Tosca Coal had to pay substantial rent to Tremont Realty.
5Although respondent Sujak conveyed the fixtures, and perhaps the goodwill, of the Tosca Café to respondent Adis Radoncic in exchange for a promissory note, to deem this a conveyance from Tosca Coal or Tosca Café, Inc. to 4042 East Tremont would require piercing the corporate veil twice: to find that Sujak is the same as Tosca Coal or Tosca Café, Inc. and to find that Radoncic is the same as 4042 East Tremont. However, Berisha makes very clear on appeal that he is not relying on veil-piercing.
67The award of attorneys' fees against Sujak pursuant to Debtor and Creditor Law § 276–a cannot stand. First, as indicated, the 2013 transactions involving 4042 East Tremont did not constitute fraudulent conveyances, at least under the current allegations of the petition. Second, the 2006 transaction between the Tosca corporations was not fraudulent as to Berisha, who was not injured until 2008 (*see Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 A.D.3d 476, 477, 75 N.Y.S.3d 139 [1st Dept. 2018]; *Huntington v. Kneeland,* 102 App.Div. 284, 286, 92 N.Y.S. 944 [2d Dept. 1905], *affd* 187 N.Y. 563, 80 N.E. 1111 [1907]). Third, even if a fraudulent transfer occurred, Sujak is neither a debtor nor a transferee. Hence, he "cannot be held liable without piercing the corporate veil unless [he] benefited from the conveyances" (*D'Mel & Assoc. v. Athco, Inc.*, 105 A.D.3d 451, 452, 963 N.Y.S.2d 65 [1st Dept. 2013]).
**126 Sujak did not benefit from Radoncic's promissory note, because Radoncic made no payments thereunder. Although Tremont Realty LLC, of which Sujak is a member, received rent payments from 4042 East Tremont, Sujak is not the same as the LLC, and it is not clear that the receipt of rent would constitute a benefit from the conveyance (*see id.* at 452–453, 963 N.Y.S.2d 65 ["receipt of a salary from the transferee corporation as an officer of the corporation is not sufficient to render the officer a transferee or beneficiary of the transfer"] [internal quotation marks omitted]).
8Supreme Court providently exercised its discretion in appointing nonparty Bernard D'Orazio as a receiver pursuant to *459 CPLR 5228(a) (*see Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 317, 900 N.Y.S.2d 698, 926 N.E.2d 1202 [2010]). The judgment that Berisha obtained against the Tosca corporations more than six years ago remains unsatisfied.
The appointment of a receiver who is unrelated to Sujak will increase the likelihood that the judgment will be satisfied. Moreover, there is a "risk of fraud or insolvency if a receiver is not appointed" (*id.* [internal quotation marks omitted]). Even if the requirements for a fraudulent conveyance have not been satisfied, the transactions involving 4042 East Tremont are suspicious. As for insolvency, the Tosca corporations and 4042 East Tremont have all filed for bankruptcy (the proceedings were dismissed) and have all made assignments for the benefit of creditors (ABCs).
The Tosca corporations and 4042 East Tremont's argument in opposition to the appointment of the receiver based on the law of the case doctrine is unavailing (*see Kleinser v. Astarita*, 61 A.D.3d 597, 878 N.Y.S.2d 28 [1st Dept. 2009]).
The assignment for the benefit of 4042 East Tremont's creditors (index no. 260292/17) should not be dismissed on the ground that it violated the temporary restraining order in index no. 260677/16, because the TRO was issued in the absence of a motion for a preliminary injunction (*see* CPLR 6301; *People v. Asiatic Petroleum Corp.*, 45 A.D.2d 835, 836, 357 N.Y.S.2d 542 [1st Dept. 1974]).
However, we affirm the dismissal on the alternate ground that, as Supreme Court said, the order appointing the receiver divested 4042 East Tremont of the property that is the subject of the ABC proceeding.
9The part of the order entered in index no. 260292/17 that addresses Berisha's claim for costs and sanctions is ambiguous, saying both that the claim is referred to a Referee to hear and report with recommendations and that an order of reference will be issued separately. An order of reference is appealable (*General Elec. Co. v. Rabin*, 177 A.D.2d 354, 356, 576 N.Y.S.2d 116 [1st Dept. 1991]). To the extent this order is not appealable, we grant leave to appeal in the interest of judicial economy (*see Serradilla v. Lords Corp.*, 12 A.D.3d 279, 785 N.Y.S.2d 433 [1st Dept. 2004]) and in the interest of justice (*see Matter of Britt v. City of New York*, 160 A.D.3d 524, 76 N.Y.S.3d 12 [1st Dept. 2018]).

To the extent Supreme Court found or implied that the assignor, the assignee, Radoncic, and their counsel engaged in sanctionable behavior, this was an improvident exercise of discretion (*see generally Gordon Group Invs., LLC v. Kugler*, 127 A.D.3d 592, 594, 8 N.Y.S.3d 115 [1st Dept. 2015]). We do not find that 4042 East Tremont's ABC proceeding was commenced in blatant disregard of the TRO.

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

175 A.D.3d 1403
Supreme Court, Appellate Division, Second Department, New York.
Claire MANNING–KRANES, et al., Respondents,
v.
Marita MANNING–FRANZMAN, et al., Appellants, et al., Defendant.
2017–09108(Index No. 8225/15)
Argued - April 30, 2019September 18, 2019

RUTH C. BALKIN, J.P., SYLVIA O. HINDS–RADIX, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ.
DECISION & ORDER
*1403 In an action for the partition and sale of real property, the defendants Marita Manning–Franzman, Christopher Manning, and Philip Manning appeal from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated August 28, 2017. The order granted the plaintiffs' motion to appoint a temporary receiver of the subject property.
ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, and the plaintiffs' motion to appoint a temporary receiver of the subject property is denied.
The plaintiffs commenced this action for the partition and sale of certain real property which they allegedly owned as tenants in common with the defendants.
The plaintiffs subsequently moved for the appointment of a temporary receiver of the property. By order dated August 28, 2017, the Supreme Court granted the plaintiffs' motion. The defendants Marita Manning–Franzman, Christopher Manning, and Philip Manning appeal.
12CPLR 6401(a) permits the court, upon a motion by a person with an "apparent interest" in property, to appoint a temporary receiver of that property where "there is danger" that it will be "materially injured or destroyed." However, the appointment of a temporary receiver "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (*Schachner v. Sikowitz,* 94 A.D.2d 709, 709, 462 N.Y.S.2d 49; *see Vardaris Tech, Inc. v. Paleros Inc.,* 49 A.D.3d 631, 632, 853 N.Y.S.2d 601). **"Therefore, a motion seeking such appointment 'should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests' "** (*Vardaris Tech, Inc. v. Paleros Inc.,* 49 A.D.3d at 632, 853 N.Y.S.2d 601, quoting *Lee v. 183 Port Richmond Ave. Realty,* 303 A.D.2d 379, 380, 755 N.Y.S.2d 664; *see Quick v. Quick,* 69 A.D.3d 828, 829, 893 N.Y.S.2d 583).
3Here, the plaintiffs failed to make such a clear evidentiary showing (*see Magee v. Magee,* 120 A.D.3d 637, 638, 990 N.Y.S.2d 894; *Quick v. Quick,* 69 A.D.3d at 829, 893 N.Y.S.2d 583). In particular, the plaintiffs' speculative and conclusory assertions about certain expenditures the defendants made of rental income derived from the property were insufficient to demonstrate that the defendants were using that income for their own personal benefit (*see* *1404 *Board of Mgrs. of Nob Hill Condominium Section II v. Board of Mgrs. of Nob Hill Condominium Section I,* 100 A.D.3d 673, 954 N.Y.S.2d 145; *Vardaris Tech, Inc. v. Paleros Inc.,* 49 A.D.3d at 632, 853 N.Y.S.2d 601; *cf. Rose v. Rose,* 305 A.D.2d 578, 578–579, 760 N.Y.S.2d 196; *Butler v. Gibbons,* 225 A.D.2d 335, 335, 638 N.Y.S.2d 634). Moreover, with the exception of expenditures made for renovations, the remaining challenged expenditures were not so significant as to present an "imminent danger of irreparable loss or waste" with respect to the subject property (**436 *Breslin Realty Dev. Corp. v. Shaw,* 91 A.D.3d 804, 805, 936 N.Y.S.2d 698; *see* CPLR 6401[a]). Indeed, in that regard, the value of the real estate provided sufficient security to the plaintiffs to enable them to protect their interests (*see Matter of Kristensen v. Charleston Sq.,* 273 A.D.2d 312, 709 N.Y.S.2d 853). As to expenditures for renovations, the plaintiffs did not demonstrate that any of the work done on the property was unnecessary or wasteful. Accordingly, the Supreme Court improvidently exercised its discretion in granting the motion to appoint a temporary receiver of the property (*see Board of Mgrs. of Nob Hill Condominium Section II v. Board of Mgrs. of Nob Hill Condominium Section I,* 100 A.D.3d at 673, 954 N.Y.S.2d 145; *Vardaris Tech, Inc. v. Paleros Inc.,* 49 A.D.3d at 632, 853 N.Y.S.2d 601).
In light of our determination, we need not reach the parties' remaining contentions.
BALKIN, J.P., HINDS–RADIX, MALTESE and BRATHWAITE NELSON, JJ., concur.

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

In this proceeding to dissolve a PC of a law firm 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.

175 A.D.3d 1120
Supreme Court, Appellate Division, Fourth Department, New York.
In the Matter of Ross M. CELLINO, Jr., Petitioner–Respondent,
v.
CELLINO & BARNES, P.C., and Stephen E. Barnes, Respondents-Appellants. (Appeal No. 1.)
1418CA 18–00669
Entered: August 22, 2019

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.
MEMORANDUM AND ORDER
*1120 It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.
Memorandum: Petitioner, one of the two directors and 50% shareholders of respondent corporation Cellino & Barnes, P.C. (PC), brought this special proceeding against the PC and petitioner's co-shareholder **218 Stephen E. Barnes (collectively, respondents) seeking, inter alia, judicial dissolution of the PC pursuant to Business Corporation Law § 1104(a)(1) and (3). Formed in 1998 by petitioner and Barnes, the PC began as a regional law firm with offices in Buffalo and Rochester. In 2008, the PC began its expansion into the downstate market, and in 2013, Barnes approached petitioner about opening an office in California. Petitioner declined but, according to petitioner, by *1121 that time Barnes and the chief operating officer (COO) of the PC had already made preparations to open an office in Los Angeles. Barnes thereafter formed Cellino & Barnes, L.C. (LC), a California corporation that was separate from the PC and in which Barnes had a 99.9% interest. Petitioner became a minority owner with a .1% ownership in the LC.
In 2017, petitioner filed an initial petition for dissolution of the PC and also withdrew from and divested himself of his interest in the LC. Petitioner subsequently filed an amended petition for dissolution alleging, among other things, that there had been a breakdown in communication between himself and Barnes with respect to the management and direction of the PC. In particular, petitioner alleged that Barnes had favored the LC to the detriment of the PC by allowing the LC to utilize the PC's computer network, telephone number, and employees without adequate compensation. Petitioner further alleged, inter alia, that Barnes had directed to the LC mass tort cases solicited by the PC in the Northeast; paid a bonus to the PC's COO from the PC's account for work that the COO did on behalf of the LC; refused petitioner's request to terminate the COO as a PC employee and hire him as an LC employee; and rejected petitioner's request to restrict the COO's access to the PC's bank account.
Respondents moved, inter alia, for summary judgment dismissing the amended petition, and petitioner cross-moved for the appointment of a temporary receiver pursuant to Business Corporation Law § 1202(a)(1). In appeal No. 1, respondents appeal from an order that granted in part petitioner's cross motion for the appointment of a temporary receiver. In appeal No. 2, respondents appeal, as limited by their brief, from that part of an order of Supreme Court denying respondents' motion insofar as it sought summary judgment dismissing the amended petition. We affirm in both appeals.
1Addressing first appeal No. 2, we reject respondents' contention that the court erred in denying their motion insofar as it sought summary dismissal of the amended petition on the ground that dissolution would not benefit the shareholders because the PC has continued to function effectively and prosperously. The determination whether a corporation should be dissolved is within the discretion of the court (*see* Business Corporation Law § 1111[a]; *Matter of Kemp & Beatley [Gardstein]*, 64 N.Y.2d 63, 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173 [1984]), and "the benefit to the shareholders of a dissolution is of paramount importance" in making that determination (§ 1111[b][2]). Although respondents submitted evidence demonstrating that the PC has continued *1122 to conduct business at a profit, dissolution is not to be denied in a proceeding brought pursuant to Business Corporation Law § 1104 simply because the corporate business has been conducted at a profit (*see* § 1111[b][3]) or because the dissension has not yet had an appreciable impact on the profitability of the corporation (*see Molod v. Berkowitz*, 233 A.D.2d 149, 150, 649 N.Y.S.2d 438 [1st Dept. 1996], *lv dismissed* 89 N.Y.2d 1029, 658 N.Y.S.2d 244, 680 N.E.2d 618 [1997]).

**219 234Here, the record contains ample evidence of dissension and deadlock between petitioner and Barnes, and we conclude that, in opposition to respondents' showing that the PC continues to operate profitably, petitioner raised issues of fact whether dissension and deadlock have so impeded the ability of the PC to function effectively that dissolution would benefit the shareholders. In a close corporation like the PC, "the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation" (*Greer v. Greer*, 124 A.D.2d 707, 708, 508 N.Y.S.2d 217 [2d Dept. 1986], *appeal dismissed* 69 N.Y.2d 947, 516 N.Y.S.2d 1029, 509 N.E.2d 364 [1987]). When a point is reached at which the shareholders who are actively conducting the business of the corporation cannot agree, dissolution may be in the best interests of those shareholders (*see Matter of Gordon & Weiss*, 32 A.D.2d 279, 281, 301 N.Y.S.2d 839 [1st Dept. 1969]), and we agree with the court's determination that a hearing should be held to give the parties an opportunity to present their evidence on this controverted issue (*see Matter of Ricci v. First Time Around*, 112 A.D.2d 794, 794, 492 N.Y.S.2d 295 [4th Dept. 1985]; *Matter of Pivot Punch & Die Corp.*, 9 A.D.2d 861, 861, 193 N.Y.S.2d 34 [4th Dept. 1959]; *see also Matter of Giordano v. Stark*, 229 A.D.2d 493, 494, 645 N.Y.S.2d 517 [2d Dept. 1996]; *Matter of Kournianos [H.M.G., Inc.]*, 175 A.D.2d 129, 129–130, 571 N.Y.S.2d 823 [2d Dept. 1991]).

5**Contrary to respondents' contention in appeal No. 1, we conclude that the court did not abuse its discretion in appointing a temporary receiver** (*see generally Greer*, 124 A.D.2d at 708, 508 N.Y.S.2d 217; *Nelson v. Nelson*, 99 A.D.2d 917, 918, 473 N.Y.S.2d 40 [3d Dept. 1984]) **for the limited purposes of "oversee[ing] the separation of the LC and the PC; ... assess[ing] the appropriate amounts due and owing from the LC to the PC, if any; and ... oversee[ing] the separation of clients between the two entities."**

In a proceeding for judicial dissolution brought under article 11 of the Business Corporation Law, the court has discretion to "make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment ... of a receiver under article 12 (Receivership)" (**Business Corporation Law § 1113; *see* *1123 § 1202[a][1]), and petitioner's submissions in support of his application for the appointment of a temporary receiver demonstrated that the entanglement of the PC and the LC created a danger of irreparable loss and that a receivership is necessary for the protection of the interests of the parties** (*see generally Matter of Armienti*, 309 A.D.2d 659, 661, 767 N.Y.S.2d 2 [1st Dept. 2003]; *Matter of Harrison Realty Corp.*, 295 A.D.2d 220, 220, 744 N.Y.S.2d 23 [1st Dept. 2002]). Specifically, the affidavits of petitioner, a licensed certified public accountant (CPA) and certified valuation analyst retained by petitioner, a former CPA for the PC, and an office manager for the PC supported petitioner's allegations of economic improprieties in the form of inadequate reimbursement by the LC to the PC for cross-charges. Those affidavits also raised issues of fact whether the LC was taking mass tort cases that otherwise would have been handled by the PC and whether it was using web addresses owned by the PC to redirect clients to the LC's new website. Inasmuch as it likely will be difficult to quantify what, if any, economic harm the PC has suffered as a result of clients being shepherded from the PC to the LC and inasmuch as respondents have refused to allow petitioner's CPA to speak with the COO of the PC, we **220 conclude that the court did not abuse its discretion in appointing a temporary receiver (*see generally Greer*, 124 A.D.2d at 708, 508 N.Y.S.2d 217; *Nelson*, 99 A.D.2d at 918, 473 N.Y.S.2d 40) to determine what if any amount the LC owes the PC, rather than ordering an accounting.

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

174 A.D.3d 582
Supreme Court, Appellate Division, Second Department, New York.
Mark LAFFEY, et al., Respondents, et al., Plaintiffs,
v.
Emmett LAFFEY, et al., Defendants;
James D. Leonard, et al., Nonparty-Appellants. (Action No. 1)
Mark Laffey, et al., Respondents, et al., Plaintiffs,
v.
Emmett Laffey, et al., Defendants;
James D. Leonard, et al., Nonparty-Appellants. (Action No. 2)
Emmett Laffey, Plaintiff,
v.
Philip Laffey, et al., Respondents;
James D. Leonard, et al., Nonparty-Appellants. (Action No. 3)

ALAN D. SCHEINKMAN, P.J., CHERYL E. CHAMBERS, JEFFREY A. COHEN, ROBERT J. MILLER, JJ.
DECISION & ORDER
*582 In three related actions, inter alia, for declaratory and injunctive relief and to recover damages for breach of fiduciary duty, which were joined for trial, nonparties James D. Leonard, Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg appeal from (1) an order of the Supreme Court, Nassau County (Timothy S. Driscoll, J.), dated October 21, 2015, (2) an order of the same court dated March 29, 2016, and (3) a supplemental order of the same court dated May 31, 2016. The order dated October 21, 2015, insofar as appealed from, granted the motion of James D. Leonard, Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg to confirm a Referee's report dated June 17, 2015, only to the extent of awarding James D. Leonard commissions calculated based on the reasonable time he spent on the matter and awarding Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg total attorneys' fees in the sum of only $623,698.50, and granted the cross motion of Mark Laffey and Philip Laffey, plaintiffs in Action Nos. 1 and 2 and defendants in Action No. 3, and U.S. 1 Laffey Real Estate Corp., doing business as Laffey Fine Homes, a plaintiff in Action Nos. 1 and 2, to reject the Referee's report to the **566 extent of rejecting, as excessive, the Referee's recommendation to award James D. Leonard commissions calculated at the maximum statutory rate and awarding Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg total attorneys' fees in the sum of $623,698.50. The order dated March 29, 2016, insofar as appealed from, denied those branches of the motion of James D. Leonard, Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg which were for leave to reargue and renew with respect to so much of the order dated October 21, 2015, as concerned Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg, and, upon granting that branch of the motion which was for *583 leave to reargue with respect to so much of the order dated October 21, 2015, as concerned James D. Leonard, adhered to the prior determination. The supplemental order dated May 31, 2016, upon the order dated March 29, 2016, and upon James D. Leonard's further submission, made under protest, awarded James D. Leonard total commissions in the sum of only $519,108.50, plus disbursements.
ORDERED that the appeal from so much of the order dated October 21, 2015, as granted the motion of James D. Leonard, Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg to confirm the Referee's report dated June 17, 2015, only to the extent of awarding James D. Leonard commissions calculated based on the reasonable time he spent on the matter, and granted the cross motion of Mark Laffey, Philip Laffey, and U.S. 1 Laffey Real Estate Corp., doing business as Laffey Fine Homes, to reject the Referee's report to the extent of rejecting, as excessive, the Referee's recommendation to award James D. Leonard commissions calculated at the maximum statutory rate is dismissed, as that portion of the order was superseded by the order dated March 29, 2016, made upon reargument; and it is further,
ORDERED that the appeal from so much of the order dated March 29, 2016, as denied that branch of the motion of James D. Leonard, Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg which was for leave to reargue with respect to so much of the order dated October 21, 2015, as concerned Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg is dismissed, as no appeal lies from an order denying reargument; and it is further,
ORDERED that the appeal by Rosenberg Calica & Birney, LLP, and Ronald J. Rosenberg from the supplemental order dated May 31, 2016, is dismissed, as those nonparties are not aggrieved by that order (*see* CPLR 5511); and it is further,
ORDERED that the orders dated October 21, 2015, and March 29, 2016, are affirmed insofar as reviewed; and it is further,

ORDERED that the supplemental order dated May 31, 2016, is affirmed on the appeal by James D. Leonard; and it is further,
ORDERED that one bill of costs is awarded to the respondents.
Mark Laffey, Philip Laffey, and Emmett Laffey are brothers, as well as the principals of the residential real estate business operating under the name of Laffey Fine Homes. Each brother also owns individual real estate businesses, often competing directly with Laffey Fine Homes or the brothers' individually owned businesses. Beginning in approximately 2007, irreconcilable *584 conflicts arose among the brothers, resulting in protracted and often acrimonious litigation, including the instant three actions, which were joined for trial.
On January 30, 2013, the Supreme Court appointed James D. Leonard (hereinafter the receiver) to act as temporary receiver **567 to oversee the business and property of U.S. 1 Laffey Real Estate Corp., doing business as Laffey Fine Homes (hereinafter LFH), Laffey Associates, LLC, eRealty Title Agency Corp., and 55 Northern Blvd., LLC. On March 14, 2013, the court allowed the receiver to retain Ronald J. Rosenberg and the law firm of Rosenberg Calica & Birney, LLP (hereinafter RCB), as counsel to the receiver. Subsequently, on February 6, 2015, the matter of the receiver's commissions, as well as the attorneys' fees of Rosenberg and RCB, was referred to a Special Referee to hear and report. After a two-day hearing, the Special Referee recommended that the receiver be awarded total commissions in the sum of $1,841,164 pursuant to CPLR 8004, and that Rosenberg and RCB be awarded 90% of the attorneys' fees they submitted.
The receiver, Rosenberg, and RCB then moved to confirm the Referee's report. Mark Laffey, Philip Laffey, and LFH opposed the motion and cross-moved to reject the Referee's report. In an order dated October 21, 2015, the Supreme Court, which had previously reviewed, inter alia, the receiver's time records through October 31, 2014, rejected, as excessive, the Special Referee's recommendation to award the receiver commissions calculated at the maximum statutory rate of 5% of the sums received and disbursed by him during the receivership (*see* CPLR 8004[a]). Instead, the court directed the receiver to submit updated time records, which would then be used as the basis for calculating the percentage of his commission pursuant to CPLR 8004. The court also reduced RCB and Rosenberg's attorneys' fees from the sum of $607,498.37 recommended by the receiver to the sum of $492,150.85, calculated by awarding RCB and Rosenberg total attorneys' fees in the sum of $623,698.50, plus disbursements, and deducting therefrom attorneys' fees awarded to them pursuant to prior decisions.
The receiver, as well as RCB and Rosenberg, moved for leave to reargue and renew with respect to the order dated October 21, 2015. The court, in an order dated March 29, 2016, denied those branches of the motion which concerned RCB and Rosenberg and, upon granting that branch of the motion which was for leave to reargue with respect to so much of the prior order as concerned the receiver, adhered to its prior determination. The receiver, under protest, subsequently submitted *585 updated time records, and the court, in a supplemental order dated May 31, 2016, awarded the receiver total commissions in the sum of $519,108.50, plus disbursements.
1As a threshold matter, it is not disputed that the receiver was appointed pursuant to CPLR article 64 and, pursuant to a prior order of the Supreme Court dated July 18, 2013, the commission of the receiver should be determined pursuant to CPLR 8004. Specifically, CPLR 8004 provides that a receiver "is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows." In other words, "a Receiver is not entitled as a matter of right to the maximum 5%, the court having discretion to fix a lesser commission as the facts and circumstances of any particular case indicate" (*Weckstein v. Breitbart*, 154 A.D.2d 305, 305, 546 N.Y.S.2d 593; *see Hirsch v. Peekskill Ranch*, 100 A.D.2d 863, 474 N.Y.S.2d 117).
Here, the receiver submitted evidence that the sums received by him during his administration were $37,284,690, and the amounts disbursed by him during the same period were $36,361,899. The receiver requested a total commission of $1,841,164, calculated as 5% of the average **568 of the sums received and amounts disbursed. Instead, the Supreme Court awarded him a total commission of $519,108.50, which amounts to approximately 1.4% of the average of the sums received and amounts disbursed.
2In fixing the appropriate amount of compensation, the court should take into account, inter alia, the value and size of the assets under administration, the quantity, nature and complexity of the services rendered by the receiver, and the overall reasonableness of the ultimate dollar amount arrived at by applying the formula set out in CPLR 8004 (*see Weckstein v. Breitbart*, 154 A.D.2d at 307, 546 N.Y.S.2d 593; *see also New York State Mtge. Loan Enforcement & Admin. Corp. v. Milbank Site One Houses*, 151 A.D.2d 424, 426, 542 N.Y.S.2d 632).
34Contrary to the receiver's contention, it was not error for the Supreme Court to request updated time records before establishing the final amount of the receiver's commission, as the amount of time spent by the receiver in discharging his duties constitutes one relevant consideration, among many others, in

determining the reasonable value of his services. Taking into account the totality of the evidence presented before the Special Referee, the Supreme Court providently exercised its discretion in fixing the receiver's total commission at $519,108.50, or approximately 1.4% of the average of the sums received and amounts disbursed (*see* CPLR 8004[a]).

*586 **56Similarly, "the fees of a receiver's attorneys are measured by the fair and reasonable value of the services rendered" (*Matter of F.G.A. Concrete Constr. Corp. [Canter—Farinacci]*, 26 A.D.2d 639, 272 N.Y.S.2d 458). This, in turn, requires consideration of the following factors: "[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).** Applying these factors, we find that the Supreme Court providently exercised its discretion in assessing the fair and reasonable value of the legal services provided by RCB and Rosenberg at $623,698.50, and we discern no reason, under the facts presented, to increase that amount (*see Matter of F.G.A. Concrete Constr. Corp. [Canter—Farinacci]*, 26 A.D.2d at 639–640, 272 N.Y.S.2d 458).

The remaining contentions of the receiver, RCB, and Rosenberg are without merit.

SCHEINKMAN, P.J., CHAMBERS, COHEN and MILLER, JJ., concur.

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

172 A.D.3d 926
Supreme Court, Appellate Division, Second Department, New York.
PHOENIX GRANTOR TRUST, Appellant,
v.
EXCLUSIVE HOSPITALITY, LLC, et al., Respondents, et al., defendants.
2016–09073(Index No. 710949/15)
Argued—January 25, 2019May 8, 2019

DECISION & ORDER
*926 In an action, inter alia, to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Allan B. Weiss, J.), entered August 12, 2016.
The order denied the plaintiff's motion for the appointment of a receiver for the subject real property.
ORDERED that the order is affirmed, with costs.
Following the commencement of this foreclosure action, the plaintiff moved for the appointment of a receiver to manage the subject real property and to operate the hotel located on the premises. The motion was opposed by the defendant mortgagor, which is a company that currently operates the hotel, and three defendant guarantors of the mortgage debt. The Supreme Court denied the plaintiff's motion, and the plaintiff appeals.
Although the relevant mortgage consolidation agreement provides that the mortgagee may apply for the appointment of a receiver in the event of a default by the borrower (*see* Real Property Law § 254[10]), the Supreme Court did not improvidently exercise its discretion in denying the plaintiff's motion given the substantial issues of fact that have been raised in this case, including those regarding the validity of the underlying note and whether a default has in fact occurred (*cf. Clinton Capital Corp. v. One Tiffany Place Developers,* 112 A.D.2d 911, 912, 492 N.Y.S.2d 427).
*927 The plaintiff's alternative request for relief was not raised in the Supreme Court and, thus, is not properly before this Court (*see Emigrant Mtge. Co., Inc. v. Persad,* 117 A.D.3d 676, 678, 985 N.Y.S.2d 608).
MASTRO, J.P., ROMAN, HINDS–RADIX and MALTESE, JJ., concur.

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

170 A.D.3d 1156
Supreme Court, Appellate Division, Second Department, New York.
Thameshwar MANGRA, etc., respondent,
v.
Parbatee MANGRA, appellant.
2016–016102016–114542016–11455(Index No. 17753/13)
Argued—December 6, 2018March 27, 2019

DECISION & ORDER
*1156 ORDERED that the judgment of divorce is affirmed insofar as appealed from; and it is further,
ORDERED that the first order is affirmed insofar as appealed from; and it is further,
ORDERED that the second order is affirmed; and it is further,
ORDERED that one bill of costs is awarded to the plaintiff.
In September 2013, Khamraj Mangra, who is now deceased *1157 (hereinafter the decedent), commenced this action for a divorce and ancillary relief.
During their 12–year, childless marriage, the parties acquired real property located at 111–09 103rd Avenue in Richmond Hill (hereinafter the 103rd Avenue property), as well as real property located at 104–61 Atlantic Avenue, Richmond Hill (hereinafter the Atlantic Avenue property). The entirety of the Atlantic Avenue property was rented out to various tenants, while only a portion of the 103rd Avenue property was rented out to tenants. The unrented portion of the 103rd Avenue property was occupied by the parties prior to their separation and thereafter by the defendant.
At trial, held before a Court Attorney Referee, the parties acknowledged that the Atlantic Avenue property, which was titled solely in the defendant's name, was more valuable than the 103rd Avenue property, which was essentially underwater, that is, the amount owed on the mortgages on that property exceeded its fair market value. However, each party expressed the desire to occupy the 103rd Avenue property and neither party sought to have the properties sold. The decedent argued that he should be permitted to occupy the 103rd Avenue property due to a medical condition, **156 while the defendant contended that she should be permitted to occupy the 103rd Avenue property as it was more affordable to her. The Supreme Court awarded the decedent the 103rd Avenue property but required him to indemnify and hold the defendant harmless for any financial obligations with respect to that property and to cause the defendant to be removed from the mortgages on that property. The defendant was awarded the Atlantic Avenue property and, to balance out the difference in the values of the two properties, the decedent was awarded full title to all of his retirement accounts, including amounts he withdrew therefrom during the pendency of the action. A judgment of divorce was entered on December 29, 2015.
In early January 2016, the defendant moved, inter alia, pursuant to CPLR 4404(b) and 5015 to vacate so much of the judgment of divorce as determined issues of equitable distribution. The decedent died on January 30, 2016. Thameshwar Mangra, the decedent's son by a prior marriage, was named executor of the decedent's estate and, by stipulation, was substituted as the plaintiff (hereinafter the plaintiff).
The plaintiff cross-moved, among other things, to be appointed receiver of the 103rd Avenue property so that he could effectuate a transfer of title to that property from the defendant to the decedent's estate. In an order dated September 6, 2016, the *1158 Supreme Court, inter alia, denied the defendant's motion and granted that branch of the plaintiff's cross motion which was to appoint the plaintiff as receiver of the 103rd Avenue property.
In a separate order, also dated September 6, 2016, the court, among other things, appointed the plaintiff receiver of the 103rd Avenue property for the purpose of effectuating the transfer of title. The defendant appeals from the judgment of divorce and both orders.
12As a general rule, courts will not disturb the findings of a Referee as long as they are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility (*see Anvaer v. Anvaer,* 160 A.D.3d 794, 74 N.Y.S.3d 629). The trial court is vested with broad discretion in making an equitable distribution of marital property, and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed (*see Gafycz v. Gafycz,* 148 A.D.3d 679, 48 N.Y.S.3d 464; *Halley–Boyce v. Boyce,* 108 A.D.3d 503, 504, 969 N.Y.S.2d 467). Here, we discern no proper basis for disturbing the equitable distribution determination made by the Court Attorney Referee.
34“ **‘A court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions’** ” (*Caponera v. Caponera,* 165 A.D.3d 1221, 1222, 87 N.Y.S.3d 614, quoting CPLR 5106; *see Wagenmann v. Wagenmann,* 96 A.D.2d 534, 536, 465 N.Y.S.2d 44). “ **‘Whether a receiver should be appointed in a particular matter is a determination committed to the court's sound discretion’ ”** (*Caponera v.*

Caponera, 165 A.D.3d at 1222–1223, 87 N.Y.S.3d 614, quoting *Foley v. Gootenberg,* 137 A.D.3d 744, 745, 26 N.Y.S.3d 336). Here, the record supports the Supreme Court's determination that the defendant failed to cooperate in effectuating the transfer of title to the 103rd Avenue property, as required by the judgment of divorce. Under the circumstances, the court providently exercised its discretion in granting that branch of the plaintiff's cross motion which was to be appointed receiver of the 103rd Avenue property to effectuate the transfer of title **157 (*see Zephirin v. Pierre–Louis,* 141 A.D.3d 517, 518, 35 N.Y.S.3d 233).

5678We also agree with the Supreme Court's determination to deny those branches of the defendant's motion which were pursuant to CPLR 4404(b) and 5015 to vacate so much of the judgment of divorce as determined issues of equitable distribution. Pursuant to CPLR 4404(b), after a trial not triable as of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision and issue a new decision based on, inter alia, newly discovered evidence (*see* *1159 *Da Silva v. Savo,* 97 A.D.3d 525, 526, 948 N.Y.S.2d 333). Pursuant to CPLR 5015(a)(2), the court which rendered a judgment may relieve a party from it upon the grounds of, among other things, “newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial.” “In order for relief to be granted under CPLR 4404(b) or 5015(a)(2) based on newly-discovered evidence, the movant must show that it could not have previously discovered the evidence” (*Da Silva v. Savo,* 97 A.D.3d at 526, 948 N.Y.S.2d 333).

Here, the defendant failed to demonstrate either that the claimed newly discovered evidence would probably have produced a different result or that she could not have previously discovered the alleged new evidence. While the defendant alleged that she had discovered “title issues” with respect to the Atlantic Avenue property, the record reflects that the defendant's deed to that property was recorded on July 4, 2004, prior to other deeds referenced by the defendant, which were not recorded until May 2, 2006, more than nine years prior to the commencement of the trial in this action. The defendant failed to explain why she could not have previously discovered the other deeds, which were recorded prior to the commencement of this action. The defendant failed to show that there was any third person who was claiming any right or interest in the title to the Atlantic Avenue property. The defendant also failed to show that the decedent committed any fraud, either upon her or upon the Supreme Court. Thus, we agree with the court's determination to deny those branches of the defendant's motion which were pursuant to CPLR 4404(b) and 5015 to vacate so much of the judgment of divorce as determined issues of equitable distribution.

The defendant's remaining contentions are without merit.

SCHEINKMAN, P.J., RIVERA, HINDS–RADIX and BARROS, JJ., concur.

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