NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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4570 HHP LENDER LLC,

Plaintiff,

- against -

4570 HH PKWY LLC, ARSENIO JIMENEZ, ARIEL JIMENEZ, ANA LUISA GONZALEZ-SOSA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PARKING VIOLATION BOARD OF THE CITY OF NEW YORK, UNITED STATES OF AMERICA,

Defendant.

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SECOND AMENDED ORDER

Index No. **36221/19E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 4, Read on this motion noticed on 7/6/20, and duly submitted as no. 2 on the Motion Calendar of 3/22/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Judgment of Foreclosure and Sale		
Memorandum of Law		
Administrative Order 5.25.2022 and Amended Bronx Auction Plan 2021	3,4	

Defendants 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENE, and ANA JIMENEZ A/K/A ANA LUISA GONZALEZ SOSA's motion and plaintiff's cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 9/30/2022

Hon. **FIDEL E. GOMEZ, AJSC**

1.CHECK ONE — X CASE DISPOSED — ☐ NON-FINAL DISPOSITION

2. MOTION IS — X GRANTED (MOTION)
CROSS-MOTION IS — X DENIED (CROSS-MOTION)
☐ GRANTED IN PART

3. CHECK IF APPROPRIATE.
☐ OTHER
☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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4570 HHP LENDER LLC,

Plaintiff(s),

- against -

4570 HH PKWY LLC, ARSENIO JIMENEZ, ARIEL JIMENEZ, ANA LUISA GONZALEZ-SOSA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PARKING VIOLATION BOARD OF THE CITY OF NEW YORK, UNITED STATES OF AMERICA,

Defendant(s).

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SECOND AMENDED DECISION AND ORDER

Index No: 366221/19E

In this action to foreclose a mortgage and sell the real property which it encumbers, plaintiff moves seeking, *inter alia*, the entry of a Judgment of Foreclosure and Sale. Plaintiff avers that upon confirmation of the Referee's report, and because all defendants have defaulted, RPAPL § 1351 requires the issuance of Judgment of Foreclosure and Sale. Defendants 4570 HH PKWY LLC (4570), ARSENIO JIMENEZ (Arsenio), ANA LUISA GONZALEZ-SOSA (Sosa), and ARIEL JIMENEZ (Ariel) oppose the instant motion asserting that the Referee by, *inter alia*, applying the wrong interest rate, has miscalculated all sums due and owing by the moving defendants. 4570, Arsenio, Sosa, and Ariel also cross-move seeking an order, *inter alia*, pursuant to CPLR § 5015(a)(1) vacating the Court's

Order Appointing a Referee to Compute and for Other Relief[1], dated January 21, 2020, which held that all defendants had been duly served with the summons and complaint and had failed to appear. 4570, Asernio, Sosa, and Ariel contend, *inter alia*, that they were never served with the summons and complaint, such that their failure to interpose answers is excusable. Plaintiff opposes the instant cross-motion, asserting that that the Referee computed all sums due pursuant to the terms of Loan Agreement between the parties, such that the calculations are accurate. Plaintiff also asserts that movants were served with process such that they have no reasonable excuse for failing to answer and that they also fail to proffer a meritorious defense to the instant action.

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[1] Although the Court has not yet formally entered a judgment against the defendants in this action, for purposes of this motion it is a distinction without a difference. To be sure, pursuant to RPAPL § 1321 (1), an order of reference is authorized when the defendants fail to answer (*id.* ["If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a Referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due. Where the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants be absentees, the order of reference also shall direct the Referee to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as to any payments which have been made."]), which is the functional equivalent of a default judgment and is the burden to which the Court held plaintiff prior to issuing its prior order.

For the reasons that follow hereinafter, plaintiff's motion is granted and 4570, Arsenio, Ariel, and Sosa's cross-motion is denied.

According to the complaint, this action is for foreclosure on a mortgage and the sale of the property which secures the corresponding promissory note. The complaint alleges that on November 30, 2017, 4570 executed a Promissory Note (note) obligating it to repay non-party Fith Avenue Capital III LLC (Fifth Avenue) the amount of $499,999. The note was secured by a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, which pledged real property located at 4570 Henry Hudson Parkway East, Bronx, NY 10471 as collateral. Arsenio and Sosa also executed a guaranty of payment, wherein they agreed to guarantee the loan made to 4570. On March 22, 2019, the mortgage and note were assigned to plaintiff, who now holds and owns them. The foregoing documents required that 4570 repay the entire loan by December 1, 2018 and obligated 4570 to make monthly interest payments until such time. The documents further state that if 4570 fails to make a payment when due, it constitutes a default and that plaintiff could then accelerate all sums due and if said sum is not paid, may then institute foreclosure proceedings. It is alleged that on December 1, 2018, 4570 failed to pay the entire loan as required and that neither Sosa nor Arsenio satisfied the debt owed to plaintiff. It is alleged that $499,000 is due and owing on the

loan and as a result, plaintiff seeks a Judgment of Foreclosure and Sale.

On December 21, 2019, the Court (Gonzalez, J.) granted plaintiff's application seeking, *inter alia*, the entry of a default against all defendants since they had failed to appear and/or interpose answers.

PLAINTIFF'S MOTION

Plaintiff's motion seeking, *inter alia*, an order pursuant to RPAPL § 1321[2], confirming the Referee's report and pursuant to RPAPL § 1351, seeking the entry of Judgment of Foreclosure and Sale is granted. Significantly, on this record, plaintiff establishes that the Referee's calculations as to all sums due and owing are accurate and based on the terms of the mortgage, note, and Loan Agreement between the parties. With regard to to the entry of a Judgment of Foreclosure and Sale, because this Court, as will be discussed hereinafter, denies movants' cross-motion to vacate their default for failing to interpose answers, plaintiff is entitled to a Judgment of Foreclosure and Sale.

Confirmation of Referee's Report

[2] The instant motion is actually one pursuant to CPLR § 4403 and not RPAPL § 1321, which governs the appointment of a Referee in a foreclosure action.

Pursuant to CPLR § 4403, "upon the motion of any party or his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the . . . the report of a Referee to report." It is well settled that "a Referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" (*HSBC Bank USA, N.A. v Sharon*, 202 AD3d 764, 766 [2d Dept 2022]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2d Dept 2020]; *Nationstar Mtge., LLC v Durane-Bolivard*, 175 AD3d 1308, 1310 [2d Dept 2019]; *HSBC Bank USA, N.A. v Cherestal*, 178 AD3d 680, 682 [2d Dept 2019]; *U.S. Bank N.A. v Sheth*, 177 AD3d 1018, 1020 [2d Dept 2019]; *Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]; *Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 791 [2d Dept 2017]; *Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678 [3d Dept 1993]). However, where a Referee's findings are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility, his/her report should be confirmed (*Sharon* at 202; *IndyMac Fed. Bank, FSB* at 726; *Nationstar Mtge., LLC* at 1310; *U.S. Bank N.A.* at 1020; *Citimortgage, Inc.* at 768; *Flagstar Bank, F.S.B.* at 791).

Notably, however, confirmation of a Referee's report ought to be denied if it is based on inadmissible hearsay or on documents never actually produced to the Referee (*U.S. Bank N.A. as Tr. for*

CMALT REMIC 2007-A4 PRAA-REMIC Pass-Through Certificates, Series 2007 A4 v Chait, 197 AD3d 1077, 1078 [1st Dept 2021] ["Court denied confirmation of Referee's report stating that "[i]n his report of amount due upon the subject note and mortgage, the Referee relied on an April 13, 2018 affidavit by a vice president of plaintiff's loan servicer that, according to plaintiff's books and records pertaining to defendant's loan and payment history, defendant had been in default since August 1, 2011, and owed plaintiff the stated amount. However, because the books and records themselves were not submitted, the affidavit is inadmissible hearsay."]; *Cherestal* at 683 [Court rejected Referee's report stating that "[h]ere, 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" (internal quotation marks omitted).]; *Citimortgage, Inc.* at 768-769 ["Here, as the defendant contended in opposition to the plaintiff's submissions, the 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 record."]).

Because the opponent of confirmation has an opportunity to argue against confirmation upon an application to confirm a Referee's report, the failure by the Referee to hold a hearing prior to issuing a report does not preclude confirmation (*NYCTL 1998-2 Tr. v Bethelite Community Baptist Church*, 192 AD3d 429, 430 [1st Dept 2021], *lv to appeal denied*, 37 NY3d 906 [2021] ["Further, the court properly granted plaintiffs' motion for an order and judgment confirming the Referee's report and for leave to enter a judgment of foreclosure on the tax lien. Defendant was not prejudiced by any error in failing to hold a hearing, because it had an opportunity to raise questions and submit evidence that could be considered by Supreme Court in determining whether to confirm the Referee's report."]; *Bank of New York Mellon v Viola*, 181 AD3d 767, 769-770 [2d Dept 2020]; *Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233, 1236 [2d Dept 2018]).

In support of instant motion, plaintiff submits the Referee's Report of Amount Due, created by Joseph A. Carafano (Carafano), the Referee appointed by the Court to compute all sums due to plaintiff. Carafano states that based on his review of the note, mortgage, Loan Agreement, the guaranty agreement, and an affidavit by David Aviram (Aviram), 4570's Manager, he determined that plaintiff is owed $616,820.19 "for principal, protective advances for insurance and tax liens, and interest on protective advances," plus interest on the principal and protective advances from

September 11, 2018.

Carafano attaches a Statement of Amount Due and Owing (statement) to his report, which details how he arrived at the foregoing amount. Specifically, Carafano notes that the principal on the loan as evinced therein is $499,000. He further states that the interest on the principal through February 6, 2020 is $147,665.19, calculated at a rate of 24 percent per year. Carafano also states that 4570 owes $29,999.94 in late charges. The statement indicates that the foregoing sums total $677.664.13. Carafano also adds several protective advances to the foregoing sum. Specifically, he adds the following protective advances: two insurance payments, one totaling $1,063.06 and another totaling $2214; two tax credits, one totaling $18,375.72 and another totaling $9,534.38. The protective advances total $31,187.16 and the interest thereon, at a rate of 24 percent, totals $3,631.29. Finally, Carafano credits 4570 with a payment made by 4570 totaling $4,166.70 and with $91,495.69 held by plaintiff in escrow. After adding the protective advances to the interest on the same and subtracting the credits noted, Carafano calculates that the sums due and owing as of February 6, 2020 total $616,820.19 with interest thereon at a rate of $354.12 per day.

Plaintiff submits Aviram’s affidavit, upon which Carafano relied. Aviram states that he is 4570's Manager and has personal

knowledge of the instant action upon review of plaintiff's records, maintained by plaintiff in the ordinary course of plaintiff's business. Aviram states that plaintiff is the holder of a note and mortgage, attached to his affidavit, and submitted to Carafano. Upon reviewing Carafano's statement, Aviram states that it was prepared using plaintiff's records and provided to Carafano and that it "sets forth the amounts due and owing on the Note and Mortgage mentioned in the complaint herein for principal, interest, late charges, protective advances and interest on protective advances."

Plaintiff submits the note between 4570 and Fifth Avenue. The note is dated November 30, 2017 and indicates that Fifth Avenue loaned 4570 $499,999, which 4570 agreed to repay. Article 1 of the note states that 4570

> shall make a payment of interest only from the Closing Date until the last day of the month in which the Closing Date occurs. Thereafter, commencing on January 1, 2018, Borrower shall make monthly payments of interest only, in full, in arrears on the first Business Day of each month (each, a 'Payment Date') for the immediately preceding Payment Period (hereinafter defined), until all amounts due under the Loan Documents are paid in full on the Maturity Date.

Article 1(2) states that

> [w]hile any Event of Default exists, the Loan shall bear interest at the Default

> Rate. As used herein, 'Default Rate' shall mean the maximum rate of interest permitted under the laws of the State of New York.

Article 1(3)[3] discloses that the maturity date is December 1, 2018 and Article 2 states that

> [t]he Debt shall become due and payable at the option of Lender if any payment required in this Note is not paid on or prior to the date when due after the expiration of any and all applicable notice and grace periods, if any, or if not paid on the Maturity Date or on the happening of any other Event of Default.

Plaintiff submits the mortgage between 4570 and Fifth Avenue, which is dated November 30, 2017 and indicates that 4570 grants Fifth Avenue a mortgage. Section 1.1 defines the mortgaged property as real property located at 4570 Henry Hudson Parkway East, Bronx, NY, along with all fixtures, rents and leases, and defines obligations as all amounts due under loan documents executed by the parties. Pursuant to Article 2, the mortgage is granted to Fifth Avenue "to secure the full obligation and timely payment and performance of the obligations," namely the amounts of the loan made to 4570. Per Article 4.1(a), upon a default, as defined by the Loan Agreement, Fifth Avenue could declare all sums on the loan immediately due. Per Article 4.1(d), upon default, Fifth Avenue could institute foreclosure proceedings.

[3] This section is denominated as Article 1(1), however, it is clear that it should be titled Article 1(3).

Plaintiff submits the Loan Agreement between 4570 and Fifth Avenue, dated November 30, 2017. Section 2.1 indicates that Fifth Avenue loaned 4570 $499,999 to be repaid under the terms of the agreement, which loan was evinced by the note. Section 2.2 states that "[w[hile any Event of Default exists, the Loan shall bear interest at the Default Rate," and Section 1.1, defines the foregoing rate as the "lesser of 24% or the maximum rate of interest permitted under the laws of the State of New York." Section 8.1 (1) defines a default as the failure to pay the loan in full on the maturity date, which per Section 1.1 is December 1, 2018. Section 8.1(2) states that the failure to pay sums under the loan when due also constitute a default. With regard to the application of any payments Section 2.3(5) states that

> [s]o long as no Event of Default exists, all payments received by Lender under the Loan Documents shall be applied in the following order: (a) to any fees and expenses due to Lender under the Loan Documents; (b) to any Default Rate interest or late charges; (c) to accrued and unpaid interest; (d) to amounts owed under any Reserves; and (e) to the principal sum and other amounts due under the Loan Documents. Prepayments of principal, if permitted or accepted, shall be applied against amounts owing in inverse order of maturity. While any Event of Default exists, Lender may apply all payments to amounts then owing in any manner and in any order as determined by Lender.

Pursuant to Section 1.1, loss proceeds are "awards or payments

payable to Borrower or Lender in respect of all or any portion of the Property in connection with a casualty or condemnation thereof," and with regard to the same, Section 4.2(5) states that "[a]ny Loss Proceeds remaining after payment of all restoration costs shall be applied by Lender to the payment of amounts owing under the Loan Documents."

With respect to waivers, Section 11.11 of the Loan Agreement states that

> [n]o course of dealing on the part of Lender, or any of its respective officers, employees, consultants or agents, nor any failure or delay by Lender with respect to exercising any right, power or privilege of Lender under any of the Loan Documents, shall operate as a waiver thereof.

Plaintiff submits an affidavit by Jason Leibowitz (Leibowitz), its Manager, wherein he states that per his review of plaintiff's records, made and kept in the ordinary course of plaintiff's business, although the insurance company paid $136,995 for damage to 4570, $45,500 was used in preparation to repair the damage. Specifically, $45,000 was paid to Rojas Engineering PLLC and $500 was paid for inspection fees. Those sums were spent between July 16, 2018 and October 2, 2018. As a result of the foregoing, the remaining $91,495.69 was applied as a credit to the 4570's loan.

Based on the foregoing, plaintiff establishes entitlement to

confirmation of Carafano's report. As noted above, where a Referee's findings are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility, his/her report should be confirmed (*Sharon* at 202; *IndyMac Fed. Bank, FSB* at 726; *Nationstar Mtge., LLC* at 1310; *U.S. Bank N.A.* at 1020; *Citimortgage, Inc.* at 768; *Flagstar Bank, F.S.B.* at 791). Confirmation of a Referee's report, however, ought to be denied if it is based on inadmissible hearsay or on documents never actually produced to the Referee (*U.S. Bank N.A. as Tr. for CMALT REMIC 2007-A4 PRAA-REMIC Pass-Through Certificates, Series 2007 A4* at 1078; *Cherestal* at 683; *Citimortgage, Inc.* at 768-769).

Here, Carafano's report is premised on all of plaintiff's records, including many of which were provided to this Court. Based on those records, and Aviram's affidavit identifying them as business records, Carafano concludes that after accounting for protective advances, interest on the same, and providing 4570 any credits due, the sums due and owing as of February 6, 2020 total $616,820.19 with interest thereon at a rate of $354.12 per day.

Movants' opposition fails to establish, as urged, that Carafano applied the wrong rate of interest, inequitably applied interest, or that 4570 was not appropriately credited with sums received in response to an insurance claim.

In opposition to the plaintiff's motion, movants submit

several affidavits.

In an affidavit by Sosa, notarized on June 1, 2020, she states that she and her husband, Arsenio, own the premises located at 4570 Henry Hudson Parkway East, Bronx, NY, where her son, Ariel resides. Sosa further states that she lives at 2260 University Avenue, Bronx, NY (2260) and that she was never served with the summons and complaint in this action[4]. Lastly, Sosa states that on January 21, 2018, a pipe broke at 4570 Henry Hudson Parkway East, Bronx, NY, that Arsenio filed an insurance claim as a result, that the insurance company sent her and Arsenio a check for $136,995.99, and that the check was given to Fifth Avenue.

In an affidavit by Arsenio, he states that he and Sosa own 4570 Henry Hudson Parkway East, Bronx, NY, and that Ariel resides thereat. With regard to the loan made to 4570 by Fifth Avenue, Arsenio states that it was for $499,999 and that he was told at closing that he had prepaid a year of interest and would not have

[4] The Court is troubled by Sosa's affidavit and her sworn assertion that on June 1, 2020, when the affidavit was notarized, she states that she lived at 2260. This assertion is at odds with an affidavit submitted by Sosa in support of a motion to vacate her default in another foreclosure action before this Court titled Emigrant Funding Corporation v 2424 Davidson Avenue, LLC, et al, Index No. 36129/19E. In that action Sosa submitted an affidavit also notarized on June 1, 2020, wherein she states that she "live[s] with my husband, Arsenio at 2352 University Avenue, Bronx, NY 10471 ("University"). We live in apartment #4S." This, of course, has no bearing on this Court's decision, but it is at best inadvertence and at worse a evidence of fraud.

to repay anything other than the principal. On January 21, 2018, a pipe broke at 4570 Henry Hudson Parkway East, Bronx, NY. Arsenio filed an insurance claim as a result, the insurance company sent he and Sosa a check for $136,995.99, and the check was given to Fifth Avenue. Arsenio states that the foregoing sum was not used to repair the home and that thus, he believed the same would be applied to the loan the principal on the loan. In December 2018 and January 2019, Arsenio received notices that 4570 had defaulted on the loan, said notices were sent to 2352 University Avenue, Apt. 4S, Bronx, NY 10468 (2352) and to 4570's lawyers. Within the foregoing notices, the default rate of interest was 16 percent and the amount of the insurance proceeds credited to the loan was only $91,495.69. Arsenio states that Carafano's report is inaccurate because it does not reflect that the insurance company paid Fifth Avenue $136,000 and because the interest rate Carafano used is 24 percent. Arsenio denies ever being served with the summons and complaint. He states that 2260 is not the correct address for 4570, and that 2352 is 4570's address.

In an affidavit, Ariel states that he lives at a home and that he was not served with the summons and complaint because he was incarcerated in May 2020.

Movants submit two notices sent to 4570 at 2352 from Fifth Avenue. The first, dated December 28, 2018 indicates that

$414,725.47 was required to satisfy the mortgage encumbering 4570 and that said sum had to be paid by 5pm that day. The notice lists the rate of interest as 16 percent and credits 4570 with $91,495.69, received pursuant to an insurance claim. The second notice is almost identical to the first, except that is dated January 22, 2019, requires payment by 5pm that day, and lists the payoff amount as $420,280.97

Movants submit Article 11 of the Loan Agreement, which states that

> [a]ll notices required or permitted to be given hereunder (each, a "Notice") shall be in writing addressed to the party to be so notified at its address set forth below . . . If to Borrower: 4570 HH PKWY LLC 2352 University Avenue, Apartment 4S Bronx, NY 10468 Attention Mr. Arsenio Jimenez

Based on the foregoing, movants fail to establish that the credit applied to the loan, in light of the insurance proceeds paid to Fifth Avenue, was incorrect. Given that no repairs were made to 4570 subsequent to the claim, Arsenio's affidavit discloses a discrepancy between the sums paid by the insurance company and the sums applied to the loan. However, as discussed above, Leibowitz establishes that Fifth Avenue spent $45,500 of the $136,995.69 received by Fifth Avenue in preparation to undertake repairs, such that only $91,496.69 of the proceeds were left and were, as noted by Carafano, applied to the instant loan.

With regard to how the insurance funds were applied, the interest rates applied to the loan, and when interest was applied, movants fail to establish that the Referee miscalculated the same. Significantly, when interest was applied and at what rate is governed by the loan agreement between the parties.

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than to reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Thus, "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]).

Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain

meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.* at 475). This approach, of course, serves to provide "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no

reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id.* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to

the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of N.Y.*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long standing rule, the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*id.* at 416 [internal citations omitted]).

Here, with regard to the applicable interest upon a default, Section 2.2 of the Loan Agreement states that "[w]hile any Event of Default exists, the Loan shall bear interest at the Default Rate," and Section 1.1 defines the foregoing rate as the "lesser of 24% or the maximum rate of interest permitted under the laws of the State of New York." Moreover, Section 8.1 (1) of the Loan Agreement,

defines a default as the failure to pay the loan in full on the maturity date, which per Section 1.1 is December 1, 2018. Section 8.1(2) states that the failure to pay sums under the loan when due also constitute a default. Thus, per the clear an unambiguous language in the Loan Agreement the rate of interest upon 4570's default is 24 percent, the rate applied by Carafano.

While in his affidavit, Arsenio intimates that the interest rate sought in the notices sent to 4570 by Fifth Avenue should bind it, thus limiting the interest rate thereto, this argument - in essence one of waiver - is without merit. To be sure, Section 11.1 of the Loan Agreement expressly proscribes waiver when, as urged, Fifth Avenue's conduct might have given rise to the same (*Goldberg v Manhattan Mini Stor. Corp.*, 225 AD2d 408, 408 [1st Dept 1996] ["Plaintiff's claim that a prior course of conduct lulled him into a belief that his property was not in danger of being sold is without merit in view of the no-waiver clause in the agreement."]). Here then, the fact that in order to facilitate payment on the loan First Avenue sought to apply a reduced interest rate, does not preclude it from seeking the rate prescribed in the Loan Agreement.

To the extent that movants, by counsel, assert that Carafano calculated interest due on the loan prior to applying all credits, specifically the proceeds from the insurance claim, this assertion is also without merit. Significantly, Section 1.1, states that

proceeds are "awards or payments payable to Borrower or Lender in respect of all or any portion of the Property in connection with a casualty or condemnation thereof," and with regard to the same, Section 4.2(5) states that "[a]ny Loss Proceeds remaining after payment of all restoration costs shall be applied by Lender to the payment of amounts owing under the Loan Documents. Accordingly, under the express terms of the Loan Agreement, neither plaintiff nor Carafano were required to first deduct the insurance proceeds from the principal and then calculate interest on the reduced amount.

Accordingly, this portion of plaintiff's motion is granted.

Judgment of Foreclosure and Sale

Plaintiff's motion seeking an order granting it a Judgment of Foreclosure and Sale pursuant to RPAPL § 1351 is granted. As will be discussed below, upon denial of movants' application to vacate their default, all defendants have defaulted and plaintiff's application must be granted.

CPLR § 1351(1) states that the

> judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which may be sold separately without material injury to the parties interested, be sold by or

> under the direction of the sheriff of the county, or a Referee within ninety days of the date of the judgment.

Here, plaintiff establishes entitlement to a Judgment of Foreclosure and Sale since all defendants having any interest in the instant premises have defaulted.

4570, ARSENIO, SOSA AND ARIEL'S CROSS-MOTION

Movants' cross-motion for an order vacating their default in failing to interpose answers to the summons and complaint is denied. Significantly, movants fail to rebut the presumption of service established by the affidavits of service, which evince that they were duly served with the summons and complaint. Nor do any of them assert a meritorious defense to the claims in the complaint.

CPLR § 5015

Because movants aver that they have a reasonable excuse for their default and a meritorious defense to the claims in the complaint, the instant motion is one pursuant to CPLR § 5015(a)(1). However, insofar as movants also aver that they were never served with the summons and complaint, they interpose the absence of personal jurisdiction as the excuse for failing to appear. Accordingly, this Court must first determine the jurisdictional portion of the instant motion pursuant to CPLR § 5015(a)(4) and

then address the issue of vacating the instant judgment on grounds of excusable default pursuant to CPLR § 5015(a)(1).

To be sure, it is well settled that when a defendant seeks to vacate a default judgment pursuant to CPLR § 5015(a)(1) by raising a jurisdictional defense pursuant to CPLR § 5015(a)(4), the court must resolve the jurisdictional question before determining whether a discretionary vacatur of the default under CPLR § 5015(a)(1) is warranted (*Roberts v Anka*, 45 AD3d 752, 753 [2d Dept 2007] ["When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1)."], *lv. dismissed* 10 NY3d 851 [2008]; *Delgado v Velecela*, 56 AD3d 515, 516 [2d Dept 2008]; *Marable ex rel. Ralph v Williams*, 278 AD2d 459, 459 [2d Dept 2000]; *Taylor v Jones*, 172 AD2d 745, 746 [2d Dept 1991]). Only if the jurisdictional question is resolved in favor of the opponent (in this case, plaintiff), will the court reach the issue of whether vacatur pursuant to CPLR § 5015(a)(1) is warranted (*Roberts* at 752; *Delgado* at 516; *Marable ex rel. Ralph* at 459; *Taylor* at 746).

CPLR § 5015(a)(4) - Lack of Jurisdiction

4570, Jimenez, Sosa, and Ariel's motion seeking to vacate the Court's order for lack of personal jurisdiction is denied.

Significantly, movants fail to rebut the presumption of service established by the affidavit of service submitted by movants.

CPLR § 5015(a)(4) authorizes a court to vacate a judgment when the same is obtained despite a "lack of jurisdiction to render the judgment or order" (CPLR § 5015[a][4]). The proponent of a motion to vacate a judgment for want of jurisdiction must establish either that the party to whom a judgment was granted failed to obtain personal jurisdiction over him or her (*Toyota Motor Credit Corp. v Hardware Lam*, 93 AD3d 713, 713 [2d Dept 2012]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 485 [2d Dept 2008]), or that the court lacked the requisite subject matter jurisdiction to render judgment (*Lacks v Lacks*, 41 NY2d 71, 77 [1976]; *HSBC Bank USA, N.A. v Ashley*, 104 AD3d 975, 976 [2d Dept 2013]).

It is well settled that the burden of establishing personal jurisdiction and proper service rests with the plaintiff (*Frankel v Schilling*, 149 AD2d 657, 659 [2d Dept 1989]; *Torres v Corpus*, 131 AD2d 463, 464 [2d Dept 1987]). Generally, an affidavit of service is prima facie evidence of proper service (*Caba v Rai*, 63 AD3d 578, 582-583 [1st Dept 2009]; *NYCTL 1998-1 Trust Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *Scarano v Scarano*, 63 AD3d 716, 716 [2d Dept 2009]; *Simonds v Grobman*, 277 AD2d 369, 370 [2d Dept 2000]). Accordingly, an affidavit evidencing proper service upon the defendant is sufficient to support a finding of

personal jurisdiction (*Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]). Personal jurisdiction will be upheld without a traverse hearing if the only evidence submitted in opposition is a bare or conclusory denial of service (*Caba* at 583 [Sworn denial conclusorily stating that defendant was not served was insufficient to rebut service as evinced by the affidavit of service.]; *Simonds* at 370 ["The defendants failed to submit a sworn denial of service. Moreover, they did not swear to specific facts to rebut the statements in the process server's affidavits."]; *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 984 [2d Dept 2009][The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308 (2), and the defendant's bare and unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service created by the affidavit of service" (internal citations omitted)]; *Scarano* at 716 ["Here, the defendant's affidavit was insufficient. Since he never denied the specific facts contained in the process server's affidavit, no hearing was required."]; *Rabinowitz* at 460 [Defendant negated service of process upon him by citing to the affidavit of service and pointing to the deficiencies therein.]; *Chemical Bank v Darnley*, 300 AD2d 613, 613 [2d Dept 2002]), or a minor discrepancy, such as a mistake in the description of the recipient listed in the server's affidavit (*Green Point Savings Bank v Clark*, 253 AD2d 514, 515 [2d Dept 1998]). Stated

differently, in order to successfully assail and rebut service so as to warrant a hearing, a defendant's affidavit must specifically rebut the facts in the affidavit of service (*Caba* at 683; *Simonds* at 370; *Rabinowitz* at 460). If the denial of service is factually specific, then the court must hold a traverse hearing before deciding whether it has personal jurisdiction over the defendant (*Frankel v Schilling*, 149 AD2d 657, 659 [2d Dept 1989]; *Powell v Powell*, 114 AD2d 443, 444 [2d Dept 1985]).

In cases where a defendant claims that he did not reside at the address where service was effectuated, in order to rebut the presumption of service, he must submit corroborating proof (*Bank of Am., N.A. v Lewis*, 190 AD3d 910, 911 [2d Dept 2021] ["Here, the defendant submitted his affidavit, wherein he averred, *inter alia*, that he did not reside at the address in Rosedale when service was purportedly effectuated, and copies of his 2014 through 2016 tax returns indicating that the defendant resided at an address in Ridgewood. The defendant's submissions were sufficient to rebut the *prima facie* showing of proper service, and to necessitate a hearing."]; *Am. Home Mtge. Acceptance, Inc. v Lubonty*, 188 AD3d 767, 770 [2d Dept 2020] [Motion to vacate a default judgment denied because, *inter alia*, "(a)lthough the defendant submitted an affidavit in which he averred that he resided at a Florida address at the relevant time, he failed to submit documentary evidence to support that claim."]; *Bank of New York Mellon v Lawson*, 176 AD3d

1155, 1157 [2d Dept 2019] ["The defendants failed to submit any documentary evidence to support John Lawson's claim that he did not reside at the Brooklyn address at the time he was served, and they failed to submit an affidavit from a resident of that address denying receipt of a copy of the summons and complaint or stating that John Lawson did not live there."]; *cf. U.S. Bank v Arias*, 85 AD3d 1014, 1016 [2d Dept 2011] ["However, to rebut that showing, the defendant submitted a sworn denial of service containing specific facts to rebut the presumption of proper service. Furthermore, in replying to contentions raised by the plaintiff in its opposition papers, the defendant submitted documentary evidence supporting his claim that he did not reside at the subject premises or at the Long Island City address in 2008. The defendant's submission was sufficient to rebut the *prima facie* showing of proper service, and to necessitate a hearing. Accordingly, the matter must be remitted to the Supreme Court, Queens County, for a hearing to determine whether the defendant was properly served with process pursuant to CPLR 308(2), and for a new determination thereafter of his motion to vacate the judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction."]).

At a traverse hearing, plaintiff bears the burden of establishing service upon the defendant (*Chaudry Const. Corp. v James G. Kalpakis & Assoc.*, 60 AD3d 544, 545 [1st Dept 2009];

Schorr v Persaud, 51 AD3d 519, 519–520 [1st Dept 2008]). Moreover, at the hearing, the trial court can resolve issues of credibility, such resolution is accorded great deference, and absent a determination that it is against the weight of the evidence, cannot be disturbed on appeal (*McCray v Petrini*, 212 AD2d 676, 676 [2d Dept 1995]; *Avakian v De Los Santos*, 183 AD2d 687, 688 [2d Dept 1992]).

Here a review of the affidavits of service submitted by plaintiff in support of its motion establish the following. On May 8, 2019, Arsenio was served with the summons and complaint when the same were left at 2260, his home, with his sister Evelyn Jimenez. On May 11, 2019, Ariel was served with the summons and complaint when the same were left at 2420 Dividson Avenue, Apt 1B, Bronx, NY 10468 (2420), his home, with Wendy Doe, a relative. On May 11, 2019, Sosa was served with the summons and complaint when the same were left at 2420, her home, with Wendy Doe, a relative. On May 22, 2019, 4570 was served with the summons and complaint when the same were delivered to the New York State Secretary of State.

In support of their motion, Arsenio, Ariel, and Sosa, submit the affidavits discussed above. With regard to service, Sosa states that she resided at 2260, that she was in the Dominican Republic, and that she was never served with process. Ariel states that he resided at a home, but never specifies where that is, that

he was never served with process, and that he was incarcerated in May 2020. Arsenio states that he was never served with process either individually or on behalf of 4570 and that 2352 is where 4570 should have been served.

Based on the foregoing, the portion of the instant motion seeking vacatur of the Order Appointing a Referee to Compute and for Other Relief on grounds that movants were not served with the summons and complaint is denied. A noted above, an affidavit of service is *prima facie* evidence of proper service (*Caba* at 582-583; *NYCTL 1998-1 Trust Bank of N.Y.* at 460; *Scarano* at 716; *Simonds* at 370), establishes proper service upon the defendant sufficient to support a finding of personal jurisdiction (*Skyline Agency, Inc.* at 139), and personal jurisdiction will be upheld without a traverse hearing if the only evidence submitted on a motion to vacate a judgment is a bare or conclusory denial of service (*Caba* at 583; *Simonds* at 370; *Beneficial Homeowner Service Corp.* at 984; *Scarano* at 716 *Rabinowitz* at 460). In other words, in order to successfully assail and rebut service so as to warrant a hearing, a defendant's affidavit must specifically rebut the facts in the plaintiff's affidavit of service (*Caba* at 683; *Simonds* at 370; *Rabinowitz* at 460). Only if the denial of service is factually specific, then the court must hold a traverse hearing before deciding whether it has personal jurisdiction over the defendant (*Frankel* at 659; *Powell* at 444).

Here, the affidavits of service submitted by plaintiff establish that Sosa, Ariel, and Arsenio were properly served with process because the affidavits evincing service upon them establish that the summons and complaint were served upon relatives at their homes (CPLR § 308[2] ["Personal service upon a natural person shall be made . . . by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served."]). With regard to 4570, the affidavit of service establishes that 4570 was served by delivering the summons and complaint to the New York State Secretary of State (NY Limit Liab Co § 303[a] "Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served."]).

The affidavits submitted by movants fail for different reasons. First, Sosa's attempt to rebut service fails as a matter of law because nothing submitted by her corroborates her claim that

she did not reside at 2420. Indeed, she submits no evidence to that effect at all. Since, where as here, Sosa claims that she did not reside at the address where service was effectuated, in order to rebut the presumption of service, she must submit corroborating proof (*Bank of Am., N.A.* at 911; *Am. Home Mtge. Acceptance, Inc.* at 770; *Bank of New York Mellon* at 1157; *cf. U.S. Bank* at 1016). To the extent that Sosa states that she was in the Dominican Republic on the date of service, since she was served by substituted service, it does not avail her.

Ariel's affidavit fails to rebut service since he merely denies service in a bald and conclusory way. Compounding his affidavit's shortcomings, it does not even indicate where he lived at the time service was effectuated - May 11, 2019. Instead, he merely describes his abode as his home. To the extent that Ariel asserts that he was incarcerated in May 2020, insofar as according to the affidavit of service he was served with process a year earlier, his contention is irrelevant.

Arsenio's affidavit fails to rebut service because he merely asserts that he was never served. Unlike Sosa, he never states where he lived on the date service is alleged to have been effectuated and instead asserts that he did not live at 2260, an address at which he was never served. Accordingly, Arsenio's bald and conclusory denial of service, coupled with his denial that he

did not live at an unrelated address, cannot rebut service as a matter of law. Arsenio's affidavit also fails rebut service of process upon 4570, since his conclusory denial of service on behalf of 4570 does not rebut the affidavit of service evincing that 4570 was served via the New York State Secretary of State.

To the extent that Arsenio intimates that a basis for negating personal jurisdiction is that the agreement between the parties required service of process upon 4570 at 2352, his contention is without merit. Significantly, he relies on a portion of the Loan Agreement governing the delivery of notices and not the initiation of a law suit.

To be sure, Article 11 of the Loan Agreement governs the mailing and delivery of "[a]ll notices required or permitted to be given hereunder," requiring that they be delivered to 2352 and to 4570's counsel. Hence, applying well established principles of contract interpretation, Article 11 of the Loan Agreement did not require that 4570 be served at 2352.

As noted above, parties should be bound by their agreements, and in order to enforce an agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield* at 569). Thus, "when the parties set down their agreement in a clear, complete document, their writing should be

enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 475). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569).

Here, the notice decribed in Article aa of the Loan Agreement is neither a summons nor a complaint, terms with very distinct legal significance. Accordingly, while notices were required to be sent to 2352, which Arsenio concedes actually were, there is no requirement under the agreement between the parties that service of process upon 4570 also had to be effectuated there. *CPLR § 5015(a)(1) - Excusable Default & Meritorious Defense*

Movants' motion seeking vacatur of the Court's Order Appointing a Referee to Compute and for Other Relief pursuant to CPLR § 5015(a)(1), on grounds of excusable default, is denied. Significantly, having denied movants' motion pursuant to CPLR § 5015(a)(4), thereby finding that they were properly served, movants' excuse for their failure to answer is unreasonable as a matter of law. Moreover, here, movants fail to allege any defense to the claims in the complaint, let alone a meritorious one.

Vacatur of an order or judgement pursuant to CPLR §5015(a)(1), on grounds that it was obtained upon default, requires that the moving party demonstrate both a reasonable excuse for the default and the legal merit of the claim or defense asserted (*M-Dean Realty*

Corp., v General Security Insurance Company, 6 AD3d 169, 171 [1st Dept 2004]; *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). On a motion to vacate a default, movant is only required to "demonstrate the existence of a possibly meritorious defense [or cause of action and it is] . . . not necessary for [the movant] to establish its defense [or cause of action] as a matter of law but merely to set forth facts sufficient to make out a *prima facie* showing" (*Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691, 692 [1st Dept 1983]; *Quis v Bolden*, 298 AD2d 375, 375 [2d Dept 2002]).

Whether the excuse proffered and the merits asserted are legally sufficient rests within the sound discretion of the court (*Goldman* at 291). When a party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (*Lutz v Goldstone*, 31 AD3d 449, 450 [2d Dept 2006]). Similarly, the failure to demonstrate the merits of the claim or defense, is by itself, enough to warrant denial of a motion to vacate a default *(Matter of William O.*, 16 AD3d 511, 511 [2d Dept 2005]).

The time within which to move for the vacatur of the default judgment is usually one year after the service of the order or judgment entered upon the default (CPLR § 5015[a][1]). Thus, the failure to move to vacate the default within a year of its entry usually bars vacatur regardless of the reasonableness of the excuse

or the existence of the action's merit (*Lopez v Imperial Delivery Service, Inc.*, 282 AD2d 190, 197 [2d Dept 2001]; *Nahmani v Town of Ramapo*, 262 AD2d 291, 291 [2d Dept 1999]). However, as an exception to this general rule, when vacatur of a default judgment is warranted in the interests of justice, a court can entertain and grant an untimely motion to vacate a default judgment (*Johnson v Sam Minskoff & Sons, Inc.*, 287 AD2d 233, 236 [1st Dept 2001]; *State of New York v Kama*, 267 AD2d 225, 225 [1st Dept 1999] [Defendant's failure to answer resulting in a default judgment entered against her vacated in the interests of justice despite her five year delay in seeking vacatur. The court found that the interests of justice mandated a vacatur of the default and a restoration of the case since the default was taken even though plaintiff knew that defendant lacked the ability to defend the action due to a mental disability and thus might have needed a guardian appointed to avoid the default.]). Thus, should the party seeking to vacate a judgment or order issued on default fail to move within the year prescribed, the court has the authority to entertain such motion, and if the circumstances warrant it, vacate the default in the interests of justice (*id.*). In such cases, however, the excuse for belatedly seeking to vacate a default judgment must be more compelling (*id.*; Siegel, NY Prac § 108, at 187 [3d ed] ["but if the year has expired the excuse for the default had best be all the more compelling"]).

Here, the excuse proffered by movants for their failure to answer the summons and complaint in this action is the absence of service of the summons and complaint upon them. In other words, they contend that because they were not served with the summons and complaint, they were unable to answer and litigate this matter prior to the issuance of the Order Appointing a Referee to Compute and for Other Relief.

Since movants' excuse for failing to answer is the lack of personal jurisdiction, which here, has been established by the denial of their motion to the extent premised on that basis, movants have not established a reasonable excuse as a matter of law. Moreover, the affidavits submitted by movants are bereft of a meritorious defense to this action. The only semblance of a defense to the this action came from Arsenio who objected to the Referee's calculations. This, of course, is not a defense to the claims in the complaint and if it were, this Court nevertheless found that claim to be bereft of merit. Accordingly, movants' motion, pursuant to CPLR § 5015, is denied.

CPLR § 317

Movants' motion pursuant to CPLR § 317 is denied. Significantly, as noted above, movants fail to establish a meritorious defense to the instant action, a requirement of vacatur under CPLR § 317.

CPLR § 317 states that

> [a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 . . . who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

Accordingly, a defendant against whom a judgment is entered, but who was never aware of the action or the default precipitating the same may have said judgment vacated upon demonstration of a meritorious defense and upon a showing that he/she/it was never personally served with process.

To obtain relief under CPLR § 317, a defendant need only demonstrate the absence of personal service of the summons and complaint in time to defend the action and the existence of a meritorious defense (*Brooke Bond India, Limited v Gel Spice Co., Inc.*, 192 AD2d 458, 460 [1st Dept 1993]. "For the purposes of this section, personal delivery has been defined as in-hand delivery (*Fleetwood Park Corp. v Jerrick Waterproofing Co., Inc.*, 203 AD2d 238, 239 [2d Dept 1994] (internal quotation marks omitted)]; *Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 142 [1986]; *Natl. Bank of N. New York v Grasso*, 79 AD2d 871, 871 [4th

Dept 1980]). Accordingly, it is well settled that service upon a corporate defendant upon the secretary of state is not personal service upon the defendant as described by CPLR § 308 (*Eugene Di Lorenzo, Inc.* at 142 ["It is also well established that service on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an agent designated under CPLR 318."]; *Solomon Abrahams, P.C. v Peddlers Pond Holding Corp.*, 125 AD2d 355, 357 [2d Dept 1986]; *Bank of N. New York* at 871).

Moreover, relief under CPLR § 317 does not require demonstration a reasonable excuse for any delay in seeking to vacate a prior judgment (*id.* at 460; *Di Lorenzo, Inc.* at 141; *Solomon Abrahams, P.C.* at 356). Notably, even where there is no personal service upon the defendant, vacatur pursuant to CPLR § 317 shall be denied if defendant had actual notice of the action, meaning it received a copy of the summons and complaint by some other means, prior to the entry of default and judgment (*Associated Imports, Inc. v Leon Amiel Publisher, Inc.*, 168 AD2d 354, 354 [1st Dept 1990] ["The record reveals that the corporate defendants had actual notice of the summons and complaint in time to defend."]; *Fleetwood Park Corp.* at 239; *Essex Credit Corporation v Theodore Taranti Associates, Ltd.*, 179 AD2d 973, 973-974 [3d Dept 1992]).

Here, as already discussed above, the wholesale absence of any

defense, let alone a meritorious one, precludes the grant of the instant motion pursuant to CPLR § 317. It is hereby

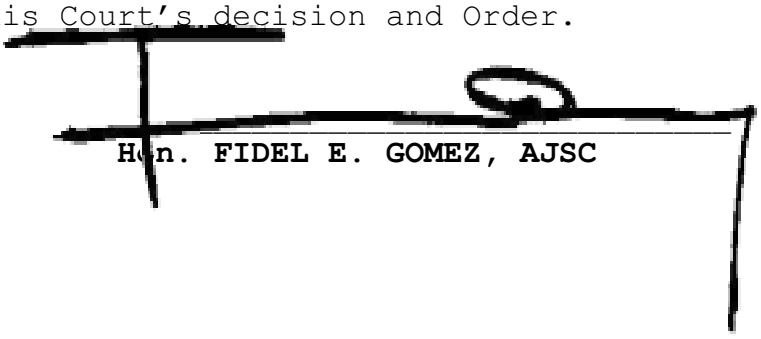
ORDERED that plaintiff's motion is granted in accordance with the Judgment of Foreclosure and Sale annexed hereto. It is further

ORDERED that the sale authorized by the foregoing Judgment of Foreclosure and Sale be conducted in accordance with Administrative Order 5.25.2022 and Amended Bronx Auction Plan 2021, both which are appended hereto. It is further

ORDERED that plaintiff serve a copy of this Decision and Judgment of Foreclosure and Sale with Notice of Entry upon defendants and the Referee within 30 days hereof.

This constitutes this Court's decision and Order.

Dated :9/30/22



Hon. FIDEL E. GOMEZ, AJSC

At an IAS Part 32 of the Supreme Court of the State of New York, held in and for the County of Bronx at the Bronx Supreme Court located 851 Grand Concourse, Bronx, New York 10451 on the 30th day of September, 2022

PRESENT:

HONORABLE FIDEL E. GOMEZ , J.S.C.

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4570 HHP LENDER LLC,

Plaintiff,

-against-

4570 HH PKWY LLC, ARSENIO JIMENEZ, ARIEL JIMENEZ, ANA LUISA GONZALEZ-SOSA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PARKING VIOLATION BOARD OF THE CITY OF NEW YORK, UNITED STATES OF AMERICA,

Defendants.

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Index No. 36221/2019E

JUDGMENT OF FORECLOSURE AND SALE

Mortgaged Premises:

4570 Henry Hudson Parkway East Bronx, New York 10471 (Block: 5813, Lot: 131)

On the Summons (the "Summons") and the Verified Complaint in a Foreclosure Action (the "Complaint") and Notice of Pendency (the "NOP"), duly filed in this action on April 25, 2019, the Affirmation in Support of Application for Order of Reference, and Other Relief dated July 19, 2019, of Michael J. Bonneville, Esq., attesting to the accuracy and veracity of the pleadings and other filings herein, the Order Appointing a Referee to Compute and for Other Relief January 21, 2020 and filed with the Office of the Bronx County Clerk on January 28, 2020 ("Order of Reference"), and on the Affirmation of Regularity of Michael J. Bonneville, Esq., counsel to 4570 HHP LENDER LLC ("Plaintiff") dated May 12, 2020 and the Affirmation of Services Rendered of Michael J. Bonneville, Esq., dated May 12, 2020, and exhibits annexed thereto, upon reading

and filing the Affidavits of Service heretofore filed in the Office of the Bronx County Clerk, showing that each and all of the defendants herein have been duly served within this State with the Summons, from all of which it appears that more than thirty (30) days have elapsed since each defendant was served; and none of the defendants have answered, moved or appeared with respect thereto although the time for them to do so has expired and has not been extended by court order or otherwise, except defendant, United States of America by and through United States Attorney Office. appeared herein by filing a Notice of Appearance and Waiver, dated July 2, 2019; and since the filing of the NOP of this action it has not been amended to include additional necessary defendants, nor so as to embrace real property other than that described in the original Complaint, or so as to extend the Plaintiff's claim against the mortgaged premises; that the Complaint herein and due NOP of this action containing all the particulars required to be stated therein were duly filed in the Office of the Bronx County Clerk April 25, 2019, and at or after the time of filing the Complaint, an Order of Reference having been duly made and appointing Joseph A. Carafano, Esq., as Referee, to compute the amount due to the Plaintiff upon the Note and Mortgage set forth in the Complaint and to examine and report whether the mortgaged premises located at **4570 Henry Hudson Parkway East, Bronx, New York 10471 (Block: 5813, Lot: 131)** (as described on Schedule "A" annexed hereto) (the "Property") can be sold as one parcel, from all of which it appears that this is an action brought to foreclose a mortgage on real property situated in the County of Bronx together with interest thereon and the expenditures made by Plaintiff, which are now due and payable, as more fully reported by Joseph A. Carafano, Esq., the Referee herein referred to compute the amount due and owing to the Plaintiff, and on reading and filing the report of Joseph A. Carafano, Esq., the Referee named in said Order of Reference, by which report, bearing a date

of February 25, 2020, it appears that the sum of **$616,820.19** was due as of February 6, 2020, and that the Property should be sold in one parcel.

On motion of Kriss & Feuerstein LLP, attorneys for the Plaintiff, it is

ORDERED, that the motion is granted in its entirety without opposition, and it is further,

ORDERED, ADJUDGED AND DECREED, the Referee's Report of Amount Due (the "Report") of Joseph A. Carafano, Esq., dated February 25, 2020 and filed in the Office of the Bronx County Clerk on February 25, 2020, be and the same is hereby in all respects, ratified and confirmed; and it is further,

ORDERED, ADJUDGED AND DECREED, that the Property and personal property described in the Complaint in this action and as hereafter described, be sold in one parcel at public auction at the **BRONX COUNTY SUPREME COURT, 851 GRAND CONCOURSE, BRONX, NEW YORK 10451** ~~**ON ANY MONDAY (EXCEPT HOLIDAYS) AT 2:00 P.M., IN ROOM #711**~~, by and under the direction of **JOSEPH A. CARAFANO, ESQ.,** who is hereby appointed Referee for that purpose that the said Referee give public notice of the time and place of such sale in accordance with RPAPL §231 in The Bronx Times Reporter and **the New York Law Journal and** and that the Plaintiff or any other parties to this action may become the purchaser or purchasers at such sale, that the purchaser will be required to deposit with the Referee ten percent (10%) of the amount bid, in certified funds immediately upon the Referee's acceptance of the purchaser's bid for which a Referee's receipt will be given and that in case the Plaintiff shall become the purchaser at the said sale, they shall not be required to make any deposit thereon, that said Referee execute to the purchaser or purchasers on such a sale a deed of the premises sold, that in the event a party other than the Plaintiff becomes the purchaser or purchasers at such sale, the closing[1] of title shall be

FG

J.S.C.

[1] The failure of the successful bidder to pay the full purchase price bid and appropriate closing costs at a closing to be scheduled within thirty (30) days following the auction may result in the forfeiture of the 10% deposit.

had thirty (30) days after such sale unless otherwise stipulated by all parties to the sale, and it is further

ORDERED, ADJUDGED AND DECREED, that said Referee on receiving the proceeds of such sale shall forthwith pay therefrom, in accordance with their priority according to law, the taxes, assessments, sewer, rents or water rates which are or may become liens on the premises at the time of the auction sale with such interest or penalties which may have lawfully accrued thereon to the date of the auction sale bidders payment of the deposit, and it is further

ORDERED, ADJUDGED AND DECREED, that said Referee then deposit the balance of said proceeds of sale in his/her own name as Referee in **an FDIC-insured bank within the State of New York** and shall thereafter make the following payments and his/her checks drawn for that purpose shall be paid by said depository.

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FIRST: The statutory fees of said Referee in the sum of ~~$500.00.~~ **750.00**

SECOND: The expenses of the sale and the advertising expenses as shown on the bills presented and certified by said Referee to be correct. Duplicate copies of which shall be annexed to the report of sale.

THIRD: Said Referee shall also pay to the Plaintiff or its attorney the sum of $_____ adjudged to Plaintiff for costs and disbursements in this action to be taxed by the clerk and inserted herein, together with an additional allowance of $ **300.00** hereby awarded to Plaintiff in addition to costs and also the sum of **$616,820.19** the said amount so reported by the Referee in the Referee's Oath, together with interest at the per diem rate of $354.12 as set forth in the Referee's Oath from **February 6, 2020** (the date interest was calculated to in said Report) until the date of entry of this judgment, continuing with interest at the rate set forth in the Note and Mortgage until the date of the transfer of the Referee's Deed or so much thereof as

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the purchase money of the Property will pay of the same; together with $ 9,075 hereby awarded to the Plaintiff as reasonable legal fees; together with any advances which Plaintiff has made for taxes, insurance principal and interest and any other charges due to prior mortgages, or to maintain the premises pending consummation of this foreclosure sale by delivery of the Referee's Deed, not previously included in the computation and upon presentation of receipts for said expenditures to the Referee, all together with interest at the interest rate set forth in the Note and Mortgage from the date of the advance until the date judgment is entered and then continuing with interest at the rate set forth in the Note and Mortgage until the date of transfer of the Referee's Deed. Copies of such receipts shall be annexed to the Referee's Report of Sale.

FOURTH: If such Referee intends to apply for a further allowance for his/her fees and application shall be made to the Court therefor upon due notice to those parties entitled thereto,

ORDERED, ADJUDGED AND DECREED, that in case the Plaintiff be the purchaser of the Property at said sale, or in the event that the rights of the purchasers at said sale and the terms of sale under this judgment shall be assigned to and be acquired by the Plaintiff, and a valid assignment thereof filed with said Referee, said Referee shall not require the Plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the Plaintiff or its assignee, a deed or deeds of the premises sold upon the payment to said Referee of the amounts specified above in items marked **"FIRST"** and **"SECOND"** and the amounts of the aforesaid taxes, assessments, sewer rents and water rates with interest and penalties thereon or in lieu of the payment of said last mentioned amounts upon filing with said Referee receipts of the proper municipal authorities showing payment thereof, that the balance of the amount bid after deducting therefrom the aforesaid amounts paid by the Plaintiff for Referee's fees, advertising expenses, taxes, assessments, sewer rents and water rates shall be allowed to the Plaintiff and applied by said

Referee upon the amounts due to the Plaintiff as specified in item marked **"THIRD"**, that if after so applying the balance of the amount bid, there shall be a surplus over and above the said amounts due to the Plaintiff, the Plaintiff shall pay to the said Referee, upon delivery to Plaintiff of said Referee's Deed, the amount of such surplus, that said Referee on receiving said several amounts from the Plaintiff shall forthwith pay therefrom said taxes, assessments, sewer rents, water rates with interest and penalties thereon, unless the same have already been paid and shall then deposit the balance.

ORDERED, ADJUDGED AND DECREED, that said Referee take the receipt of the Plaintiff or Plaintiff's attorney for the amounts paid as hereinbefore directed in item marked **"THIRD"**, and file it with his/her report of sale; that he/she deposit the surplus monies, if any, with the Bronx County Clerk within five (5) days after the same shall be received and be ascertainable, to the credit to this action, to be withdrawn only on the order of this court, signed by a Justice of this Court; that said Referee make his/her report of such sale under oath showing the disposition of the proceeds of the sale and accompanied by the vouchers of the person to whom the payment were made and file it with the Bronx County Clerk within thirty (30) days after completing the sale and executing the proper conveyance to the purchaser and that if the proceeds of such sale be insufficient to pay the amount reported due to the Plaintiff with interest and costs as aforesaid, the Plaintiff may recover from the defendants, **4570 HH PKWY LLC, ARSENIO JIMENEZ and ANA LUISA GONZALEZ-SOSA**, the whole deficiency of so much thereof as the Court may determine to be just and equitable of the residue of the mortgaged debt remaining unsatisfied after a sale of the mortgaged premises and the application of the proceeds thereof, provided a motion for a deficiency judgment shall be made as prescribed by section 1371 of the Real Property Actions and Proceedings Law within the time limited therein, and the amount

thereof is determined and awarded by an order of this Court as provided for in said section; and it is further

ORDERED, ADJUDGED AND DECREED, that the purchaser or purchasers at said sale be let into possession on production or delivery of the Referee's Deed; and it is further,

ORDERED, ADJUDGED AND DECREED, that each and all of the defendants in this action and all persons claiming under them, or any or either of them after the filing of such NOP of this action be and they are hereby forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof; and it is further

ORDERED, ADJUDGED AND DECREED, that by accepting this appointment the referee affirms that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointment based on compensation").

ORDERED, ADJUDGED AND DECREED, that said premises is to be sold in one parcel in "as is" physical order and condition, subject to any state of facts that an inspection of the premises would disclose, any state of facts that an accurate survey of the premises would show; any covenants, restrictions, declarations, reservations, easements, rights of way and public utility agreements of record, if any, any building and zoning ordinances of the municipality in which the mortgaged premises is located and possible violations of same; any rights of tenants or person in possession of the subject premises; prior lien(s) of record, if any, except those liens addressed in section 1354 of the Real Property Actions and Proceedings Law, any equity of redemption of the UNITED STATES OF AMERICA to redeem the premises within 120 days from the date of sale;

ORDERED, ADJUDGED AND DECREED, that the purchaser and/or purchasers at the foreclosure sale shall pay any: (i) Town, Village, City, Hamlet transfer taxes, New York State transfer taxes and any other tax imposed upon and/or arising from the transfer of title; and (ii) any other charges occurring as a result of the transfer of title, including but not limited to deed stamps, recording fees, title continuation charges and title insurance costs shall be borne by the purchaser and/or purchasers; and it is further

ORDERED, ADJUDGED and DECREED, that if the purchaser or purchasers at said sale default(s) upon the bid and/or the terms of sale the Referee may place the property for resale without prior application to the Court unless Plaintiff's attorneys shall elect to make such application; and it is further

ORDERED, ADJUDGED AND DECREED, that if the successful bidder at the foreclosure sale defaults in concluding the transaction at the purchase price, he/she may be liable for the difference if the property is subsequently sold at auction for a sum which is inadequate to cover all items allowed in this Final Order and Judgment; and it is further

ORDERED, that pursuant to RPAPL § 1351 (1) the mortgaged premises are to be sold under the direction of the referee within ninety (90) days of the date of this order; and it is further

~~**ORDERED**, that if the referee does not conduct the sale within 90 days of the date of the judgment, in accordance with CPLR §2004, the time fixed by RPAPL §1351(1) is extended for the referee to conduct the sale as soon as reasonably practicable; and it is further~~

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ORDERED, ADJUDGED AND DECREED, that the referee appointed to serve herein be served with a signed copy of this Judgment of Foreclosure and Sale with notice of entry; and it is further

Clerk's

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ORDERED, that the Plaintiff shall serve a copy of the Notice of Sale upon the ~~*Ex Parte*~~ Office at least ten (10) days prior to the scheduled sale date.

Said premises commonly known as: **4570 Henry Hudson Parkway East, Bronx, New York 10471 (Block: 5813, Lot: 131)**. A description of said mortgaged premises is annexed hereto and made a part hereof as Schedule A.

E N T E R:

HON. FIDEL E. GOMEZ , J.S.C.
9/30/22

Bronx County Clerk

MORTGAGE FORECLOSURE CERTIFICATE

SCHEDULE A

DESCRIPTION

TITLE NUMBER: [redacted]

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough and County of Bronx, City and State of New York, bounded and described as follows:

BEGINNING at a point on the easterly side of Henry Hudson Parkway East (Service Road) (Riverdale Avenue), 50 feet wide, distant 180 feet southerly from the corner formed by the intersection of the easterly side of Henry Hudson Parkway East and the southerly side of West 246th Street, 80 feet wide;

RUNNING THENCE easterly, at right angles to Henry Hudson Parkway East, 112.50 feet;

THENCE southerly, parallel with Henry Hudson Parkway East, 90 feet;

THENCE westerly, at right angles to Henry Hudson Parkway East, 112.50 feet to the easterly side of Henry Hudson Parkway East;

THENCE northerly along the easterly side of Henry Hudson Parkway East, 90 feet to the point or place of BEGINNING.

Premises Known As: 4570 Henry Hudson Parkway, Bronx, NY.

Supreme Court
of the
State of New York

DORIS M. GONZALEZ
ADMINISTRATIVE JUDGE
CIVIL TERM

CHAMBERS
851 GRAND CONCOURSE
BRONX, NEW YORK 10451

ADMINISTRATIVE ORDER (FORECLOSURE SALES)

By the Authority vested in me as Administrative Judge of this Court, I hereby order as follows:

WHEREAS our Court is continuously adjusting to the COVID-19 public health emergency; and,

WHEREAS mortgage foreclosure and related judicial foreclosure sales will be resuming as our Court continues to normalize its operations; it is hereby

ORDERED that the Amended Bronx Auction Plan 2021, posted at https://www.nycourts.gov/LegacyPDFS/courts/12jd/bronx/civil/pdfs/Bronx-Auction-Plan-OCT-2021.pdf, remains in effect, and the plaintiff's bar is advised to be familiar with those rules and adhere to same in all respects; and it is further

ORDERED that in accordance with the Amended Bronx Auction Plan 2021, the Court reiterates and calls attention to the requirement therein that plaintiff's attorneys must contact the Bronx Foreclosure Part at: bxforeclosure@nycourts.gov by email and provide the following information in order to schedule a foreclosure auction: (1) the title of the action with index number; (2) email address of the homeowner; (3) the plaintiff's attorney's email address and contact info; and (4) the Referee's name, email and contact info. Every auction will be scheduled for a date assigned by the Bronx Foreclosure Department; and it is further

ORDERED that any sale which proceeds on a date not previously selected by the Bronx Foreclosure Department, or which is not otherwise in substantial conformity with this Administrative Order and the Amended Bronx Auction Plan 2021, is deemed to be a nullity and subject to being vacated on motion or other application; and it is further

ORDERED that judicial sales shall normally be conducted on a Monday, except when volume is such that a second day of sales is permitted, which will be on a Wednesday; and it is further

ORDERED that in any case in which a sale is scheduled or re-scheduled, or in which the plaintiff seeks an extension of time to effectuate a sale, there shall be an amended

judgment of foreclosure and sale; and the plaintiff shall submit to the Court and file in NYSCEF a copy of a proposed amended judgment of foreclosure and sale which shall refer to, and to which shall be appended, the Amended Bronx Auction Plan 2021; and it is further

ORDERED that the proposed amended judgment shall also include the name and telephone number of the mortgage servicer for a plaintiff as required by RPAPL 1351 (1); and it is further

ORDERED that no auction sale shall take place until a date 45 days after the amended judgment of foreclosure and sale is signed and entered by the Court and served by mail by the plaintiff on the owner of the equity of redemption at the subject premises, or such other address as has been provided by the owner of the equity of redemption.

Dated: 5/25/2022
The Bronx, New York

Hon. Doris M. Gonzalez
Administrative Judge

STATE OF NEW YORK UNIFIED COURT SYSTEM

TWELFTH JUDICIAL DISTRICT

SUPREME COURT, CIVIL DIVISION

851 GRAND CONCOURSE

BRONX, NEW YORK 10451

DORIS M. GONZALEZ

Administrative Judge – Civil Term

AMENDED BRONX AUCTION PLAN 2021

Every Auction will be scheduled by the Bronx Foreclosure Clerk. In order to schedule an auction, Plaintiff Attorneys must contact the Bronx Foreclosure Part at: **bxforeclosure@nycourts.gov**, commencing January 17, 2022. All emails must provide the following in order to schedule a foreclosure auction: (1) the title of the action with index number; (2) email address of the homeowner; (3) the Plaintiff's attorney email address and contact info; and (4) the Referee, email and contact info. Every auction will be scheduled by the Bronx Foreclosure Department. There will be no interaction with the email address regarding anything other than auctions.

****** scheduling requirements apply to both outdoor and indoor auctions.**

The Court email address mailbox and associated calendar will be monitored by one clerk assigned to the Foreclosure Department, as well as by the Chief Clerk or their designee. Depending on the volume of inquiries an additional clerk may be assigned, to handle all auction requests.

1. **Given the COVID-19 pandemic, and in order to ensure the implementation of safety measures including occupancy limitations and social distancing, foreclosure auctions will temporarily be held outside on the East 158th street entrance stairs. It shall be the duty of the referee assigned to conduct the auction to make sure that all bidders, interested parties, and observers are wearing masks and observing proper social distancing. There will be no clerk, or court officer assigned to the exterior of the building. An area on the first floor at or near the 158th street entrance will be set up for the referee and clerk to finalize all paperwork. The terms of the sale will be posted on the exterior doors of the 158th street entrance with copies to be distributed by the referee.**

2. Only one auction may be scheduled at a time and auctions will be scheduled every Monday in twenty-five-minute blocks beginning at 2:15 p.m. and ending at 4:15 p.m., in order to avoid peak employee, juror and general public entrance/exit times.

3. **All granted judgments of foreclosure and sale shall include the following language**:

   "*Attached are the auction rules of the Court which shall be followed by the referee assigned to conduct this sale*."

4. All previously published notice of auctions MUST be republished with the new date designated by the auction/foreclosure clerk.

5. When it is determined that auctions can be held indoors, auctions will continue every Monday (four on the calendar), in courtroom 711. The only persons permitted in the courtroom will be the Clerk, the referee for the property to be auctioned and up to a maximum of twenty-five (25) bidders. All other referees and bidders awaiting later scheduled auctions will wait in the auxiliary courtroom which will be determined each Monday.

6. Consideration of an additional day of the week for auctions or a morning and afternoon Monday auction calendar will depend on the number of requests made for any given Monday.

7. When using courtroom 711, the robing room in room 711 will be made available for the referee to prepare the auction paperwork with the successful bidder. The table in the robing room will be cleaned appropriately after EVERY sale; the rear door to the robing room will be used as an ingress/egress instead of the front of the courtroom which is being used as the auction room.

8. The terms of the sale will be posted on the outside of courtroom 711 and the auxiliary courtroom with copies to be distributed, when auctions are returned indoors**.**

BRONX Foreclosure Auction Rules

The following rules shall be applicable for foreclosure auctions held within the 12TH Judicial District and shall be incorporated into the Judgment of Foreclosure and Sale for foreclosure auctions held within the Twelfth Judicial District

1. The Referee must require the observance of any requirements in effect at the time of the foreclosure auction and at any subsequent closing. Prior to scheduling any auctions, Plaintiff's counsel shall contact the assigned Referee to ascertain whether the Referee wishes to continue to serve as a Referee during the COVID-19 health emergency. Should the Referee not wish to continue to serve as a Referee, the Plaintiffs attorney shall promptly make application to have a Successor Referee appointed.

2. All participants shall maintain appropriate social distancing (at least 6 feet) during the auction. The Referee, the successful bidder, and the Plaintiff's agent shall maintain appropriate distancing (at least 6 feet apart) while executing the Memorandum of Sale and the tendering of the deposit.

3. All participants in the closing must comply with any face covering rule, regulation, or order in effect at the time of the closing. Should a bidder fail to comply, the Referee may cancel the closing and hold the bidder in default.

GENERAL:

1. The Referee and all interested parties must be present at the place indicated in the Order of the Court on the published date promptly at 2:00 PM.
2. The Terms of Sale, including any known encumbrances, must be posted outside of the Courtroom/gathering location no later than 1:45 PM of the day of sale.
3. Referees shall announce any encumbrance on the property prior to bidding.
4. Referees will accept either 1) cash; or 2) certified or bank check, made payable to the Referee. No double-endorsed checks will be accepted.
5. A successful bidder must have in his/her possession at the time of the bid the full 10% of the sum bid, in cash or certified bank check to be made payable to the Referee.
6. All bidders must have proof of identification and will be required to stand and state their names and addresses on the record at the time the bid is made.
7. No sale will be deemed final until the full 10% deposit has been paid to the Referee and a contract has been signed, which must be done in the courthouse immediately following the sale.
8. If a successful bidder fails to immediately pay the deposit and sign the Terms of Sale, the property will be promptly returned to auction the same day.
9. Bidders are cautioned that the failure to pay the full purchase price bid and appropriate closing costs at a closing to be scheduled within thirty (30) days following the auction may result in the forfeiture of the 10% deposit. The consent of the Court will be required for adjournment of the closing beyond ninety (90) days.
10. The amount of the successful bid, which will become the "purchase price," will be recorded by the court reporter.
11. If the successful bidder defaults in concluding the transaction at the purchase price, he/she may be liable for the difference if the property is subsequently sold at auction for a sum which is inadequate to cover all items allowed in the Final Order and Judgment.
12. It is the responsibility of the bidder to acquaint him/herself with the property, any encumbrances thereon, and the Terms of Sale before placing a bid and to be certain that adequate funds are available to make good the bid. The failure of the successful bidder to complete the transaction under the terms bid will presumptively result in the bidder's preclusion from bidding at auction for a period of sixty (60) days.

SURPLUS FUNDS**:**

1. A court clerk will be present at all indoor court-ordered foreclosure auctions. If there is a potential for Surplus Funds, the clerk will record the sale price, amount awarded in the final judgment of foreclosure and the upset price and enter that information in UCMS (Foreclosure Surplus Screen).

2. When the sale price exceeds the greater of the judgement amount or upset price, the clerk will provide the referee conducting the sale a Surplus Monies Form at the auction to complete.
3. The form will include the following information: a case caption; name, address and telephone number of the referee; the plaintiff s representative and the purchaser; a judgement amount; and the upset and sale price.
4. The form must be signed by the referee, plaintiff representative and purchaser of the foreclosed property.
5. The referee will complete the form at the auction, and deliver the signed form to the court clerk, who will subsequently provide it to the County Clerk.
6. All cases with a potential for Surplus Funds will be calendared for a control date in the no later than six months after the auction. (This is a non-appearance part.) On the control date, the clerk will consult the County Clerk Minutes. If Surplus Funds have been deposited or the Report of Sale indicates a deficiency, the appearance will be appropriately marked. In the event, that no Report of Sale has been filed, but there are motions pending, the clerk will adjourn the case to a date beyond the motion return date. If a Report of Sale has not been filed and no motions are pending, the case will be adjourned to the MFJ Judge for further proceedings, as necessary, and the referee shall be notified.