

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

-----X
 EMIGRANT FUNDING CORPORATION,

Plaintiff,

- against -

Index No. 36129/19E

Hon. FIDEL E. GOMEZ
 Justice

2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ,
 ANA JIMENEZ A/K/A ANA LUISA GONZALEZ SOSA,
 CAPITAL ONE BANK (USA) N.A., ASSET ACCEPTANCE,
 LLC, CACH, LLC, NEW YORK PRESBYTERIAN
 HEALTHCARE SYSTEM, NEW YORK STATE DEPARTMENT
 OF TAXATION AND FINANCE-CIVIL ENFORCEMENT,
 CREDIT ACCEPTANCE CORPORATION, NEW YORK CITY
 DEPARTMENT OF FINANCE, NEW YORK CITY
 ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
 PARKING VIOLATIONS BUREAU, NEW YORK CITY
 TRANSIT ADJUDICATION BUREAU, LA CASITA GROUP
 FAMILY DAYCARE, LLC, JUANA SANTOS, MARISOL BURGOS,
 LUZ TORRES, CARLOS REYES, MIRIAM RIVERA, DELIA GIL,
 WILLIAM VERA, WILLIAM VERA JR., MALTA BOURDIER,
 DAILYN TORRES, JONATHAN HERNANDEZ, AMANDA LOPEZ,
 JANE DOE (NAME REFUSED), JOHN DOE (NAME REFUSED),
 EMILY GUITTEREZ, ELSA GUITTEREZ, MIKE BUI,
 UNITED STATES OF AMERICA (SOUTHERN DISTRICT),

Defendant.

-----X
 The following papers numbered 1 to 4, Read on this motion noticed
 on 9/16/20, and duly submitted as no. 1 on the Motion Calendar of
 3/31/22.

	<u>PAPERS NUMBERED</u>	
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: 8/25/2022

Hon.


FIDEL E. GOMEZ, AJSC

1. CHECK ONE

CASE DISPOSED
DISPOSITION

NON-FINAL

2. MOTION/CROSS-MOTION
IS

GRANTED (MOTION)
 DENIED (CROSS-MOTION)
 GRANTED IN PART
 OTHER

3. CHECK IF
APPROPRIATE.

SETTLE ORDER
 SUBMIT ORDER
 DO NOT POST
 FIDUCIARY APPOINTMENT
 REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: August 26,
2022 @ 11am

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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EMIGRANT FUNDING CORPORATION,

AMENDED DECISION AND ORDER

Plaintiff(s),

Index No: 36129/19E

- against -

2424 DAVIDSON AVENUE, LLC, ARSENIO
JIMENEZ, ANA JIMENEZ A/K/A ANA LUISA
GONZALEZ SOSA, CAPITAL ONE BANK (USA)
N.A., ASSET ACCEPTANCE, LLC, CACH, LLC,
NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM,
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE-CIVIL ENFORCEMENT, CREDIT
ACCEPTANCE CORPORATION, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, LA
CASITA GROUP FAMILY DAYCARE, LLC, JUANA
SANTOS, MARISOL BURGOS, LUZ TORRES,
CARLOS REYES, MIRIAM RIVERA, DELIA GIL,
WILLIAM VERA, WILLIAM VERA JR., MALTA
BOURDIER, DAILYN TORRES, JONATHAN
HERNANDEZ, AMANDA LOPEZ, JANE DOE (NAME
REFUSED), JOHN DOE (NAME REFUSED), EMILY
GUITTEREZ, ELSA GUITTEREZ, MIKE BUI,
UNITED STATES OF AMERICA (SOUTHERN
DISTRICT),

Defendant(s).

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In this action to foreclose a mortgage and sell the real property which it encumbers, defendants 2424 DAVIDSON AVENUE, LLC (Davidson), ARSENIO JIMENEZ (Jimenez) and ANA JIMENEZ A/K/A ANA LUISA GONZALEZ SOSA (Sosa) move seeking an order, *inter alia*, pursuant to CPLR § 5015(a)(1) vacating the Court's Order of

Reference and Default Judgment¹ and Order to Appoint a Receiver in Mortgage Foreclosure, dated December 24, 2019, which held that all defendants had been duly served with the summons and complaint and had failed to appear. Jimenez and Sosa 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 motion, asserting that movants were served with process such that they have no reasonable excuse for failing to answer and that they fail to proffer any defense to the instant action. Plaintiff cross-moves seeking, *inter alia*, the entry of a Judgment of Foreclosure and Sale. Plaintiff's cross-motion is unopposed.

For the reasons that follow hereinafter, Davidson, Jimenez,

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.

and Sosa's motion is denied and plaintiff's cross-motion is granted without opposition.

According to the complaint, this action is for foreclosure on a mortgage and the sale of the properties which secure the corresponding promissory note. The complaint alleges that on January 8, 2015, Davidson executed a promissory note obligating it to repay non-party Fajim Limited the amount of \$550,000. The promissory note was secured by a mortgage, which pledged real property located at 2352 University Avenue, Bronx, NY 10468 (2352) as collateral. On November 9, 2016, Davidson executed a promissory note obligating it to repay plaintiff \$225,000. The promissory note was secured by a mortgage that pledged 2352 and real property located at 2424 Davidson Avenue, Bronx, NY 10468 (2424) as collateral. On that same day, Davidson executed an amended restated note, obligating it to repay plaintiff \$775,000. The amended restated note was secured by an agreement of spreader, assumption, consolidation and modification of mortgage, which consolidated the two prior mortgages and pledged 2352 and 2424 as collateral for the amended restated note. Davidson also executed an assignment of leases, whereby leases and rents at 2352 and 2424 were assigned to plaintiff. Jimenez and Sosa executed a guaranty of payment, wherein they agreed to guarantee the loans made to Davidson. Plaintiff holds and owns the notes, the mortgages, the amended restated note, and agreement of spreader, assumption,

consolidation and modification of mortgage. The foregoing documents require that Davidson repay the loans made to it via monthly installments and that the failure to make a payment when due constitutes a default. Upon default, plaintiff is authorized to accelerate the debt and if payment is not made, may institute an action to foreclose the mortgage and sell the collateral pledged thereunder. It is alleged that on May 1, 2018, Davidson failed to make a payment when due, that the debt was accelerated and that neither Davidson, Jimenez, nor Sosa satisfied the debt owed to plaintiff. It is alleged that \$766,236.53 is due and owing on the loan and as a result thereof, plaintiff seeks a judgment of foreclosure and sale.

On December 24, 2019, the Court (Gonzalez, J.) granted plaintiff's application seeking, *inter alia*, the entry of default judgment against all defendants since they had failed to appear and/or interpose answers.

DAVIDSON, JIMENEZ, AND SOSA'S MOTION

CPLR § 5015

Because Jimenez and Sosa 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

Davidson, Jimenez, and Sosa's motion seeking to vacate this Court's order for lack of personal jurisdiction is denied. Significantly, there is nothing submitted in support of Davidson's application to vacate the prior order. As such, Davidson's application is denied. With regard to Jimenez and Sosa's application, the same is denied since they 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]).

In support of their motion, movants submit the affidavits of service, evincing service of the summons and complaint upon Sosa and Jimenez. The first affidavit states that on March 13, 2019, the summons and complaint was served upon Jimenez when a copy of the same was left with Sosa at his home, located at 2260 University Avenue, Apt 2N, Bronx, NY 10468 (2260). The second affidavit

states that on the foregoing date, Sosa was served with the summons and complaint when a copy of the same was handed to her at 2260, her home.

Movants also submit two affidavits. The first is by Jimenez, wherein he states, in pertinent part, the following. Jimenez is Davidson's Managing Partner. Jimenez states that he and his wife reside at 2352 in apartment 4S. With regard to service of the summons and complaint, Jimenez states that he was never served with the same. To the extent that that it is alleged that Jimenez was served with the summons and complaint at 2260, he states that he does not live there. Jimenez further states that the guaranty agreement he executed required that he be served with process at 2352 and that had he been served there, he would have received the same. The second affidavit is by Sosa, wherein she states, in pertinent part, as follows. Sosa is Davidson's member. She and her husband reside at 2352 in apartment 4S. Sosa states that with regard to service of the summons and complaint, she was never served with the same. To the extent that it is alleged that she was served with process at 2260, Sosa alleges that she did not reside there.

Movants submit a portion of the guaranty agreement they executed, which indicates that delivery of items, not enumerated therein, be effectuated at 2352.

Based on the foregoing, the portion of the instant motion seeking vacatur of the Order of Reference and Default Judgment on grounds that Jimenez and Sosa were not served with the summons and complaint is denied. As 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 movants establish that Sosa was properly served with process because the affidavit evincing service upon her establishes that the summons and complaint were handed to her at her home (CPLR § 308[1] ["Personal

service upon a natural person shall be made . . . by delivering the summons within the state to the person to be served.”]). The affidavits of service also establish that Jimenez was duly served with process because the affidavit evincing service upon him establishes that the summons and complaint were left at his home with Sosa (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.”])).

The affidavits submitted by Jimenez and Sosa wherein they attempt to rebut service fail as a matter of law because nothing submitted by them corroborates their claim that they did not reside at 2260. Indeed, they submit no evidence to that effect at all and instead focus on one page of the guaranty agreement, which by itself, fails to support their assertion, namely, that they were required to be served at 2352. Since, where as here, Jimenez and Sosa claim that they did not reside at the address where service was effectuated, in order to rebut the presumption of service, they 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), and this alone warrants denial of their motion.

Additionally, to the extent that Jimenez and Sosa’s salient

basis for negating personal jurisdiction is that the agreement between the parties required service of process upon them at 2352 rather than 2260, the place that plaintiff believed constituted their residence, their contention is without merit. Specifically, plaintiff's evidence belies the foregoing claim.

In opposition to the instant motion and in support of its cross-motion, plaintiff submits the guaranty agreement between plaintiff and Jimenez and Sosa, dated November 9, 2016, and executed by Jimenez and Sosa. Paragraph 16 of the agreement governs service of process upon Jimenez and Sosa and states that

[t]he undersigned agree to submit to personal jurisdiction in the State of New York in any action or proceeding arising out of this Guaranty and, in furtherance of such agreement, the undersigned hereby agree and consent that without limiting other methods of obtaining jurisdiction, personal jurisdiction over the undersigned in any such action or proceeding may be obtained within or without the jurisdiction of any court located in New York and that *any process or notice of motion or other application to any such court in connection with any such action or proceeding may be served upon the undersigned by registered or certified mail to or by personal service at the last known address of the undersigned, whether such address be within or without the jurisdiction of any such court* (emphasis added).

Paragraph 14 of the foregoing agreement, governing the mailing of notices to Jimenez and Sosa, and which they fail to provide in

full, states that

[a]ny notice, request or demand given or made under this Guaranty shall be in writing and shall be hand delivered or sent by Federal Express or other reputable courier service or by postage prepaid registered or certified mail, return receipt requested, and shall be deemed given (i) when received at the following addresses if hand delivered or if sent by Federal Express or other reputable courier service, and (ii) three (3) business days after being postmarked and addressed as follows if sent by registered or certified mail, return receipt requested . . . If to the undersigned: Arsenio Jimenez[,] 2352 University Avenue Bronx, New York 10468 (emphasis added).

Plaintiff also submits a copy of Jimenez' driver's license, issued in 2012 and not expiring until 2020, which lists 2260 as his address. Plaintiff submits a skip tracer address search performed on March 13, 2019, which lists 2260 as Jimenez' address. Lastly, plaintiff submits an email from Sosa to David Rivas², sent on December 20, 2017, wherein she asserts that 2260 is her new address.

Based on the foregoing, plaintiff demonstrates that Jimenez

²In an affidavit submitted by plaintiff, David Rivas (Rivas) states that he is plaintiff's Assistant Treasurer, whose duties include communicating with borrowers once they default on a loan with plaintiff. Rivas states that he received an email from Sosa on December 20, 2017, notifying him that 2260 was her new address. Thereafter, all mortgage statements and correspondence were sent to 2260.

and Sosa were served in accordance with paragraph 16 of the guaranty agreement by submitting evidence that at the time Jimenez and Sosa were served, they resided at 2260, the address at which they were served.

First, contrary to movants' contentions, plaintiff was required to serve them with process at their last known address and not the address listed in paragraph 14 of the guaranty agreement.

Preliminarily, it is well settled

that a person who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed

(*Credit Car Leasing Corp. v Elan Group Corp.*, 185 AD2d 109, 109 [1st Dept 1992]; see *Gilbert v Burnstine*, 255 NY 348, 356 [1931] ["It was necessary that he be brought within the jurisdiction of Pennsylvania either by service of process, or by his voluntary appearance, or, as the court significantly added, the fact must appear that he had in some manner authorized the proceeding, follows the general rule that where a written notice is required it must be served personally upon a defendant within the territorial jurisdiction of the court by whose order or judgment personal liability is to be fixed, unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient" [internal citations and quotation marks omitted]; *Lease*

Fin. Group, LLC v Moore, 42 Misc 3d 135(A) [App Term 2014]; *Natl. Equip. Rental, Ltd. v Dec-Wood Corp.*, 51 Misc 2d 999, 1000 [App Term 1966]). Indeed, this principle dates back to at least 1877, when the United States Supreme Court noted that

[i]t is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them

(*Pennoyer v Neff*, 95 US 714, 735 [1877], *overruled on other grounds by Shaffer v Heitner*, 433 US 186 [1977]).

Here, applying the well settled principle that parties should be bound by their agreements, it is clear that service of process was required at Jimenez and Sosa's last known address. To be sure, 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 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).

A review of the guaranty agreement clearly evinces that for purposes of obtaining personal jurisdiction over Jimenez and Sosa, service of a summons and complaint is governed by paragraph 16 of the agreement, which discusses jurisdiction in the event of an action and prescribes the method of service. Contrariwise, paragraph 14, relied upon by movants, is bereft of any of the foregoing language and instead prescribes the method of providing notices or demands to Jimenez and Sosa.

Second, plaintiff's evidence establishes that 2260, where Jimenez and Sosa were served, was their last known address. As noted above, in 2019, Jimenez's then current driver's license listed 2260 as his address, as did the skip tracer performed on the date of service. Moreover, Sosa herself, via email, designated 2260 as her last known address prior to the date she was served thereat.

CPLR § 5015(a)(1) - Excusable Default & Meritorious Defense

Movants' motion seeking vacatur of the Court's Order of Reference and Default Judgment and Order to Appoint a Receiver in Mortgage Foreclosure judgment 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 Jimenez and Sosa 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 of Reference and Default Judgment.

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, Jimenez and Sosa have not established a reasonable excuse as a matter of law. Moreover, the affidavits submitted by Jimenez and Sosa are bereft of any defense to this action, let alone a meritorious one. Accordingly, movants' motion, pursuant to CPLR § 5015, is denied.

CPLR § 317

Movants' motion pursuant to CPLR § 317 is denied. Significantly, as noted above, neither Jimenez nor Sosa 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).

To obtain relief under CPLR § 317 there is no need to demonstrate 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.

PLAINTIFF'S CROSS-MOTION

Plaintiff's motion seeking, *inter alia*, the entry a Judgment of Foreclosure and Sale is 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. It is hereby

ORDERED that plaintiff's motion is granted in accordance with

the Order Confirming Referee Report and Judgment of Foreclosure and Sale annexed hereto. It is further

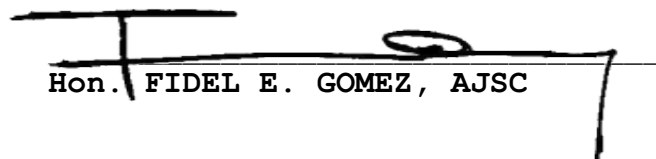
ORDERED that the sale authorized by the foregoing Order Confirming Referee Report and Judgment of Foreclosure and Sale be conducted in accordance with Administrative Order 5.25.2022 and Amended Bronx Auction Plan 2021, both which are appended hereto. It is further

ORDERED that all parties appear for a settlement conference on August 26, 2022 at 11am.

ORDERED that plaintiff serve a copy of this Decision and Order and the Order Confirming Referee Report 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 :8/25/22


Hon. FIDEL E. GOMEZ, AJSC

COMMERCIAL FORECLOSURE

At an I.A.S. Term Part **32**
of the Supreme Court of
the State of New York
held in and for the
County of BRONX at the
Courthouse thereof on
the 25th day of July, **2022**

Present:

Honorable Fidel E. Gomez
Justice

-----X
EMIGRANT FUNDING CORPORATION,

Plaintiff,

-against-

2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ,
ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA,
CAPITAL ONE BANK (USA) N.A., ASSET
ACCEPTANCE, LLC, CACH, LLC, NEW YORK
PRESBYTERIAN HEALTHCARE SYSTEM, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE-
CIVIL ENFORCEMENT, CREDIT ACCEPTANCE
CORPORATION, NEW YORK CITY DEPARTMENT OF
FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, LA CASITA GROUP FAMILY DAYCARE, LLC,
JUANA SANTOS, MARISOL BURGOS, LUZ TORRES,
CARLOS REYES, MIRIAM RIVERA, DELIA GIL,
WILLIAM VERA, WILLIAM VERA, JR., MALTA
BOURDIER, DAILYN TORRES, JONATHAN HERNANDEZ,
AMANDA LOPEZ, JANE DOE (NAME REFUSED), JOHN
DOE (NAME REFUSED), JOHN DOE (NAME REFUSED),

INDEX NO.
36129/2019E

ORDER CONFIRMING
REFEREE REPORT
AND JUDGMENT OF
FORECLOSURE AND
SALE

MORTGAGED
PROPERTY:
2352 University
Ave, Bronx, NY
10468 & 2424
Davidson Avenue,
Bronx, NY 10468
COUNTY: BRONX
SBL # 11; 3212;
55 and 11; 3199;
75

EMILY GUITTEREZ, ELSA GUITTEREZ, MIKE BUI,
UNITED STATES OF AMERICA (SOUTHERN
DISTRICT),
Defendants.
- - - - - X

UPON the Summons, Complaint, and Notice of Pendency filed in this action on the 5th day of March, 2019, the affirmation of Jacqueline M. Della Chiesa, Esq. of Terenzi & Confusione, P.C., the affidavit of merit and amount due by Maryann Monteserrato who is the Assistant Vice President of Emigrant Funding Corporation, duly sworn to on February 20, 2019, together with the exhibits annexed thereto, all in support of Plaintiff's motion for a Judgment of Foreclosure and Sale; and

UPON the motion by defendants' 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ, ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA seeking to vacate their default and Plaintiff having filed opposition thereto; and

UPON the affirmation of Jacqueline M. Della Chiesa, Esq. of Terenzi & Confusione, P.C., dated January 22, 2021, the affidavits of Maryann Monteserrato sworn to on January 22, 2021 and David Rivas sworn to on January 22, 2021 and John Hudak sworn to on September 15, 2020, together with the exhibits annexed thereto, all in opposition to 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ, ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA's motion to vacate their default; and

UPON proof that each of the defendants herein has been duly served with the Summons and Complaint in this action, and has not served any answer to the Complaint or otherwise appeared, nor had their time to do so extended; and it appearing that more than the legally required number of days has elapsed since defendants 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ, ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA, CAPITAL ONE BANK (USA) N.A., ASSET ACCEPTANCE, LLC, CACH, LLC, NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE-CIVIL ENFORCEMENT, CREDIT ACCEPTANCE CORPORATION, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, LA CASITA GROUP FAMILY DAYCARE, LLC, JUANA SANTOS, MARISOL BURGOS, LUZ TORRES, CARLOS REYES, MIRIAM RIVERA, DELIA GIL, WILLIAM VERA, WILLIAM VERA, JR., MALTA BOURDIER, DAILYN TORRES, JONATHAN HERNANDEZ, AMANDA LOPEZ, JANE DOE (NAME REFUSED), JOHN DOE (NAME REFUSED), JOHN DOE (NAME REFUSED), EMILY GUITTEREZ, ELSA GUITTEREZ, MIKE BUI were so served and/or appeared]; and Plaintiff having established to the court's satisfaction that a judgment against defendants is warranted; and

UPON the affidavit of mailing reflecting compliance with CPLR 3215(g)(3)(iii); and

UPON proof that non-appearing defendants 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ, ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA, CAPITAL ONE BANK (USA) N.A., ASSET ACCEPTANCE, LLC, CACH, LLC, NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE-CIVIL ENFORCEMENT, CREDIT ACCEPTANCE CORPORATION, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, LA CASITA GROUP FAMILY DAYCARE, LLC, JUANA SANTOS, MARISOL BURGOS, LUZ TORRES, CARLOS REYES, MIRIAM RIVERA, DELIA GIL, WILLIAM VERA, WILLIAM VERA, JR., MALTA BOURDIER, DAILYN TORRES, JONATHAN HERNANDEZ, AMANDA LOPEZ, JANE DOE (NAME REFUSED), JOHN DOE (NAME REFUSED), JOHN DOE (NAME REFUSED), EMILY GUITTEREZ, ELSA GUITTEREZ, MIKE BUI are not absent, in accordance with RPAPL §1321(2); and

A Referee having been appointed to compute the amount due to Plaintiff upon the note and mortgage set forth in the Complaint and to examine whether the mortgaged property located at 2352 University Avenue, Bronx, NY 10468 (the "University Avenue Premises") and 2424 Davidson Avenue, Bronx, NY 10468 (the "Davidson Avenue Premises") which are collectively referred to as the ("Mortgaged Premises"), can be sold in two parcels; and

UPON reading and filing the Report of Lorraine C. Corsa, Esq., dated March 11, 2020 the Mortgaged Property may be sold in two separate parcels; and

UPON proof of due notice of this motion upon all parties entitled to receive same, and upon all the prior proceedings and papers filed herein;

NOW, by motion of Terenzi & Confusione, P.C., attorney's for the Plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' 2424 DAVIDSON AVENUE, LLC, ARSENIO JIMENEZ, ANA JIMENEZ a/k/a ANA LUISA GONZALEZ SOSA motion to vacate their default is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for judgment of foreclosure and sale is granted in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED that the Referee's Report be, and the same is, hereby in all respects ratified and confirmed; and it is further

ORDERED, ADJUDGED AND DECREED, that the University Avenue Premises and the Davidson Avenue Premises described in the Complaint and as hereafter described, or such part thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of this action as provided by the RPAPL be sold, within 90 days of the date of this Judgment, in

two separate parcels, at a public auction at the
Bronx County Courthouse, 851 Grand Concourse, Bronx, New York 10451

under the direction of Lorraine C. Corsa, Esq., 80 Westchester Square, Bronx, NY 10461 (718) 406-3431 who is hereby appointed Referee for that purpose; that said Referee give public notice of the time and place of sale in accordance with RPAPL §231 in **the New York Law Journal and The Bronx Times Reporter**; and it is further

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J.S.C.

ORDERED, ADJUDGED AND DECREED that attached are the auction rules of the Court which shall be followed by the referee assigned to conduct this sale; and it is further

ORDERED, ADJUDGED AND DECREED that by accepting this appointment, the Referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment") and §36.2 (d) ("Limitations on appointments based upon compensation"); and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED, ADJUDGED AND DECREED that the Referee is prohibited from accepting or retaining any funds for herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, ADJUDGED AND DECREED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees, or its representative is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representative; and it is further

~~ORDERED, ADJUDGED AND DECREED 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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J.S.C.

ORDERED, ADJUDGED AND DECREED that at the time of sale the Referee shall accept a written bid from the Plaintiff or the Plaintiffs attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED, ADJUDGED AND DECREED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee, in cash or certified or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff in which case no deposit against the purchase price shall be required; and it is further

ORDERED, ADJUDGED AND DECREED that, in the event the first successful bidder fails to execute the Terms of Sale immediately following the bidding upon the subject property or fails to immediately pay the ten percent (10%) deposit as required, the property shall immediately and on the same day be reoffered at auction; and it is further

ORDERED, ADJUDGED AND DECREED that the Referee shall then deposit the down payment and proceeds of sale, as necessary, **an FDIC-insured bank within the State of New York** in _____ in her own name as Referee, in accordance with CPLR 2609; and it is further

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J.S.C.

ORDERED, ADJUDGED AND DECREED that after the property is sold, the Referee shall execute a deed to the purchaser, in accordance with RPAPL §1353 and the terms of sale, which shall be deemed a binding contract; and it is further

ORDERED, ADJUDGED AND DECREED that, in the event a party other than the Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale unless otherwise stipulated by all parties to the sale; and it is further

ORDERED, ADJUDGED AND DECREED that, if Plaintiff (or its affiliate, as defined in paragraph (a) of subdivision 1 of section six-1 of the Banking Law) is the purchaser, such party shall place the property back on the market for sale or other occupancy: (a) within 180 days of the execution of the deed of

sale, or (b) within 90 days of completion of construction, renovation, or rehabilitation of the property, provided that such construction, renovation, or rehabilitation proceeded diligently to completion, whichever comes first, provided however, that a court of competent jurisdiction may grant an extension for good cause; and it is further

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

ORDERED, ADJUDGED AND DECREED, that the Referee then deposit the balance of said proceeds of sale in her own name as Referee in **an FDIC-insured bank within the State of New York** in _____, and shall thereafter make the following payments in accordance with RPAPL §1354, as follows:

FIRST: The Referee's statutory fees for conducting the sale, in accordance with CPLR 8003(b), not to exceed **750.00.** ~~\$500.00 unless the property sells for \$50,000.00 or more~~
~~[OR in the event a sale was cancelled or postponed,~~
~~Plaintiff shall compensate the Referee in the sum of \$~~

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J.S.C.

~~_____ for each adjournment or cancellation, unless
the Referee caused the delay],~~

SECOND: All taxes, assessments, and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments, or water rates that have not become absolute, and any other amounts due in accordance with RPAPL §1354(2). Purchaser shall be responsible for interest and penalties due on any real property taxes accruing after the ^{closing.} ~~sale.~~ The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The Purchaser shall hold the Referee harmless from any such penalties or fees assessed;

THIRD: 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;

FOURTH: The Referee shall then pay to the Plaintiff or its attorney the following:

Amount Due per Referee's Report: \$1,144,547.68 with interest at the note rate from February 28, 2020 until the date of entry of this judgment, together with any advances as provided for in the note and mortgage which Plaintiff has made for taxes, insurance, principal, and

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J.S.C.

interest, and any other charges due to prior mortgages or to maintain the property pending consummation of this foreclosure sale, not previously included in the computation, upon presentation of receipts for said expenditures to the Referee, all together with interest thereon pursuant to the note and mortgage, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred

Costs and Disbursements: \$_____ adjudged to the Plaintiff for costs and disbursements in this action (*add if applicable*, as taxed or calculated by the Clerk and inserted herein), with interest at the statutory judgment rate from the date of entry of this judgment;

Additional Allowance: \$300.00 is hereby awarded to Plaintiff in addition to costs, with interest at the statutory judgment rate from the date of entry of this judgment, pursuant to CPLR Article 83;

Attorney Fees: \$11,333 is hereby awarded to Plaintiff as reasonable legal fees herein, ~~with interest at the statutory rate from the date of entry of this judgment;~~

FIFTH: Surplus monies arising from the sale shall be **with the Bronx County Clerk** paid ~~into court~~ by the officer conducting the sale within five days after receipt in accordance with RPAPL §1354(4)

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J.S.C.

and in accordance with local County rules regarding Surplus Monies; and it is further

ORDERED, ADJUDGED AND DECREED that if the Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at such sale and the terms of sale under this judgment shall be assigned to and be acquired by the Plaintiff, and a valid assignment thereof is filed with said Referee, said Referee shall not require 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 property sold upon the payment to said Referee of the amounts specified in items marked "First", "Second", and "Third" above; that the Referee shall allow the Plaintiff to pay the amounts specified in "Second" and "Third" above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by the Plaintiff, shall be applied to the amount due Plaintiff as specified in paragraph "Fourth" above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with paragraph "Fifth" above; and it is further

ORDERED, ADJUDGED AND DECREED that all expenses of recording the Referee's deed, including real property transfer tax, which is not a lien upon the property at the time of sale, shall be paid by the purchaser, not by the Referee from sale

proceeds, and that any transfer tax shall be paid in accordance with Tax Law §1404; and it is further

ORDERED, ADJUDGED AND DECREED that if the sale proceeds distributed in accordance with paragraphs "First," "Second," "Third", and "Fourth" above are insufficient to pay Plaintiff the Amount Due per the Referee's Report as set forth in paragraph "Fourth" above, Plaintiff may seek to recover a deficiency judgment against 2424 Davidson Avenue, LLC, Arsenio Jimenez and Ana Jimenez a/k/a Ana Luisa Gonzalez Sosa in accordance with RPAPL §1371 if permitted by law; and it is further

ORDERED, ADJUDGED AND DECREED that the mortgaged property is to be sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same, including any and all outstanding HPD liens and violations; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL §1354; any equity of redemption of the United States of

America to redeem the property within 120 days from the date of sale; and any rights pursuant to CPLR 317, 2003, and 5015, or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED, ADJUDGED AND DECREED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants in this action and all persons claiming through them and any person obtaining an interest in the property after the filing of the Notice of Pendency are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED, ADJUDGED AND DECREED that within 30 days after completing the sale and executing the proper conveyance to the purchaser, unless the time is extended by the court, the officer making the sale shall file with the **Bronx County** clerk a report under oath of the disposition of the proceeds of the sale in accordance with RPAPL §1355(1) and follow all local County rules regarding handling of Surplus Monies; 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

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J.S.C.

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 Plaintiff shall serve a copy of this Judgment with Notice of Entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties or persons entitled to service, including the Referee appointed herein; and it is further

ORDERED, ADJUDGED AND DECREED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL §1307 and RPAPL §1308 to secure and maintain the property until such time as ownership of the property has been transferred and the deed duly recorded; and it is further

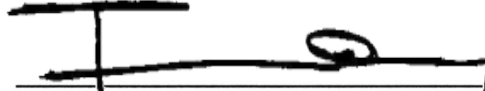
ORDERED, ADJUDGED AND DECREED that, when the Referee files a report of sale, he or she shall concurrently file a Foreclosure Actions Surplus Monies Form; and it is further

ORDERED, ADJUDGED AND DECREED that to ensure compliance herewith, Plaintiff shall file a written report with the court within six months from the date of entry of this judgment stating whether the sale has occurred and the outcome thereof.

Said property is commonly known as 2352 University Avenue, Bronx, NY 10468 and 2424 Davidson Avenue, Bronx, NY 10468.

The legal description of the mortgaged property referred to herein is annexed hereto as Schedule A.

ENTER:



HON. FIDEL E. GOMEZ
7/25/22

"UNIVERSITY AVENUE PREMISES"

SCHEDULE A

DESCRIPTION OF PREMISES UNDER EXAMINATION

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 as depicted on that certain survey dated October 27, 2016 and certified by Stephen F. Hoppe L.S. being more particularly bounded and described as follows:

BEGINNING at a point on the southeasterly side of University Avenue distant 1,121.96 feet northeasterly from the corner formed by the intersection of the southeasterly side of University Avenue with the northeasterly side of West 183rd Street;

RUNNING THENCE North 45 degrees 00 minutes 00 seconds East 41.67 feet;

THENCE South 45 degrees 00 minutes 00 seconds East 100.92 feet;

THENCE South 44 degrees 36 minutes 00 seconds West 41.67 feet;

THENCE North 45 degrees 00 minutes 00 seconds West 101.21 feet to the southeasterly side of University Avenue, the point or place of BEGINNING.

Premises commonly known as:

2352 University Avenue, Bronx, New York

And also by

Block: 3212 and Lot: 55

"DAVIDSON AVENUE PREMISES"

SCHEDULE A

DESCRIPTION OF PREMISES UNDER EXAMINATION

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, being bounded and described as follows:

BEGINNING at a point on the easterly side of Davidson Avenue, distant 146.15 feet southerly from the corner formed by the intersection of the said easterly side of Davidson Avenue, with the southerly side of Fordham Road;

RUNNING THENCE southerly, along the easterly side of Davidson Avenue, 25.10 feet;

THENCE easterly, along a line which forms an interior angle of 84 degrees 53 minutes 10 seconds with the easterly side of Davidson Avenue, 103.90 feet;

THENCE northerly at right angles to the last mentioned course, 19.37 feet to a point;

CONTINUING THENCE northerly, along a line which forms an exterior angle of 174 degrees 17 minutes 40 seconds with the last mentioned course, 5.66 feet;

THENCE westerly, along a line which forms an interior angle of 84 degrees 17 minutes 40 seconds with the last mentioned course, 102.22 feet to the point or place of BEGINNING.

Premises commonly known as:

2424 Davidson Avenue, Bronx, New York

And also by

Block: 3199 and Lot: 75

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.