SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

METROPOLITAN NATIONAL BANK,

Plaintiff,

- against -

TECH REALTY DEVELOPERS, INC., MICHAEL MAZZEO, JR., R.A. DESIGNS, INC., BOYLE SERVICES, INC., THE PEOPLE OF THE STATE OF NEW YORK, THE CITY OF LONG BEACH, JOHN DOE NOS. 1-100, JOHN DOE CORPORATION NOS. 1-100 and JOHN DOE COMPANY NOS. 1-100,

Defendants.

The Names of the "JOHN DOE" Defendants being Fictitious and Unknown to Plaintiff, the Persons and Firms Intended Being Those Who May Be in Possession of, or May Have Possessory, Lien or Other Interests in, the Mortgaged Premises Herein Described.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 3547/09
Motion Seq. No.:02
Motion Date: 02/15/10
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The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit and Exhibits	**1**
Affirmation in Opposition and Exhibits	**2**
Reply Affidavit and Reply Memorandum of Law in Further Support of Motion	**3**
Referee's Report to Compute	**4**
Supplemental Affidavit and Exhibits	**5**
Supplemental Affirmation in Opposition and Exhibits	**6**
Supplemental Reply Affidavit and Exhibit	**7**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Motion by the attorneys for the plaintiff for an order directing a judgment of foreclosure and sale and approval of the Referee's Report is granted.

On May 14, 2010, the parties appeared before the Referee to determine the amounts due to Metropolitan National Bank on the note and mortgage that are the subject of this action.

Based on the hearing, the Referee issued his Report to Compute dated May 27, 2010. *See* Referee's Report to Compute.

Defendants Tech Realty Developers Inc. ("Tech Realty") and Michael Mazzeo, Jr. ("Mazzeo") have raised a number of objections to the Referee's Report.

Defendants Tech Realty and Mazzeo object to the premises being sold as one parcel. Section 7.5 of the Mortgage provides that ". . . Mortgagor hereby waives any right which it may have to require the Mortgaged Property (or any part thereof) to be sold as separate tracts or units in the event of foreclosure or sale." Moreover, the premises consists of a single parcel of land measuring "a hundred by two hundred feet and appraised as one unit not as two separate parcels." *See* Transcript of Referee's Hearing May 14, 2010, pgs. 46-48. Defendants Tech Realty and Mazzeo's objection to the sale as one parcel is misplaced. *See Manhattan Ry. Co. v. Central Hanover Bank & Trust Co.*, 99 F.2d 789 (1938).

Defendants Tech Realty and Mazzeo argue that, based on Exhibit 9 to the Referee's Report, the outstanding interest due is $298,900.75, not $994,340.88 as alleged by plaintiff. The sum of $994,340.88 was computed by taking the default rate of interest under the loan documents, 24% per annum (as provided in the Fourth Modification and Extension of Mortgage note admitted into evidence at the Referee's Hearing) and multiplying that rate by the unpaid

principal balance of $3,187,000.00 and then dividing that product ($764,880.00) by 360 to get the per diem interest rate of $2,124.67 per day and then multiplying by the number of days, 468, to arrive at the sum of $994,340.88. Defendants Tech Realty and Mazzeo argue that the sum of $298,900.75 listed on plaintiff's Exhibit 9 was the correct interest computation. This sum, however, did not reflect interest at the default rate of 24% per annum, but rather, was computed on the basis of the contract rate of 7% per annum. The Referee rejected defendants Tech Realty and Mazzeo's unsupported argument and correctly computed interest at the default rate for the post-maturity period (February 1, 2009 through May 14, 2010) as $994,340.88.

Again, the attorney for the defendants Tech Realty and Mazzeo argues that the referee did not have the authority to compute the amount due for the payment of taxes and insurance premiums as these items were deleted from the Order of Reference. Nowhere in any of the opposition papers do defendants Tech Realty and Mazzeo deny that the bank paid the taxes and insurance, or that the mortgage and note did not provide for reimbursement by the mortgagor for any payments made by the bank, or that the defendant was in default in paying the real estate taxes and insurance.

The order appointing the Referee to Compute states the referee is appointed

> ". . . to ascertain and compute the amounts due, with *except for attorney's fees,* interest to the date of his report^ to Metropolitan Bank upon the note and mortgage set forth in the verified complaint herein, ~~together with such amounts, if any, expended by Metropolitan Bank for payment of taxes, insurance premiums, legal fees and other charges relating to the mortgaged premises~~. . ."

One can read the order to mean that the Referee shall compute the amounts due the bank solely as specified in the mortgage and note as set forth in the verified complaint. Since taxes

and insurance are specifically set forth in the mortgage and note, they are to be computed by the referee. In other words, by crossing out the words taxes, insurance and "other charges" relating to the mortgage premises, the order prevented the inclusion of "other charges" that might not be in the mortgage and note. In reality, deleting the typewritten language from the order protects the defendants from allowing the plaintiff to insert "other charges" in the order that are not set forth in the mortgage and note. Defendants Tech Realty and Mazzeo's attorney suggests that should plaintiff's attorney wish to resettle the order of Judge Martin he should make a motion pursuant to CPLR § 5019. "Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment." *See Herpe v. Herpe*, 225 N.Y. 323 (1919). Assuming *arguendo* that defendants Tech Realty and Mazzeo are correct that plaintiff should have moved pursuant to CPLR § 5019, there is no reason why this Court cannot treat the within motion as one pursuant to CPLR § 5019 to resettle the Order Appointing a Referee. Giving defendants Tech Realty and Mazzeo every benefit of the doubt and agreeing *arguendo* with their interpretation that drawing a line through the words taxes and insurance on the Order of Reference is a defect, it is still a correctable defect. *See Chase Home Mortgage Corp. v. Marti*, 279 A.D.2d 270, 719 N.Y.S.2d 14 (1st Dept. 2001). CPLR § 2001 provides that mistakes, omissions, defects, or irregularities may be corrected "if a substantial right of a party is not prejudiced." In the within action a substantial right would be prejudiced if the plaintiff were required to resettle the order pursuant to CPLR § 5019 and go through the cost and expense to rectify what at most can be categorized as an ambiguity, and at worst a minor curable defect, when the evidence shows that the defendant is responsible for the taxes and insurance. *See Helfhat v. Whitehouse*, 258 N.Y. 274 (1932); *Engelbrechten v. Galvanoni & Nevy Bros., Inc.*, 60

Misc.2d 419, 302 N.Y.S.2d 691 (N.Y. County Sup. Ct. 1969). Moreover, there lies within the Court the inherent power to correct its record where the correction relates to mistakes or errors which may be termed clerical in their nature or where it is made in order to conform the record to the truth. *Clark v. Scoville*, 198 N.Y. 279 (1910). An Order of Reference may be amended *nunc pro tunc* to correct technical irregularities so as not to impair the validity of a foreclosure judgment or sale. *See* 2.20 Bergman on New York Mortgage Foreclosures, § *20.01* citing *Brody, Adler & Koch v. Hochstadter*, 160 A.D. 310, 144 N.Y.S. 631 (1st Dept. 1913)

It appears that in order to bring this foreclosure action to a timely conclusion the bank is willing to waive its fees and expenses.

At footnote 4 of his Supplemental Affidavit, Scott Lubin, a senior Vice-President of plaintiff Metropolitan National Bank, states:

> "I note that Metropolitan National Bank is entitled, under the subject note and mortgage, as modified and extended, to recover its costs and expenses, including attorneys' fees, incurred in connection with the collection of the amounts due, and the enforcement of its rights, thereunder. Through the date of the Referee's Hearing (and without including the fees and expenses incurred in connection with the preparation of this supplemental affidavit), Metropolitan National Bank has incurred $94,313.75 in fees and expenses, which sums are recoverable against Defendants under the loan documents. However, Metropolitan National Bank is willing to waive such sums to avoid further delay in the completion of this foreclosure action."

The Court has considered defendants Tech Realty and Mazzeo's other objections and finds them also to be without merit. *See* 2-20 Bergman on New York Mortgage Foreclosures § 20.06(1)(d) citing *Johnson v. Frederick*, 219 N.Y.S.2d 482 (Kings County Sup. Ct. 1961).

The Referee's Report to Compute dated May 14, 2010 is supported by the evidence and is ratified and confirmed in its entirety. *See Spodek v. Feibusch*, 55 A.D.3d 903, 865 N.Y.S.2d 575 (2d Dept. 2008); *Thomas v. Thomas*, 21 A.D.3d 949, 800 N.Y.S.2d 768 (2d Dept. 2005).

The proposed Judgment of Foreclosure and Sale annexed as Exhibit A to the Supplemental Affidavit sworn to May 28, 2010 of Scott Lubin is referred to the Judgment Clerk as to form and shall be signed if in conformity with the within decision.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
July 14, 2010