At an IAS Term, Part 9 Comm of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of June, 2015.

PRESENT:

HON. DAVID B. VAUGHAN,
Justice.

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766 MILLER LEND LLC,

Plaintiff,

- against -

Index No.: 500561/13

FLAMINGO FUNDING INC., FLAMINGO CAPITAL LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and JOHN DOE # "1" through # "20", said persons or parties being fictitious and unknown to plaintiff, the persons or parties being unknown to plaintiff and intended to be the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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The following papers numbered 1 to 15 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4 5-6 8-9 11-12
Opposing Affidavits (Affirmations)	7 10 13
Reply Affidavits (Affirmations)	14
Other ACRIS documents	15

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Upon the foregoing papers in this commercial foreclosure action, plaintiff, 766 Miller Lend LLC (766 Miller), seeks an order granting its June 17, 2013 ex parte application (electronically filed as NYSCEF Document Nos. 9-14 and re-filed as Document Nos. 90-95) for: (1) an order of reference appointing a referee to ascertain and compute the amounts due, and (2) an order amending the caption to eliminate the "John Doe" defendants.

Defendants, Flamingo Funding Inc. (Flamingo Funding) and Flamingo Capital LLC (Flamingo Capital), collectively moves (in motion seq. 2) for an order, pursuant to CPLR 3215 (c) and RPAPL § 1321, dismissing this foreclosure action.

766 Miller cross-moves (in motion seq. 3), pursuant to 22 NYCRR 130-1.1 (Part 130), for an order: (1) awarding "the actual expenses and reasonable attorney's fees incurred in opposing the defendants' main motion to dismiss and making the instant cross-motion, or in the alternative referring the case to a referee to calculate said legal fees" and (2) imposing a monetary sanction against the Flamingo Defendants and/or their counsel "on the grounds that the Flamingo Defendants' main motion is without merit in law and fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, and that the main motion asserts material factual statements that are false . . ."[1]

766 Miller separately moves (in motion seq. 4) for an order appointing a receiver to collect rents and make necessary disbursements in connection with the maintenance of the

[1] *See* 766 Miller's August 6, 2014 notice of cross motion for the imposition of sanctions.

commercial property at 766 Miller Avenue in Brooklyn, a six-family apartment building (Property), which is the subject of this commercial foreclosure action.

Background

The Commercial Loan

On May 12, 2004, Flamingo Capital purchased the Property by borrowing $322,500.00 from Astoria Federal Savings and Loan Association (Astoria), pursuant to a "Mortgage Note" executed by Moishe Tress, a member of Flamingo Capital (Astoria Note).[2] The loan was secured by a May 12, 2004 purchase money mortgage between Flamingo Capital as "Mortgagor" and Astoria as "Mortgagee" encumbering the subject Property,[3] which was recorded with the New York City Department of Finance Office of the City Register (City Register) on July 13, 2004 under City Register File Number (CRFN) 2004000434668 (Mortgage).[4]

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[2] The Astoria Note is Exhibit A to the verified complaint, a copy of which is annexed as Exhibit 1 to the August 6, 2014 affirmation of Michael A. Gould, Esq. in opposition to the Flamingo Defendants' dismissal motion (Gould Dismissal Opposition Affirmation).

[3] A copy of the Mortgage is attached as Exhibit B to the verified complaint (*see* Gould Dismissal Opposition Affirmation, Exhibit 1).

[4] The court, in its discretion, takes judicial notice of the publically recorded Mortgage, mortgage assignment, assumption agreement, modification agreement, security agreements and deed regarding the Property and identified herein that are maintained on the New York City Department of Finance City Register's Automated City Register Information System (ACRIS), which "supports the Office of the City Register in recording and maintaining official documents" (*see* http://a836-acris.nyc.gov/CP/CoverPage/AboutAcris; *La Sonde v Seabrook*, 89 AD3d 132, 137 [2011] [holding that "[t]his Court has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State"];

The Mortgage provides, in pertinent part, that the "Mortgagor covenants with the Mortgagee":

> "1. That the Mortgagor will pay the indebtedness as hereinbefore provided."
>
> . . . .
>
> "4. That the holder of this First Mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.
>
> "5. That the Mortgagor will pay all taxes, assessments, sewer rents or water rates, and in default thereof the Mortgagee may pay the same, other than those taxes and charges escrowed by Mortgagee."
>
> . . . .
>
> "12. That the Mortgagor hereby assigns to the Mortgagee the rents, issues and profits of the premises as further security for the payment of said indebtedness"
>
> . . . .
>
> "15. In the event Mortgagor, without the prior written consent of Mortgagee, in each instance obtained, shall sell, assign, convey, or otherwise transfer this Mortgaged Premises or any part thereof . . . then the entire unpaid balance of the indebtedness shall, at the option of the Mortgagee, be immediately due and payable . . . Provided that in determining whether to grant or withhold its consent under this provision, Mortgagee, without limitation of its rights hereunder or otherwise, may . . . condition its consent on a change in the terms

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Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13, 19-20 [2009] [holding that judicial notice is taken of "public documents that are generated in a manner which assures their reliability" such as "material derived from official government websites"]; *Des Fosses v. Rastelli*, 283 App Div 1069, 1070 [1954] ["This court has taken judicial notice of the deed in the foreclosure action . . . recorded April 15, 1953"], *affd* 308 NY 850 [1955]; *see also People v Langlois*, 122 Misc 2d 1018, 1021-1022 [Suffolk County Ct 1984] ["A court may resort to such documents, references and other repositories of information as are worthy of belief and confidence and may be taken by the court on its own motion in the absence of a specific request by a party"] [citing *Richardson on Evidence*, 10th Ed. §§ 8, 10 and 14]).

of payment of the Note, including an increase in the rate of interest payable thereunder. . . ."

. . . .

"17. In order to more fully protect the security of this mortgage, the Mortgagor . . . shall pay to the Mortgagee each month until the whole of the principal and interest are fully paid, one-twelvth (1/12th) of the annual real estate taxes, hazard insurance premiums, and water and sewer rents, if required by the Mortgagee, covering the mortgaged property . . . A failure to make any of those payments when due shall be a default under the terms of this First Mortgage and thereupon the holder of this First Mortgage may declare the entire unpaid balance of principal and interest due and payable by no later than thirty (30) days following applicable notice and the expiration of any time to cure. . . ."

. . . .

"20. If the First Mortgage is referred to attorneys for collection or foreclosure, following an event of default which has not been cured, the Mortgagor shall pay all sums, including reasonable attorneys fees, incurred by the Mortgagee, together with all statutory costs, disbursements and allowances . . . All such sums with interest thereof at the rate set forth herein shall be deemed to be secured by the First Mortgage and collectible out of the mortgaged premises."

. . . .

"22. The Note, or an interest in the Note, together with this First Mortgage may be sold one or more times. Mortgagor may not receive any prior notice of these sales."

. . . .

"25. The whole of the principal sum and interest secured hereby shall become due at the option of the Mortgagee upon . . .

(a) the default in the payment of any installment of principal or interest within thirty (30) days of the date that the same comes due, following notice to cure such default. However, Mortgagee is not obligated to give notice to cure a monetary default more than once in any calendar year; or

> (b) the default in the payment of any tax, water charge, sewer rent, assessment, or license fee or other charge . . . or the failure of Mortgagor to furnish Mortgagee with receipted tax bills or other proof of payment and delivery of the aforesaid items by no later than ten (10) days following notice by Mortgagor . . ."

ACRIS reflects that Flamingo Capital assigned all rents, earnings and income derived from the Property to Astoria, as required by paragraph 12 of the Mortgage, pursuant to a May 12, 2004 "Assignment of Rents and Interest in all Leases as Collateral Security" executed by Moishe Tress of Flamingo Capital and Mark Levin of 766 Miller (Rent Assignment), which was recorded with the City Register on July 13, 2004 under CRFN 2004000434669.

The 2006 Deed Transfer

Importantly, ACRIS reflects that Flamingo Capital conveyed the Property to Flamingo Funding by a March 13, 2006 "Bargain and Sale Deed with Covenant Against Grantor's Acts (Individual or Corporation)," which was recorded with the City Register on June 2, 2006 under CRFN 2006000307140.

The 2011 Mortgage Assignment

ACRIS also reflects that Astoria, on August 16, 2011, assigned the Mortgage "TOGETHER with the bonds or notes or obligations described in said Mortgage" to 766 Miller, pursuant to an "Assignment of Mortgage" executed by Astoria's First Assistant Vice President, John King, which was recorded with the City Register on November 30, 2011 under CRFN 2011000416649 (2011 Mortgage Assignment).

ACRIS also reflects that Astoria assigned the Rent Assignment to 766 Miller, pursuant to an August 16, 2011 "Assignment of Assignment of Rents and Interest in all Leases as Collateral Security" executed by John King of Astoria and recorded with the City Register on November 30, 2011 under CRFN 2011000416650.

The 2012 Assumption Agreement

ACRIS reflects that on January 9, 2012 Flamingo Funding as "Transferee" and 766 Miller as "Lender" entered into an "Assumption Agreement" (2012 Assumption Agreement) executed by Flamingo Funding's President, Kennedy George, and Mark Levin of 766 Miller, pursuant to which they modified the Astoria Note, Mortgage and other loan documents and Flamingo Funding: (1) assumed liability to 766 Miller under the Astoria Note and Mortgage; (2) assigned all leases, rents and income derived from the Property to 766 Miller; and (3) granted 766 Miller a security interest in all personal property that is located at the Property. The 2012 Assumption Agreement was recorded with the City Register on March 15, 2012 under CRFN 2012000105381.[5]

The "Recitals" in the preamble of the Assumption Agreement, which the parties explicitly incorporated into the Agreement by reference, provide, in relevant part:

> "**WHEREAS**, Lender, as the assignee of Astoria . . . by assignment of mortgage dated August 16, 2011, is the owner and holder of [the Astoria Note] made by FLAMINGO CAPITAL LLC ("Transferor") to Astoria, and secured

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[5] The verified complaint alleges that "[i]n the Modification and Forbearance Agreement dated as of January 9, 2012, the terms of the Note and Mortgage were modified as provided herein" (Complaint at ¶ 8). However, ACRIS reflects that the Assumption Agreement is the only mortgage modification recorded with the City Register on ACRIS.

by a mortgage . . . The Transferor is liable for the payment and performance of all of the Transferor's obligations under the Loan Documents.

"**WHEREAS**, the Mortgage provides that the Security Property may not be sold, transferred or further encumbered without the prior written consent of Lender.

"**WHEREAS**, in direct contravention of the Mortgage, Transferor conveyed the Security Property, subject to the first lien Mortgage, to Transferee by deed dated March 13, 2006 . . . (the 'Conveyance Default');

"**WHEREAS**, Transferor is currently in further default of its obligations under the Loan as a result of Transferor's failure to pay its monthly payments due from January 1, 2011 and for each and every month due thereafter (the 'Monetary Default'). . . .

"**WHEREAS**, due to Transferor's Default, Lender commenced a foreclosure action against Transferor and Transferee in the Supreme Court of the State of New York, County of Kings under Index Number 21140/11 (the "Foreclosure Action");[6]

"**WHEREAS**, Transferee acknowledges the Default of Transferor;

"**WHEREAS**, Transferee has asked Lender and Lender agreed to consent to the transfer of the Security Property subject to the terms and conditions of the Loan Documents and this Agreement . . . ; and

"**WHEREAS**, Lender has agreed to consent to the transfer of the Security Property to Transferee in consideration of: (I) Transferee's full compliance with the covenants, terms and conditions of the Modification and Forbearance Agreement ('Forbearance Agreement') dated January 9, 2012; (ii) Transferee's full compliance with the covenants and conditions of the Loan Documents and this Agreement; and (iii) the assumption by Transferee of liability to Lender for the repayment of the remaining unpaid balance of the Note and the performance of each and every other obligation contained in the Loan Documents, this Agreement and the Forbearance Agreement."

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[6] The Kings County Clerk's records reflect that on January 27, 2012, 766 Miller filed a "Notice Discontinuing Foreclosure Action" and a "Notice Canceling Lis Pendens" in the 2011 foreclosure action, both of which were dated January 26, 2012.

In the Assumption Agreement, Flamingo Funding and 766 Miller agreed that (1) "[t]he unpaid principal balance of the Note as of October 1, 2011 is . . . $282,167.09"; (2) the loan documents (including the Astoria Note and Mortgage) "are amended to secure . . . the performance of the covenants and agreements of Transferee contained in this Agreement and the Forbearance Agreement [and] to provide that it shall be an event of default under the Loan Documents if Transferee shall default in the performance of any covenant or agreement contained in this Agreement or in the Forbearance Agreement"; (3) "[i]t shall be a default under the Note and the Mortgage and each of the other Loan Documents if the Transferee shall default in the performance of any covenant or agreement of this Agreement or the Forbearance Agreement"; and (4) "[n]othing herein shall be deemed to . . . release or change the liability of any party who may now be . . . liable, primarily or secondarily, under the Loan Documents" (*see* Assumption Agreement at ¶¶ 2, 4, 8 and 10).

The 2012 Payment Default Notice

766 Miller, in a December 27, 2012 letter from counsel, notified Flamingo Funding that it was in default under the "Loan Documents" based on its failure to remit payments for "Extension fees per Modification," "Real Estate taxes" and "Water and related charges" (Default Notice).[7] The Default Notice warned that "[y]our failure to remit payment and proof of payment by January 10, 2013 will result in the commencement of appropriate legal

[7] The verified complaint alleges that "by notice dated December 27, 2012 . . . Plaintiff duly accelerated the entire sum due on the Mortgage" (Complaint at ¶ 15 and Exhibit D).

and equitable remedies available to Lender under the Loan Documents" (Gould Dismissal Opposition Affirmation, Exhibit 1 [Complaint at Exhibit D at 2]).

The Instant Foreclosure Action

766 Miller, on February 5, 2013, commenced this foreclosure action against the Flamingo Defendants by filing a summons, a complaint verified by Mark Levin, 766 Miller's managing member, and a notice of pendency. 766 Miller alleges that Flamingo Capital, as "Borrower," "defaulted under the terms of the Mortgage, as modified, by failing and neglecting to pay": (1) "the extension fees, in the amount of $5,000.00 due on or before April 1, 2012 and $5,000.00 due on or before October 1, 2012"; (2) "the real estate taxes applicable to the Mortgaged Property in the amount of $5,812.69 through December 31, 2012"; and (3) "water and related charges in the amount of $28,034.95 through December 4, 2012" (Complaint at ¶¶ 12-14). The verified complaint asserts: (1) a cause of action for a judgment of foreclosure and sale against "the Borrower," Flamingo Capital (*id.* at ¶¶ 4-16),[8] and (2) a cause of action against all defendants, pursuant to paragraph 36 of the Mortgage, for "reasonable attorneys' fees and disbursements incurred in the instant foreclosure" (*id.* at ¶¶ 29-30).

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[8] Although 766 Miller asserted the first cause of action against Flamingo Capital only (Complaint at ¶¶ 3-16), the "Wherefore" clause in the verified complaint seemingly asserts a third cause of action for a deficiency judgment against both Flamingo Capital and Flamingo Funding. Thus, the verified complaint provides that "Plaintiff demands judgment of foreclosure and sale [and] that Defendants FLAMINGO CAPITAL LLC and FLAMINGO FUNDING INC., jointly and severally, be adjudged to pay the whole residue or so much thereof as the Court may determine to be just and equitable of the debt remaining unsatisfied after the sale of the Property . . ." (*id.* at 6-7).

The verified complaint alleges that Flamingo Funding "is made a defendant herein by virtue of its being fee owner of the Mortgaged Property, and by virtue of said defendant having executed and delivered the Assumption Agreement dated January 9, 2012 and recorded on March 15, 2012 in the Office of the New York City Register, County of Kings, as CRFN No. 2012000105381, wherein said defendant assumed all of the Borrower's obligations per the Note, Mortgage and other loan documents" (*id.* at ¶ 23).

The verified complaint annexes copies of: (1) the Astoria Note as "Exhibit A"; (2) the Mortgage as "Exhibit B"; (3) the "Legal Description" of the Property as "Exhibit C"; (4) the Default Notice with a copy of the certified mail receipt as "Exhibit D"; and (5) a listing of judgment creditors as "Exhibit E."

The Flamingo Defendants Default

According to 766 Miller's Affidavits of Service (NYSCEF Document Nos. 3 and 4), the Flamingo Defendants were served with the summons, verified complaint and notice of pendency on February 12, 2013 at 2:25 p.m. when the documents were personally delivered to Chad Matice of the Secretary of State at the office of the Department of State in Albany.[9]

The Flamingo Defendants admittedly defaulted by failing to timely answer, appear or otherwise respond to the summons and verified complaint on or before March 20, 2013 (Wharton Dismissal Affirmation at ¶ 6). To date, the Flamingo Defendants have not moved for an order vacating their admitted default.

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[9] *See* Exhibit X to the July 23, 2014 affirmation of Frank Wharton, Esq. in support of the Flamingo Defendants' dismissal motion (Wharton Dismissal Affirmation).

The 2013 Ex Parte Application For An Order Of Reference

Within three months of the Flamingo Defendants' default in answering the complaint, 766 Miller, on June 17, 2013 at 9:58 a.m., electronically filed an ex parte application for an Order of Reference with supporting papers and a request for judicial intervention (RJI) (Gould Dismissal Opposition Affirmation at ¶ 11 and Exhibit 3). The "NYSCEF - Kings County Supreme Court Confirmation Notice and Receipt" for "Documents Filed" reflects that 766 Miller's counsel, Michael A. Gould, Esq. (Attorney Gould), electronically filed Document Nos. 9-15 on June 17, 2013, consisting of: (1) a "Proposed Order of Reference" for the appointment of a referee to ascertain and compute the amounts due; (2) Attorney Gould's June 12, 2013 "Affirmation of Regularity"; (3) a June 12, 2013 "Affidavit of Regularity" from Mark Levin, the managing member of 766 Miller; (4) Attorney Gould's June 12, 2013 "Affirmation pursuant to the order of the Administrative Judge"; (5) "Exhibit A - Summons and Complaint and Lis Pendens" (including all exhibits to the verified complaint); (6) "Exhibit B - Affidavits of Service"; and (7) the RJI, indicating that the "Relief Sought" was an "order Appointing Referee" and that the Flamingo Defendants were in default (Gould Dismissal Opposition Affirmation, Exhibit 3).

Five months later, the Foreclosure Department sent Attorney Gould an email instructing him to submit a "working copy" of 766 Miller's Proposed Order of Reference, copies of the supporting papers and confirmation that the application was electronically filed. Specifically, on November 1, 2013 at 12:34 p.m., "efile@courts.state.ny.us" sent Attorney

Gould an email with the Subject "NYSCEF Alert: Kings - Foreclosure (non-residential mortgage)" advising that "DOCUMENT RETURNED FOR CORRECTION 11/01/2013":

> "Return Reason
> Gila Brownstein returned the following document(s) for correction on 11/01/2013 12:34 PM:
> Reason: Unless otherwise directed by the Court or as described herein, and with the exceptions listed below, in all NYSCEF cases in which an RJI has been filed, working copies of e-filed documents that are intended for judicial review must be submitted
>
> Doc # Document Type Description Motion # Received Date
> 9 PROPOSED EXPARTE ORDER Proposed Order of Reference 06/17/2013
>
> Re-file Instructions - DO NOT FILE A NEW DOCUMENT
> To file a corrected document, go to the Document List for this case and click the "Re-File" link for the document."[10]

Thus, the court requested the submission of a working copy of 766 Miller's ex parte application for an order of reference and specifically instructed Attorney Gould *not* to re-file the application, since it was already filed on the court's online Document List for the case.

According to the Kings County Clerk's online "Document List" for this action, the Foreclosure Department, which reviews all ex parte foreclosure applications for form before they are submitted to the court for decision, indicates that the ex parte application was "Processed," noted that the Proposed Order of Reference (designated as Document No. 9) was "Returned for Correction" and instructed Attorney Gould to "Re-file this document" (Gould Dismissal Opposition Affirmation at Exhibit 5).

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[10] A copy of the "Email Report" and the email are annexed as part of Exhibit 3 to Attorney Gould's August 6, 2014 Affirmation in support of 766 Miller's cross motion for Part 130 sanctions (Gould Sanction Affirmation).

Attorney Gould, on November 19, 2013, promptly responded to the court's November 1, 2013 email by mailing the requested documents to the Kings County Foreclosure Department by Federal Express (Gould Dismissal Opposition Affirmation, Exhibit 4).

766 Miller's 2013 Ex Parte Motion For An Order Appointing A Receiver

Meanwhile, about one month after filing the ex parte motion for an order of reference, 766 Miller, on July 8, 2013, electronically filed an ex parte application for an order appointing a receiver with supporting papers (NYSCEF Document Nos. 16-20).

By order dated March 26, 2014, this court denied 766 Miller's ex parte application for an order appointing a receiver, without prejudice, because 766 Miller's proposed order "failed to conform to the suggested Kings County format."[11]

The Flamingo Defendants' Dismissal Motion (Motion Seq. 2)

While 766 Miller's ex parte application for an Order of Reference was sub judice, the Flamingo Defendants, on or about July 23, 2014, moved to dismiss the action on the ground that 766 Miller "did not make any motion for a default within the required one year following service of the Summons and Complaint as required by CPLR 3215, and RPAPL 1321" (Wharton Dismissal Affirmation at ¶ 3).

Specifically, the Flamingo Defendants submit an attorney affirmation admitting that they were served with process through the New York Secretary of State on February 12,

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[11] *See* Attorney Gould's August 8, 2014 Affirmation in support of motion for an order appointing a receiver (Gould Receiver Affirmation) at ¶¶ 12-13 and Exhibit 5.

2013, pursuant to BCL § 306, and that they were required to answer or notice their appearance within twenty days of service, or by March 20, 2013. The Flamingo Defendants contend that 766 Miller failed to "file a motion for default and order of reference to compute within the required one year" or before March 21, 2014, pursuant to CPLR 3215 (a), and thus, dismissal of the foreclosure is warranted under CPLR 3215 (c) (*id.* at ¶ 9).

Attorney Gould Demands That The Dismissal Motion Be Withdrawn

Upon receipt of the Flamingo Defendants' dismissal motion, Attorney Gould sent a July 25, 2014 letter to defense counsel, Frank Wharton, Esq. (Attorney Wharton), requesting that defendants withdraw their dismissal motion because it is based on the erroneous position that 766 Miller "fail[ed] to act within one year of service of the summons and complaint" (Gould Dismissal Opposition Affirmation, Exhibit 6). Attorney Gould advised Attorney Wharton that 766 Miller's long-pending ex parte application for an Order of Reference was electronically filed on June 17, 2013 and warned him that "we will pursue the plaintiff's remedies" if the Flamingo Defendants fail to withdraw their dismissal motion:

> "Your position is not correct. We e-filed the plaintiff's Proposed Order Appointing Referee and other relief on June 17, 2013, several months after service of process, based upon your clients' default in answering or appearing. You have never moved to vacate your clients' default.
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> "Based upon the foregoing, please confirm that you will withdraw the Motion within five (5) days of the date of this letter, in default of which we will pursue the plaintiff's remedies, including but not limited to seeking the legal fees incurred in opposing the Motion and sanctions to be imposed by the court. This letter is provided in a good-faith attempt to avoid additional motion practice" (*id.*).

By letter dated July 26, 2014 to Attorney Gould, Attorney Wharton responded that "[i]n furtherance kindly be informed that I hereby reiterate the propositions and objective of the motion, and will not withdraw the motion."[12]

766 Miller's Opposition To The Dismissal Motion

766 Miller, in opposition to the Flamingo Defendants' dismissal motion, submitted Attorney Gould's August 6, 2014 affirmation asserting that "[p]laintiff expeditiously acted to enforce its rights and did not abandon this foreclosure" "as a matter of unquestionable public record [since] Plaintiff took the next procedural step in this foreclosure, an application for appointment of a referee pursuant to RPAPL § 1321 (1), promptly upon the Flamingo Defendants' default in pleading" (Gould Dismissal Opposition Affirmation at ¶¶ 14-15). Attorney Gould states that "[i]t is unclear why counsel would make an argument that is belied by even a cursory examination of the UCS Website" (*id.* at ¶ 16).

766 Miller's Cross Motion For Sanctions (Motion Seq. 3)

766 Miller also filed an August 6, 2014 cross motion seeking an order imposing Part 130 sanctions against the Flamingo Defendants and/or their counsel, Attorney Wharton, on the grounds that the Flamingo Defendants' dismissal motion is "without merit in law and fact and cannot be supported by a reasonable argument for an extension, modification or reversal

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[12] A copy of Attorney Wharton's response letter is attached as part of Exhibit 6 to Attorney Gould's August 6, 2014 Affirmation in support of 766 Miller's cross motion for the imposition of Part 130 sanctions (Gould Sanctions Affirmation).

of existing law, and that the main motion asserts material factual statements that are false."[13] Specifically, Attorney Gould argues that sanctions are appropriate because: (1) the Flamingo Defendants' dismissal motion is frivolous; (2) "counsel's refusal to withdraw the Motion upon being apprised of the relevant circumstances constitutes frivolous conduct pursuant to the Rules"; (3) since the Flamingo Defendants never answered the verified complaint, "their conduct is clearly designed to hinder and delay resolution of this litigation"; and (4) "Mr. Wharton's signing the Motion papers following his failure to conduct 'an inquiry reasonable under the circumstances' constitutes frivolous conduct . . ." (Gould Sanctions Affirmation at ¶¶ 19-21).

The Flamingo Defendants, in opposition, submitted Attorney Wharton's affirmation in which he merely reiterates that:

> "*It is the contention of defendants that Miller did not make any motion for an order of reference upon defendants' default, nor did Miller make an application for default judgment, and based upon defendants' default within the required one year following service of the Summons and Complaint as required by CPLR 3215, and RPAPL 1321*"[14]

Notably, Attorney Wharton did not counter, or even address, the documentary evidence in this record evidencing 766 Miller's June 17, 2013 application for an order of reference.

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[13] *See* 766 Miller's August 6, 2014 Notice of Cross Motion at 2.

[14] *See* the August 11, 2014 Affirmation of Frank Wharton, Esq. in opposition to 766 Miller's cross motion for an order imposing sanctions (Wharton Sanction Opposition Affirmation) at ¶ 3 (italics in original).

766 Miller's Motion For The Appointment Of A Receiver (Motion Seq. 4)

Two days later, on August 8, 2014,[15] 766 Miller filed a separate motion for an order appointing a receiver to collect the rents and profits of the Property, pursuant to paragraph 4 of the Mortgage, which expressly and unambiguously provides that "the holder of this First Mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver."[16]

The Flamingo Defendants, in opposition, submit Attorney Wharton's affirmation contending that 766 Miller "has not established that plaintiff is a holder of the alleged mortgage[,] has not established pursuant to the proof requirements of CPLR 3215 (f) that plaintiff is entitled to the appointment of a receiver. In fact plaintiff has not made any motion for default judgment in connection with this case and the time for doing so has elapsed."[17] The Flamingo Defendants further argue that 766 Miller "has engaged in attempts to avoid the proof requirements of CPLR 3215 (f)" since 766 Miller's motion for the appointment of a receiver "does not include any affidavits in support of plaintiff's application for the appointment of a receiver as a holder of a mortgage and as the mortgagee thereby" (Wharton Receiver Opposition Affirmation at ¶ 4). They also contend that CPLR 6401 (a) only

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[15] 766 Miller previously moved for the appointment of a receiver in July 2013, which was denied without prejudice (*see supra*) and again by notice of motion dated May 6, 2014, which was marked off the calendar on the June 25, 2014 return date (Gould Receiver Affirmation at ¶¶ 12-15).

[16] *See* Attorney Gould's August 8, 2014 Affirmation in support of 766 Miller's motion for the appointment of a receiver (Gould Receiver Affirmation) at ¶¶ 5-6; *see also* paragraph 4 of the Mortgage, a copy of which is annexed as part of Exhibit 1 to the Gould Receiver Affirmation.

[17] *See* the August 22, 2014 Affirmation of Frank Wharton in opposition to 766 Miller's motion for the appointment of a receiver (Wharton Receiver Opposition Affirmation) at ¶ 3.

authorizes the appointment of a temporary receiver "upon motion of a person having an apparent interest in the property . . ." and that 766 Miller failed to demonstrate that the "drastic remedy" of the appointment of a receiver is warranted, pursuant to CPLR 6401 (a), because "[t]here must be a danger of irreparable loss . . ." (*id.* at ¶¶ 6-7).

766 Miller responded by submitting Attorney Gould's September 4, 2014 reply affirmation in further support of the receiver motion (Gould Receiver Reply Affirmation). Attorney Gould submitted copies of the 2011 Mortgage Assignment with the City Register's Recording and Endorsement Cover Page in response to the Flamingo Defendants' contention that 766 Miller was not the holder of the Mortgage (*id.* at Exhibit 1). Attorney Gould also submitted a copy of the Kings County Document List for this action to prove that 766 Miller duly sought the appointment of a referee within one year of the Flamingo Defendants' default (*id.* at Exhibit 2). Attorney Gould further argues that proof that the Property is in danger of being lost or destroyed is not required, since the Mortgage "authorizes the court to appoint a receiver **without notice and without regard to the adequacy of any security**, as a matter of law" and "the mortgagor explicitly consented to the appointment of a receiver . . ." (*id.* at ¶¶ 11 and 15 [emphasis in original]).

Discussion

(1)

The Dismissal Motion (Motion Seq. 2)

Here, the Flamingo Defendants admittedly defaulted in March 2013 by failing to answer or otherwise respond to 766 Miller's verified complaint. In July 2014, the Flamingo Defendants sought dismissal, pursuant to CPLR 3215 (c), which provides, in relevant part:

> "If the plaintiff *fails to take proceedings for the entry of judgment within one year after the default*, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. . . ." (emphasis added).

The Dismissal Motion is based on defense counsel's assertion that "Miller did not file a motion for default and order of reference to compute within the required one year of default" (Wharton Dismissal Affirmation at ¶ 9).

For nearly two decades, the Appellate Division, Second Department, has held that dismissal is unwarranted under CPLR 3215 © for failure to prosecute where the plaintiff took a preliminary step toward obtaining a default judgment of foreclosure and sale by making an application for an order of reference within one year of the defendant's default (*HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 839 [2015] [holding that trial court improvidently exercised its discretion in dismissing the complaint, pursuant to CPLR 3215 (c), because "when the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference . . . it initiated proceedings for entry of the default judgment within one year of the defendants' default and, thus, did not abandon

this action"]; *Klein v St. Cyprian Properties, Inc.*, 100 AD3d 711, 712 [2012] [same]; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 770-771 [1996] [holding that "[t]he Supreme Court properly denied the appellant's motion to dismiss the action as abandoned pursuant to CPLR 3215 (c) since the plaintiff initiated proceedings for entry of a default judgment within one year of the appellant's default. The plaintiff moved for the appointment of a Referee to compute the amount due on the mortgage, a preliminary step towards obtaining a judgment of foreclosure"]).

The Flamingo Defendants' Dismissal Motion is baseless because 766 Miller timely filed an ex parte application for an order of reference appointing a referee on June 17, 2013, *within three months* of the Flamingo Defendants' March 20 2013 default in answering. Indeed, the NYSCEF Document List for this case in the record and on the UCS Website reflects that 766 Miller's application for an order of reference was: (1) filed by Attorney Gould as Document Nos. 9 through 15; (2) "Received" by the court on June 17, 2013; and (3) "Processed" by the court (*see* Gould Dismissal Opposition Affirmation, Exhibit 5).

Although the Foreclosure Department subsequently requested that Attorney Gould submit a working copy of the application and re-file 766 Miller's proposed order of reference (identified as Document No. 9 on the NYSCEF Document List), the application for an order of reference was never rejected by the court or withdrawn. Rather, in November 2013, the Foreclosure Department specifically directed Attorney Gould "DO NOT FILE A NEW DOCUMENT" because the application was previously processed (Gould Sanctions

Affirmation, Exhibit 3). Apparently, due to the volume of foreclosure filings in the Foreclosure Department, the review of 766 Miller's application for an order of reference was delayed and it remained sub judice since it was initially filed with the court on June 17, 2013. In any event, 766 Miller is not responsible for this unavoidable delay in resolving and deciding its timely application for an order of reference.

The Flamingo Defendants' contention that 766 Miller abandoned this action by failing to file "a motion for default and order of reference to compute within the required one year" is directly belied by irrefutable record evidence and public records, including the Kings County Clerk's NYSCEF Document List for this action on the UCS Website. Accordingly, the Flamingo Defendants' Dismissal Motion is denied.

(2)

766 Miller's Application For An Order Of Reference On Default (NYSCEF Document Nos. 9 through 15)

CPLR 3215 (f), which governs applications for a default judgment, provides, in relevant part:

> "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such a case, an affidavit as to the default shall be made by the party or the party's attorney"

"While a verified complaint may be used as the affidavit of the facts constituting the claim . . . it must contain evidentiary facts from one with personal knowledge" (*DLG Mtge.*

Capital, Inc. v United Gen. Title Ins. Co., 128 AD3d 760 [2015]), and "it must allege 'enough facts to enable a court to determine that a viable cause of action exists'" (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2010] [citations omitted]).

Importantly, RPAPL § 1321 (1), which authorizes the court to direct a referee to compute the amount due to plaintiff in a foreclosure action upon the defendant's default, provides, in relevant part:

> "If the defendant fails to answer within the time allowed . . . 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 examine and report whether the mortgaged premises can be sold in parcels . . ." (emphasis added)

Thus, pursuant to CPLR 3215 (f) and RPAPL § 1321 (1), "[w]hen seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment. That entitlement may be shown by demonstrating defendant's default in answering the complaint, or by the plaintiff showing entitlement to summary judgment . . ." (*JPMorgan Chase Bank Natl. Assoc. v Plaskett*, 45 Misc 3d 531, 532 [Sup Ct Kings County 2014] [citing 1-2 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures, § 2.01[4][k] [online edition]).

Here, the Flamingo Defendants admittedly defaulted by failing to answer the verified complaint and 766 Miller timely filed an application seeking an order of reference on default. In support of its application, 766 Miller submitted: (1) Attorney Gould's affirmation annexing the February 12, 2013 Affidavits of Service upon the Flamingo Defendants and the

pleadings; (2) the June 12, 2013 "Affidavit of regularity" of Mark Levin, the managing member of 766 Miller; (3) the complaint, which was verified on personal knowledge by Mark Levin; (4) a copy of the Mortgage (as Exhibit A to the verified complaint); (5) a copy of the Astoria Note (as Exhibit B to the verified complaint); (6) a legal description of the Property (as Exhibit C to the verified complaint); (7) a copy of 766 Miller's Default Notice (as Exhibit D to the verified complaint); and (8) a print out of all judgment creditors who may have an interest in the Property (as Exhibit E to the verified complaint).

766 Miller's verified complaint, the allegations in which are deemed admitted by the Flamingo Defendants, alleges that: "[p]laintiff is the owner and holder of the Mortgage, and the Note that it secures" (Complaint at ¶ 9); Flamingo Capital (defined as "the Borrower") "defaulted in the terms of the Mortgage, as modified, by failing and neglecting to pay": (1) $10,000.00 in "extension fees" that were due on April 1, 2012 and October 1, 2012; (2) $5,812.69 in "real estate taxes" due for the Property as of December 31, 2012; and (3) $28,034.95 in "water and related charges" due as of December 4, 2012 (*id.* at ¶¶ 12-14); Flamingo Funding, as "fee owner of the Mortgaged Property . . . executed and delivered the Assumption Agreement dated January 9, 2012 . . . wherein said defendant assumed all of the Borrower's obligations per the Note, Mortgage and other loan documents" (*id.* at ¶ 23); and "[p]laintiff duly accelerated the entire sum due on the Mortgage" in the December 27, 2012 Default Notice (*id.* at ¶ 15) .

Here, 766 Miller's verified complaint, including the loan documents attached thereto and incorporated therein and the ACRIS Documents,[18] sufficiently establish that the Flamingo Defendants defaulted in answering and allege "facts constituting the claim." Accordingly, 766 Miller has demonstrated its entitlement to an order appointing a referee to compute the amount due and owing to it.

(3)

766 Miller's Motion For An Order Appointing A Receiver (Motion Seq. 4)

Similarly, 766 Miller is entitled to an order appointing a receiver to collect rent at the Property, pursuant to the express terms of the Mortgage. Paragraph 4 of the Mortgage (attached as Exhibit A to the verified complaint) plainly states that "the holder of this First Mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver."

While the Flamingo Defendants' contend that 766 Miller's motion should be denied because it "has not established that plaintiff is a holder of the alleged mortgage" (Wharton Receiver Opposition Affirmation at ¶ 3), the Flamingo Defendants have waived any standing

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[18] The ACRIS Documents previously discussed herein (and identified in the record) have been considered as part of 766 Miller's verified complaint (*St. Regis Tribe of Mohawk Indians v State*, 5 NY2d 24, 26 [1958] [holding that "we may not consider matters beyond the face of the complaint except insofar as we may take judicial notice of them by common law or by statute . . . and thereby read them into the complaint"], *rearg. denied* 5 NY2d 793 [1958], *cert. denied* 359 US 910 [1959], *reh. denied* 359 US 910 [1959]; *Anderson v Port Washington Public Parking Dist.*, 1 AD2d 826, 827 [1956] [holding that court "may read into the complaint for the purpose of determining its sufficiency all the facts and applicable statutes of which the court may take judicial notice"]; *City of Watertown v Town of Watertown*, 207 Misc 433, 446 [1952] [holding that "[i]n determining the sufficiency of this complaint the court is not required to pretend ignorance of matters of common knowledge and public record. Judicially noticed, such matters may be here considered as though embodied in the complaint"]).

defense by failing to assert the defense in a timely answer or pre-answer motion to dismiss (*see U.S. Bank Natl. Assn. v Denaro*, 98 AD3d 964 [2012]; *HSBC Bank USA, NA v Schwartz*, 88 AD3d 961 [2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2009]). Indeed, the Flamingo Defendants are deemed to have admitted 766 Miller's allegation that "[p]laintiff is the owner and holder of the Mortgage, and the Note that it secures" in paragraph 9 of the verified complaint by failing to answer or otherwise respond to the complaint. Furthermore, Flamingo Funding expressly acknowledged that 766 Miller "is the owner and holder" of the Astoria Note in the Assumption Agreement.

Similarly unavailing is the Flamingo Defendants' contention that 766 Miller is not entitled to an order appointing a receiver because there is no danger of irreparable loss (Wharton Receiver Opposition Affirmation at ¶ 7). However, CPLR 6401, pursuant to which a party with an interest in property may seek the appointment of a temporary receiver "where there is a danger that the property will be removed from the state, or lost, materially injured or destroyed," is inapplicable if the mortgage contains a provision specifically providing for the appointment of a receiver (*First Natl. Bank of Glens Falls v Caputo*, 124 AD2d 417, 417 [1986] [holding that application for appointment of receiver was governed by CPLR 6401 if the mortgage contained no provision authorizing the appointment of a receiver"]).

Under the circumstances presented here, where the Mortgage specifically provides for the appointment of a receiver," Real Property Law (RPL) § 254 (10) authorizes the appointment of a receiver "as further security for the payment of the indebtedness" without

the need to show danger that the Property is at risk (*Ridgewood Savings Bank v New Line Realty VI Corp.*, 24 Misc 3d 1227 (A) [Sup Ct Bronx County 2009]). Thus, RPL § 254 (10), entitled "Mortgagee entitled to appointment of receiver," explicitly provides that:

> "A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness."

Accordingly, 766 Miller is entitled to an order appointing a receiver to collect the rents and profits derived from the Property as additional security for the Flamingo Defendants' payment of the indebtedness under the Astoria Note, in accordance with the terms of paragraph 4 of the Mortgage and RPL § 254 (10).

(4)

766 Miller's Cross Motion For Sanctions (Motion Seq. 3)

766 Miller cross-moves for an order, pursuant to 22 NYCRR 130-1.1, imposing sanctions against the Flamingo Defendants and/or their counsel, Frank Wharton, Esq., on the grounds that the Dismissal Motion "lacks all merit in law or fact and is frivolous . . ." because it is based on the "demonstrably false" "allegation that the Plaintiff did not seek appointment of a referee within a year of service . . ." (Gould Sanctions Affirmation at ¶ 18). Attorney Gould correctly notes that "Mr. Wharton could have ascertained the Plaintiff's

timely application for a referee pursuant to RPAPL § 1321 (1) simply by examining the UCS Website" and that "counsel's refusal to withdraw the [Dismissal] Motion upon being apprised of the relevant circumstances constitutes frivolous conduct pursuant to the Rules" (*id.* at ¶¶ 18-19). 766 Miller contends that sanctions are warranted based upon this frivolous conduct by the Flamingo Defendants and their counsel, including reimbursement of its attorneys' fees and expenses incurred in responding to the Flamingo Defendants' Dismissal Motion and in making this cross motion for sanctions.

Pursuant to 22 NYCRR 130-1.1, the court, in its discretion, may award a party to an action "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part," and, in addition to awarding such costs, may impose financial sanctions upon a party. Conduct constitutes "frivolous conduct" under this section where it "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or where "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" 22 NYCRR 130-1.1 (c) provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Attorney Wharton, in opposition to the cross motion for sanctions, merely reiterates the Flamingo Defendants' demonstrably false factual assertion that "*Miller did not make any motion for an order of reference upon defendants' default . . .*" and request that the Dismissal Motion be granted, without addressing the irrefutable record evidence proving otherwise (Wharton Sanctions Opposition Affirmation at ¶ 3 and page 4 [italics in original]). Attorney Wharton contends that "plaintiff has not demonstrated that defendants or their counsel engaged in any conduct that could reasonably be regarded as subject to sanction" (*id.* at ¶ 6). However, Attorney Wharton fails to establish that the Dismissal Motion is legally or factually meritorious, nor can he, since the Dismissal Motion is premised on a false statement of facts, which Attorney Gould brought to his attention. Attorney Wharton also fails to justify his stubborn refusal to withdraw the Dismissal Motion after Attorney Gould specifically advised him that it was premised on false statements of fact.

The Flamingo Defendants' Dismissal Motion and Attorney Wharton's persistent course of filing motion papers based on demonstrably false factual statements seemingly constitutes a strategy undertaken to prolong a resolution of this foreclosure action in bad faith (22 NYCRR 130-1.1 [c] [2]). "This abuse of the judicial process [by creating unnecessary litigation] supports the imposition of sanctions" (*Maroulis v 64th St.-Third Ave. Assoc.*, 77 NY2d 831, 833 [1991]).

For the foregoing reasons, the imposition of appropriate sanctions is warranted under 22 NYCRR 130-1.1. Consequently, since the Flamingo Defendants' Dismissal Motion and

Attorney Wharton's refusal to withdraw the Dismissal Motion constitute frivolous conduct, 766 Miller is entitled to an award of the reasonable attorneys' fees incurred in opposing the Flamingo Defendants' Dismissal Motion and making the instant cross motion for sanctions (*see* 22 NYCRR 130-1.1 [a]; *Asim v City of New York*, 117 AD3d 655, 656 [2014]; *Weissman v Weissman*, 116 AD3d 848, 850 [2014], *lv denied* 24 NY3d 902 [2014]; *Trajkovic v Trajkovic*, 98 AD3d 55, 57 [2012]; *Matter of Herskowitz v Tompkins*, 184 AD2d 402, 404 [1992], *appeal dismissed* 80 NY2d 1023 [1992]). Accordingly, it is

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ORDERED that the Flamingo Defendants' Dismissal Motion (Motion Seq. 2) is denied; and it is further

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ORDERED that the branch of 766 Miller's application for an order of reference appointing a referee to compute the amounts due (NYSCEF Document Nos. 9 through 15) is granted and the proposed "Order Of Reference" filed by 766 Miller (NYSCEF Document No. 9) shall be signed and issued following review and approval of its terms by this court; and it is further

ORDERED that the branch of 766 Miller's application for an order amending the caption to eliminate the "John Doe" defendants (NYSCEF Document Nos. 9 through 15) is granted; and it is further

ORDERED that the caption in this action shall read as follows:

----------X
766 MILLER LEND LLC,

Plaintiff,

- against -

FLAMINGO FUNDING INC., FLAMINGO CAPITAL LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.
----------X;

and it is further

ORDERED that 766 Miller's motion for an the appointment of a receiver (Motion Seq. 4) is granted and the proposed "Order To Appoint Receiver" filed by 766 Miller (NYSCEF Document No. 36) shall be signed and issued following review and approval of its terms by this court; and it is further

ORDERED that 766 Miller's cross motion for an order, pursuant to 22 NYCRR 130-1.1 (Part 130), imposing sanctions (Motion Seq. 3) is granted to the extent that 766 Miller is awarded the reasonable attorney's fees that it incurred in opposing the Dismissal Motion and in making the sanctions motion, after a hearing is conducted to determine the amount of those attorney's fees; and it is further

003

ORDERED, that this matter is referred to the Judicial Hearing Officer Part for a hearing to determine the reasonable attorney's fees that 766 Miller incurred in opposing the

Dismissal Motion and in making the sanctions motion. The parties are to appear in room 969 on July 28, 2015 at 10 am to complete a JHO Referral Form from the Part Clerk.

This constitutes the decision and order of this court.

E N T E R,

J.S.C.

HON. DAVID B. VAUGHAN