

**Bayview Loan Servicing, LLC v Focused Enters.,
Ltd.**

2022 NY Slip Op 30337(U)

February 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 13120/11

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 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 1st day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
BAYVIEW LOAN SERVICING, LLC, A DELAWARE
LIMITED LIABILITY COMPANY,

Plaintiff,

- against -

Index No. 13120/11

FOCUSED ENTERPRISES, LTD., JUDY JORDAN,
COMMISSIONER OF LABOR STATE OF NEW YORK,
WORKERS COMPENSATION BOARD, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE,
GARDEN CITY BOXING CLUB INC., NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, FIRST
WEST MORTGAGE BANKERS LTD., HOME
HEATING OIL CORP., GREG JORDAN SR., GREG
JORDAN JR., KEVIN MITCHELL, ANTHONY
BRANCH, SARA JORDAN, ANTOINETTE FORTES,
GREG WILLIAMS,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposition Affidavits (Affirmations) Annexed _____
Reply Affidavits (Affirmations) Annexed _____

4-31
34-55, 57-61
63-65

Upon the foregoing papers in this action to foreclose a mortgage on the real property at 429-437 Marcus Garvey Boulevard in Brooklyn (Block 1669, Lot 1) (Property),¹ defendants Focused Enterprises Ltd. (Focused or borrower) and Greg Jordan Sr. (Jordan Sr.) (collectively, defendants) move (in motion sequence [mot. seq.] nine) for an order: (1) setting aside the September 16, 2021 foreclosure sale/auction of the Property (September 2021 Foreclosure Sale) “by reason of the failure of the plaintiff to serve timely notice of [the September 2021 Foreclosure Sale] in accordance with [the] Judgment of Foreclosure And Sale . . .”; (2) declaring any referee’s deed to be null and void; and (3) dismissing the complaint, pursuant to CPLR 3211 (a) (4) and RPAPL § 1301 (3).

Background

On June 8, 2011, plaintiff Bayview Loan Servicing, LLC, a Delaware Limited Liability Company (Bayview), commenced this residential foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that on or about September 28, 2006, defendant Focused executed a \$560,000.00 note in favor of First West Mortgage Bankers, Ltd. (First West), which was secured by a mortgage on the Property (complaint at ¶¶ 1-2). The complaint erroneously alleges that defendant Judy Jordan executed a personal guarantee of the loan in favor of *Focused* on September 28, 2006 (*id.* at ¶ 3). The complaint also erroneously alleges that

¹ According to defendant Greg Jordan Sr., he has resided at the Property since the commencement of this action and defendant Focused Enterprises, Ltd., his wholly owned catering business, occupies the second floor of the Property.

the mortgage was assigned *from Focused* to Bayview on September 28, 2006 (*id.* at ¶ 4). The complaint alleges that by a September 25, 2009 agreement between defendants Focused, Judy Jordan and Bayview, the loan note “was adjusted to provide for a[n] increased principal balance . . .” of \$757,308.37, as well as changing the interest rate and the maturity date (*id.* at ¶ 5). The complaint alleges that defendant Focused failed to comply with the terms and provisions of the note and mortgage by failing to make the monthly payments due on March 1, 2011, and each successive month thereafter and that, after service of a notice of acceleration, plaintiff elects to declare the entire balance due (*id.* at ¶¶ 11-12).

Defendants Jordan Sr. and Focused were served with process on June 14, 2011. All of the defendants, including defendants Jordan Sr. and Focused, failed to answer or otherwise respond to the complaint.

On June 5, 2013, Bayview moved for an order of reference and other relief, which was granted on default. A February 17, 2015 order of reference was issued appointing a referee to compute the amount due to plaintiff and to report whether the Property can be sold in a single parcel. The referee subsequently issued an April 2, 2015 report in which he determined that \$1,174,201.95 is due and owing as of March 31, 2015, and that the Property can be sold in a single parcel.

The 2015 Judgment of Foreclosure and Sale

On August 31, 2015, the court (Schack, J.) issued a judgment of foreclosure and sale, ratified and confirmed the referee’s report and ordered, adjudged and decreed that the

Property be sold in one parcel at public auction under the referee's direction, and that "said Referee shall . . . give public notice of the time and place of sale in accordance with RPAPL 231 in [the] Brooklyn Daily Eagle" (*see* NYSCEF Doc No. 10) (2015 Judgment of Foreclosure and Sale). The 2015 Judgment of Foreclosure and Sale further ordered that:

"the Plaintiff *shall* serve a copy of the Notice of Sale upon the Owner of Equity of Redemption at both his/her last known address and the property address (affidavit of such service shall be presented to the Foreclosure Clerk on or before the auction sale) and upon the Foreclosure Department *at least ten (10) days prior to the scheduled sale*" (*id.* [emphasis added]).

The 2015 Judgment of Foreclosure and Sale awarded plaintiff the sum of \$1,174,201.95 with interest thereon from March 31, 2015.

On April 7, 2017, "assignee of plaintiff," USD 322 Macon Funding LLC (USD 322 Macon), moved, by order to show cause, for an order granting it, as Bayview's assignee, the right to be installed as mortgagee in possession of the Property. By a May 1, 2017 order, this court granted the motion without opposition, and ordered that USD 322 Macon "shall be installed as mortgagee in possession and that a copy of the order "shall be served on all parties within 10 days."

Meanwhile, defendants Focused and Jordan Sr. moved, by order to show cause, to dismiss this action, pursuant to CPLR 3215 (e), due to plaintiff's failure to seek a default judgment within one year of defendants' appearance default and to stay a foreclosure sale. By an October 27, 2017 Amended Decision/Order, the court (Sweeney, J.) granted the motion, dismissed the action and held that "plaintiff did not initiate proceedings for the

entry of a default judgment within one year of the defendant's default" and "plaintiff provided no excuse whatsoever for the plaintiff's protracted delay in making the motion . . ." (*see* NYSCEF Doc No. 12).

On or about April 24, 2018, USD 322 Macon commenced a second action against Focused to foreclose the very same mortgage under Kings County index No. 508302/18 (Second Foreclosure Action) (*see* NYSCEF Doc No. 14). On September 20, 2018, Focused answered the complaint in the second foreclosure action, denied the material allegations therein, asserted affirmative defenses and asserted counterclaims. On January 7, 2019, USD 322 Macon moved for summary judgment against Focused and an order of reference in the Second Foreclosure Action. The Second Foreclosure Action is still pending.

Meanwhile, USD 322 Macon moved for leave to renew defendants' dismissal motion and to discontinue the action as against Judy Jordan, who died on August 5, 2015. By an April 16, 2019 decision and order, the court (Sweeney, J.) granted USD 322 Macon's renewal motion and, upon renewal, denied defendants' motion to dismiss and enjoin the foreclosure sale and granted USD 322 Macon's motion to discontinue this action as against Judy Macon.

Thereafter, on July 11, 2019, Jordan Sr. filed for bankruptcy, which triggered an automatic stay of this foreclosure action.

The September 2021 Foreclosure Sale

On September 16, 2021, a foreclosure auction of the Property was conducted at which Mohamed Meazeb on behalf of United 433 Halsey LLC (United) emerged as the winning bidder with a purchase price of \$1,651,000.00 (September 2021 Foreclosure Sale).

Defendants' Instant Motion

Defendants now move for an order setting aside the September 2021 Foreclosure Sale, declaring any referee's deed to be null and void and dismissing the complaint, pursuant to CPLR 3211 (a) (4) and RPAPL 1301 (3).

Defendant Jordan Sr. submits an affidavit attesting that he is the sole principal of defendant Focused, a catering business that owns the Property. Jordan Sr. attests that Focused has its principal place of business in the commercial space on the second floor of the Property, and that he and his family reside in the four residential units at the Property. Jordan Sr. asserts that Focused "has been forced to litigate multiple foreclosure actions concerning the same mortgage arrears, involving the same parties" since 2018, and that the Second Foreclosure Action is still pending, despite the fact that this action was restored pursuant to the court's April 16, 2019 decision and order. Jordan Sr. also asserts that "[a]ctive litigation on the second action has ensued following the restoration of the subject action, with no attempts made by plaintiff to either consolidate said action with the subject action and/or discontinue the second action" and that "the commencement and/or prosecution of two simultaneous foreclosure actions concerning the same mortgage arrears (and consequently the same property) is in violation of CPLR § 3211 (a) (4) and RPAPL

§ 1301(3).” Jordan Sr. argues that “[g]iven that the second action was commenced at a time when the first foreclosure action had been dismissed, I contend that the within action should now be dismissed, with active litigation clearly ensuing on the subject 2018 foreclosure action.”

Jordan Sr. also argues that plaintiff failed to serve notice of the September 2021 Foreclosure Sale upon Focused and at the Property at least 10 days prior to the date of the September 16, 2021 foreclosure auction/sale, as required by the 2015 Judgment of Foreclosure and Sale. Jordan Sr. attests that:

“[i]t was not until September 18, 2021, two days after the foreclosure auction/sale of said property that I was aware as to any notice of sale having been served upon the defendant-mortgagor at said property, with said notice having been served by first class mail delivery, in an envelope postmarked September 13, 2021. My attorney advises me that his office did not receive such notice until September 17, 2021, pursuant to an envelope marked postmarked September 13, 2021. Clearly, plaintiff did not comply with the notice dictates imposed by the Honorable Court's August 31, 2015 Judgment of Foreclosure and Sale, and as such, said auction/sale should be set aside, and any transfer of the property, pursuant to a referee's deed, should be deemed null and void.

In addition, Jordan Sr. asserts that the September 2021 Foreclosure Sale was not conducted within 90 days of the 2015 Judgment of Foreclosure and Sale, as required by RPAPL § 1351. Jordan Sr. argues that the September 2021 Foreclosure Sale was improper since “[t]he subject Judgment of Foreclosure and Sale was entered on September 3, 2015, more than six years before said September 16, 2021 auction date.”

Defendants also submit an attorney affirmation in which defense counsel recounts the procedural history of this foreclosure action and the pending Second Foreclosure Action, which USD 322 Macon commenced in April 2018, and has continued to litigate, even after this previously commenced foreclosure action was restored in April 2019. Defense counsel affirms that “plaintiff’s counsel, despite improperly prosecuting two active simultaneous foreclosure actions concerning the same mortgage arrears, served your affirmant’s office with a ‘Notice of Sale’ reflecting a foreclosure auction/sale of the subject . . . property to be held on July 11, 2019” and annexes a copy (*see* NYSCEF Doc No. 20). Jordan Sr. filed for bankruptcy on July 11, 2019, which triggered an automatic stay of this foreclosure action and the foreclosure auction/sale (until the bankruptcy was dismissed on August 28, 2019).

Defense counsel affirms that “[a] foreclosure auction/sale of the . . . property was apparently recently held on September 16, 2021” but asserts that:

“[s]uch foreclosure auction sale was held, pursuant to a ‘Notice of Sale’ which was not properly served upon either the defendant FOCUSED . . . as the ‘Owner of Equity of Redemption at both his/her last known address and the Property Address’; nor was it properly served upon your affirmant’s office, as counsel of record for the appearing defendant mortgagor, FOCUSED . . .

“While said ‘Notice of Sale’ was apparently filed with the Office of the Kings County Clerk on August 26, 2021 . . . it was not until September 13, 2021, just three days before said auction/sale date, that either your affirmant or the defendant, FOCUSED . . . were served with said ‘Notice of Sale,’ which service was effectuated by plaintiff pursuant to first class mail delivery . . . Given the resultant delays with the United States

Postal Service concerning the forwarding of regular mail, it is not surprising that your affirmant's office did not receive said mailing until September 17, 2021, one day after said foreclosure auction/sale was held. . . ."

Defense counsel notes that the Kings County Clerk's minutes reflect that neither plaintiff's counsel nor the referee filed an affidavit of service of the "Notice of Sale." Defense counsel asserts that "no attempts were made to serve of said 'notice' prior to September 13, 2021, upon which day plaintiff apparently forwarded said document to both your affirmant and defendants at the subject . . . property address, pursuant to first class mail delivery." Defense counsel notes that the envelope for the late Notice of Sale, a copy of which is attached to his affirmation as Exhibit 17, "did not even bear the name of either the plaintiff, plaintiff's attorney, or the court-appointed referee."

Defense counsel explains that upon learning of the 2021 Foreclosure Sale, he attempted to contact the court-appointed referee by electronic mail and received an automatic response that his office was permanently closed. Defense counsel received documents about the 2021 Foreclosure Sale from another attorney who is associated with the referee, and those documents reflected the purchase price, a closing tentatively scheduled for October 18, 2021, and that the purchaser was Mohamed Meazeb on behalf of United. Defense counsel asserts that "it was not until September 17, 2021 that such said corporate/limited liability company was legally formed." Defense counsel thus argues that United was not even a valid corporate entity in the State of New York at the time it "purchased" the Property at the 2021 Foreclosure Sale.

Defense counsel also argues that “the scheduling of said foreclosure auction/sale conducted on September 16, 2021 would appear to be in violation of RPAPL § 1351” because the 2021 Foreclosure Sale was not conducted within 90 days of the 2015 Judgment of Foreclosure and Sale. Indeed, defense counsel notes that the September 16, 2021 sale date was “almost six years after the date of the Judgment of Foreclosure and Sale.” Defense counsel also argues that the 2021 Foreclosure Sale was improper because it was not conducted within one year of the 2015 Judgment of Foreclosure and Sale. Given the fact that the 2021 Foreclosure Sale was improper, defendants seek an order setting aside the 2021 Foreclosure Sale, deeming any referee’s deed null and void.

Defense counsel also reasons that the 2015 Judgment of Foreclosure and Sale “which is six years old is not a timely and accurate computation of the amounts due under the note and mortgage (as reflected by the resultant bid for the property exceeding the original judgment amount by well more than \$500,000).” Defense counsel thus argues that the August 26, 2021 notice of sale is “substantially inaccurate and incomplete” since it does not account for six years of interest, taxes and other fees and expenses. Defense counsel asserts that “[n]o sale can properly be held until, at the very least, plaintiff’s procurement of a proper Judgment of Foreclosure and Sale, with a proper current Judgment amount . . .”

Finally, defense counsel argues that this foreclosure action should be dismissed, pursuant to CPLR 3211 (a) (4), since USD 322 Macon commenced the Second Foreclosure Action at a time when this action had been dismissed, pursuant to CPLR 3215 (c), and

continued litigating the Second Foreclosure Action when this foreclosure action was restored. Defense counsel, however, acknowledged that this court has broad discretion to formulate a remedy when there are two actions pending for the same relief.

USD 322 Macon's Opposition

USD 322 Macon, in opposition, submits an attorney affirmation arguing that the Second Foreclosure Action was commenced “only to preserve Plaintiff's rights with respect to the sums due and owing by Defendants to Plaintiff on the subject note and mortgage, so as to avoid the impending lapse of the six-year statute of limitations . . .”

USD 322 Macon's counsel explains that after the renewal order was granted and the time to appeal had passed “[p]laintiff did not withdraw the Second [Foreclosure] Action as Defendants retained their right to appeal the Renewal Order . . .” USD 322 Macon's counsel asserts that “[p]laintiff has not yet filed a motion to discontinue the Second [Foreclosure] Action, although it intends to do so at the appropriate time.”

USD 322 Macon's counsel affirms that upon the dismissal of Jordan Sr.'s bankruptcy case on August 28, 2019, “[p]laintiff scheduled another foreclosure auction for *November 14, 2019* as set forth in the Notice of Sale annexed hereto as Exhibit I[,]” but defendant Focused filed for bankruptcy on November 13, 2019 (emphasis added). Notably, however, the Notice of Sale annexed to counsel's opposing affirmation as Exhibit I states that the referee will sell the Property at public auction on *October 31, 2019*, which preceded Focused's November 13, 2019 bankruptcy filing. USD 322 Macon's counsel affirms that “[p]ursuant to a decision dated August 13, 2020, Plaintiff obtained in rem relief in the

Focused Bankruptcy Action to file a foreclosure auction relating to the Premises after a 30 day stay period.”

USD 322 Macon’s counsel affirms that “[d]ue to the restrictions relating to the Coronavirus pandemic and the requirements relating thereto, all foreclosure actions were stayed until the Kings County Supreme Court granted Plaintiff’s request to schedule a COVID conference in this action.” Counsel affirms that defense counsel actively participated in two COVID conferences, after which defendants did not file a hardship declaration. According to USD 322 Macon’s counsel, “[a]fter the COVID conferences . . . the Kings County Foreclosure Department agreed to the scheduling of the Foreclosure Auction for September 16, 2021 pursuant to email correspondence dated August 3, 2021” and “[p]ursuant to the requirements of the Kings County Foreclosure Department, the Notice of Sale was filed in the Kings County Clerk’s Office on August 26, 2021.”

Regarding service of the Notice of Sale, USD 322 Macon’s counsel affirms that:

“The Notice of Sale was mailed to David M. Harrison, Esq., as counsel for the Defendants, as well as to the other defendants and the Premises on September 7, 2021 as set forth in an affidavit of mailing annexed hereto as **Exhibit Q**. *Plaintiff does not know why the postmark is stamped as September 13, 2021*, but the Plaintiff mailed the Notice of Sale to the Defendants on September 7, 2021” (emphasis added).

Exhibit Q is an “Affidavit of Mailing” from John O’Keefe, which was notarized on September 13, 2021, and attests that:

“[O]n September 7th I served a copy of the within Notice of Sale by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and

custody of the U.S. Postal service within New York State, addressed to each of the following persons at the last known address set forth after each name: . . .” (NYSCEF Doc No. 51).

Notably, the September 13, 2021 affidavit of mailing merely says that the Notice of Sale was served “on September 7th” and does not indicate what year the Notice of Sale was mailed to defense counsel and Focused.

Counsel asserts that dismissal is not warranted, pursuant to CPLR 3211 (a) (4) because the statute explicitly states that the court need not dismiss “but may make such order as justice requires.” Counsel asserts that it has not pursued the Second Foreclosure Action since 2019 when this foreclosure action was restored, and “if any foreclosure action needs to be dismissed, it is the Second [Foreclosure] Action, which Plaintiff intends to do at the appropriate time.”

Counsel argues that the September 2021 Foreclosure Sale should not be set aside pursuant to RPAPL § 1351 (1) because the 2015 Judgment of Foreclosure and Sale was granted prior to the date that the statute went into effect and the statute is not retroactive. Without mentioning the court’s directive in the 2015 Judgment of Foreclosure and Sale, counsel argues that “there is no requirement for the Defendant to have notice of a foreclosure auction prior to the foreclosure auction.” Counsel also asserts that “[d]efendants claim that they did not receive the Notice of Sale that Plaintiff mailed to the Defendants on September 7, 2021 as set forth in the affidavit annexed hereto as **Exhibit Q**” but “[p]laintiff has no obligation to explain the reason why the postmark is September 13, 2021.” Counsel further argues that “pursuant to CPLR § 2003, a court may only set

aside a judicial sale for failure to comply with the requirements of the CPLR if a 'substantial right' of a party was prejudiced . . ." and defendants have not demonstrated that they have been prejudiced.

Counsel affirms that the deed to the Property has not yet been delivered to United, the successful bidder at the September 2021 Foreclosure Sale.

Non-Party United's Opposition

United, in opposition, submits an affidavit from Mohamed Moazeb, the principal member of United, the successful bidder at the September 2021 Foreclosure Sale. Moazeb attests that United was incorporated on September 17, 2021, one day after the September 2021 Foreclosure Sale, but that he was also personally listed as the bidder. United also submitted an attorney affirmation adopting the arguments in USD 322 Macon's opposition.

Defendants' Reply

Defendants, in reply, submit an attorney affirmation arguing that this action should be dismissed, pursuant to CPLR 3211 (a) (4) and RPAPL § 1301 (3), because "[a]t no time prior to the foreclosure auction/sale conducted of defendants' subject property on September 16, 2021 has plaintiff ever made any attempts to properly discontinue said second foreclosure action, relating to the exact same property . . ." more than two years after this action was restored and more than one year after the bankruptcy stay was lifted.

Defense counsel further contends that **"it is inarguable that the Notice of Sale was not properly mailed to the Defendants prior to said September 16, 2021 foreclosure auction/sale, pursuant to the Honorable Court's previously rendered 'Judgment of**

Foreclosure and Sale.” Defense counsel notes that a copy of the envelope with the *September 13, 2021 postmark* within which plaintiff’s Notice of Sale was mailed (see NYSCEF Doc No. 24) reflects that **“plaintiff did not abide with this court-imposed directive”** in the 2015 Judgment of Foreclosure and Sale that plaintiff serve a copy of the Notice of Sale “upon the Owner of Equity of Redemption at both his/her last known address and the Property Address . . . and upon the Foreclosure Department *at least ten (10) days prior to the scheduled sale*” (emphasis added). Defense counsel also notes that the September 13, 2021 affidavit of service, which plaintiff’s counsel claims was mailed on September 7, 2021 (only *nine days before* the September 16, 2021 foreclosure auction/sale), simply states that the Notice of Sale was served “on September 7th . . .” without even indicating a year. Defense counsel questions the veracity of plaintiff’s counsel’s assertion that:

“Plaintiff does not know why the postmark is stamped September 13, 2021 . . .” and claims that “plaintiff and/or [the process server] actually do[] know why the postmark is stamped September 13, 2021; as that is the date it was served upon your affirmant and defendants herein by regular mail (as evidenced by Mr. O’Keefe’s Affidavit bearing the same September 13, 2021 date, and further evidenced by the postmark on the envelopes containing plaintiff’s ‘Notice of Sale’ mailed to other defendant parties by Mr. O’Keefe, which postmark on said envelopes is also September 13, 2021.”

Defense counsel collectively submits copies of the envelopes addressed to defendants Brown Sugar Club, Jordan Sr. and Judy Jordan, but the postmarks are not legible (*see* NYSCEF Doc No. 65).

Defense counsel reasons that even if the affidavit of service proves that plaintiff served the Notice of Sale on September 7, 2021, it still does not comply with the 2015 Judgment of Foreclosure and Sale, which required that the Notice of Sale be served 10 days prior to the September 16, 2021 scheduled auction/sale, or no later than September 6, 2021. Defense counsel asserts that “[a] ‘substantial right of defendants’ was prejudiced in not being given proper notice by plaintiff of the sale pursuant to the dictates imposed by the Honorable Court’s ‘Judgment of Foreclosure And Sale.’” Defense counsel argues that plaintiff’s failure to properly serve defendants with a Notice of Sale “was in blatant violation of a judicial directive imposed by the judgment from which said resultant foreclosure auction/sale was conducted . . .”

Discussion

The 2015 Judgment of Foreclosure and Sale specifically ordered that:

“the Plaintiff shall serve a copy of the Notice of Sale upon the Owner of Equity of Redemption at both his/her last known address and the property address (affidavit of such service shall be presented to the Foreclosure Clerk on or before the auction sale) and upon the Foreclosure Department at least ten (10) days prior to the scheduled sale” (*id.*).

Thus, plaintiff was required, by the express terms of the court’s 2015 Judgment of Foreclosure and Sale, to serve Focused, the owner of the equity of redemption, *on or before September 6, 2021*, 10 days prior to the September 16, 2021 Foreclosure Sale.

Plaintiff produced a September 13, 2021 affidavit of mailing in which its process server attested that a Notice of Sale for the September 16, 2021 foreclosure auction/sale

was mailed to Focused on “September 7th” without indicating what year. In addition, the record reflects that the Notice of Sale was sent in an envelope that was postmarked “September 13, 2021[,]” which plaintiff’s counsel admittedly cannot explain. Regardless of whether the Notice of Sale was mailed on September 7, 2021 or September 13, 2021, there is no question that plaintiff failed to mail a timely Notice of Sale to Focused, the owner of the equity of redemption, on September 6, 2021, 10 days prior to the September 16, 2021 foreclosure auction/sale, in accordance with the court’s mandate in the 2015 Judgment of Foreclosure and Sale.

It is well-settled that “[t]he title owner of property encumbered by a mortgage or a tax lien has the right to redeem the property at any time *prior to the actual sale* under a judgment of foreclosure” (*NYCTL 1996-1 Tr. v Moore*, 51 AD3d 885, 886 [2008] [emphasis added]). Defendant Focused has demonstrated that it was prejudiced by belatedly receiving notice of the September 16, 2021 foreclosure auction/sale after the September 2021 Foreclosure Sale had already been conducted. Indeed, Focused’s right of redemption had already been extinguished by the time it received the Notice of Sale. Because plaintiff failed to provide Focused with timely notice of the September 16, 2021 foreclosure auction/sale on or before September 6, 2021, as required by the express terms of the 2015 Judgment of Foreclosure and Sale, that branch of defendants’ motion to set aside and vacate the September 16, 2021 foreclosure sale/auction is granted.

That branch of defendants’ motion to dismiss this action, pursuant to CPLR 3211 (a) (4) and RPAPL §1301 (3), based on the pendency of both this foreclosure action and

the Second Foreclosure action is denied. A February 17, 2015 order of reference was issued *on default*. Defendants Focused and Jordan Sr., the borrower and its principal, never moved for an order vacating their appearance default in this foreclosure action. Having failed to do so, defendants are absolutely precluded from seeking dismissal of this action based on the pendency of the Second Foreclosure Action. Accordingly, it is hereby

ORDERED that defendants' motion (mot. seq. nine) is only granted to the extent that the September 16, 2021 sale/auction of the Property is hereby set aside and vacated; the motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**