

<b>HSBC Bank USA, N.A. v Kaul</b>
2022 NY Slip Op 34210(U)
September 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 503920/16
Judge: Mark I. Partnow
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At an IAS Term, Part FRP 2 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 28<sup>th</sup> day of September, 2022.

P R E S E N T:

HON. MARK PARTNOW,  
Justice.

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE  
FOR NOMURA ASSET ACCEPTANCE CORPORATION,  
MORTGAGER PASS THROUGH CERTIFICATES, SERIES 2005-  
AR3,

Plaintiff,

- against -

Index No. 503920/16

ASHIM KAUL, FIRST UNITED MORTGAGE BANKING CORP.,  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU, IAN BROWN,  
LAVERN BROWN, JOCELIN ALADIN, SHAWN HARRIS,  
JAVON DURDEN, ASHLEY BUSH and TASHIA BUSH,

US#5 6,7,8,9,10.

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) _____	<u>230-236</u>	<u>237-247</u>	<u>252-264</u>	<u>267-277, 279</u>	<u>287-293</u>
Opposing Affidavits (Affirmations) _____	<u>280-286, 298</u>	<u>280-286</u>	<u>287-293</u>	<u>294-295, 299-300</u>	
Reply Affidavits (Affirmations) _____	<u>296</u>	<u>302-306</u>	<u>299-300</u>	<u>297, 307-310</u>	

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 507 Maple Street in Brooklyn (Block 4793, Lot 59) (Property), Temporary Receiver Harry Horowitz (Receiver Horowitz) moves (in motion sequence [mot. seq.] six), by order to show cause, for an order permitting him to retain the law Firm of Adam Kalish P.C., as Special Counsel to him for Landlord/Tenant and Supreme Court proceedings.

Ashim Kaul (Kaul or borrower) cross-moves (in mot. seq. seven) for an order, pursuant to CPLR 2201, staying enforcement of the January 5, 2022 Order Appointing Horowitz as Receiver in this mortgage foreclosure action (January 2022 Receiver Order).

Kaul moves (in mot. seq. eight) for an order: (1) granting him leave to renew his opposition to the motion (in mot. seq. three) filed by plaintiff, HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation, Mortgage Pass Through Certificates Series 2005-AR3 (HSBC), for summary judgment, an order appointing a referee and a default judgment, which this court granted by a February 14, 2022 Short Form Order (SFO) and a February 14, 2022 “Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment,” both of which were entered on April 22, 2022 (collectively, the February 2022 Order of Reference),<sup>1</sup> pursuant to CPLR 2221 (e), and, upon renewal, denying HSBC’s motion; or (2) granting him leave to reargue HSBC’s summary judgment motion, pursuant to CPLR 2221 (d), and, upon reargument, denying HSBC’s summary judgment motion; and (3) staying enforcement of the January 2022 Receiver Order “pending the resolution of this motion” (NYSCEF Doc No. 252 at 2).

Receiver Horowitz moves (in mot. seq. nine), by order to show cause, for an order: (1) adjudging defendant Kaul to be in ongoing contempt for willful disobedience of the January 2022 Receiver Order and the January 13, 2022 Notice to Attorn; (2) holding Kaul in ongoing contempt for willful disobedience of the January 2022 Receiver Order and the January 13, 2022 Notice to Attorn, and punishing him by the imposition of a fine or

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<sup>1</sup> See NYSCEF Doc Nos. 250 and 251.

imprisonment or both; (3) directing Kaul to stop changing the locks on the Property; and (4) directing Kaul to permit Receiver Horowitz and his agents, employees, representatives and building superintendents or agents thereof to obtain immediate and complete access to the Property.

Kaul cross-moves (in mot. seq. 10) for an order: (1) denying Receiver Horowitz's contempt motion (mot. seq. nine); and/or (2) removing Receiver Horowitz, pursuant to CPLR 6405; and/or (3) granting him damages for waste caused by Receiver Horowitz.

### **Background**

On March 17, 2016, HSBC commenced this action to foreclose a mortgage encumbering the Property, a three-family residential building, which was executed by Kaul on March 10, 2005 to secure a note in favor of First United Mortgage Banking Corp. (First United) in the principal amount of \$584,000.00. Kaul allegedly default under the mortgage by failing to make the monthly mortgage payment that was due on May 1, 2010 (NYSCEF Doc No. 1, complaint at ¶ 9).

On June 27, 2016, Kaul answered the complaint, denied the material allegations therein except admitted that he executed the note and mortgage. Kaul asserted affirmative defenses, including lack of standing, failure to serve a default notice, failure to comply with RPAPL 1304 and that this action is barred by the statute of limitations. Kaul also asserted eleven counterclaims, including a counterclaim to discharge the mortgage pursuant to RPAPL 1501 (4) based on the statute of limitations (NYSCEF Doc No. 32).

On October 17, 2019, HSBC moved (in mot. seq. three) for an order granting it summary judgment, dismissing Kaul's answer, affirmative defenses and counterclaims, appointing a referee to calculate the amount due and owing, granting it a default judgment and amending the caption to replace the John Doe defendants with the tenants residing at the Property, Ian Brown, Lavern Brown, Jocelin Aladin, Shawn Harris, Javon Durden, Ashley Bush and Tashia Bush (NYSCEF Doc No. 92).

On January 7, 2020, HSBC moved (in mot. seq. four) for an order, pursuant to RPAPL 1325 and RPL 254 (10), appointing a temporary receiver "of all the rents and profits now due and unpaid or to become due during the pendency of this action and issuing out of the mortgaged premises" (see NYSCEF Doc No. 141).

On January 27, 2020, Kaul cross-moved (in mot. seq. five) for summary judgment dismissing the complaint based on a prior foreclosure action commenced in 2009 and discontinued in June 2015 and HSBC's alleged failure to serve Kaul with a default notice, as required under the mortgage (NYSCEF Doc Nos. 150 and 152 at ¶ 9).

#### ***The January 2022 Receiver Order***

By the January 2022 Receiver Order, this court granted HSBC's motion for the appointment of a temporary receiver, appointed Receiver Horowitz "with the usual powers and directions . . ." to collect all rents and profits for the benefit of plaintiff "now due and unpaid or to become due during the pendency of this action and issuing out of the mortgage premises . . ." (NYSCEF Doc No. 223 at 3). The January 2022 Receiver Order explicitly provided that it is:

“**ORDERED**, that the tenants, licensees, or other persons in possession of said premises attorn to said Receiver and pay over to said Receiver all rents, license fees and other charges of such premises now due and unpaid or that may hereafter become due; and that the defendants be enjoined and restrained from collecting the rents . . .” (*id.* at 5).

The January 2022 Receiver Order further provided that “**THE RECEIVER SHALL NOT APPOINT AN ATTORNEY, AGENT, APPRAISER, AUCTIONEER OR ACCOUNTANT WITHOUT PRIOR ORDER OF THIS COURT**” (*id.* at 7).

*Receiver Horowitz’s Motion to Retain Counsel (Mot. Seq. Six)*

On March 14, 2022, Receiver Horowitz moved, by order to show cause, for an order permitting him to retain the Law Firm of Adam Kalish P.C. as Special Counsel to him. Receiver Horowitz submitted an affidavit attesting that he was appointed by the court on January 5, 2022, and that he is qualified to act as Receiver because he duly filed a bond in accordance with the January 2022 Receiver Order (NYSCEF Doc No. 232).

Receiver Horowitz further attests that the January 13, 2022 “Notices to Attorn to the Receiver, were served upon the Premises” and copies are included with the motion (*id.* at ¶ 6 and NYSCEF Doc No. 235). Receiver Horowitz asserts, upon information and belief, that “there are tenants who refuse to abide by the notice to attorn” and that he is “requesting Mr. Kalish as special counsel to the receiver so that I can make sure the Tenants and the defendants comply with the Notice to Attorn and to cooperate with, and make rental payments to, the Receiver” (NYSCEF Doc No. 232 at ¶¶ 8-9).

*Defendant Kaul's Cross Motion to Stay The  
January 2022 Receiver Order (Mot. Seq. Seven)*

On March 15, 2022, Kaul cross-moved for an order staying the enforcement of the January 2022 Receiver Order based on an attorney affirmation. Defense counsel argues that this court should exercise its discretion and stay the January 2022 Receiver Order, pursuant to CPLR 2201, which provides that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Defense counsel argues that a stay should be granted pending Kaul’s appeal from the January 2022 Receiver Order. (NYSCEF Doc No. 238).

HSBC, in opposition, argues that staying the January 2022 Receiver Order would be prejudicial and would “cause Plaintiff significant avoidable trouble and expense” (NYSCEF Doc No. 280 at ¶ 32). HSBC asserts that prior to the issuance of the January 2022 Receiver Order, Kaul had not paid property taxes since 2006, and HSBC “was compelled to and did make significant payments in the aggregate amount of \$92,211.57 for the real property taxes accruing on the Mortgaged Premises (as of September 24, 2019)” (*id.* at 33). HSBC asserts that “Receiver Horowitz began collecting rent from the Tenants in the amount of \$5,515.00 per month as of March 1, 2022 [which] are more than sufficient to pay the real property tax payments accruing . . .” (*id.* at ¶ 34). Additionally, HSBC argues that “New York Courts have consistently and uniformly held that so long as the mortgage provides for appointment of a receiver on default, a plaintiff . . . will be entitled to a receiver ‘without regard to the adequacy of the security for the loan . . .’” (*id.* at ¶ 43

[quoting *GEEM 2007-C1 Ditmars Lodging, LLC v Mohola, LLC*, 84 AD3d 1311, 1312 (2d Dept 2011)]).

***The February 2022 Order of Reference***

Meanwhile, by the February 14, 2022 SFO, this court granted HSBC's summary judgment motion (mot. seq. three), denied defendant Kaul's summary judgment cross motion (mot. seq. five), and determined that:

"The Court finds that plaintiff established, prima facie, entitlement to summary judgment through the submission of affidavits from Brandon McNeal and Kyra Schwartz and the business records attached thereto. In opposition, defendant fails to raise a triable issue of fact.

"Defendant's motion for summary judgment (sequence 5) is denied in its entirety. Defendant's contention that the instant action is barred by the statute of limitations is without merit. . . . Here, contrary to defendant's contentions, the subject loan was properly deaccelerated in the prior action under index number 16411/2009 by a voluntary discontinuance by order dated June 17, 2015. However, since the statute of limitations begins to run on the date each installment becomes due, the plaintiff is barred from recovering any monthly default that occurred prior to March 17, 2010 since the instant action was commenced on March 17, 2016 (*Ditech Financial, LLC v Reiss*, 175 AD3d 618, 620 [2d Dept 2019]). The portion of defendant's motion seeking dismissal of the instant action for failure to comply with paragraph 22 of the Mortgage is denied as plaintiff established it served defendant with a default notice in its motion for summary judgment (sequence 3).

"A form order to follow" (NYSCEF Doc No. 251 at 1-2).

On February 14, 2022, the court issued a form "Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment," pursuant to which HSBC's summary judgment motion was granted "in all respects," Kaul's answer with affirmative

defenses and counterclaims was dismissed with prejudice and stricken, a referee was appointed to ascertain and compute the amount due to HSBC for principal and interest on the note and mortgage (as of March 17, 2010), the caption was amended to replace the John Doe defendants with the tenants allegedly residing at the Property and HSBC was granted a default judgment against the non-appearing defendants (*see* NYSCEF Doc No. 250).

The February 14, 2022 SFO and Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment were entered with the court on April 22, 2022 (*see* NYSCEF Doc Nos. 250 and 251).

***Defendant Kaul's Motion to Renew or Reargue (Mot. Seq. Eight)***

On April 25, 2022, Kaul moved for leave to renew or reargue his opposition to HSBC's summary judgment motion (mot. seq. three) based on counsel's assertion that "this Court did not address Defendant's RPAPL § 1304 arguments"<sup>2</sup> and, upon reargument or renewal, Kaul seeks an order denying HSBC's summary judgment motion and staying enforcement of the January 2022 Receiver Order "pending the resolution of this motion."<sup>3</sup>

Defense counsel argues that renewal is warranted based on a change in the law regarding the RPAPL 1304 90-day pre-foreclosure notice. Defense counsel explains that in December 2021, in *Bank of America, N.A. v Kessler*, (202 AD3d 10 [2021]), the Second

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<sup>2</sup> NYSCEF Doc No. 253 at ¶ 12.

<sup>3</sup> This branch of Kaul's motion is denied because it illogically seeks an order staying enforcement of the January 2022 Receiver Order "pending the resolution of this motion[.]" without an order to show cause with a temporary restraining order (*see* NYSCEF Doc No. 252 at 2).

Department held that additional notices or materials cannot be included *in the same envelope* as an RPAPL § 1304 90-day pre-foreclosure notice. Defense counsel argues that:

“In 2022, the Second Department built on the foundation created by *Kessler* in *Wells Fargo Bank, N.A. v Davidson*, 202 AD3d 880 (2d Dept 2022), a copy of which is annexed hereto as part of **Ex. F**. Per *Davidson*, the failure to comply with the separate mailing requirement is a matter of law, as it appears on the face of the record and cannot be disregarded by the court if brought before it. *See, also, Deutsche Bank Natl. Trust Co. v Bancic*, \_\_\_AD3d\_\_\_, 2022 NY Slip Op 02112 (2d Dept 2022) (non-compliance with RPAPL § 1304 is an issue of law), a copy of which is annexed hereto as part of **Ex. F**” (NYSCEF Doc No. 253 at ¶ 21).

Defense counsel contends that, under the Second Department’s holding in *Kessler*, “[a]ny additional language included in the RPAPL § 1304 notice renders it defective” (*id.* at ¶ 25). Defense counsel asserts that HSBC’s October 16, 2015 90-day pre-foreclosure notice (NYSCEF Doc No. 221) “is defective, as it includes an additional notice,<sup>4</sup> sent in the same envelope, in contradiction of RPAPL § 1304(2) and *Kessler*” (NYSCEF Doc No. 221 at ¶¶ 29-31). Defense counsel now contends, for the first time, that HSBC was not entitled to summary judgment because HSBC’s 90-day pre-foreclosure notice was facially defective, as a matter of law, because it contained that additional notification.

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<sup>4</sup> The second page of HSBC’s RPAPL § 1304 90-day pre-foreclosure notice advises, in accordance with the Federal Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq., that “[t]his communication is an attempt to collect a debt and any information obtained will be used for that purpose. However, if you have received a discharge of this debt in bankruptcy or are currently in a bankruptcy case, this notice is not intended as an attempt to collect a debt and, this company has a security interest in the property and will only exercise its rights as against the property” (NYSCEF Doc No. 260 at 2).

Alternatively, defense counsel claims that reargument is warranted because “this Court overlooked the binding law (i.e., *Kessler* and its progeny), which, when applied to Plaintiff’s 90-Day notice, warrants dismissal of the action” (*id.* at ¶ 39).

***HSBC’s Opposition to Kaul’s Renewal/Reargument Motion***

HSBC, in opposition, submits a memorandum of law arguing that Kaul’s renewal and re-argument motions are based entirely on the Second Department’s December 2021 decision in *Kessler* “which is wholly unavailing, as Kaul, whose property was an investment property which he rented to tenants, was not entitled to receive a 90-day pre-foreclosure notice pursuant to RPAPL § 1304” (NYSCEF Doc No. 298 at 1-2).

HSBC further argues that the *Kessler* decision is not a basis for renewal as an intervening “change in the law” because *Kessler* was decided two months before the February 14, 2022 SFO and Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment were issued, and “two weeks before Kaul filed a supplemental brief in opposition to Plaintiff’s summary judgment motion, which addressed *Kessler*” (*id.* at 2). HSBC also contends that *Kessler* “does not constitute a ‘change in the law,’ since that case merely implements the strict compliance approach to RPAPL § 1304 which was already recognized by the courts in this judicial department . . .” (*id.*).

HSBC argues that *Kessler* and its progeny cannot be the basis for a reargument motion, since Kaul did not even raise the RPAPL 1304 defense in opposition to HSBC’s summary judgment motion or in support of its own summary judgment cross motion (*see* NYSCEF Doc Nos. 152, 153, 189 [only asserting the statute of limitations and failure to

serve a default notice in accordance with the mortgage in opposition to HSBC's summary judgment motion and in support of its cross motion for summary judgment]). HSBC notes that "Kaul did not even raise the RPAPL § 1304 defense in opposition to Plaintiff's summary judgment motion, thereby abandoning it" and "a court cannot 'misapply' or 'overlook' facts and law that are not properly before it . . ." (NYSCEF Doc No. 298 at 2).<sup>5</sup>

***Receiver Horowitz's Motion For an Order  
of Contempt Against Defendant Kaul (Mot. Seq. Nine)***

On June 16, 2022, Receiver Horowitz moved, by order to show cause, for an order adjudging defendant Kaul to be in contempt for willful disobedience of the January 2022 Receiver Order and the January 13, 2022 Notice to Attorn, punishing defendant Kaul and ordering him to stop changing the locks on the Property and to permit Receiver Horowitz to obtain immediate and complete access to the Property. Receiver Horowitz submits an affidavit attesting that:

"On or about June 8, 2022, I sent Dunstan Johnson to the premises to maintain the premises. My agent told me that the locks were changed to the premises.

"On or about June 9, 2022, I had the proposed attorney for the receiver send a demand letter to the Defendant's attorney with regards to the incident.

"On or about June 10, 2022, I had Dunstan Johnson [ ] change the locks and provide a key to the tenant.

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<sup>5</sup> Similarly, in opposition to Kaul's summary judgment cross motion (mot. seq. five) and in its reply in further support of its summary judgment motion (mot. seq. three), HSBC argued that "Kaul abandoned all of his affirmative defenses asserted in the Answer, with the exception of the Ninth Affirmative Defense [statute of limitations] and Third Affirmative Defense [failure to mail a default notice as required by the mortgage]" and that "[t]he abandoned affirmative defenses should be dismissed" (see NYSCEF Doc Nos. 190 at 3-4).

“On or about June 14, 2022, the Defendant’s attorney sent a letter to Mr. Kalish stating that the property was still owned by the client.

“On or about June 14, 2022, I sent Dunstan Johnson to the premises again to fix a door and once again the locks were changed and construction work was being performed.”

“The Defendant is refusing to comply with the Court order” (see NYSCEF Doc No. 270 at ¶¶ 8-13).

Receiver Horowitz’s counsel asserts that “there has been no cooperation by Defendant” who has repeatedly changed the locks, which has “further aggravate[ed] the Receiver’s inability to perform his duties” (NYSCEF Doc No. 268 at ¶ 6).

***Defendant Kaul’s Cross Motion to Remove Receiver Horowitz (Mot. Seq. 10)***

On June 29, 2022, defendant Kaul opposed Receiver Horowitz’s contempt motion and cross-moved for an order removing Receiver Horowitz, pursuant to CPLR 6405, and awarding him damages for waste to the Property. Defense counsel argues that “Defendant did not commit any action which would warrant a contempt charge” (NYSCEF Doc No. 288 at ¶ 15). Defense counsel asserts that “the only express direction given to Defendant [in the January 2022 Receiver Order], as owner, is to “turn over to the Receiver all rents collected from and after the date of this order” and “Defendant complied with this obligation” (*id.* at ¶ 19). Kaul also submits an affidavit alleging that “[a]t no point did I ever intend to disobey this Court’s January 5, 2022 order[,]” “since the moment Mr. Horowitz commenced his duties, I have not sought to collect any rent from the tenants, and I did not prevent them in any way from paying the rent to the temporary receiver” and

“I did not prevent Mr. Horowitz from collecting the rent, nor did I intend to do so”

(NYSCEF Doc No. 291 at ¶¶ 4-5). Kaul further claims that:

“Nevertheless, the tenants began complaining to me that the temporary receiver was making them feel uncomfortable, by calling them at odd hours, sending representatives to their apartments unannounced, constantly reminding them that the rents needed to be paid to him, and repeatedly telling them that he intends to increase their rents, despite their leases being ongoing” (*id.* at ¶ 6).

Kaul further explains that a tenant moved out in June 2022 so he “wanted to prepare the first floor apartment for the next potential tenants, so I undertook to make the necessary repairs, at my own expense” (*id.* at ¶ 8). Kaul recounts that he changed the locks, as is customary when a tenant moves out, and that he made a key for Receiver Horowitz, but “it appears that Mr. Horowitz hastily sent somebody to the Property at an odd hour, before me having the occasion to provide him with a copy of the key” (*id.* at ¶ 9). Kaul claims that “[t]he next day, I found the locks on the main door and the first floor apartment tampered with” and “[t]he kitchen sink in the first floor apartment was left on, which caused water damage” (*id.* at ¶ 10).

### Discussion

#### **(1)**

#### ***Motions Regarding Receiver Horowitz***

The mortgage, under the 1-4 Family Rider, explicitly provides, at Section H, entitled “ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER: LENDER IN

POSSESSION,” that the mortgagee is entitled to have a receiver appointed to collect rents and to manage the Property during the pendency of this foreclosure action:

“Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues (‘Rents’) of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender’s agents to collect the Rents, and agrees that each tenant of the Property shall pay the Rents to Lender or Lender’s agents. However, Borrower shall receive the Rents until (i) Lender has given Borrower notice of default pursuant to Section 22 of the Security Instrument and (ii) Lender has given notice to the tenant(s) that the Rents are to be paid to Lender or Lender’s agent. This assignment of Rents constitutes an absolute assignment and not an assignment for additional security only. If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums secured by the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender’s agents upon Lender’s written demand to the tenant; (iv) unless applicable law provides otherwise, all Rents collected by Lender or Lender’s agents *shall be applied first to the costs of taking control of and managing the Property* and collecting the Rents, including, but not limited to, attorney’s fees, receiver’s fees, premiums on receiver’s bonds, repair and maintenance costs, insurance premiums, taxes, assessments and other charges on the Property, and then to the sums secured by the Security Instrument; (v) Lender, Lender’s agents or any judicially appointed receiver shall be liable to account for only those Rents actually received; and (vi) ***Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security***” (NYSCEF Doc No. 155 at § H [emphasis added]).

In accordance with the foregoing terms of the subject mortgage, to which Kaul specifically agreed, this court issued the January 2022 Receiver Order, which specifically acknowledged that the parties covenanted that the mortgagee is entitled to the appointment of a receiver after defendant's payment default and the commencement of a foreclosure action "to maintain and manage the Mortgaged Premises, prevent any destruction and further deterioration thereto, and to collect any future rents and profits of the Mortgaged Premises pending foreclosure and sale . . ." (NYSCEF Doc No. 223 at 2). The January 2022 Receiver Order also provides that Receiver Horowitz "is authorized to forthwith take charge and enter into possession of the Mortgaged Premises . . ." (*id.* at 3). Receiver Horowitz is also authorized under the January 2022 Receiver Order to rent out and/or lease any part of the Property for terms not exceeding one year (*id.* at 5).

The terms of the mortgage and the January 2022 Receiver Order clearly mandate that Kaul turn over rents and profits, possession and maintenance of the Property to Receiver Horowitz, whose responsibilities include preparation of the Property for leasing. In violation of the January 2022 Receiver Order, Kaul admittedly changed the locks on the Property and performed construction on the Property in anticipation of leasing a unit out. By changing the locks, Kaul has admittedly interfered with Receiver Horowitz's assigned duties regarding the Property and has violated the January 2022 Receiver Order. Defendant Kaul, in contrast, has failed to provide any reasonable basis to remove Receiver Horowitz other than his conjecture regarding Receiver Horowitz's ability to prepare the Property for a new tenant.

(2)

*Defendant Kaul's Motion to Renew or Reargue*

Kaul moves (mot. seq. eight) for leave to renew or reargue his opposition to HSBC's summary judgment motion (mot. seq. three) and, upon renewal or reargument, an order denying HSBC's motion on the ground that HSBC's 90-day pre-foreclosure notice failed to strictly comply with RPAPL 1304 because it contains additional language. Kaul's motion is based entirely on the Second Department's decision in *Bank of America, N.A., v Kessler*, (202 AD3d 10 [2d Dept 2021]), which was issued on December 15, 2021. *Kessler*, in a matter of first impression, held that the "inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in [the statute] constitutes a violation of the separate envelope requirement of RPAPL 1304 (2)" (*Kessler*, 202 AD3d at 14). Essentially, defendant Kaul contends that this "new law" requires that HSBC's prior summary judgment motion be renewed and, upon renewal, and the application of *Kessler*, that HSBC's summary judgment motion be denied and the complaint dismissed.

A motion for leave to renew must be based upon new facts or a change in the law, not offered on the original application, "that would change the prior determination" (*Seidman v Industrial Recycling Properties, Inc.*, 143 AD3d 970, 971 [2d Dept 2016]; *Carrasco v Weissman*, 120 AD3d 534, 537 [2d Dept 2014]; CPLR 2221 [e] [3]). The change in the law must be outcome-determinative to be the basis for a motion to renew (*DeRaffele Mfg. Co., Inc. v Kaloakas Mgt. Co.*, 48 AD3d 807, 809 [2d Dept 2008]).

In contrast, “[a] motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). “A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Mazinov v Rella*, 79 AD3d 979, 980 [2010] [internal quotation marks omitted]).

Here, there is no basis for granting Kaul leave to renew because there was no change in the law regarding the RPAPL 1304 90-day pre-foreclosure notice after this court issued the February 14, 2022 SFO and “Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment.” The Second Department’s *Kessler* decision was previously issued in December 2021, before Kaul had completed his supplemental briefing in opposition to HSBC’s summary judgment motion. In any event, *Kessler* does not represent a “change in the law,” warranting renewal under CPLR 2221. As the Second Department notes in *Kessler*, “[t]his appeal requires the Court to address the issue of how exacting the requirement of strict compliance is with respect to the ‘separate envelope’ mandate of RPAPL 1304” (*Kessler*, 202 AD3d at 11). In confirming the application of the “strict compliance” standard with respect to the notice sent pursuant to RPAPL 1304, *Kessler* merely clarifies existing law and, as such, “does not afford a basis for renewal attributed to a change in the law” (*D’Alessandro v Carro*, 123 AD3d 1, 7 [1st Dept 2014]; *cf. Kajo v E.W. Howell Co.*, 120 AD3d 1195 [2014] [holding that denial of motion for leave

to renew was proper because plaintiff failed to establish that the case law created a change in the law that would alter the prior determination in this matter]). Research has disclosed no ruling regarding *Kessler* to the contrary within the Second Department. Thus, the *Kessler* decision did not “change” the law within the meaning of CPLR 2221 (e) (3) and does not warrant leave to renew.

Regardless, the holding in *Kessler* would not change this court’s ultimate determination because Kaul did not raise the alleged inadequacy of HSBC’s RPAPL 1304 90-day pre-foreclosure notice in opposition to HSBC’s summary judgment motion or in support of its own summary judgment cross motion. Rather, Kaul adamantly argued that denial of HSBC’s motion was warranted based on the statute of limitations, which had accrued with the prior commencement of a 2009 foreclosure action, and HSBC’s alleged failure to send Kaul, the borrower, with a default notice, as required by paragraph 22 of the mortgage. Having failed to raise the sufficiency of the RPAPL 1304 notice in opposition to HSBC’s summary judgment motion, Kaul waived that affirmative defense. Under these circumstances, this court need not decide whether the “separate envelope rule” clarified in the Second Department’s December 2021 *Kessler* decision conflicts with HSBC’s federal statutory obligations under the FDCPA, as a debt collector (*see Bank of New York Mellon v Luria*, 2022 NY Slip Op 22218 [Sup Ct Putnam County 2022]; *see also CIT Bank, N.A. v Neris*, 2022 WL 1799497, \*5 [S.D.N.Y. 2022] [declining to follow *Kessler* to the extent that it imposes a bright line rule that conflicts with a debt collector’s notice obligations under the FDCPA]).

Kaul is similarly denied leave to reargue its opposition to HSBC's summary judgment motion on the ground that HSBC's RPAPL 1304 pre-foreclosure notice was defective, as a matter of law, based on the "single envelope rule" because he failed to raise that particular defense in opposition to HSBC's summary judgment motion. In any event, Kaul has failed to identify any law that this court overlooked or misapprehended when it granted HSBC's summary judgment motion and issued the February 14, 2022 SFO and Order Granting Summary Judgment, Appointing a Referee and Granting a Default Judgment. Accordingly, it is hereby

**ORDERED** that Receiver Horowitz's motion (mot. seq. six) permitting him to retain the Law Firm of Adam Kalish P.C. as Special Counsel for Landlord/Tenant and Supreme Court Proceedings is granted *nunc pro tunc* without opposition; and it is further

**ORDERED** that defendant Kaul's cross motion (mot. seq. seven) for an order, pursuant to CPLR 2201, staying enforcement of the January 2022 Receiver Order pending Kaul's appeal is denied; and it is further

**ORDERED** that defendant Kaul's motion (mot. seq. eight) for leave to renew or reargue his opposition to HSBC's summary judgment motion (mot. seq. three) and his summary judgment cross motion (mot. seq. five) is denied; that branch of the motion seeking a stay of the January 2022 Receiver Order "pending the resolution" of this motion is denied as moot; and it is further

**ORDERED** that Receiver Horowitz's motion (mot. seq. nine) to hold Kaul in contempt for willful disobedience of the January 2022 Receiver Order and Receiver


Horowitz's January 13, 2022 Notice to Attorn is granted, and defendant Kaul will be fined up to \$2,000.00 per incident, upon a separate motion by Receiver Horowitz, if he continues to interfere with Receiver Horowitz's duties and obligations regarding the Property after service of this decision and order with notice of entry thereof; and it is further

**ORDERED** that defendant Kaul shall refrain from changing the locks at the Property and shall permit Receiver Horowitz and his agents, employees, representatives and building superintendents or agents thereof, to obtain immediate and complete access to the Property and to otherwise allow Receiver Horowitz to carry out his duties and obligations regarding the Property; and it is further

**ORDERED** that defendant Kaul's motion (mot. Seq. 10) for an order removing Receiver Horowitz, pursuant to CPLR 6405, and awarding Kaul damages is denied.

This constitutes the decision and order of the court.

E N T E R,



MARK E. PARTNOW, JSC

HON. MARK I PARTNOW  
SUPREME COURT JUSTICE