To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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AMOS FINANCIAL LLC,

Plaintiff,

against-

SHARON K. CRAPANZANO, UNION STATE BANK, KRISTINA CRAPANZANO, MIRIAM ROSENBERG,

Defendants.

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DECISION & ORDER

Index No. 34327/2021
Order Date: Jan. 31, 2022
Motion Seq. 8

EISENPRESS, A.J.S.C.

The papers electronically filed as NYSCEF Docs. 39-56 were read on this motion by plaintiff for an Order pursuant to CPLR 4403 and Uniform Rule 202.44 rejecting the post-hearing report by Court Attorney-Referee Erin Guven, and for related relief.

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

Multiple times this Court has described as "tortured" this residential foreclosure action concerning the real property located at 28 Eakman Drive, Garnerville, New York. As this Court (Berliner, J.) most recently memorialized by Decision and Order in July 2021, plaintiff let this action linger between 2010 and 2019. By Order dated March 3, 2020, this Court – after hearing (Markus, C.A.R.) – found an extraordinary pattern of plaintiff's bad faith and persistent failure by plaintiff to offer some non-trivial explanation for nine years of inaction at defendants' expense. Accordingly, the Court tolled interest from January 1, 2011, and directed plaintiff to move for summary judgment within 45 days on pain of Rule 202.27 dismissal for unreasonably

failing to proceed. When plaintiff moved, this Court (Berliner, J.) denied summary judgment. On plaintiff's next motion for summary judgment in December 2020, the Court again found that plaintiff's alleged proof of loan default was facially insufficient, and that plaintiff's evidentiary proffer lacked adequate foundation. Having denied plaintiff's summary judgment, the Court put the matter down for a trial scheduling conference.

Nevertheless, plaintiff moved for summary judgment a third time. By Decision and Order entered July 2021, the Court denied plaintiff's third motion as procedurally defective for violating Uniform Rule 202.8-g, which requires a Statement of Material Facts to make a CPLR 3212 motion, and substantively for lack of admissible proof of borrower default on the subject loan (*see Amos Financial, LLC v Crapanzano*, 73 Misc 3d 448 [Sup Ct Rockland Co 2021]). Summarizing the numerous deficiencies of plaintiff's proof on this loan that plaintiff concedes was serially assigned, the Court narrated that:

> "[P]laintiff's record fails to establish whether the 2008 loan records bearing a 2017 print date were made originally by Union State Bank and then incorporated into KeyBank's records, or were made by KeyBank, or were made by Bank of America, or perhaps were made by some other entity in the chain and then incorporated into some other entity. This pivotal question of fact is not conjecture: it arises from plaintiff's own papers and its failure, once again, to carry its burden of proof"

(*id.*, at 374). Plaintiff did not seek relief from those findings in any respect, and instead proceeded to the court-ordered hearing before Court Attorney-Referee Erin Guven on October 27, 2021.

The report after hearing, issued December 1, 2021, narrated that plaintiff had adduced at the hearing the same documentary evidence previously submitted and which formed the basis of the Court's denial of plaintiff's motion in July 2021. The substantial evidentiary issues that the Court recognized relating to those documents' authenticity and reliability (*see* Ref Report [NYSCEF 36], at 5) were not resolved. Indeed, the referee specifically found that plaintiff's testifying witness failed to establish that KeyBank, as putative holder of the note in 2008,

acquired Union State Bank in 2009 – a necessary condition for plaintiff to prevail given that Union State Bank (not KeyBank) allegedly held of the note, created the proffered business records of supporting the claimed loan default and transferred the loan. The referee further found that plaintiff's KeyBank witness failed to lay foundation to admit Union State Bank's business records into evidence to prove the truth of the default, and that her testimony as to circumstances surrounding the making of those records was not credible based on its inconsistency with the loan assignment records that plaintiff also offered into evidence. The referee memorialized that these kinds of issues repeatedly had been before the Court, which had repeatedly cautioned plaintiff about them. Accordingly, the referee recommended that this Court enter conclusive findings that plaintiff's foreclosure action must fail (NYSCEF 36).

Plaintiff now moves pursuant to CPLR 4403 and Uniform Rule 202.44 to reject the referee's report. The gravamen of plaintiff's objection is that plaintiff did not raise the issue of loan ownership at the time the records of loan default were made (*see* Pl's Mem [NYSCEF 41], at ¶ 23), and plaintiff attaches what it denominates as proof from the Comptroller of the Currency that KeyBank acquired Union State Bank before the loan default records were made. Plaintiff contends that because plaintiff did not raise those issues at the inquest, it was error for the referee to raise them sua sponte. Plaintiff further argues that even if its evidence fails concerning loan ownership at the time the loan default records were made, the balance of equities favor plaintiff in this action based on the post-2011 interest toll (*see id.*, at ¶¶ 44-46).

Defendants were absent from the inquest and did not oppose this motion.

Analysis

As plaintiff's papers correctly observe, a referee report "should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*see JNG Construction, Ltd. v Roussopoulous*, 170 AD3d 1136, 1141 [2d Dept 2019]). Notwithstanding plaintiff's contrary suggestion, the referee did exactly that. The transcript shows that the referee properly recited the key issues of borrower

default and proof remaining before Court, and specifically addressed the credibility of plaintiff's witness – finding her testimony to lack credibility. Her findings were substantially supported by the record then before her. Thus, the strong presumption is that her report should be confirmed, and plaintiff must overcome that strong presumption either in law or in equity. This CPLR 4403 context is not an opportunity for another bite at the proverbial apple.

These results obtain especially in this case, in which plaintiff has had not one, not two, not three, but four bites at the apple – and would turn this motion into a fifth. Plaintiff's papers suggest that the referee should not have raised the issue sua sponte – but ignores that it is *this Court* that, after plaintiff's third summary judgment, identified those issues of proof and commended them to the referee to determine upon hearing. Plaintiff also ignores that it sought no relief from the Court's July 2021 determination that addressed these matters in substantial detail, on much the same evidence that plaintiff adduced before the referee. Thus, the referee did not err by raising issues sua sponte.

Plaintiff's next argument is that it's now ostensibly clear who owned and serviced the loan at the pivotal times at issue for plaintiff's proof of loan default. If so, however, it'd be because plaintiff now offers – for the first time – ostensible proof of KeyBank's acquisition of Union State Bank that plaintiff did not adduce before the referee (*see* Tr. [NYSCEF 37]; *compare* Pl's Exhs 1-12 [NYSCEF 16-26, 35] *with* Pl's Mem in Support, Exh N [NYSCEF 55]). Plaintiff does not explain why it failed to make this presentation before the Referee, or at any other time in the numerous other motions. Moreover, as this evidence dates to 2007, it is inconceivable that this evidence was unavailable to plaintiff at the time of the three summary judgment motions or especially before the referee *after this Court's July 2021 order specifically and extensively addressed the subject.* Thus, this evidence is not properly before the Court.

Nor can plaintiff now reasonably plead that the equities side with plaintiff. As Referee Markus correctly memorialized, in a prior report, this Court repeatedly has found that plaintiff engaged in bad faith, repeatedly prolonged this litigation, and made three summary judgment

motions resulting in serial denials for failure of proof – relief from which denials plaintiff did not seek. Plaintiff then failed before the referee on much the same reasons. At a certain point, enough is enough. If plaintiff now must bear unfortunate consequences, the record of this action demonstrates beyond cavil that plaintiff has only itself to blame.

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that on this Court's own motion, the report of the referee is confirmed; and it is further

ORDERED that plaintiff's action is dismissed; provided, however, that the *nunc pro tunc* tolling of interest from January 1, 2011, is remitted and plaintiff may begin collecting interest as of the date hereof (but not the period from January 1, 2011, to the date hereof); and it is further

ORDERED that the County Clerk is directed to vacate the Notice of Pendency and notate the same on the records of the subject property; and it is further

ORDERED that within five days hereof, counsel for plaintiff shall serve this Decision and Order, with Notice of Entry, on defendants by U.S. Mail at the record address, and on the County Clerk, and file via NYSCEF a suitable affirmation of such service.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
January 31, 2022

HON. SHERRI L. EISENPRESS, A.J.S.C.

To:

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By NYSCEF

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