

<b>Christiana Trust v Ali</b>
2023 NY Slip Op 34349(U)
December 1, 2023
Supreme Court, New York County
Docket Number: Index No. 850131/2015
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART 32

*Justice*

-----X

INDEX NO. 850131/2015

CHRISTIANA TRUST, A DIVISION OF WILMINGTON  
SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL  
CAPACITY BUT AS TRUSTEE OF ARLP TRUST 5,

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

Plaintiff,

- v -

SHEHARBANO ALI, INTERNATIONAL PLAZA  
CONDOMINIUM,

**JUDGMENT OF FORECLOSURE  
AND SALE and DECISION +  
ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 172, 173, 174

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

Based upon the foregoing the motion is determined as follows:

Plaintiff in this action is the holder of a note given by Defendant Farida Ali ("Farida") which memorializes a loan in the original principal amount of \$875,500.00. The note is secured by a mortgage encumbering real property located at 303 East 43<sup>rd</sup> Street, Unit 9A, New York, New York. Farida was the sole owner of the property when the note and mortgage were given. Farida defaulted in repayment under the note on or about July 1, 2011. By deed dated July 28, 2014, and recorded on August 6, 2014, Farida transferred title to herself and non-party Sherharbano Ali ("Sherharbano"), Farida's daughter.

On March 26, 2015, Plaintiff commenced this action to foreclose on the mortgage against Farida, but not Sherharbano, and a notice of pendency was filed. Farida was served with the summons and complaint and appeared by filing an answer. By order of Justice Judith N. McMahon dated March 13, 2018, Plaintiff's motion for summary judgment and an order of reference was granted without opposition. On July 17, 2020, Farida died. A motion by Sherharbano to, *inter alia*, stay this matter until a fiduciary could be appointed for Farida's estate was denied by order of this Court. By order dated June 28, 2022, this Court granted Plaintiff's motion to amend the complaint to substitute the Plaintiff and to add Sherharbano as a Defendant. By order dated, May 5, 2023, this Court denied Plaintiff's motion for, *inter alia*, summary judgment against Sheharbano and for issuance of a Judgment of Foreclosure and Sale.

Now, Plaintiff moves to reargue and for renewal of the Court's May 5, 2023 decision, and upon same, for summary judgment against Sheharbano, striking her answer confirming the Referee's Report, granting a Judgment of Foreclosure and Sale, directing the distribution of the sale proceeds and to amend the caption. Defendant Sherharbano opposes the motion.

The branch of Plaintiff's motion to reargue the court's decision and order dated May 5, 2023, is denied as movant has not established the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (*see* CPLR 2221; *Foley v Roche*, 68 AD2d 558 [1<sup>st</sup> Dept 1979]). The underlying moving papers fail to establish an evidentiary foundation for admission into evidence, as business records under CPLR §4518, any of the documents necessary for a *prima facie* case of foreclosure.

The branch of the motion to renew the above decision is based on a newly submitted affidavit from Anthony Younger ("Younger"), an Assistant Secretary of Rushmore Loan Management Services, LLC, as servicing agent and attorney in-fact for Plaintiff. Contrary to Sherharbano's arguments, Plaintiff provided a reasonable justification for the failure to present said new facts in the prior motion (*see generally* CPLR 2221[e][2]; *Arena v Shaw*, 179 AD3d 415 [1<sup>st</sup> Dept 2020]).

In any event, the Court may treat this motion as a successive motion for summary judgment since this motion clearly enhances judicial efficiency in this case (*see MTGLQ Invs. v Collado*, 183 AD3d 414 [1<sup>st</sup> Dept 2020]). Notably, summary judgment was granted against the mortgagor Farida without opposition over five years ago and neither Farida nor the fiduciary of her estate moved for vacatur of same. Further, Sherharbano's entire interest in the premises was derived after recordation of the mortgage and her inheritance of Farida's one-half interest came after a notice of pendency was filed in this case.

Based upon the affidavit of Younger and the supporting documents, Plaintiff established the mortgage, note, and evidence of mortgagor's default, Plaintiff's standing and the servicer's authority to act (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> Dept 2010]).

As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1<sup>st</sup> Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v Johnson*, 177 AD3d 561 [1<sup>st</sup> Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1<sup>st</sup> Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of the motion to reargue is denied, but the branch for renewal is granted, and it is further

ORDERED that upon renewal, Plaintiff is awarded summary judgment against the Sheharbano Ali and a default judgment against the non-appearing defendants; and it is further

ORDERED that the caption is amended *nunc pro tunc* to strike the defendants named herein as “John Doe” #1 through “John Doe” #12; and it is further

ORDERED that the caption shall read *nunc pro tunc* as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
ELIZON MASTER PARTICIPATION TRUST I, U.S. BANK  
TRUST NATIONALASSOCIATION, AS OWNER TRUSTEE

Plaintiff,

-against-

SHEHARBANO ALI, INTERANTIONAL PLAZA  
CONDOMINIUM,

Defendants.

-----X

and it is further

ORDERED and ADJUDGED that the motion for a judgment of foreclosure and sale and to confirm the referee’s report is granted; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 1 year of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of Elaine Shay, Esq., who is appointed Referee for this purpose; and it is further

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at [sfc-foreclosures@nycourts.gov](mailto:sfc-foreclosures@nycourts.gov) and obtain consent to place the matter on the auction calendar and, thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted in accordance with the annexed New York County Auction Part Rules for Outdoor Auctions.

ORDERED that after receiving permission from the Auction Part Clerk, the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the **New York Amsterdam News**; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff’s failure to provide such proof, then said adjournment shall not be considered at the referee’s request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon

compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from receiving any funds without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 1 year of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff’s attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such

construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100.00. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed.
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
  - a. Amount Due from the Referee's Report: \$1,480,531.27, together with interest at the note rate from December 15, 2021, until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred.
  - b. Costs and Disbursements: \_\_\_\_\_ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment.
  - c. The Court declines to award additional allowance.
  - d. Attorneys' Fees: \$7,280.00.
5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable, and it is further

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354, any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that Defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within **14 days** after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may re-notice the property for sale with or without prior application to this Court, and the deposit of the recalcitrant bidder forfeited and retained by Plaintiff as liquidated damages; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950.00 for conducting and attending a closing with a purchaser other than plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further identified:

A description of the premises is annexed hereto as schedule A.

Mortgage Servicer: Rushmore Loan Management Services, LLC – Tel. 888-504-7300

12/1/2023  
DATE

*Francis Kahn III*  
FRANCIS KAHN, III, A.J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

**SCHEDULE A – LEGAL DESCRIPTION**

THE CONDOMINIUM UNIT KNOWN AS UNIT NO. 9 A (HEREINAFTER CALLED THE "UNIT") IN THE BUILDING KNOWN AS AND BY STREET NO. 301-303 EAST 43RD STREET (THE "BUILDING") IN THE BOROUGH OF MANHATTAN, CITY COUNTY AND STATE OF NEW YORK, DESIGNATED AND DESCRIBED AS UNIT NO. 9 A IN THAT CERTAIN DECLARATION ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP OF SAID BUILDING AND THE LAND UPON WHICH IT IS SITUATE (THE "PROPERTY") COMPRISING INTERNATIONAL PLAZA CONDOMINIUM (THE "CONDOMINIUM") MADE BY THE GRANTOR UNDER THE CONDOMINIUM ACT OF THE STATE OF NEW YORK DATED 8/3/84 RECORDED 8/27/84 IN REEL 827 P 207 IN THE OFFICE OF THE NEW YORK COUNTY REGISTER (THE "DECLARATION") AND DESIGNATED AS THE TAX LOT NO. 1023 IN BLOCK 1336 OF SECTION 5 OF THE BOROUGH OF MANHATTAN ON THE TAX MAP OF THE REAL PROPERTY ASSESSMENT DEPARTMENT OF THE CITY OF NEW YORK AND ON THE FLOOR PLANS OF THE BUILDINGS, CERTIFIED BY AVINASH K. MALHOTRA ON 8/3/84 AND FILED WITH THE REAL PROPERTY ASSESSMENT DEPARTMENT OF THE CITY OF NEW YORK COUNTY REGISTER ON 8/27/84 AS CONDOMINIUM PLAN NO. 4267.

TOGETHER WITH AN UNDIVIDED 1.1319% INTEREST IN THE COMMON ELEMENTS OF THE PROPERTY, AS DEFINED IN THE DECLARATION.

THE LAND AREA OF THE PROPERTY IS DESCRIBED AS FOLLOWS:

ALL THAT CERTAIN PLOT, PIECE OR PARCEL OF LAND, SITUATE, LYING AND BEING IN THE BOROUGH OF MANHATTAN CITY, COUNTY AND STATE OF NEW YORK, BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT THE CORNER FORMED BY THE INTERSECTION OF THE EASTERLY SIDE OF SECOND AVENUE WITH THE NORTHERLY SIDE OF EAST 43RD STREET;

RUNNING THENCE EASTERLY ALONG THE NORTHERLY SIDE OF EAST 43RD STREET, 100 FEET;

THENCE NORTHERLY PARALLEL WITH THE EASTERLY WITH THE EASTERLY SIDE OF SECOND AVENUE, 100 FEET, 5 INCHES;

THENCE WESTERLY PARALLEL WITH THE NORTHERLY SIDE OF EAST 43RD STREET, 100 FEET TO THE EASTERLY SIDE OF SECOND AVENUE;

THENCE SOUTHERLY ALONG THE EASTERLY SIDE OF SECOND AVENUE, 100 FEET, 5 INCHES TO THE POINT OR PLACE OF BEGINNING.

**Supreme Court, New York County Auction Part Rules for Outdoor Auctions****An auction will not go forward if it is not on the Auction Calendar**

1. Prior to scheduling publication, the plaintiff and referee shall contact the Auction Part clerk at [SFC-Forclosures@nycourts.gov](mailto:SFC-Forclosures@nycourts.gov) to place the auction on the auction calendar.
2. The Referee and all interested parties must be present on the scheduled auction date at 2:15 p.m. on the portico at 60 Centre Street.
3. The Terms of Sale must be posted on the portico before the auction begins. The Referee shall afford prospective bidders time to review the Terms of Sale.
4. At his or her discretion, the Referee *may* choose not to accept cash.
5. A successful bidder must have in his/her possession at the time of the bid the full 10% of the sum bid, in cash (if accepted at the referee's discretion) or certified or bank check to be made payable to the Referee.
6. All persons wishing to bid on properties must register with the Referee and provide proof of identification.
7. Bidders will be required to stand and state their names at the time the bid is made.
8. Bidders are permitted to use cell phones to communicate with business partners via text messages only. Phone calls and video calls (such as FaceTime, Skype or Teams) are not permitted.
9. No sale will be deemed final until the full 10% deposit has been paid to the Referee and the Terms of Sale have been signed; this must be done immediately following the auction.
10. If a successful bidder fails to immediately pay the deposit and sign the Terms of Sale, the property will be promptly re-auctioned the same afternoon.
11. Bidders are cautioned that the failure to furnish the 10% deposit or sign the Terms of Sale after winning an auction may result in the loss of future bidding privileges. The Court reserves the right to impose penalties for inappropriate behavior or other misconduct as it sees fit.
12. Within 10 days of the auction the Referee shall report to the auction clerk via email ([SFC-Forclosures@nycourts.gov](mailto:SFC-Forclosures@nycourts.gov)) the amount of the successful bid (the purchase price) and the name and address of the successful bidder.
13. Within 10 days of the auction the Referee shall report to the auction clerk via email ([SFC-Forclosures@nycourts.gov](mailto:SFC-Forclosures@nycourts.gov)) the sale price, the amount awarded in the judgment of foreclosure and sale and the upset price. The clerk shall record and enter this information in the court's computer system.
14. The Referee conducting the sale shall complete a Surplus Monies Form immediately following the sale. All information must be completed; if there is no surplus, then that must also be indicated.
15. Within 10 days of the auction, the Referee shall deliver the signed Surplus Monies Form to the auction clerk via email ([SFC-Forclosures@nycourts.gov](mailto:SFC-Forclosures@nycourts.gov)). The auction clerk shall upload the form to NYSCEF (if an e-filed case) or provide it to the County Clerk (if a paper case).
16. All bidders must wear a face mask/shield at all times and social distancing must be observed by all bidders at all times. Bidders who do not comply with the face mask and/or the social distancing mandate will be removed from the auction.
17. A copy of these rules will be appended to all Judgments of Foreclosure and Sale.