

**Wilmington Sav. Fund Socy., FSB v 414 E. 115 LLC**

2024 NY Slip Op 32877(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850427/2023

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

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

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

*Justice*

INDEX NO. 850427/2023

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

MOTION SEQ. NO. 002

-----X  
WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN  
ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE  
OF MFA 2021-INV2 TRUST,

Plaintiff,

- v -

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

414 EAST 115 LLC, ILAN TAVOR, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
PARKING VIOLATIONS BUREAU, SHARESTATES  
INVESTMENTS, LLC, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE,

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56,  
57, 58, 59, 60, 61, 62, 63, 64, 65, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for

JUDGMENT - FORECLOSURE & SALE

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage encumbering parcel of commercial real property located at 414 East 115th Street, New York, New York. The mortgage, dated April 26, 2021, secures a loan with an original principal amount \$1,350,000.00 which is memorialized by a note of the same date. The note and mortgage were given by Defendant 414 East 115 LLC, ("414 East"), and executed by Defendant Ilan Taylor ("Taylor") as Sole Member of 414 East. Concomitantly with these documents, Taylor executed a guaranty of the indebtedness. Plaintiff commenced this action and pled that 414 East defaulted in repayment of the indebtedness beginning on October 1, 2022. Defendants defaulted in appearing or answering and Plaintiff's motion for a default judgment and an order of reference was granted by order of this Court dated November 15, 2023. Now, Plaintiff moves to confirm the January 8, 2024, report of Referee Tom Kleinberger, Esq. and for the issuance of a judgment of foreclosure and sale. Defendants 414 East and Taylor oppose Plaintiff's motion and, cross-move to vacate their default pursuant to CPLR §317 and §5015[a][1]. Plaintiff opposes Defendants' cross-motion.

Since whether Defendants' default is vacated will necessarily affect the disposition of Plaintiff's motion, the Court will address the cross-motion first. Generally, to vacate a default in appearing, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay*, 180 AD3d 504 [1st Dept 2020]). "Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2<sup>nd</sup> Dept 2005]; *see also Glauber v Ekstein*, 133 AD3d 713, 713 [2d Dept 2015]). To demonstrate a meritorious defense, the movant must tender

“an affidavit from an individual with knowledge of the facts” (*Peacock v Kalikow*, 239 AD2d 188, 190 [1<sup>st</sup> Dept 1997]). The affidavit must make satisfactory factual allegations; it must do more than merely make “conclusory allegations or vague assertions” (*see Gorman v English*, 137 AD3d 556 [1<sup>st</sup> Dept 2015] [internal citations omitted]). Under CPLR §317, non-appearing defendant not personally served may still defend the action within one year after it learns of the default judgment upon the Court finding that it “did not personally receive notice of the summons in time to defend and has a meritorious defense” (*see CPLR §317; Wilson v Kore Method on Gansevoort LLC*, 180 AD3d 486 [1<sup>st</sup> Dept 2020]; *Simon & Schuster v Howe*, 105 AD2d 604, 605 [1<sup>st</sup> Dept 1984]).

In support of this branch of its motion, Defendants submitted an affidavit from Taylor wherein he claims in a conclusory fashion that Defendants’ default was a result of Plaintiff’s purported lack of “good faith” in amicably resolving Defendants’ default in payment. This does not constitute a viable excuse since Taylor does not aver Plaintiff’s lack of “good faith” occurred after Defendants’ were served and was a result of their default (*see Wells Fargo v Stewart*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 03777 [2d Dept 2024]). In any event, the copies of Defendants’ email correspondences with Plaintiff’s servicer regarding the status of the loan are all dated before service of the pleading was made. Since Taylor does not deny receipt of the pleadings or notice of the action in time to defend, his affidavit constitutes nothing more than “mere neglect [which] is not a reasonable excuse” (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]; *see also Goldfarb v Zhukov*, 145 AD3d 757, 758 [2d Dept 2016]). Absent a reasonable excuse, the Court need not determine whether Defendants have presented a meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1<sup>st</sup> Dept 2013]).

As to the Plaintiff’s motion, a Referee’s 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” (*Citimortgage, Inc. v Kidd*, 148 AD3d 767, 768 [2d Dept 2017]; *see also Bank of N.Y. Mellon v Davis*, 193 AD3d 803 [2d Dept 2021]). There is no requirement that any particular records support the Referee’s findings so long as the proof is in evidentiary form and evinces the facts for which they are proffered (*see eg Nationstar Mtge., LLC v Cavallaro*, 181 AD3d 688 [2d Dept 2020]; *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). A plaintiff may, therefore, rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). After issuance of the Referee’s report, the court is authorized to reject the report, in whole or in part, and render its own findings (*see eg Bank of Am., N.A. v Barton*, 199 AD3d 625 [2d Dept 2021]).

Here, Plaintiff established that the evidence before the Referee substantially supported the Referee’s findings on the amount due under the note, accrued interest, and other expenses (*see U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2d Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept. 2015]). In opposition, Defendants failed to proffer any arguments regarding the efficacy of the Referee’s calculations.

Accordingly, it is

ORDERED and ADJUDGED that Plaintiff’s motion for a judgment of foreclosure and sale and to confirm the referee’s report is granted and Defendant’s cross-motion is denied; 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, lien for common charges, the expense of sale and the costs of this action as provided in the RPAPL be sold within 180 days 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 **Tom Kleinberger, 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 **sforeclosures@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 serve it on the Referee. **IF THE AUCTION IS NOT ON THE CALENDAR, then the auction will not go forward;** and it is further

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 180 days 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 Plaintiff the following:
  - a. Amount Due from the Referee's Report: \$1,800,390.76, together with interest at note rate from December 15, 2023, 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. Attorney's fees: \$5,650.00.
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

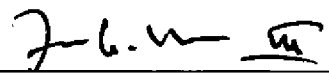
ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

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.

<u>8/2/2024</u> DATE			 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> REFERENCE
			<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT

**HON. FRANCIS A. KAHN III**  
J.S.C.

**SCHEDULE A  
DESCRIPTION OF MORTGAGED PREMISES**

**Block 1708 and Lot 142**

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the Southerly side of East 115th Street, distant 132 feet 6 inches Easterly from the corner formed by the intersection of the Easterly side of First Avenue with the Southerly side of East 115th Street;

RUNNING THENCE Easterly along the Southerly side of East 115th Street, 18 feet 9 inches;

THENCE Southerly parallel with First Avenue and part of the way through a party wall, 100 feet 11 inches to the center of the block;

THENCE Westerly along the center line of the block, 18 feet 9 inches; and

THENCE Northerly parallel with First Avenue and part of the way through another party wall, 100 feet 11 inches to the point or place of BEGINNING.

**Premises known as 414 East 115th Street, New York, New York 10029**