

HSBC Bank USA, N.A. v Hayon

2025 NY Slip Op 31172(U)

April 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 502733/15

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP-1 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 7th day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,
Justice.

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2,

Plaintiff,

- against -

Index No. 502733/15

RAFI HAYON, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FAIRMONT FUNDING, LTD., BOARD OF MANAGERS OF THE 215 BAY 23RD STREET CONDOMINIUM, CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD, CHANDER RAJ, DONALD RAJ, MARY RAJ,

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) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

66-69, 77 91-115
115 119-122
119-122 125-132

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 215 Bay 23rd Street, Unit 1B, in Brooklyn (Block 6441, Lot 1102) (Property), plaintiff HSBC Bank USA, National Association as Trustee For Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006-AF2 (HSBC or Plaintiff) moves (in motion sequence [mot. seq.] five) for an order: (1) confirming the December 17,

2019 Referee's Report, pursuant to RPAPL § 1321; (2) granting it a Judgment of Foreclosure and Sale, pursuant to RPAPL § 1351; (3) directing the distribution of the sale proceeds, pursuant to RPAPL § 1354; and (4) determining that "the reply to counterclaims filed on September 25, 2018 is a nullity . . ." ¹ (NYSCEF Doc No. 77).

Defendant Rafi Hayon (Hayon or Defendant Borrower) cross-moves (in mot. seq. six) for an order granting him leave "to renew, and vacating prior Orders and dismissing the *unverified* Complaint . . ." on the following grounds:

"(a) Pursuant to CPLR 2221 (e), on a Motion to Renew, as the original Justice involved, Hon. Richard Velasquez, J.S.C., did not have before him the Reply papers on the original 2015 Motion to Dismiss and . . . the Motion to Reargue and Renew of 2017 did not reference said papers, which prevented the case from being fully litigated, thus defendant cross-moves to renew prior applications;

"(b) Pursuant to CPLR 2221 (e), as one of two prior Justices, Hon. Noach Dear, J.S.C., separately heard the application on a Motion for an Order of Reference and did not have the full facts before him, not being aware of or involved with the Motions before Hon. Richard Velasquez, J.S.C.;

"(c) As a result of the foregoing, Justice Dear was unaware of all the facts at the time he granted the Order of Reference; in addition, the Referee had little or no facts other than what were fed to him, as it is clear from the Oath the Referee did not actually review any supporting documents; upon denial of the 2017 Motion to Reargue and Renew, defendant filed an Answer with Counterclaim to which plaintiff replied;

¹ On September 25, 2018, HSBC mistakenly filed a reply to defendant Ragi Hayon's untimely asserted counterclaims after HSBC was granted a default judgment against Defendant Hayon (NYSCEF Doc Nos. 53, 54 and 57).

“(d) Pursuant to RPAPL § 1302, as it is not alleged upon personal knowledge that the plaintiff or its predecessor complied with this Section, in particular violating §§ 1302 (1) (a), (b), (2), and Banking Law §§ 595-a, 6-l, 6-m, as, in particular, no exhibits were annexed to the Certificate of Merit, nor did the affiant allege her conversation with the alleged creditor’s agent, whether or not same would have been hearsay;

“(e) Pursuant to RPAPL § 1306, as the alleged ‘lender, assignee or mortgage loan servicer,’ did not file documents and facts in accordance with said section or information required under said section, alleging that Wells Fargo Bank was the creditor, while not alleging same in the Complaint . . . ;

“(f) Pursuant to CPLR 3211 (1), due to conflicting documentary evidence inclusive of circumstantial evidence refuting standing in this matter as the true party-in-fact has been Wells Fargo Bank and not the named plaintiff, which is an indication that the Note was not in plaintiff’s actual possession;

“(g) Pursuant to CPLR 3211 (a) (2), for lack of subject matter jurisdiction as the plaintiff lacks standing to sue, and plaintiff has no clear right to claim the collateral not having demonstrated a viable chain of title in the mortgages, but relying upon suspect ‘gap assignments’ of no validity, nor did plaintiff, upon information and belief, possess the Note, if any, at commencement, as, upon information and belief, no Note exists at the present time;

“(h) Pursuant to CPLR 3211 (a) (7), for failing to plead a cause of action, as the allegations in the Complaint are barred under the theory of collateral estoppel, as a prior Justice (Garson) ruled as to the exact same parties that a complete property description must be alleged in the Complaint and was not;

“(i) Pursuant to CPLR 3211 (a) (10), for failing to join persons who should be made parties; and

“Pursuant to CPLR (5015) (a) (1), (2), (3), (4), [for] vacatur on the grounds of (1) excusable default, if any; (2) new or missing evidence (the absent Reply); (3) fraud or misrepresentation; (4) lack of jurisdiction, as there was and is no standing by the plaintiff (invoking RPAPL 1302-a) . . .” (*see* NYSCEF Doc No. 91).

Background

On March 10, 2015, HSBC commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1 and 4). The complaint alleges that on May 2, 2006, Hayon executed a \$400,000.00 promissory note in favor of Fairmont Funding LLC (Fairmont), which was secured by a mortgage encumbering Hayon’s Property (NYSCEF Doc No. 1 at ¶¶ 4, 9 and Exhibit B). The complaint alleges that Hayon “failed to pay the October 1, 2010 payment and subsequent installments due . . .” (*id.* at ¶ 8). Notably, a copy of the promissory note with a blank endorsement from Fairmont on the bottom of the fourth page was annexed as an exhibit to HSBC’s complaint, thereby establishing HSBC’s standing to foreclose² (NYSCEF Doc No. 1 at 10-13).

HSBC’s affidavit of service in the record reflects that Hayon was served with process by personal delivery of the summons and complaint on March 31, 2015 at 5:13 a.m. at 17638 80th Road in Jamaica, New York (NYSCEF Doc No. 17).

² *See Deutsche Bank Nat’l Trust Co. v Blackman*, 203 AD3d 698, 699 (2022) (holding that plaintiff established its standing to foreclose “by annexing to the complaint a copy of the note, endorsed to the plaintiff . . .”).

On May 1, 2015, Hayon moved to dismiss the complaint, pursuant to CPLR 3211 (a) (7), based on a lack of subject matter jurisdiction and for failure to state a claim (NYSCEF Doc No. 31 at 7). Hayon's 2015 reply argued that the dismissal of a prior 2011 foreclosure action for failure to adequately describe the Property mandated dismissal of the HSBC's 2015 complaint in this action as law of the case (NYSCEF Doc Nos. 102-104).

By an April 1, 2016 decision and order, the court (Velasquez, J.) denied Hayon's pre-answer dismissal motion (*id.* at 5-6). Specifically, the court held that "Plaintiff has now commenced a new foreclosure proceeding with a new index number, and same is permitted where no final judgment was entered against Defendant and the matter has not been fully litigated" and "[t]hus, this matter is not barred by res judicata" (*id.*). The court also rejected Hayon's argument that the complaint fails to state a claim because it lacks an accurate description of the Property and held that "the Property is described in detail in the Notice of Pendency and the Mortgage – both of which are attached to the Summons and Complaint" (*id.* at 6). Finally, the court held that Hayon produced "no credible evidence in support of its contention" that HSBC lacked standing to foreclose (*id.*).

On May 26, 2017, HSBC moved for an order of reference, a default judgment against the non-appearing and non-answering defendants and to amend the caption (NYSCEF Doc No. 27). On August 23, 2017, Hayon opposed the motion (NYSCEF Doc No. 31 at ¶ 3). On September 1, 2017, HSBC withdrew its motion for an order of reference (NYSCEF Doc No. 35) and filed notice of entry of the court's April 1, 2016 order denying Hayon's dismissal motion (NYSCEF Doc No. 33). Notably, Hayon failed to answer the

complaint within ten days after service of notice of entry upon him (*see* CPLR 3211 [f]), or by September 11, 2017.

On September 12, 2017, HSBC moved, once again, (in mot. seq. three) for an order of reference and a default judgment against the non-appearing and non-answering defendants, including Hayon (NYSCEF Doc No. 37). Hayon opposed the motion on the grounds that the motion was premature and HSBC lacks standing and Hayon cross-moved (in mot. seq. four) for leave to renew and/or reargue his 2015 dismissal motion.

By a May 23, 2018 decision and order, entered on May 25, 2018, the court (Velasquez, J.) denied Hayon's cross-motion to reargue and/or renew "as no new issues were raised and [defendant] failed to point out any misapplied law and/or facts by the court" (NYSCEF Doc No. 51).

The 2018 Order of Reference

By an August 9, 2018 decision and order, the court (Dear, J.) granted HSBC's motion for an order of reference and a default judgment against Hayon, and noted that Hayon's motion to reargue did not toll his time within which to answer the complaint (NYSCEF Doc No. 53). The court issued an August 9, 2018, Order of Reference (2018 Order of Reference) and a default judgment against the non-answering defendants (NYSCEF Doc No. 54). Notably, the 2018 Order of Reference required that the Referee issue a report of the amounts due "no later than sixty (60) days of the date of this order . . ." or by October 8, 2018 (*id.* at 2).

On September 7, 2018, Hayon e-filed an untimely answer to the complaint,³ in which he denied the allegations and asserted affirmative defenses and counterclaims (NYSCEF Doc No. 52). On September 25, 2018, HSBC mistakenly replied to Hayon's counterclaims, since HSBC was already granted a default judgment against Hayon (NYSCEF Doc No. 57).

The December 2019 Referee's Report

In December 2019, *more than a year after* the 2018 Order of Reference was issued, the Referee belatedly issued his Oath and his December 17, 2019 "Report of Amount Due" (December 2019 Referee's Report), which generally provides that:

"upon the complaint and the supporting affidavit submitted by the plaintiffs attorneys, that I have computed and ascertained the amount due to the plaintiff upon and by virtue of the note and mortgage and that I find, and accordingly report, that there is due to the plaintiff on the note and mortgage, the sum of \$576,568.72, as of October 3, 2019.

"Schedule A, which is attached, contains a summary of the documentary evidence introduced before me and shows the amounts due for principal and interest respectively, the period of the computation of the interest and its rate.

"I have made inquiry as to the advisability of selling the mortgaged premises in parcels and find accordingly that the mortgaged premises should be sold in one parcel" (NYSCEF Doc No. 65 [emphasis added]).

³ Hayon's answer erroneously asserts that it was timely, pursuant to CPLR 3211 (f), because "[n]o Notice of Entry was served with the Court's Decision and Order filed May 25, 2018, so time to answer has not run" (NYSCEF Doc No. 521 at fn.1)

Schedule A to the December 2019 Referee's Report lists the following documents reviewed by the Referee in making his computation: (1) the note; (2) the mortgage and mortgage assignments; (3) "Plaintiff's Affidavit of Merit and Amounts Due, dated October 4, 2019" *without identifying the affiant or providing a copy of the affidavit*; and (4) the summons and complaint (*id.*).

HSBC's Instant Motion

On February 26, 2020, within 60 days after the December 2019 Referee's Report was issued, HSBC moved for an order confirming the Referee's Report, granting it a Judgment of Foreclosure and Sale and deeming its reply to Hayon's counterclaims a "nullity" (NYSCEF Doc No. 77). HSBC submits an attorney affirmation annexing exhibits, including the December 2019 Referee's Report (NYSCEF Doc No. 69). However, HSBC's motion *does not include* a copy of the October 4, 2019 Plaintiff's Affidavit upon which the Referee relied to compute the amounts due and owing, nor does it explain the reason for the delay, since the December 2019 Referee's Report was issued *more than a year after* the 2018 Order of Reference.

HSBC's counsel merely asserts that "[i]n conjunction with the motion for an Order of Reference previously granted by this Court, Plaintiff established all the required elements for a [judgment of] foreclosure" (*id.* at ¶ 20). HSBC's counsel also requests that HSBC's reply to Hayon's counterclaims be withdrawn as a "nullity" "as this Court had previously awarded a default judgment against . . . Hayon on August 9, 2018, and time to answer had not been extended by this Court" (*id.* at ¶ 24).

Hayon's Cross-Motion to Vacate, Renew and Dismiss

On April 22, 2022, Hayon opposed HSBC's motion and cross-moved for an order vacating his default, pursuant to CPLR 5015 (a) (1) - (a) (4), granting him leave to renew his 2015 dismissal motion and his 2017 motion to reargue and/or renew, pursuant to CPLR 2221 (e), and dismissing the complaint, pursuant several grounds under CPLR 3211 (a) that were nor previously raised in Hayon's 2015 dismissal motion (NYSCEF Doc No. 91). Defense counsel asserts that Hayon makes his cross-motion "to renew prior applications on the basis of missing 2015 papers not before a prior judge and the fact the real party-in-interest in this matter was disguised, ousting standing; and to vacate and dismiss prior Orders on various bases, including a form of fraud and unexplored collateral estoppel" (NYSCEF Doc No. 115 at ¶ 2).

Defense counsel explains that because he opted out of e-filing while he was ill, the court (Velasquez, J.) may not have considered Hayon's December 8, 2015 reply in support of Hayon's 2015 dismissal motion when it issued its April 1, 2016 order denying his motion (*id.* at ¶¶ 10-12). Defense counsel explains that "[u]pon preparation and service of the early October 2017 Motion [to reargue Hayon's 2015 dismissal motion], it was realized that the Reply papers were missing, but due to confusion during counsel's illness, a copy could not be located" (*id.* at ¶ 15). Defense counsel claims, without any evidence, that "[t]he personnel in various court parts in the days of NYSCEF treated the hard copies brought to the Court as disposable courtesy copies and, upon submission, disposed of the [2015 reply]

papers . . .” yet he admits that the 2015 reply papers were “stamped by Motion Support on 12/08/2015” indicating that the court received them (*id.* at ¶¶ 31-32).

Defense counsel re-submits the purportedly missing 2015 reply papers as “new evidence” in support of his motion for leave to renew his 2015 dismissal motion (*id.* at ¶ 28; *see also* NYSCEF Doc Nos. 102-104). Essentially, Hayon’s 2015 reply papers argue that the dismissal of a prior 2011 foreclosure action for failure to adequately describe the property in the complaint is law of the case, warranting dismissal of HSBC’s 2015 complaint in this foreclosure action (*id.* at ¶¶ 28 and 39-40; NYSCEF Doc No. 97). Defense counsel argues that leave to renew should be granted “to reopen review of all of the records in this matter so that the case is properly adjudicated” (*id.* at ¶ 38).

Defense counsel also argues that renewal of Hayon’s 2015 dismissal motion should be granted based on “new evidence” revealed in 2017 that “Wells Fargo Bank was the real party in interest and had been the real party in interest going back to 2015, when the case commenced, although Wells Fargo disguised its participation” (*id.* at ¶ 46). Defense counsel references the May 2, 2017, affidavit from Tiffany Bufford, Vice President Loan Documentation for Wells Fargo Bank, N.A., the servicer for HSBC, which HSBC submitted in support of its 2017 motion for an order of reference (*see* NYSCEF Doc No. 39 at 7-10). Defense counsel contends that “there is nothing in the record of Wells Fargo being either servicer or creditor” despite Bufford’s affidavit testimony (*id.* at ¶ 49).

Defense counsel also vaguely argues that the court’s August 9, 2018 decision and order granting HSBC’s motion for an order of reference and a default judgment against

Hayon “appears to be deficient and should be vacated *as it burdens* defendant” (*id.* at ¶ 23 [emphasis added]). Although Hayon waived any challenge to personal jurisdiction by failing to raise it in his 2015 dismissal motion,⁴ defense counsel asserts that the 2018 Order of Reference is “faulty” because it states that all defendants were served with process, when “[n]o realistic effort was made to serve any defendant” and “Hayon was allegedly served at four different addresses” (*id.* at ¶ 24).

As additional grounds for vacatur of the 2018 Order of Reference, pursuant to CPLR 5015 (a) (1), defense counsel argues that the court “in error states that defendant defaulted” (*id.* at ¶ 54). Defense counsel contends that Hayon’s time within which to answer the complaint, pursuant to CPLR 3211 (f), was tolled during both his 2015 dismissal motion and his subsequent 2017 motion for leave to reargue and/or renew, without citing any legal support for his creative and unsupported legal theory (*id.*).

Defense counsel also makes conclusory assertions that vacatur is warranted: (1) under CPLR 5015 (a) (2) based on new evidence (i.e., the December 8, 2015 reply) and “evidence of Wells Fargo being the real party-in-interest . . .”; (2) under CPLR 5015 (a) (3) because “[t]he concealment of Wells Fargo in this case is a form of fraud . . .”; and (3) under CPLR 5015 (a) (4) based on HSBC’s lack of standing (*id.* at ¶ 54 [b]-[d]).

⁴ CPLR 3211 (e) provides, in relevant part, that “an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading . . .”

Finally, defense counsel asserts, in opposition to HSBC's motion to confirm, that the August 9, 2018 Order of Reference requires that the Referee issue a report within 60 days, and the December 2019 Referee's Report was issued "over a year too late to comply" (*id.* at ¶ 24).

HSBC's Opposition and Reply

HSBC, in opposition to Hayon's cross-motion and in further support of its motion, submits an attorney affirmation asserting that Hayon failed to satisfy his burden for renewal, pursuant to CPLE 2221 (e), because he "fails to provide a reasonable justification for the failure to present such facts on the prior 2017 Motion to Reargue and Renew" and "Defendant has failed to show how the new fact not offered on the prior motion would change the prior determination made by the Judge denying the 2015 Motion to Dismiss[.]" especially since "[a] simple review of the Reply papers demonstrates that Defendant simply rehashed and minimally expanded the same arguments set forth in the moving papers" (NYSCEF Doc No. 119 at ¶¶ 7 and 14).

HSBC's counsel notes that while defense counsel assumes that the court did not consider Hayon's December 8, 2015 reply papers because they were not specifically mentioned in the court's April 1, 2016 order denying his 2015 dismissal motion, the reply papers were admittedly stamped by the court's Motion Support Office proving that they were received by the court (*id.* at ¶ 8). Counsel notes that Hayon inexplicably failed to raise this issue in his 2017 motion to reargue and/or renew, and thus, he "should not be allowed

to present this argument for the first time in this second attempt to renew the 2015 Motion to Dismiss . . .” (*id.* at ¶¶ 9 and 13).

HSBC’s counsel also argues that the claims that Hayon is attempting to reassert in his renewal cross-motion relating to HSBC’s lack of standing and the effect of the court’s dismissal of the 2011 foreclosure action, are barred by *res judicata* and the law of the case doctrine because they have been fully litigated and resolved (*id.* at ¶¶ 19-22 and 27). HSBC’s counsel asserts that “Plaintiff has sufficiently established possession of the Note prior to commencement” and its standing to foreclose by assignment of the endorsed note to the Trust, by physical delivery and possession of the promissory note and by annexing a copy of the endorsed note to the complaint upon commencement of this foreclosure action (*id.* at ¶¶ 42-57). HSBC also submits a May 13, 2022 affirmation by Yimell M. Suarez Abreu, Esq. (Attorney Abreu), regarding HSBC’s counsel’s possession of the original endorsed note as part of the collateral file that counsel obtained on October 28, 2014 (NYSCEF Doc No. 120).

Regarding that branch of Hayon’s cross-motion seeking to vacate his default, HSBC’s counsel asserts that Hayon his “failed to timely move for an extension of time to plead and had not moved to vacate his default until the instant motion, *almost 4 years after* the Notice of Entry was served on October 12, 2018” (*id.* at ¶ 29 [emphasis added]). HSBC’s counsel also argues that Hayon failed to provide a reasonable excuse for his failure to timely answer the complaint 10 days after HSBC served Hayon with notice of entry of

the order denying Hayon's 2015 dismissal motion on September 1, 2017, and has failed to demonstrate a meritorious defense to this foreclosure action (*id.* at ¶¶ 30, 32 and 33).

Hayon's Reply

Hayon, in reply, submits an attorney affirmation challenging the Abreu Affirmation regarding HSBC's counsel's possession of the endorsed note as of October 28, 2014 (NYSCEF Doc No. 125). Hayon submits a second reply affirmation reiterating that "[b]oth the 2015 and 2017 decisions/orders were defective" because "[t]he 2015 Decision/Order omitted the Reply, while the 2017 Decision/Order omits everything, so it is almost impossible to know what Justice Velasquez did or did not review" (NYSCEF Doc No. 128 at ¶ 7). Hayon also reiterates that the 2015 complaint inadequately describes the Property, and thus, should have been dismissed for the same reason that the 2011 foreclosure action was dismissed (*id.* at ¶ 11) and that that "Wells [Fargo] hid behind the curtain until 2017, when it stepped from behind the curtain to announce its involvement" (*id.* at ¶ 21).

Discussion

(1)

Hayon's Cross-Motion for Leave to Renew

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination (CPLR 2221 [e] [2]) and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e] [3]). The Second Department has held that "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first

factual presentation” and has denied successive renewal motions, like Hayon’s second renewal cross-motion at issue here (*see Nunez v Yonkers Racing Corp.*, 218 AD3d 480, 481 [2d Dept 2023] [holding that trial court properly denied defendant company’s *second motion to renew* previously denied summary judgment motion where second motion presented no new facts that were not previously submitted that would have changed the court’s determination and failed to provide reasonable justification for failing to present such affidavits previously]). Furthermore, denial of renewal is warranted, as a matter of law, where the movant fails to offer a reasonable justification for failing to present the alleged new facts on the prior motion and fails to demonstrate that the new facts would have changed the prior determination (*Hersko v Hersko*, 224 AD3d 813, 816 [2d Dept 2024]).

Here, renewal is not warranted because Hayon failed to identify any new facts or law that were not presented on the prior motion(s) and failed to demonstrate that such facts or law would have changed the court’s prior determination(s). Hayon’s theory that court personnel disposed of his hard copy reply papers that he submitted in support of his 2015 dismissal motion is rejected, since Hayon admits that his reply papers were stamped by the court’s Motion Support Office, indicating that they were received by the court. The fact that the court did not specifically reference Hayon’s reply papers in its order denying his 2015 dismissal motion does not mean that those reply papers were not considered.

Furthermore, Hayon already had an opportunity to raise the issue of the purportedly missing reply papers on his first motion to reargue and/or renew his 2015 dismissal motion.

In any event, the arguments raised in Hayon's purportedly missing reply papers regarding the dismissal of a prior 2011 foreclosure action based on an inadequate description of the Property in the complaint, is irrelevant to the sufficiency of the complaint in this 2015 foreclosure action and does not constitute law of the case. Because Hayon's legal argument has no merit and could not have changed the prior determination on Hayon's 2015 dismissal motion, Hayon's second motion for leave to renew is denied.

(2)

Hayon's Cross-Motion to Vacate His Default

CPLR 5015 (a) (1) through (a) (4) provides that:

“(a) On Motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

“1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party . . .

“2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial . . .

“3. fraud, misrepresentation, or other misconduct of an adverse party; or

“4. Lack of jurisdiction to render the judgment or order . . .”

While Hayon moves pursuant to every subsection of CPLR 5015 (a), he has failed to demonstrate that his motion is based on newly discovered evidence, fraud or a lack of

personal jurisdiction. For the reasons discussed, the purportedly missing reply papers from Hayon's 2015 dismissal motion is not "new evidence" within the meaning of CPLR 5015 (a) (2), since Hayon's reply papers were previously submitted to the court in further support of Hayon's 2015 dismissal motion as they were admittedly stamped by the court's Motion Support Office. Regardless, the reply papers would not change the result of Hayon's 2015 dismissal motion because the sufficiency of the complaint in the prior 2011 foreclosure action is irrelevant to the sufficiency of the complaint in this subsequent action.

Hayon's reliance on CPLR 5015 (a) (3) is also misplaced because Hayon failed to demonstrate that there was any fraud regarding Wells Fargo's servicing of the mortgage. CPLR 5015 (a) (4), which warrants vacatur for lack of jurisdiction, is inapplicable since Hayon waived any jurisdictional defense by failing to raise it in his 2015 dismissal motion.

A party seeking to vacate a default in appearing pursuant to CPLR 5015 (a) (1) based on an excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*92-18 149th Street Realty Corp. v Stolzberg*, 152 AD3d 560, 562 [2d Dept 2017]). "Whether an excuse is reasonable is a determination within the sound discretion of the Supreme Court" and, when making that discretionary determination, the court should consider relevant factors, such as the extent of the delay and prejudice to the opposing parties (*Crevecoeur v Mattam*, 172 AD3d 813, 814 [2d Dept 2019], quoting *Walker v Mohammed*, 90 AD3d 1034, 1034 [2d Dept 2011]). A motion to vacate a default judgment pursuant to CPLR 5015 (a) (1) on the ground of excusable

default must be made within one year after service upon the moving party of a copy of the judgment, with notice of its entry (*see* CPLR 5015 [a] [1]).

Here, Hayon has failed to demonstrate a reasonable excuse for his failure to answer the complaint within 10 days after HSBC's September 1, 2017, notice of entry of the court's April 1, 2016 order denying Hayon's dismissal motion, or by September 11, 2017, as required by CPLR 3211 (f). Defense counsel misunderstanding regarding the proper application of CPLR 3211 (f), and his inability to accurately calculate when Hayon's answer to the complaint was due after denial of Hayon's 2015 dismissal motion, is not a reasonable excuse for Hayon's appearance default.

Furthermore, Hayon inexplicably waited *more than four years* before moving to vacate his appearance default, which is untimely, as a matter of law and warrants denial of the motion (*Barnett v Diamond Fin. Co., Inc.*, 202 AD3d 651, 652 [2d Dept 2022] [holding that "defendant's motion to vacate the clerk's judgment was untimely, as it was made more than one year after the clerk's judgment with notice of entry was served upon it . . ."]; *New Century Mortg. Corp. v Chimmiri*, 146 AD3d 893, 894 [2d Dept 2017] ["where the motion to vacate the order dated December 24, 2009, was made *nearly four years after* service of the notice of entry, the court providently exercised its discretion in denying the motion as untimely"] [emphasis added]). Finally, as previously discussed, denial of Hayon's untimely motion to vacate his appearance default is warranted because Hayon failed to demonstrate a meritorious defense to this action.

(3)

HSBC's Motion to Confirm The Referee's Report

“The report of a referee 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 [2017]). While CPLR 4403 authorizes a court to confirm or reject a referee’s report, “[t]he referee’s findings and recommendations are advisory only and have no binding effect on the court . . .” (*Indymac Federal Bank, FSB v Vantassell*, 187 AD3d 725, 726 [2d Dept 2020]). In cases involving references to report, the trial court is the ultimate arbiter of the dispute and has the power to reject the referee’s report (*Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 [2d Dept 2020]; *see also HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2d Dept 2019]).

The Second Department has held that a motion to confirm a referee’s report and for a judgment of foreclosure and sale should be denied where “[t]he referee’s computations as to the amount due and owing to the plaintiff were not substantially supported by the record” (*Bank of America, N.A. v Barton*, 199 AD3d at 627 [denying motion to confirm referee report because “affidavit of an assistant vice president of the plaintiff . . . constituted inadmissible hearsay and lacked probative value because the business records purportedly relied upon in making the calculations were not produced”]; *Indymac Federal Bank, FSB v Vantassell*, 187 AD3d at 727 [holding that Supreme Court erred in confirming referee’s report because it relied on a hearsay affidavit from Ocwen, the loan’s servicer, which was

insufficient to establish a proper foundation for the admission of business records regarding the amount due under the loan] *U.S. Bank Nat'l Assoc. v Calabro*, 175 AD3d 1451, 1452 [2019] [holding that “the Supreme Court should have denied the plaintiff’s motion to confirm the Referee’s report [which was] not substantially supported by the record inasmuch as the computation was premised upon unproduced business records”]; *HSBC Bank USA, National v Cherestal*, 178 AD3d at 683 [holding that motion to confirm referee’s report should have been denied because the report included disbursements “calculated based on business records that were never produced by the plaintiff or submitted to the referee”]).

Here, in December 2019, *more than a year after* the 2018 Order of Reference was issued, the Referee issued his untimely Oath and his December 17, 2019 “Report of Amount Due” based on “Plaintiff’s Affidavit of Merit and Amounts Due, dated October 4, 2019” without identifying the affiant and without providing a copy of the affidavit (NYSCEF Doc No. 65). HSBC’s motion for an order confirming the December 2019 Referee’s Report is denied because the Referee’s findings and computations therein regarding the total amount due under the subject mortgage are not substantially supported by the record as the computations are based entirely on an unidentified affidavit. Accordingly, it is hereby

ORDERED that HSBC’s motion (mot. seq. five) is only granted to the extent that HSBC’s reply to counterclaims filed on September 25, 2018 (NYSCEF Doc No. 57) is a

nullity, since the court previously issued a default judgment against Hayon; HSBC's motion is otherwise denied; and it is further

ORDERED that the Referee shall compute the amounts due and issue a new report describing the computations of the amounts owed and annexing copies of all affidavits and documents relied upon in making such computations; and such report shall be issued within 30 days of service of this decision and order with notice of entry thereof; and it is further

ORDERED that Hayon's cross-motion (mot. seq. six) is denied in its entirety.

This constitutes the decision and order of the court.

April 7, 2025

E N T E R,



Hon. Cenceria P. Edwards, J. S. C.