

**CitiMortgage, Inc. v Zaibak**

2025 NY Slip Op 31871(U)

May 13, 2025

Supreme Court, Kings County

Docket Number: Index No. 511227/14

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

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 13th day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X

CITIMORTGAGE, INC.,

Plaintiff,

- against -

Index No. 511227/14

VICTOUR ZAIBAK; ALLA CHERENKOVA; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____	<u>75, 77-99, 101</u>	<u>104-116, 118-121</u>
Opposing Affidavits (Affirmations) _____	<u>104-116, 118-121</u>	<u>125-129</u>
Reply Affidavits (Affirmations) _____	<u>125-129</u>	

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 2248 East 64<sup>th</sup> Street in Brooklyn (Block 8634, Lot 19) (Property), plaintiff CitiMortgage, Inc. (CitiMortgage or Plaintiff) moves (in motion sequence [mot. seq.] four) for an order: (1) confirming the February 25, 2019, Referee’s Report made in accordance with RPAPL § 1321; (2) granting it a Judgment of Foreclosure and Sale, pursuant to RPAPL § 1351; and (3) directing the distribution of the sale proceeds, pursuant to RPAPL § 1354 (NYSCEF Doc No. 101).

Defendant Victour Zaibak (Zaibak or Defendant) cross-moves (in mot. seq. five) for an order: (1) denying Plaintiff's motion for judgment of foreclosure and sale; (2) dismissing this action based upon Plaintiff's noncompliance with RPAPL § 1304; (3) tolling interest based upon Plaintiff's prolonged delay in prosecuting this action and a prior action under Kings County index No. 10216/2010; and (4) granting him leave to renew the court's September 25, 2017 order, pursuant to CPLR 2221 (e) (NYSCEF Doc No. 118).

### **Background**

On November 26, 2014, CitiMortgage commenced this action to foreclose a March 20, 2008, mortgage in the principal amount of \$1,190,000.00 encumbering the Property, which was allegedly executed by Zaibak (NYSCEF Doc No. 1 at ¶¶ 4-5). The complaint alleges that Defendant Zaibak "failed and neglected to comply with the terms and provisions of said mortgage, bond/note/loan agreement, and said instrument(s) secured by said mortgage by omitting and failing to pay items of principal and interest . . ." on November 1, 2009 (*id.* at ¶ 7 and Schedule C).

CitiMortgage's affidavits of service in the record reflects that Zaibak and Alla Cherenkova were served with process, pursuant to CPLR 308 (2), on December 12, 2014 at 2:53 p.m., by delivering the documents to "CLARA SMITH – LAST NAME REFUSED, BABYSITTER," a person of suitable age and discretion, and by mailing the documents to Defendants at the Property on December 17, 2014. The affidavits of service were filed on December 30, 2014 (NYSCEF Doc Nos. 10 and 11). Thus, service was completed ten days later, or on January 9, 2015, and Defendants' answers were due on February 9, 2015.

None of the defendants answered or otherwise responded to the complaint.

On February 3, 2015 – *before* Defendants’ answers were due – CitiMortgage e-filed a request for judicial intervention (RJI) to seek a residential settlement conference (NYSCEF Doc No. 13). Subsequently, foreclosure settlement conferences were held on March 24, 2015 and April 22, 2015, pursuant to CPLR 3408, until the action was released from the foreclosure settlement conference part on April 22, 2015 (NYSCEF Doc No. 96).

On November 28, 2016, *about 19 months after* the action was released from CPLR 3408 conferencing, Defendants Zaibak and Cherenkova collectively moved for an order dismissing the action as abandoned, pursuant to CPLR 3215 (c) (NYSCEF Doc No. 14). By a September 25, 2017 decision and order, the court (Dear, J.) denied Defendants’ dismissal motion and held that:

“Plaintiff has demonstrated sufficient excuse for failing to timely move. Counsel has affirmed that . . . he was ready to move for judgment on multiple occasions in a timely manner but was instructed not to due to loss mitigation and the double-tracking prohibition. Plaintiff has also presented a potentially meritorious case, attaching the note and mortgage to the complaint and offering an uncontroverted allegation that Defendant defaulted” (NYSCEF Doc No. 26).

Defendants Zaibak and Cherenkova appealed from the September 25, 2017 order (NYSCEF Doc No. 28). The Second Department affirmed the September 25, 2017 order and held that:

“Here, in opposition to the defendants’ motion, the plaintiff demonstrated that, within one year after the defendants’ default, it filed a request for judicial intervention which sought a ‘mortgage foreclosure’ on the subject property and a foreclosure settlement conference as mandated by CPLR 3408.

Where, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (*see* CPLR 3408 [a], [m]), a formal judicial request for such a conference in connection with an ongoing demand for the ultimate relief sought in the complaint constitutes ‘proceedings for entry of judgment’ within the meaning of CPLR 3215 (c) . . . Since the plaintiff demonstrated that it initiated proceedings for the entry of judgment of foreclosure and sale within one year after defendants’ default, it was not required to proffer a reasonable excuse or demonstrate a potentially meritorious cause of action . . .” (*Citimortgage, Inc. v Zaibak, et al*, 188 AD3d 982, 983 [2d Dept 2020]).

Defendants moved for leave to reargue the Second Department’s decision and order or for leave to appeal to the Court of Appeals, which was denied (NYSCEF Doc No. 129).

Meanwhile, on November 10, 2017, CitiMortgage moved for summary judgment, an order of reference, a default judgment and to amend the caption (NYSCEF Doc No. 29). On June 25, 2018, Defendants Zaibak and Cherenkova opposed the motion and cross-moved for a stay, dismissal for lack of personal jurisdiction or, alternatively, for leave to file a late answer to the complaint (NYSCEF Doc Nos. 53-59).

By an October 22, 2018 decision and order, the court (Dear, J.) granted CitiMortgage’s motion and denied the Defendants’ dismissal cross-motion because they “do not deny that they employ a babysitter named Clara, meeting the description, who might have been present at the time of service” (NYSCEF Doc No. 63 at 2). The court further held that “[i]n light of the lack of reasonable excuse and significant delay in seeking leave to file a late answer, the Court declines to allow Defendants to do so” (*id.*). The court issued an October 22, 2018 Order of Reference (NYSCEF Doc No. 64).

### *CitiMortgage's Instant Motion*

On August 24, 2021, CitiMortgage moved for an order confirming the February 25, 2019 Referee's Report, granting it a judgment of foreclosure and sale and directing the distribution of the sale proceeds (NYSCEF Doc No. 75). CitiMortgage filed an amended notice of motion on August 31, 2021 (NYSCEF Doc No. 101). The February 25, 2019 Referee's Report provides, in relevant part, that:

“Based upon the documentary evidence introduced before me, I have computed and ascertained the amount due to the plaintiff under said note/bond and mortgage and that I find, and accordingly report, that there is due to the plaintiff for principal, accrued interest, advances and late charges the sum of \$1,795,902.09 as of January 14, 2019.

“The following documentary evidence introduced before me shows the amounts due for principal, interest and other amounts now due the plaintiff:

- “a. A conformed copy of the Order of Reference;
- “b. An Affidavit of Amount Due verified by Marc Handley, Vice President - Document Control of CitiMortgage, Inc., the plaintiff, sworn to on January 3, 2019, stating that the total amount owing to the plaintiff in unpaid principal, interest, late charges owing prior to acceleration and property preservation is \$1,795,902.09. Said affidavit is attached hereto and made a part hereof as **Exhibit A . . .**” (NYSCEF Doc No. 95).

Schedule A to the Referee's Report is an affidavit from Marc Handley (Handley), a Vice President - Document Control at CitiMortgage, which services loans “for its own account” (*id.* at page 8 at ¶ 1). Handley's affidavit is based on his examination of CitiMortgage's business records regarding the mortgage, “which include data compilations, electronic

imaged documents, and others” (*id.* at ¶ 3). Handley attests to CitiMortgage’s compliance with RPAPL § 1304 and states that:

“I confirm that Borrower was sent a ninety (90) day pre-foreclosure notice on March 14, 2014 by certified mail and first class mail in an envelope separate from any other notice. The registration number for the ninety (90) day pre-foreclosure notice is 7012 1640 0000 5981 969” (*id.* at ¶ 9).

Without referencing any of CitiMortgage’s business records, a payment history or any documentary evidence, Handley further attests that as of January 14, 2019, the Borrower owes CitiMortgage a total of \$1,795,902.09 (*id.* at ¶ 10).

### ***Defendant Zaibak’s Opposition and Cross-Motion***

On January 20, 2022, Zaibak opposed CitiMortgage’s motion and cross-moved (NYSCEF Doc No. 104). On April 6, 2022, Zaibak amended his notice of cross-motion seeking to dismiss the action for failure to comply with RPAPL § 1304, tolling interest based upon Plaintiff’s “prolonged delay in prosecuting this action . . .” and granting him leave to renew the court’s September 25, 2017 order (NYSCEF Doc No. 118).

Zaibak submits an affidavit asserting that “I would like to resolve this matter however because of Plaintiff’s delay in prosecuting the matter 12 years of interest have accrued on the loan rendering the amount owed excessive compared to the original principal balance” (NYSCEF Doc No. 106 at ¶ 10). Defense counsel submits an affirmation asserting that interest should be tolled from 2010 through 2017 based on Plaintiff’s delays in prosecuting this 2014 foreclosure action and a prior action commenced in 2010 (NYSCEF Doc No. 105 at ¶¶ 14-28).

Defense counsel further argues that leave to renew the court’s September 25, 2017 order denying Defendants’ dismissal cross-motion is warranted based on appellate law that supports dismissal and is in “contravention of the September 2017 Order” (*id.* at ¶¶ 40-41). While defense counsel acknowledges that the September 25, 2017 order was affirmed on appeal on the ground that CitiMortgage’s filing of the RJI to request a foreclosure settlement conference constituted compliance with its obligation to take proceedings for the entry of a default judgment, defense counsel seemingly challenges the validity of the Second Department’s decision since CitiMortgage filed the RJI just before Zaibak’s default (*id.* at ¶¶ 37-38).

Defense counsel also submits a supplemental affirmation asserting that “[i]t is clear by both the form and content of the 90-day notices submitted, that what was mailed to the Defendant does not comply with RPAPL 1304” (NYSCEF Doc No. 119 at ¶ 8). Specifically, defense counsel relies on the Second Department’s holdings in *CitiMortgage, Inc. v Dente*, 200 AD3d 1025 (2d Dept 2021) and *Bank of Am., N.A. v Kessler*, 202 AD3d 10 (2d Dept 2021), wherein the court held that under RPAPL § 1304 (2), additional materials cannot be placed in the same envelope as the statutory notice (*id.* at ¶¶ 12-21).

### **Discussion**

#### **(1)**

#### ***Defendant’s Cross-Motion***

Defendant Zaibak’s cross-motion seeking dismissal based on CitiMortgage’s failure to strictly comply with RPAPL § 1304 is denied. Defendant Zaibak’s reliance on the

Second Department's holdings in *Kessler* and *Dente* is misplaced because those holdings were specifically reversed by the Court of Appeals' subsequent decision in *Kessler* that was issued on February 14, 2023, after the parties' instant motion and cross-motion were *sub judice*. Importantly, in *Bank of Am. v Kessler*, the Court of Appeals specifically rejected the bright-line rule imposed by the Second Department, and held that statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute "other notices" that must be sent in a separate envelope from the RPAPL § 1304 notice and "application of a bright-line rule would contravene the legislative purpose" of RPAPL § 1304 (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 326 [2023]).

Similarly unavailing is Defendant Zaibak's attempt to obtain leave to renew in an effort to overturn the court's September 26, 2017 decision and order denying his dismissal cross-motion pursuant to CPLR 3215 (c). CPLR 2221 (e) (2) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been *a change in the law* that would change the prior determination" (emphasis added). "Therefore, '[a] motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law'" (*JPMorgan Chase Bank, Nat'l Ass'n v Eze*, 232 AD3d 865, 866 [2d Dept 2024], quoting *Sharan v Christiana Trust*, 219 AD3d 1549, 1551 [2d Dept 2023]). Here, however, as defense counsel acknowledges, the Second Department affirmed the September 26, 2017 decision and order (*CitiMortgage, Inc. v Zaibak et al.*, 188 AD3d 982

[2d Dept 2020]). The Second Department's holding in this action has recently been cited with approval (*see US Bank Nat'l Ass'n v Pane*, 2025 WL 1242300, at \*2 [2d Dept Apr. 30, 2025]; *U.S. Bank Nat'l Ass'n v DiGiovanni*, 231 AD3d 1077, 1078 [2d Dept 2024]). Because Zaibak's motion to reargue and for leave to appeal from the Second Department's 2020 decision and order was denied with costs (NYSCEF Doc No. 129), the instant cross-motion to renew cannot change what is now the law of the case.

Finally, that branch of Defendant's motion to toll interest on the ground that Defendant has been prejudiced by the inordinate delays in prosecuting this action and a prior action is denied. Defendant Zaibak, who has not denied executing the mortgage loan, has resided at the Property for over a decade mortgage-free and has, thus, reaped some benefit and has not been unfairly prejudiced from the delays in prosecuting this foreclosure action. For these reasons, interest will not be tolled in this action.

(2)

***CitiMortgage's Motion***

CPLR 4403 provides that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part . . . the report of a referee . . . may make new findings with or without taking additional testimony; and may order a new trial or hearing.” “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 [2d Dept 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 [2020]). "[T]he Supreme Court is the ultimate arbiter of the dispute and has the power to reject the referee's report and make new findings" (*Bank of America, N.A. v Barton*, 199 AD3d at 627 [quoting *Countrywide Home Loans, Inc. v Hershkop*, 188 AD3d 1148, 1149 (2020)]; see also *HSBC Bank USA, National v Cherestal*, 178 AD3d 680, 682-683 [2019]).

Here, the court cannot review the propriety of the calculations in the Referee's Report because it is based entirely on the Handley affidavit and CitiMortgage's unidentified and unproduced business records (*Wells Fargo Bank, N.A. v Laronga*, 219 AD3d 1559, 1560 [2d Dept 2023] [holding that "computations based on the 'review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value'"]). "A referee's findings should not be deemed substantially supported by the record when those findings are based upon inadmissible evidence" (*U.S. Bank Nat'l Ass'n v Winnie Realty Grp., LLC*, 2025 WL 1062564, at \*1 [2d Dept 2025]). Handley's hearsay affidavit upon which the Referee's Report is based is conclusory and does not substantiate the amounts purportedly due to Plaintiff. Accordingly, it is hereby

**ORDERED** that CitiMortgage's motion (mot. seq. four) is denied without prejudice; and it is further

**ORDERED** that Defendant Zaibak's cross-motion (mot. seq. five) is only granted to the extent that CitiMortgage's motion is denied; the cross-motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



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