

**Citimortgage, Inc. v Burke**

2025 NY Slip Op 32920(U)

February 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 511394/2014

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, 11201 on the 25th day of February, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,  
Acting Justice.

-----X  
CITIMORTGAGE, INC.,

Plaintiff,

- against -

KEATHA C. BURKE; JOAN RICKS; LESLEEN  
WATSON; ET AL,

Defendants.  
-----X

MS #9 + MS #10

Index No. 511394/2014 ✓

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed  
Notice of Cross-Motion/Affidavits (Affirmations) Annexed  
Opposition to Cross-Motion

206-231; 236  
238-247; 252-256  
250-251

Upon the foregoing papers in this proceeding, plaintiff moves (under mot. seq. 9) for an order (1) confirming the referee’s report; (2) granting a judgment of foreclosure and sale; (3) directing the distribution of sale proceeds; and (4) declaring that all non-appearing and non-answering defendants are in default. Defendants Keatha C. Burke, Joann Ricks, and Lesleen Watson (“defendants”) cross-move (under mot. seq. 10) got an order dismissing plaintiff’s complaint.

**Background**

Plaintiff commenced the instant action on December 3, 2014 to foreclose on the subject mortgage encumbering the subject property located at 1278 Flatbush Avenue,

Brooklyn, New York. A settlement conference was held on April 15, 2015, but the matter was released from the settlement part, following defendants' failure to appear. On May 13, 2016, plaintiff moved for an granting an order of reference, and the court denied plaintiff's motion by order dated July 26, 2016, for an insufficient certificate of merit. On April 25, 2017, plaintiff moved for its second attempt at an order of reference, and defendant cross-moved for dismissal. By order dated December 28, 2017, the court set the matter down for a traverse hearing. The parties then entered into a stipulation to withdraw their respective motions, except for the portion of the motion related to defendant Joann Ricks, and defendants were permitted to serve late answers. Following a finding of proper service on defendants, the court denied both plaintiff's and defendants' motions.

Plaintiff moved for its third attempt at summary judgment and an order of reference on August 27, 2018, and the court granted plaintiff's motion by order dated January 16, 2019. Plaintiff then moved to confirm the referee's report and for a judgment of foreclosure and sale, on October 30, 2019. By order dated March 4, 2020, the court denied plaintiff's motion, finding that referee's findings were not supported by admissible evidence.

On May 7, 2022, defendants moved to renew the court's January 16, 2019 decision granting plaintiff's motion for summary judgment. By order dated December 8, 2022, the court granted defendants' motion and vacated the January 16, 2019 decision granting summary judgment in favor of plaintiff and an order of reference, based on the now overturned *Kessler* decision. Plaintiff then moved to renew the court's December 8, 2022 decision, following the Court of Appeals overturning of *Kessler*, to reinstate the order granting summary judgment and an order of reference. By order dated July 6, 2023, the

court granted plaintiff's motion, and upon renewal, restored the court's January 16, 2019 decision granting summary judgment in favor of plaintiff.

Plaintiff now files the instant motion for a judgment of foreclosure and sale, and defendant cross-moves for dismissal based on plaintiff's failure to comply with RPAPL §1306, and the referee's report being based on unidentified records.

### *Discussion*

#### **I. Referee's Report**

In opposition to plaintiff's motion to confirm the referee's report, defendant asserts that the referee's findings are not supported by the record, as plaintiff fails to substantiate the total amount claimed in escrow, and further fails to provide payment documentation from 2010-2018, as claims in the referee's report.

Here, the referee relied upon the affidavit of Daniel Anderson, the vice president of document execution at Cenlar FSB, plaintiff's servicer. Anderson asserts that defendants defaulted on the note and mortgage starting March 1, 2010, and annexes a payment history. The payment history attached to the referee's report spans from April 2, 2019 to January 1, 2024. The earliest payment history displays an escrow balance of \$98,189.43, but does not account for the almost eight year time period starting from the date of default.

"[T]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records" (*Wilmington Sav. Fund Soc'y, FSB v. Mehraban*, 146 N.Y.S.3d 130, 132 [2d Dept 2021]; see *Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768–

769; *Bank of N.Y. Mellon v. Fontana*, 186 A.D.3d 445; *U.S. Bank N.A. v. Calabro*, 175 A.D.3d 1451, 1452).

## II. RPAPL §1306

By order dated January 16, 2019, the court granted a default judgment against defendant Joann Ricks, and dismissed all affirmative defenses and counterclaims of defendants Keatha C. Burke and Lesleen Watson, with prejudice.

As defendant Joann Ricks has not moved to vacate her default judgment, she does not have standing to now raise the affirmative defense of RPAPL §1306. Similarly, the court has already considered and dismissed defendants Keatha C. Burke and Lesleen Watson's fifth affirmative defense of RPAPL §1306.

Accordingly, the court cannot conder defendants' argument.

Accordingly, it is

**ORDERED** that plaintiff's motion (mot. seq. 9) is denied without prejudice and the referee is directed to issue a new report based on documents that support the computation; and it is

**ORDERED** that defendants' cross-motion (mot. seq. 10) is denied in all respects.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREFIM B. NECKLES  
A. J. S. C.

**HON. DEREFIM B. NECKLES  
A.J.S.C.**