

**Nationstar Mtge. LLC v Onuoha**

2025 NY Slip Op 33064(U)

July 9, 2025

Supreme Court, Kings County

Docket Number: Index No. 515201/17

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1, 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, on the 9<sup>th</sup> day of July, 2025.

P R E S E N T:

HON. CENCERIA P EDWARDS,  
Justice.

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NATIONSTAR MORTGAGE LLC,

Plaintiff,

-against-

Index No.: 515201/17  
MS 4-6

ANAGHA ONUOHA et al,

Defendant,

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and Affidavits (Affirmations)  
Annexed \_\_\_\_\_

170-175

Opposing Affidavits (Affirmations) \_\_\_\_\_

178

Affidavits/ Affirmations in Reply \_\_\_\_\_

180

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 608 Georgia Avenue in Brooklyn (Block 3837, Lot 54), Plaintiff moves for summary judgment and an order of reference. Defendants Anagha Onuoha and Famek Management 2 Corp move for an order vacating the calendar marking that marked MS 5 off, restoring that motion to the calendar to be decided along with MS 4, and upon review thereof granting MS 5 and denying MS 4. Plaintiff opposes the requested relief.

### *Background Facts and Procedural History*

Plaintiff commenced the instant foreclosure action on August 7, 2017. While all defendants were allegedly served with the summons and complaint, only Onuoha and Famek Management timely answered.

On February 5, 2018, Plaintiff moved for summary judgment and an order of reference. Defendants opposed and cross-moved to stay determination of Plaintiff's motion and for the case to be restored to the Foreclosure Settlement Conference Part.<sup>1</sup> By order dated October 24, 2018, Plaintiff's motion was granted and Defendants' denied. The Court, however, set the matter down for a conference to see if a settlement could be reached. Efforts appear to have proven unsuccessful.

Plaintiff filed a motion for judgment of foreclosure and sale on May 9, 2019. Defendants opposed, arguing among other things that the referee's calculations were not supported by admissible evidence. The Court agreed, denying the motion by order dated November 14, 2019.

On December 20, 2021, Plaintiff again filed a motion for judgment of foreclosure and sale [MS 4], now seeking to confirm a new report by the appointed referee. Defendant opposed and cross-moved [MS 5] for dismissal of the action for failure to comply with Kings County Uniform Civil Term Rule F 8. Therein, they argued that Plaintiff had unduly delayed the filing of the instant motion for judgment of foreclosure and sale. Defendants also asserted that the business records ostensibly relied upon by the referee were not proffered and that the hearing was held without notice to their counsel.

In response, Plaintiff argued that its initial motion for judgment of foreclosure and sale was timely filed and, thus, it satisfied the deadline of UCTR F 8. It additionally noted that its delay was largely occasioned by the COVID-related foreclosure moratoria and did not prejudice Defendants. Further, it countered, there is no requirement for a hearing and Defendant's counsel was served with the proposed Referee's Report prior its issuance and, while he did not challenge the calculations at that time, can still do so at this juncture. Finally, Plaintiff argued that the

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<sup>1</sup> Upon Defendants' failure to show up at two scheduled pre-settlement conferences, the matter was previously released on December 13, 2017.

proffered affidavit from an employee of Nationstar provided a sufficient foundation for the referee's findings.

In reply, Defendants reiterated that Plaintiff's motion is untimely and that no excuse for the default was advanced. They further assert that Plaintiff's affiant was merely making conclusory statements without setting forth the basis for her knowledge of the records.

By order dated January 4, 2023, the motions were transferred from this part to Part FSMP and, per the transfer order, the matter calendared there for hearing on February 9, 2023. On that date, Plaintiff's counsel appeared and Defendants' counsel did not. MS 4 was marked fully submitted and MS 5 marked off.

Two days later on February 11, 2023, Defendants filed the instant motion by order to show cause.<sup>2</sup> Therein, counsel asserts that he erroneously calendared the motions for submission rather than appearance and, thus, did not appear. Consequently, Defendants seek to have their cross-motion restored and decided with Plaintiff's motion for judgment of foreclosure and sale. The Court notes that Plaintiff's motion had already been granted prior to the filing of the instant motion, albeit the order had not yet been entered. As such, Defendants' motion will be treated as also seeking to vacate the order issued on default.

In opposition, Plaintiff argues that Defendants' counsel's excuse for his non-appearance is not reasonable as the rules of Part FRP-1 make it clear that appearances are required.

In reply, Defendants' counsel notes that the motion was before Part FSMP rather than FRP-1 and that motions there were at times submitted without argument. He further notes that he made the instant motion to restore in an extremely expeditious manner and, thus, there would clearly be no prejudice were the cross-motion restored.

### *Analysis*

"A party seeking to vacate an order entered upon its default in appearing on the return date of a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*American Brokers Conduit v Zamalloa*, 206 AD3d 959, 960 [2d Dept 2022]). "[T]he court has the discretion to accept law office failure as a reasonable

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<sup>2</sup> The order to show cause was signed on February 15, 2023.

excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue” (*Horio Realty Corp v Hunts Point Flower Market, Inc*, 181 AD3d 571, 572 [2d Dept 2020]). Here, counsel offers a credible explanation for his failure to appear, the motions are already fully briefed, and the instant motion was filed expeditiously. The marked off motion and the included opposition are potentially meritorious. As such, restoration is warranted. Rather than recalendaring the fully briefed motions, this Court agrees with Defendants that they should now be decided on the papers.

Pursuant to UCTR F,7<sup>3</sup>, “[w]ithin one year after the signing and entry of an Order of Reference, an application for a Judgment of Foreclosure and Sale must be made ... [and f]ailure to comply will result in an automatic dismissal of the action.” Here, however, it is undisputed that Plaintiff made its initial motion for judgment of foreclosure and sale within one year of the issuance of the order of reference. As such, “an application” was timely made. Nothing in the rule mandates the timing of a renewed motion for judgment of foreclosure and sale and, thus, Plaintiff’s delay – likely excusable in light of the moratoria and resultant uncertainty when cases would be able to proceed – is of no moment.

Failure to notice or hold a referee’s hearing does not provide grounds for rejecting her findings absent demonstrated prejudice – which is not present where, as here, Defendants had the opportunity to “raise questions and submit evidence directly to the Supreme Court” in opposition to a motion to confirm the referee’s report (*Deutsche Bank v Smith*, 211 AD3d 817 [2d Dept 2022]).

“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. The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute” (*Citimortgage, Inc. v Kidd*, 148 A.D.3d 767, 768 [2d Dept 2017][internal citations omitted]). “A referee's findings should not be deemed substantially supported by the record when those findings are based upon inadmissible evidence” (*US Bank v Winnie Realty Group*, 237 AD3d 871, 873 [2d Dept 2025]).

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<sup>3</sup> Formerly, F,8.

Here, the referee claims to have considered, among other things, “Affidavit of Merit and Amount Due” and “Payment History.” Neither are attached to her report. Plaintiff directs the Court’s attention to the Affidavit of Minh Nghiem, appended to the opposition to the cross-motion as Exhibit J. As the date of the affidavit and the breakdown of the amounts due and owing contained therein are consistent with the referee’s conclusions, it is possible – but not definite – that she relied upon it. Further, the exhibits to the affidavit are not reproduced as part of Exhibit J – so the affiant’s conclusions, explicitly based upon computerized records, are inadmissible hearsay. Even were the Court to consider the copy of the Nghiem Affidavit attached to Plaintiff’s moving papers as Exhibit G which includes the referenced exhibits, there is still no direct connection between the affidavit and the referee’s report. Further, while Nghiem proffers a “payment history” as Exhibit 4, she does not provide a sufficient foundation for its admissibility. Though she professes a familiarity with the creation and maintenance of Nationstar’s records, she does not attest that the payment history is such a record or address it in any detail. Further, while perhaps the escrows and interest could be calculated from the “payment history” and note, there is no indication that the affiant or referee did so. In light of the foregoing, the referee’s findings are not supported by admissible evidence.

### *Conclusion*

Accordingly, it is

**ORDERED** that Defendants’ motion to vacate [MS 6] is granted to the extent that the calendar marking reflecting that MS 5 was marked off is vacated, the judgment of foreclosure and sale is vacated, and MS 5 has now been considered along with MS 4; and it is further

**ORDERED** that Plaintiff’s motion for judgment of foreclosure and sale [MS 4] is now denied; and it is further

**ORDERED** that Defendant's cross-motion to dismiss [MS 5] is now denied on the merits.

This constitutes the decision and order of the Court.

ENTER:



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