At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 29th of December 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

FLAGSTAR BANK, N.A.,

Plaintiff,

-against-

EVIATAR M. MOR, 12248 GROUP INC. BORO PARK HOME DÉCOR LLC NEW YORK CITY ENVIRONMENTAL CONTROL BOARD TCF NATIONAL BANK; JOHN DOE (NAME REFUSED)

Defendants.

Index No. 529250/2023

Decision and Order
(Motion Seq. 2 and 3)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 69-85
Opposition Papers	NYSCEF Doc. 88
Notice of Cross-Motion	NYSCEF Doc. 89-102
Reply to Motion	NYSCEF Doc. 103-104
Opposition to Cross-Motion/Reply	NYSCEF Doc. 107
Reply to Cross-Motion	NYSCEF Doc. 108

Upon the foregoing papers, the motion(s) is/are determined in accordance with this Decision and Order as follows:

Relevant Procedural History

Prior to commencement of the instant action, the real property known as 1222 48th Street, Brooklyn, NY 11219 (the "property") was owned jointly by Nathan Tropp and Udy Tropp.

On March 24, 2014, Nathan Tropp, Udy Tropp and Shimchu Corp. purportedly transferred the property to Yishtabach Shimchu NY, LLC ("Shimchu LLC"). The signature page to the deed appears to be cut off, but the notarization block on the second page reflects that the deed was executed by Nathan Tropp, Udy Tropp and Abraham Unger on April 28, 2014. The deed was recorded in the Office of the City Register on April 4, 2013 under CRFN 2013000135354

On August 1, 2018, Shimchu LLC purportedly transferred the property to defendant borrower Eviatar M. Mor (the "defendant borrower"). As reflected by the notary block, the deed was apparently executed by Abraham Unger on August 1, 2018. The deed was recorded in the Office of the City Register on May 5, 2014 under CRFN 2014000150474. On the same date

defendant borrower executed the subject mortgage (the "mortgage") which was recorded in the office of the City Register on August 7, 2018 under CRFN 2018000264321

On January 30, 2023, defendant borrower purportedly transferred the property to defendant 12248 Group Inc. ("defendant owner") prior to commencement of the action. The deed was recorded in the office of the City Register on February 8, 2023 under CRFN 2023000035240.

On October 10, 2023, this action was commenced seeking to foreclose the mortgage executed by defendant borrower encumbering the property.

Defendant John Doe #1 was served with the summons and complaint on October 25, 2023, in hand in accordance with CPLR 308[1] at the property. The affidavit of service does not reflect a specific unit where the person was allegedly served.

On February 12, 2024, defendant borrower and defendant owner joined issued with the filing of an answer asserting various affirmative defenses.

On March 6, 2025, the Court granted plaintiff's motion for summary judgment and issued an order of reference over defendants borrower and owner's objections.

Non-Party Select Portfolio Servicing Inc. ("SPS"), as plaintiff's alleged assignee now moves to confirm the referee's report and for a judgment of foreclosure and sale and to amend the caption to substitute SPS as party plaintiff. The referee's report relies on the affidavit of Cynthia May ("Ms. May" or May Affidavit") of SPS to which is annexed the affidavit of Diane L. Derenge ("Ms. Derenge" or "Derenge Affidavit") of plaintiff and alleged business records of SPS and plaintiff. Plaintiff contends that the referee's report is substantially supported by the record and should therefore be confirmed.

Defendant borrower and defendant owner oppose the motion arguing that the motion should be denied because the referee's report is not substantially supported by the record. Specifically, defendants contend that the report is not "substantially supported by the record," because it relies on inadmissible hearsay, that SPS failed to produce the underlying business records or lay a proper foundation under CPLR 4518[a] for records created by prior servicers, improperly includes more than $61,000 in unsubstantiated advances, contains a material mathematical error inflating the interest calculation, and was issued without a required hearing.

In reply plaintiff argues that Defendants' objections to the Referee's Report are waived and meritless because Defendants failed to submit any written objection to the referee or any affidavit from a person with personal knowledge. Plaintiff contends the report is substantially supported by admissible business records, including integrated payment histories and servicer affidavits satisfying CPLR 4518(a), that documentary proof establishes all escrow advances and correct interest accrual and defendants' claimed interest overcharge results from a misunderstanding of how interest accrues and that no evidentiary dispute exists requiring a hearing.

Tropp claiming to have been allegedly served as a John Doe, cross-moves to pursuant to CPLR 5015[a][1] and [a][4] to vacate the order granting summary judgment, pursuant to CPLR 2221[e] to renew and reargue the motion for summary judgment upon new facts and to dismiss the

action pursuant CPLR §5015[a][4] and CPLR 3211[a][8] for lack of personal jurisdiction. Tropp argues that plaintiff failed to exercise due diligence in identifying and serving her as a party in possession, improperly relied on CPLR 1024 "John Doe" pleading, and never obtained personal jurisdiction over Tropp. Tropp further contends that the action must be dismissed because the underlying deeds conveying title to defendant borrower are void due to lack of signatures, defective acknowledgments, and forgery and raising triable issues of fact that preclude foreclosure and require dismissal or at least denial of summary judgment.

In opposition to the cross-motion, plaintiff argues that Tropp's cross-motion must be denied because she lacks standing to seek vacatur or dismissal under CPLR 5015 and CPLR 3211, because she is not a party did not move to intervene. Plaintiff contends that even if she were a party, Tropp failed to show a reasonable excuse for her default or a potentially meritorious defense, her forgery claims are contradicted by the presumption of validity afforded to duly acknowledged and recorded deeds, are undermined by her husband's failure to dispute his own signature, and in any case are barred by laches. Plaintiff further contends that lack of joinder of Tropp does not warrant dismissal but, at most, joinder, and that Tropp cannot collaterally attack recorded deeds or seek to void them by motion and relief must be pursued in a separate plenary action.

In reply, Tropp argues that plaintiff does not dispute the core facts establishing lack of jurisdiction and defective title, that Tropp was in possession, was never served, and that Plaintiff conducted no due diligence under CPLR 1024. Tropp argues that formal intervention was unnecessary because she was already a John Doe party when the action commenced and, in any event, necessary-party joinder may be raised at any time. She reiterates that the two deeds forming the chain of title are facially void due to missing signatures, defective acknowledgments, and forgery, rebutting any presumption shifting the burden to plaintiff and reliance on laches and equitable estoppel are misplaced because the defects were apparent on the face of the recorded instruments and plaintiff had inquiry notice and thus lack clean hands. She argues that at the very least material issues of fact exist.

Discussion

Here, given Tropp's challenge to the Court's jurisdiction, Tropp's cross-motion shall be considered first.

"When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default." *Roberts v Anka*, 45 AD3d 752 [2d Dept 2007])

Indeed, "[a] court may not rule on the excusable nature of a defendants default under CPLR 5015(a)(1) without first determining the jurisdictional question." *Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817 [2d Dept 2019]; See also *Harrison v Schottenstein*, 228 AD3d 848, 850 [2d Dept 2024]["That jurisdictional question must be resolved before determining whether it is appropriate to grant a discretionary vacatur of the default"]

"Pursuant to RPAPL 1311(1), "necessary defendants" in a mortgage foreclosure action include, among others, "[e]very person having an estate or interest in possession, or otherwise, in

the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein." *U.S. Bank Tr., N.A. v Gedeon*, 181 AD3d 745 [2d Dept 2020]

"The New York State Legislature has recognized that there are circumstances where a party is ignorant, in whole or in part, of the identity of a person who should be made a party to an action. CPLR 1024 allows for the commencement of an action against an unknown party "by designating so much of his name and identity as is known"...To be effective, a summons and complaint must describe the unknown party in such a manner that the "Jane Doe" would understand that she is the intended defendant by a reading of the papers..." *Bumpus v New York City Tr. Auth.*, 66 AD3d 26 [2d Dept 2009]

In the instant matter, plaintiff commenced the instant action against inter alia:

> ""JOHN DOE#1" through "JOHN DOE#12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any having or claiming an interest in or lien upon the premises, described in the complaint"

It is undisputed that only a single person was served as a John Doe defendant who allegedly refused his name and was described as a male, with white skin, brown hair, 35-40 years of age, 5'9"- 5'11" in height and weighing 170-190 lbs.

It is further undisputed that the John Doe served was not Tropp and therefore she is not John Doe. #1. Upon being granted summary judgment and order of reference, the Court struck all the John Doe defendants other than John Doe #1 who was served. Plaintiff does not claim that Tropp is a party, was a party or that she was served. Contrary to Tropp's contentions, just because the complaint originally name multiple John Doe defendants does not ipso facto make her a party now. As such, to the extent Tropp contends she was entitled to appear as another John Doe party, she should have done so prior to the action being discontinued against the remaining John Doe defendants or should have sought intervention after the discontinuance.

However, the Court need not, and expressly does not opine of the merits of Tropp's contentions as to the viability of title and the mortgage. Assuming there is some defect in the conveyance from Shimchu Corp. to Shimchu LLC, and the deed to defendant owner and the mortgage are void, Tropp's rights would be superior to that of defendant borrower, defendant owner and plaintiff's mortgage, her absence from the action leaves whatever rights she may have unaffected by these proceedings and any sale would simply be an assignment of mortgage. *See Polish Nat. All. of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400 [2d Dept 1983]["The absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale...While the foreclosure sale may be considered void as to an omitted party...it is nonetheless effective to vest the purchaser with the interests of the mortgagee, the named defendants and persons acquiring interests from the defendants after the notice of pendency"]; *Robinson v Ryan*, 25 NY 320 [1862]["The purchaser at a mortgage sale under an attempted statutory foreclosure, void as against the mortgagor for want

of notice, stands as an assignee of the mortgage."]; *Miner v Beekman*, 50 NY 337 [1872]["But the purchaser, at a mortgage sale ineffectual to pass the title, acquires thereby title to the mortgage"]; *Gokhvat Holdings LLC v U.S. Bank N.A., Tr. to Bank of Am., N.A.*, 23-300, 2024 WL 677078, at *2 [2d Cir Feb. 20, 2024]["While a purchaser at a foreclosure sale, defective and void as against the owner of the equity of redemption, because he was not made a party to the foreclosure action, becomes assignee of the mortgage…the mortgagee does not retain an interest in the mortgage or the property."][internal citation and quotation marks omitted]

Therefore, given that Tropp is not a party and has not yet sought intervention, she does not have standing to seek vacatur of the order of reference and to seek dismissal of this action.

In so far as Tropp seeks to renew and reargue, the same must be denied because there was no previous motion or opposition filed by Tropp capable of being renewed or reargued. Rather this is the first motion made by Tropp.

Accordingly, Tropp's cross-motion is denied in its entirety. However, because the Court only recently ordered the discontinuance of the action against the John Does and it being undisputed that Tropp is an occupant of the property claiming an interest therein, Tropp shall be permitted to seek intervention, upon a proper, thorough showing of her interest in the property. Additionally, given the allegation of deed fraud which this Court finds troubling and takes very seriously, defendant borrower and Tropp are directed to explain the relevant deed transfers and history of this matter. Based upon the briefing the Court will determine whether a criminal referral to the District Attorney or Attorney General is appropriate

Nevertheless, turning to non-party SPS's motion to confirm the referee's report, CPLR 4403 provides in relevant part that "[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part…the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing."

Pursuant to CPLR 4403, the Court has the express authority to act "on its own initiative" regardless of whether parties so move. See *Breland v Motor Veh. Acc. Indem. Corp.*, 24 AD2d 881 [2d Dept 1965]["Rule 4403 of the CPLR was specifically enacted, in part, to overrule the holding in Rosenfield v. Rosenfield, 272 App.Div. 547, 74 N.Y.S.2d 82, that the court must await a formal motion before confirming or rejecting a referee's report, and to reaffirm the court's power to act on its own initiative"]

Here, SPS failed to establish it has standing to make this motion or continue this action. While SPS submits an assignment of mortgage from plaintiff to SPS, the same does not assign the note. "While assignment of a promissory note also effectuates assignment of the mortgage…the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it." *U.S. Bank Nat. Ass'n v Dellarmo*, 94 AD3d 746 [2d Dept 2012][internal citations and quotation marks omitted]; See also *Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2d Dept 2011]["an assignment of the mortgage without assignment of the underlying note or bond is a nullity"]

While Ms. May states in a conclusory fashion that SPS, "directly or through an agent, has possession of the Note, has rights of the holder, and is entitled to enforce the instrument." Ms. May does not reference or annex the records she claims to have read and does not claim to have personal knowledge of this fact.

"Although, [t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business…it is the business record itself, not the foundational affidavit, that serves as proof of the matter…Accordingly, [e]vidence of the contents of business records is admissible only where the records themselves are introduced…Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay" *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019][internal citations and quotation marks omitted]

Therefore, SPS failed to establish it has standing to make this motion, to maintain this action or to be substituted as party plaintiff. *See e.g. Citicorp Mortg. v Adams*, 153 AD3d 779 [2d Dept 2017]["Here, the plaintiff failed to demonstrate that it transferred its interest in the action to FNMA and, therefore, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion pursuant to CPLR 1018"]; *U.S. Bank N.A. v Medina*, 230 AD3d 1371 [2d Dept 2024]["U.S. Bank also failed to establish that the caption should be amended to substitute U.S. Bank as the plaintiff. Leave to amend a caption to substitute an assignee for the plaintiff may properly be granted upon evidence that the mortgage and underlying debt were assigned to the assignee"]; *Citimortgage, Inc. v Bredehorn*, 160 AD3d 803 [2d Dept 2018]["The Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion…to amend the caption by substituting FNMA as the plaintiff…Although the plaintiff submitted evidence that the mortgage was assigned to FNMA, there was no evidence in admissible form of an assignment of the note or a transfer of possession of the note to FNMA."]

Accordingly, non-party SPS is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221.

Moreover, the referee's contention that the property should be sold in one parcel is unsupported by the record in as much as the report does not reflect the evidence considered in reaching such conclusion and plaintiff's affiant did not offer any testimony or evidence pertaining to same. See *Wells Fargo Bank, N.A. v Laronga*, 219 AD3d 1559 [2d Dept 2023)[" Moreover, while the referee's report found that the mortgaged premises should be sold in one parcel, the referee failed to identify the documents or other sources upon which she based that finding"]; See also *Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]

Therefore, the referees report is not substantially supported by the record and plaintiff's motion must be denied. See *Wells Fargo Bank, N.A. v Laronga*, 219 AD3d 1559 [2d Dept 2023]; *Citimortgage, Inc. v Kidd*, 148 AD3d 767 [2d Dept 2017]

However, neither party has briefed what the proper remedy and procedure is, in circumstances where a party fails to prove its damages, as the plaintiff has here. Therefore, the parties are directed to brief the issue.

The parties' remaining contentions need not be reached in light of the Court's determinations

Accordingly, it is hereby

ORDERED, that non-party SPS's motion is DENIED in its entirety; and it further

ORDERED, that non-party SPS is precluded from participating in these proceedings, until such time as it can demonstrate entitlement to relief pursuant to CPLR 5015[a][2], CPLR 5015[a][5] or CPLR 2221; and it is further

ORDERED, non-party Tropp's cross-motion is DENIED WITHOUT PREJUDICE with leave to seek intervention upon a proper showing; and it is further

ORDERED, that the parties and Tropp are directed to brief the issue of what the proper remedy and procedure is, in circumstances where a party fails to prove its damages, within sixty (60) days of entry of this Order; and it is further

ORDERED, that within forty-five (45) days of entry of this Order, defendant Eviatar M. Mor, Udy Tropp and Nathan Tropp are each directed to submit testimony in the form of affirmations under penalty of perjury, explaining the history of this matter, including the deed transfers, the identities of the various corporate grantees/grantors of the subject property and the relationship to defendant Eviatar M. Mor, Udy Tropp and Nathan Tropp.

This constitutes the decision and order of the Court.

ENTER:

Hon. Menachem M. Mirocznik, JSC