Bank of N.Y. Mellon v Bistritzky
2026 NY Slip Op 30249(U)
January 1, 2026
Supreme Court, Kings County
Docket Number: Index No. 508444/2019
Judge: Menachem M. Mirocznik

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 1st of January 2026

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

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS LOAN TRUST 2007-OA4, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-OA4,

Plaintiff,

-against-

MORDECHAI BISTRITZKY INDIVIDUALLY AND AS HEIR AT LAW AND DISTRIBUTE OF THE ESTATE OF CHAYA BISTRITZKY A/K/A CHAYA BISTRITZKY ELKON A/K/A CHAYA ELKON; ET AL

Defendants.

Index No. 508444/2019

Decision and Order
(Motion Seq. 4 and 5)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 176-195
Opposition Papers	NYSCEF Doc. 198-199
Reply Papers	NYSCEF Doc. 200-201
Notice of Cross-Motion	NYSCEF Doc. 202-204
Opposition To Cross-Motion	NYSCEF Doc. 205-208
Reply to Cross-Motion	NYSCEF Doc. 209

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

Relevant Procedural History

This action was commenced on April 15, 2019, seeking to foreclose a mortgage (the "mortgage") executed by Chaya Bistritzky (the "Chaya") and Mordechai Bistritzky ("Mordechai") (encumbering the property known as 1418 East 29th Street Brooklyn, New York, 11210 (the "property").

On June 17, 2019, Chaya and defendant Mordechai, appeared through Attorney Jerome E. Goldman and joined issued with the filing of an answer which asserted numerous and mostly baseless affirmative defenses.

Chaya died on December 4, 2019 and by order dated January 25, 2023, the Court granted plaintiff's motion to substitute the heirs and distributees of the estate of Chaya, to amend the caption, for leave to filed and serve a supplemental summons and amended complaint, to appoint a guardian ad litem and to serve same by publication.

On February 6, 2023, plaintiff filed its supplemental summons and amended complaint.

Despite being served with the January 25, 2023 order and the supplemental summons and amended complaint by NYSCEF, defendant did not file an answer to the amended complaint.

On May 18, 2023, plaintiff moved for a default judgment and order of reference.

On June 20, 2023, plaintiff and defendant executed a stipulation adjourning the motion to July 25, 2023 and required defendant to submit opposition papers to the motion at least two weeks before the return date of the motion.

On July 14, 2023, plaintiff and defendant further stipulated to adjourn the motion to September 20, 2023 and required defendant to submit opposition papers to the motion at fifteen before the return date of the motion.

On September 20, 2023, plaintiff and defendant again stipulated to adjourn the motion to October 26, 2023 and which again required defendant to submit opposition papers to the motion at least two weeks before the return date of the motion.

On October 25, 2023, defendant filed untimely opposition papers only one day before the return date of the motion which plaintiff rejected as untimely. Defendant offered no explanation for his default in answering the amended complaint and proceeded to treat the motion as one for summary judgment as opposed to a motion for default judgment. Defendant offered no explanation for the untimely papers and the repeated violation of the various stipulations. Nonetheless, the Court adjourned the motion to November 12, 2023 to provide plaintiff an opportunity to respond.

On November 9, 2023, plaintiff filed reply noting defendant's default, the failure to offer a reasonable for the default and defendant's lack of a meritorious defense.

On November 12, 2023, on the return date of the motion, without leave of Court, defendant filed a surreply which was rejected by plaintiff as unauthorized. Nonetheless, the Court adjourned the motion to December 7, 2023.

On December 27, 2023, the Court granted plaintiff's motion for a default and issued an order of reference. The Court rejected defendant's contentions on the merits and noted that defendant has not even moved to vacate the default.

On January 13, 2025, plaintiff filed the instant motion to confirm the referee's report and for a judgment of foreclosure and sale. The Court scheduled the motion for April 16, 2025.

On April 1, 2025, plaintiff and defendant again executed a stipulation adjourning the motion to May 22, 2025 which required defendant to filed opposition papers at least 7 days before the return date of the motion. The Court adjourned the motion to May 28, 2025.

On May 22, 2023, defendant again filed untimely opposition papers which was rejected by plaintiff. Defendant argued that the report should be rejected due because the referee failed to hold a live hearing in alleged compliance with CPLR 4313, that defendant was allegedly prejudiced by the lack of a hearing, because the report was not filed within 30 days of entry of the order of reference as allegedly required by CPLR 4319, that the referee did not conduct a hearing in the same manner as trial as allegedly required by CPLR 4318 and lastly, that the report was not accompanied by a transcript as allegedly required by CPLR 4320.

On May 23, 2025, plaintiff filed reply to defendant opposition papers. Plaintiff argued that Appellate Division precedent holds that as long as defendant is provided an opportunity to object to the referee's findings there is no prejudice in the referee not conducting a hearing.

The motion was thereafter adjourned several more times, to July 30, 2025, and then to November 12, 2025.

On November 12, 2025, defendant filed consent to change attorney substituting Attorney Austin Shufelt for Attorney Goldman and filed a cross-motion to reject the referee's report and for entry of a judgment for nominal damages. Attorney Shufelt extensively and thoroughly briefed the motion in an attempt to remedy and supplement Attorney Goldman's deficient opposition papers. Defendant challenged the admissibility of the evidence relied upon by the referee in multiple meritorious respects.

Plaintiff rejected the filing and opposed consideration of the cross-motion as improper and untimely. The Court adjourned the motion one final time to November 19, 2025 and directed a short briefing schedule to provide plaintiff an opportunity to respond.

On November 18, 2025, plaintiff filed opposition to the cross-motion and reply to the motion. Plaintiff objected to the cross-motion as timely in accordance with the stipulation previously filed and pursuant to CPLR 4403. Plaintiff further argues that defendant's cross-motion is in reality an improper surreply given that the motion was fully briefed by Attorney Goldman and plaintiff prior to the filing of the cross-motion. Lastly, plaintiff contends the report should be confirmed and contends the evidence relied upon by the referee was admissible.

On November 19, 2025, defendant filed reply addressing plaintiff's contentions and reiterating the arguments pertaining to the admissibility of the evidence.

Discussion

"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 AD3d 767 [2d Dept 2017][citations omitted]

Initially, plaintiff is correct that defendant's cross-motion may not be considered.

Defendant's cross-motion is in effect a surreply. Plaintiff's motion to confirm the referee's report and for judgement of foreclosure and sale was fully briefed. While it appears, that new

counsel for defendant extensively briefed the cross-motion and asserted several meritorious well-reasoned and well-articulated arguments, the same will not be considered in light of the previous opposition filed by Attorney Goldman. As will explained below and unfortunately for defendant, Attorney Goldman's argument are baseless and even frivolous.

First, the Referee was not required to hold a live hearing and defendant was not prejudiced by the alleged lack of notice from the referee or his not conducting a hearing.

The Order of reference does not expressly require a live hearing and in fact indicates same is unnecessary. The order of reference provides that "if necessary the Referee ***may*** take testimony pursuant to RPAPL 1321".

Attorney Goldman does not dispute that on December 6, 2024, he and the referee were provided with a notice of computation, proposed report, computation and all the relevant supporting documents [NYSCEF Doc. 185 at pg 14]. The notice of computation expressly provided that if defendant had any objections, the same were to be submitted to plaintiff and the referee on or before December 20, 2024, that the referee would then determine if a hearing was necessary and that in the absence of any objection, the referee would take the matter on submission only. Attorney Goldman does not contend he submitted any objections are that he even requested a hearing before the referee. He appears to have simply ignored the notice of computation and now speciously claims prejudice because the plaintiff provided notice, not the referee and that the referee should have conducted a live hearing in absence any objections to the proposed computations.

Moreover, Attorney Goldman is well aware that nearly all references to compute in foreclosure actions are typically done on papers. See *McKinney's Practice Commentaries* to CPLR 4320 [Hon. Mark C. Dillon]["Referee trials may be conducted in person or by submissions "on paper." Referees need not conduct hearings if the reference does not include a factual dispute"] citing *Dune Deck Owners Corp. v J.J. & P. Assoc. Corp.*, 85 AD3d 1091 [2d Dept 2011]; *Bd. of Managers of Nolita Place Condominium v Texas Entertainment LLC*, 222 AD3d 577 [1st Dept 2023]["Absent the existence of a relevant factual dispute a referee is not required to hold a hearing prior to issuing a report in every case"]; See also *Trainor v Trainor*, 188 AD2d 461 [2d Dept 1992]["In order to be entitled to an evidentiary hearing...the movant must submit an affidavit sufficient to show the existence of a genuine issue of fact."]; *Wilmington Sav. Fund Socy. FSB v Oppitz*, 198 AD3d 1198, 1199 [3d Dept 2021]["CPLR 4313 requires a referee to notify the parties of the date and place for a hearing. However, "[h]earings may be performed...either on paper or by the taking of in-court evidence"]; *Bank of New York Mellon v Tedesco*, 174 AD3d 490, 492 [2d Dept 2019]["Contrary to the defendant's contention, under the circumstances of this case, the referee was not required to conduct a hearing before issuing his report"]; *Nationstar Mtge., LLC v Hawk*, 173 AD3d 1055 [2d Dept 2019]["Contrary to the defendant's contention, the Supreme Court properly confirmed the referee's report. Under the circumstances of this case, the referee was not required to conduct a hearing prior to issuing her report."]

Attorney Goldman is also well aware that the law is well settled that "as long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to [deny] a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed... Where, as

here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing." *Bank of New York Mellon v Viola*, 181 AD3d 767 [2d Dept 2020] *Flagstar Bank, FSB v Davis*, 215 AD3d 920 [2d Dept 2023]["[w]here, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing"]

Second, Attorney Goldman's arguments that the referee violated CPLR 4319 and CPLR 4320 because the report was not issued within 30 days of entry of the order of reference and lacks a transcript is also patently frivolous.

Initially, CPLR 4319 does not apply to references to report. "CPLR 4319, like CPLR 4318 preceding it, while not actually stating that it applies to only references to determine, makes clear by its content that it is limited to references to determine. Its title "Decision" makes that clear, as only a referee determining a matter, rather than issuing a report and recommendations on a matter, renders a "decision." A referee to report makes only recommendations to the court, which is separately governed by CPLR 4320(b)." *McKinney's Practice Commentaries* to CPLR 4319 [Hon. Mark C. Dillon] citing *John Hancock Mut. Life Ins. Co. v 491-499 Seventh Ave. Assoc.*, 169 Misc 2d 493, 498 [Sup Ct 1996]["a review of the legislative history makes it clear that CPLR 4317–4319 are a series of sections that all relate to referees to determine not referees to report"] *accord Lipsky v Koplen*, 282 AD2d 462 [2d Dept 2001]; *Capili v Ilagan*, 26 AD3d 354 [2d Dept 2006]; *Fuks v Rakia Assocs.*, 228 AD3d 501 [1st Dept 2024], *lv to appeal denied*, 43 NY3d 902 [2025]

CPLR 4320[b] provides that "the referee shall file his report…within thirty days after the cause or matter ***is finally submitted***. Unless otherwise stipulated, a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report." [emphasis added]

The statute expressly provides that the report shall be filed 30 days after the matter is "finally submitted" and does not state the time frame runs from entry of the order of reference. The matter being submitted to referee unquestionably refers to the submission evidence to the referee or the conclusion of a hearing to extent same was required.

As noted above, Attorney Goldman does not dispute that on December 6, 2024, he and the referee were provided with a notice of computation, the proposed report, computation and relevant supporting documents and was provided a deadline for the submission of objections on or before December 20, 2024. It is also undisputed that the referee issued his report on December 24, 2024 and plaintiff filed same on January 13, 2025. [NYSCEF Doc. 165-175].

Accordingly based upon all of the above, the Court rejects Attorney Goldman's contention, finds his contentions completely frivolous and grants plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale.

"Pursuant to 22 NYCRR 130–1.1, a court, in its discretion, after affording a party and/or the attorney for a party a reasonable opportunity to be heard, may impose sanctions against that party or the attorney for a party, or both, for frivolous conduct…Conduct is frivolous if "it is

undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" *M&T Bank v Friedmann*, 217 AD3d 934 [2d Dept 2023]

"Conduct is frivolous under 22 NYCRR 130–1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another". *Falco v Miller*, 170 AD3d 661 [2d Dept. 2019]

"In determining whether the conduct undertaken was frivolous, the court shall consider...the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" *M&T Bank v Friedmann*, 217 AD3d 934 [2d Dept 2023]

22 NYCRR §130-1.1[d] provides that an "award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case."

Here, Attorney Goldman engaged in a pattern of frivolous conduct including dilatory behavior that caused substantial delays in this action including the repeated failure to adhere to his own stipulated briefing schedules, making unauthorized filings and advancing patently frivolous arguments. Indeed, Attorney Goldman's neglect in this specific matter resulted in a default judgment and judgment of foreclosure in the amount of over $1.4 Million being entered against his client and deprived defendant of adequate representation.

Attorney Goldman's conduct is not limited to conduct in this action, is not an isolated incident and has occurred in other matters before this Court. Attorney Goldman has advanced the same or similar arguments in other foreclosure actions before this Court, which have briefed and rejected by the Court on various occasions. It does not appear that Attorney Goldman can claim ignorance of the prevailing law or the plain reading of the relevant statutes.

Nor is this the first time that Attorney Goldman was sanctioned by a Court for frivolous conduct. In *M&T Bank v Friedmann*, 217 AD3d 934 [2d Dept 2023], the Appellate Division affirmed the trial Court's imposition of sanction against Attorney Goldman for frivolously delaying a foreclosure action and making misrepresentations to the Court.

Indeed, a review of Attorney Goldman's attorney registration reveals a previous history of attorney discipline which resulted in Attorney Goldman resigning from the practice of law, in lieu of disbarment for conduct involving dishonesty, fraud, deceit or misrepresentation. See *In re Goldman*, 47 AD3d 151 [1st Dept 2007]["Respondent states that on February 2, 2005, the Supreme Court of Florida suspended him for failure to maintain the full amount of client or third party funds that he was obligated to retain in his trust account and for failure to maintain trust account records. In addition, respondent failed to satisfy the mortgage of a client because he had gambled away the funds; he has since satisfied the mortgage. On December 22, 2005, the Florida court accepted respondent's petition for disciplinary resignation and in its order the court indicated that such

resignation was tantamount to disbarment...In addition to his resignation from the Florida Bar, the Disciplinary Committee received four complaints against respondent from clients who had given him money to invest but instead he gambled away the funds. Although he has made sporadic attempts to repay these clients, he still owes them a total of more than $700,000. Respondent acknowledges that he could not successfully defend himself on the merits against charges alleging that this conduct constitutes a violation of DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation]."] *reinstatement granted* January 24, 2017, Appellate Division First Department, Opinion M-3485 [on condition "petitioner (1) continue to be monitored by the Lawyer Assistance Program of the New York City Bar Association for a period of ten (10) years; (2) continue to attend a gambling recovery program; (3) report to the Attorney Grievance Committee every six months on his progress in making restitution..."]

Accordingly, it is hereby

ORDERED, that plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale is GRANTED; and it is further

ORDERED, that defendant's cross-motion is DENIED; and it is further

ORDERED, that Attorney Goldman shall, within thirty (30) days of entry of this order (1) show cause why this Court should not impose sanctions and penalties on him for frivolous conduct within the meaning of 22 NYCRR §130-1.1 (2) advise of the amount of compensation received by Attorney Goldman for his representation of defendant in this matter and (3) provide for the Court's review, all the papers submitted by Attorney Goldman in opposition to a motion for judgment of foreclosure and sale in any foreclosure action before the Supreme Court for last twenty-four months; and it is further

ORDERED, that Attorney Goldman's failure to strictly and timely comply with the aforementioned order, absent good cause shown, may result in the imposition of further sanctions and penalties.

This constitutes the decision and order of the Court.

ENTER:

Hon. Menachem M. Mirocznik, JSC

KINGS COUNTY CLERK
FILED
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