

Citimortgage, Inc. v Johnson
2026 NY Slip Op 31377(U)
March 20, 2026
Supreme Court, Kings County
Docket Number: Index No. 518562/2019
Judge: Carolyn Walker-Diallo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 320 Jay Street, Brooklyn, New York on the 20th day of March 2026.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

----- X
CITIMORTGAGE, INC.,

Plaintiff,

Index No.: 518562/2019

- against -

DECISION AND ORDER

JOYCE C. JOHNSON, et al.,

Defendants.

----- X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these Motions:

Papers	Numbered
Motion, Affirmations in Support, and Exhibits	NYSCEF Doc. Nos. 149-162
Cross-Motion, Affirmation in Support, and Exhibits	NYSCEF Doc. Nos. 163-177

Motion Sequence #3 & 4

Upon the foregoing cited papers, the Decision/Order on these Motions is as follows:

Non-Party Jerald Miller (“Non-Party Miller”) moves for an order: (1) confirming the referee’s report of sale; and (2) directing the surplus be transferred to the Clerk of the Circuit Court of Cook County, Illinois, to be held in escrow for the benefit of Non-Party Miller and Defendant Joyce C. Johnson (“Defendant Johnson”). Defendant Citibank, N.A. (“Defendant Citibank”) cross-

moves for an order confirming the referee's report of sale and directing disbursement of the surplus to the extent of paying Defendant Citibank's claim, or in the alternative, appointing a referee to ascertain and report the amount due and priority of claims to the surplus funds. Further, Defendant Citibank opposes Non-Party Miller's motion on the grounds that: (1) no affidavit of service of the motion papers was provided; (2) Defendant Citibank has priority as a junior lienor; and (3) Non-Party Miller had no interest in the property and cannot therefore make a claim to the surplus. For the foregoing reasons, Non-Party Miller's motion is DENIED, and Defendant Citibank's motion is GRANTED IN PART and is otherwise DENIED.

RELEVANT PROCEDURAL HISTORY

The subject premises was sold at foreclosure auction on January 11, 2024. *See* Amended Referee's Report of Sale, NYSCEF Doc. Nos. 136, 140. Thereafter, the referee issued a report of sale showing that the property was sold for \$2,100,000.00, leaving a surplus of \$1,743,236.93 ("surplus") after satisfying the amounts due under the judgment of foreclosure and sale. *Id.* The surplus funds were paid into the Kings County Clerk's Office. *See* Receipt of Payment Into Court, NYSCEF Doc. No. 137. Defendant Citibank filed a claim to the surplus on April 18, 2024 in the amount due on the junior mortgage. *See* Notice of Claim to Surplus Monies, NYSCEF Doc. No. 143. The notice of claim was served on the relevant parties.

Thereafter, on April 23, 2024, Non-Party Miller filed a notice of claim to the surplus in an unliquidated amount as may be due as a result of divorce proceedings between Non-Party Miller and Defendant Johnson in a matrimonial action filed under Index Number 552251/2022 in Kings County Supreme Court ("Brooklyn Matrimonial Action"). *See* Notice of Claim to Surplus Monies, NYSCEF Doc. No. 145. On April 4, 2024, the Honorable Lorna J. McAllister issued an order directing that the surplus not be released pending further order of the matrimonial court. *See* Order

of the Honorable Lorna J. McAllister dated April 4, 2024, NYSCEF 142. It appears that Defendant Citibank was not given notice, and that no notice of a deadline to submit claims to the surplus was sent to any parties or potential claimants to the surplus before the application was made to that court. This Court takes judicial notice that the Brooklyn Matrimonial Action was dismissed and discontinued on October 30, 2024¹, and a matrimonial action was filed in Illinois under Index Number 8079/2024 (“Illinois Matrimonial Action”). An order was issued by the Illinois court on January 3, 2025, seemingly directing transfer of all the surplus funds to the Clerk of the Circuit Court of Cook County, Illinois, without accounting for additional surplus claimants. *See* Order of the Circuit Court of Cook County dated January 3, 2025, NYSCEF Doc. No. 157.

DISCUSSION

I. Non-Party Miller’s Motion is DENIED.

“[I]mproper service of a motion provides a complete excuse for default on a motion and deprives the court of jurisdiction to entertain the motion and the failure to provide a defendant with proper notice of a motion renders the resulting order and judgment entered upon that order nullities, warranting vacatur pursuant to CPLR 5015(a)(4).” *Bharath v. Sitaram*, 2026 NY Slip Op 00872, ¶ 1 (2d Dep’t 2026) (Internal citations and quotation marks omitted). Here, no affidavit of service was uploaded for Non-Party Miller’s motion. This case was electronically filed. However, only Plaintiff, Defendant Citibank, the Internal Revenue Service, and Non-Party Miller are participating in electronic filing.

¹ Accordingly, the temporary restraining order issued on April 4, 2024 by order of the Honorable Lorna J. McAllister restraining the funds at issue was lifted pursuant to CPLR 6314.04 at that time.

Non-Party Miller does not submit any affidavit of service that provides for service of the motion papers. There can be no presumption of service upon any parties not participating in NYSCEF. *See* NYSCEF Confirmation Notice for NYSCEF Doc. No. 149, Email Notifications Not Sent. The Confirmation Notice indicates that parties not participating in e-filing must be served with hard copies of motion papers pursuant to court rules. Further, proof of such service must be filed electronically to NYSCEF. *See* 22 NYCRR 202.5-b (b) (2) (i). Additionally, the non-appearance by these additional parties on the motion return date cannot be held as a default. Accordingly, Non-Party Miller has not established service of the motion papers, and therefore the motion must be DENIED.

II. Defendant Citibank's Motion is GRANTED IN PART and is Otherwise DENIED.

“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 to report.’ 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.” *U.S. Bank N.A. v. Maher*, 219 A.D.3d 1372, 1374 (2d Dep’t 2023) (Internal citations and quotation marks omitted), citing CPLR 4403. Therefore, Defendant Citibank’s motion to confirm the referee’s report is GRANTED.

Further, “[s]urplus money proceedings . . . are not collateral to the foreclosure, but are in the action itself[,] [a]nd the rights of lienors subsequent to the mortgage under foreclosure are before the court and must be protected as much as those of the owner of the property. Surplus money from a foreclosure sale is not a general asset of the owner of the equity of redemption, but stands in the place of the property for the purpose of distribution among those having vested interests in or liens on the property. The rights of the parties are fixed at the time of the foreclosure

sale, and the rights of a second lienholder are transferred to any surplus. Under New York law, the lien of a junior mortgagee who is made a party to a foreclosure action brought by a senior mortgagee, although cut-off and extinguished as to the land, continues as a lien upon the surplus funds arising from the foreclosure. [U]pon the foreclosure of the first mortgage, the lien of the second mortgage follow[s] the surplus into the hands of the [municipality's] financial officer, and the remedy of the second mortgagee is to enforce his or her claim in the court by whose direction the foreclosure had taken place.” *Maspeth Fed. Sav. & Loan Assn. v. O’Connell*, 221 A.D.3d 883, 885-86, 201 N.Y.S.3d 75, 78 (2d Dep’t 2023) (Internal citations and quotation marks omitted).

Given its secured position, Defendant Citibank may be entitled to collect surplus funds as a priority claimant before other claimants, including Defendant Johnson and Non-Party Miller. However, the temporary restraining order (“TRO”) issued in the Illinois Matrimonial Action complicates this surplus action. No evidence exists in the record that the TRO was domesticated and that it was issued with notice to Defendant Citibank and other potential claimants with rights superior to Non-Party Miller. Nevertheless, the order may be entitled to full faith and credit. Therefore, this Court may not release surplus funds to the Illinois court absent further order. As such, an order of reference is granted, along with a directive to Non-Party Miller and a respectful recommendation to the honorable Illinois court to consider the priority of claims, on notice to Defendant Citibank and the potential claimants, and for the issuance of an amended order regarding the priority of claims prior to the release of any surplus funds.

CONCLUSION

Accordingly, it is hereby

ORDERED, that Non-Party Miller's motion to confirm the referee's report and for disbursement of surplus funds is DENIED, and that Defendant Citibank's motion to confirm the referee's report is GRANTED; and it is further

ORDERED, that the referee's report and sale be absolute and binding, and this matter is referred to Scott H. Siller, (516) 644-6769, as Referee to compute in this surplus money proceeding, who is to notify in writing all potential claimants, all appearing parties, and the Corporation Counsel of the City of New York, the New York State Attorney General, the United States Attorney for the Eastern District of New York, and any other appropriate persons or parties who have a lien on the surplus funds, to appear and attend a hearing on the distribution of the surplus funds and to conduct said hearing, and to require all persons so appearing to present satisfactory identification, and to ascertain and report the amount due and priority of claims and liens, if any, and to report with all convenient speed; and it is further

ORDERED, that no payment is to be made to the Referee to compute in this surplus money proceeding from the surplus funds pursuant to consent of the parties, but rather all fees, charges, and assessments against surplus funds be made in compliance with statutory requirements to be confirmed by order of this Court; and it is further

ORDERED, that the Referee appointed herein in this surplus funds proceeding is subject to the requirements of Rule 36.2 (c) of the Rules of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that rule, the Referee shall notify the appointing judge forthwith; and it is further

ORDERED, that Non-Party Jerald Miller is directed to make an application to the Illinois Matrimonial Court within thirty (30) days of upload of the instant order to NYSCEF for an amended order from that court, on notice to Defendant Citibank and all potential surplus claimants, having considered the potential conflicting priorities, including the claim of Defendant Citibank; and it is further

ORDERED, that within thirty (30) days of upload of the instant order to NYSCEF, Defendant Citibank is directed to provide notice of a deadline to submit claims to the surplus to any parties or potential claimants to the surplus; and it is further

ORDERED, that the Referee shall not proceed to take evidence or argument until such time as such notice of the deadline to submit surplus claims is provided and any report of the Referee shall provide that proof of such notice was received prior to the issuance of any report, which notice shall be included in any future application to confirm the Referee's report.

This matter is adjourned for a status conference to October 20, 2026, at 9:30 a.m. Defendant Citibank shall serve notice of entry within ten (10) days of the upload of the order to NYSCEF upon Plaintiff, Defendants, Non-Party Miller, and all parties who have appeared in this action, with parties not participating in e-filing to be noticed via first-class mail.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Carolyn Walker-Diallo, J.S.C.