NY CLS CPLR R 4403

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 44 Trial Motions (§§ 4401 — 4406)

R 4403. Motion for new trial or to confirm or reject or grant other relief after reference to report or verdict of advisory jury

Upon 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 verdict of an advisory jury or 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. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.

History

Formerly § 4403, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA §§ 447, 553, 556; RCP 170, 221, 222; CCP §§ 997, 998, 1001, 1003, 1004, 1232; Code Proc §§ 264, 268; Gen Rules Pr 30, 31.

Advisory Committee Notes:

This rule unifies provisions respecting court action after trial by an advisory jury or a referee to report. Under former law, the procedure after verdict of an advisory jury differed from that after a reference to report.

Following verdict of an advisory jury, CPA § 553 permitted a motion for a new trial on the judge's minutes (see CPA § 549), in the appellate court with the permission of the trial court (see CPA § 550) and at Special Term. See CPA § 552. The motion at Special Term must have been at the term where any other issues in the action were tried or at the term at which a motion for judgment in the action was made. RCP 221. Following a referee's report, the motion for a new trial might have been made only at Special Term; it must have been made prior to further trial or to the hearing of a motion for final judgment. CPA § 556.

Where issues had been submitted to a referee to report, under former rule 170, either party might have moved: the prevailing party might have moved for confirmation, his opponent might have asked the court to reject the referee's report in whole or in part or might have opposed the motion to confirm. Rule 170 somewhat ambiguously stated that "after the report is filed either party may move thereon, on notice to all parties interested." The First Department had interpreted this clause as requiring a motion although it acknowledged that in practice the courts had been acting on their own initiative. Rosenfield v Rosenfield, 272 App Div 547, 74 NYS2d 82 (1st Dept 1947). There was no motion, under former practice, to confirm an advisory jury's verdict.

A motion for judgment after an advisory jury's verdict was required only where the last issues to be tried in the action had been submitted to the jury; it might have been made by either party. RCP 194(1). If issues remained to be tried by a court or referee to determine, after trial of such issues the court or the referee directed judgment on the entire action. Id. 194(2). Provisions respecting a motion for judgment after a reference to report were similar to those for motions

after an advisory jury: a motion for judgment was required when no issues remained to be tried. Id. 195, 199.

This rule eliminates the separate motions for confirmation, new trial and judgment which were permitted under former practice and uses the same practice for both advisory juries and referees to report. Unless further trial is required, upon granting a motion for confirmation, the court will render decision on all issues in the action. Where further trial is required, the court may either grant a motion for confirmation or to reject, confirm or reject the report or verdict on its own initiative, or proceed with the trial before a motion is made and confirm or reject the findings of the referee or of the advisory jury in its decision on the entire action.

The decision of the court, whether rendered upon granting a motion for confirmation or to reject or after further trial, is governed by CPLR § 4213 and must be rendered within sixty days after the close of the evidence or within sixty days after a motion under this section, whichever is later. The decision is subject to a post-trial motion pursuant to rule 4404. Thus, theoretically, a party could raise objections to findings of a referee to report or an advisory verdict which are incorporated in the court's decision even though he raised them by a motion to confirm or reject. See notes to rule 4406. If so raised, however, the court may refuse to consider them on the ground that it has previously done so.

The time limitation in this section is the same as that provided for post-trial motions under rule 4405. However, the period may be shorter, where further trial in the action is scheduled. These motions should not be permitted to delay expeditious trial of the remaining issues.

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I. Under CPLR

1. Generally

On its own initiative, special term had power to confirm or reject, in whole or in part, report of special referee relative to signatures appearing on challenged designating petition for candidate for Democratic Party nomination for state senator. Galiber v Previte, 40 N.Y.2d 822, 387 N.Y.S.2d 561, 355 N.E.2d 790, 1976 N.Y. LEXIS 2992 (N.Y. 1976).

CPLR Rule 4403 was specifically enacted, in part, to overrule a judicial holding that 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, and the legislative intent in enacting the provision limiting the parties to 15 days in which to move with respect to a referee's report was to create a period in which the parties might move before the court acted of its own volition. Breland v Motor Vehicle Accident Indemnification Corp., 24 A.D.2d 881, 264 N.Y.S.2d 584, 1965 N.Y. App. Div. LEXIS 3015 (N.Y. App. Div. 2d Dep't 1965).

CPLR Rule 4403 mandates the referring court to confirm or reject, in whole or in part, the referee's report on its own initiative if the parties have not so moved within the 15 day period, and there is no time limitation in which the court may so act. Breland v Motor Vehicle Accident

Indemnification Corp., 24 A.D.2d 881, 264 N.Y.S.2d 584, 1965 N.Y. App. Div. LEXIS 3015 (N.Y. App. Div. 2d Dep't 1965).

Where history of action, which was commenced in March 1972, was replete with dilatory tactics of defendant and his counsel, after matter was finally assigned to referee in October of 1973, numerous adjournments were granted defendant, some of which were made necessary when both defendant and his counsel failed to appear and failed to notify court of their inability to appear, the court, in January of 1975, properly confirmed report of the referee based on the evidence submitted and properly denied motion to reopen. Nagel v Nagel, 50 A.D.2d 764, 377 N.Y.S.2d 69, 1975 N.Y. App. Div. LEXIS 11557 (N.Y. App. Div. 1st Dep't 1975).

Where only issue referred by Special Term to special referee was whether or not $56,000 amount prescribed by supplemental order of attachment was excessive and original $30,000 attachment was not subject of reference, Special Term erred in reducing original attachment upon its adoption and confirmation of referee’s report. PPX Enterprises, Inc. v Scepter Records, Inc., 53 A.D.2d 838, 385 N.Y.S.2d 561, 1976 N.Y. App. Div. LEXIS 13667 (N.Y. App. Div. 1st Dep't 1976), aff'd, 43 N.Y.2d 972, 404 N.Y.S.2d 550, 375 N.E.2d 731, 1978 N.Y. LEXIS 1868 (N.Y. 1978).

In partition action, although order of reference was somewhat unclear as to whether referee had been appointed to determine or to report, any ambiguity in order was not reversible error, since court’s subsequent entertainment of motion to confirm indicated that latter type of reference had been ordered and complaining party had participated in trial by referee, even though without counsel, and had been represented by an attorney on motion to confirm report. Clark v Clark, 55 A.D.2d 985, 390 N.Y.S.2d 685, 1977 N.Y. App. Div. LEXIS 10303 (N.Y. App. Div. 3d Dep't 1977).

Court would confirm referees’ report which concluded that city’s proposed annexation of territory within town was not in over-all public interest where, inter alia, (1) proposed annexation area was wooded and agricultural without current need for water and sewer services, (2) much of

area was incapable of further development, (3) town already had plans in place to provide area with water and sewer service on demand, (4) town currently provided adequate police and fire protection to area, (5) annexation would result in loss of revenue from general and highway tax revenue, (6) city had no comprehensive master plan and did not perform planning studies prior to seeking annexation, and (7) boundaries were chosen arbitrarily and would result in 2 separate, noncontiguous parcels leaving certain town residents completely surrounded by city. Common Council of Middletown v Town Bd. of Wallkill, 143 A.D.2d 215, 532 N.Y.S.2d 17, 1988 N.Y. App. Div. LEXIS 8755 (N.Y. App. Div. 2d Dep't 1988).

Court committed fundamental procedural error when it stated that dismissal was based in part on “report of the Special Master” appointed in previous related “underlying proceeding,” inasmuch as “report” (which was undisclosed) was surplusage that had no impact on outcome of case, “underlying litigation” was never identified, and no formal order of reference or motion to confirm special master’s report was ever made; however, error was harmless where record was fully developed with respect to issues of law presented and plaintiff did not allege that purported “reference” interfered in any way with full advocacy of his position. Caplan v Winslett, 218 A.D.2d 148, 637 N.Y.S.2d 967, 1996 N.Y. App. Div. LEXIS 1531 (N.Y. App. Div. 1st Dep't 1996).

Court properly confirmed report issued by Special Referee concerning defendant’s income and assets, but denied defendant’s motion to vacate installment payment order in favor of plaintiff which was based on Special Referee’s report, as report merely recited defendant’s testimony that he had no income or employment since being fired from his job shortly after issuance of installment payment order and that his wife owned their house, and court merely made findings as to defendant’s credibility that Special Referee did not purport to make. Barrett v Stone, 236 A.D.2d 323, 653 N.Y.S.2d 598, 1997 N.Y. App. Div. LEXIS 1597 (N.Y. App. Div. 1st Dep't 1997).

In action for partition of real property, plaintiff waived his right to assert, for first time on appeal, his objections to referee’s report; in enacting CLS CPLR § 4403, legislature intended that parties point out in what respects, if any, referee’s report or his conduct of proceedings is erroneous.

Passaro v Henry, 251 A.D.2d 390, 673 N.Y.S.2d 322, 1998 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 2d Dep't 1998).

Referee's report requiring wife to pay husband $14,000 as equitable distribution of marital property was properly confirmed where wife did not challenge report by making CLS CPLR § 4403 motion and thus waived her objections to report. Sroka v Sroka, 255 A.D.2d 897, 680 N.Y.S.2d 180, 1998 N.Y. App. Div. LEXIS 12088 (N.Y. App. Div. 4th Dep't 1998).

Plaintiff was entitled to award of attorney fees where parties' security agreement provided that defendant would indemnify plaintiff for attorney fees "incurred by or asserted against [plaintiff] and arising from the occurrence of an Event of Default," and security agreement defined defendant's failure to make payments under subject promissory note as event of default. Award of attorney fees to plaintiff in accordance with parties' indemnity agreement was not precluded by alleged failure of plaintiff to comply with notice and disclosure provision of indemnity agreement where (1) indemnity clause did not require continuing notice each time claim for legal fees increased, (2) summons and complaint, which sought attorney fees in ad damnum clause, gave defendant actual notice of claim, and (3) proceedings and pleadings in litigation, by their occurrence, informed defendant that plaintiff's attorney fees were increasing. Robbins v Profile Records, Inc., 266 A.D.2d 67, 698 N.Y.S.2d 638, 1999 N.Y. App. Div. LEXIS 11638 (N.Y. App. Div. 1st Dep't 1999).

Court properly dismissed complaint in confirming referee's report finding, on clear proof, that plaintiffs repeatedly and willfully failed to comply with their discovery obligations. Stark v Reliance Nat'l Indem. Co., 273 A.D.2d 148, 710 N.Y.S.2d 893, 2000 N.Y. App. Div. LEXIS 7142 (N.Y. App. Div. 1st Dep't 2000).

Additional evidence presented by a former husband in his motion to reject a referee's report in a post-judgment matrimonial proceeding was properly submitted under N.Y. C.P.L.R. 4403 and could be considered by the trial court in ruling on the motion. Olstein v Olstein, 309 A.D.2d 697, 766 N.Y.S.2d 189, 2003 N.Y. App. Div. LEXIS 11285 (N.Y. App. Div. 1st Dep't 2003).

In a proceeding to remove a religious society's board of trustees, an appeal from the denial of a motion for an order rejecting the interim report of the court-appointed referee was dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the proceeding. Matter of Venigalla v Nori, 41 A.D.3d 725, 840 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 7735 (N.Y. App. Div. 2d Dep't 2007), rev'd, 11 N.Y.3d 55, 862 N.Y.S.2d 457, 892 N.E.2d 850, 2008 N.Y. LEXIS 1931 (N.Y. 2008).

Confirmation of a referee's report was proper in a breach of contract suit where the referee found that the distributors presented 23 highly credible fact witnesses, plus three experts familiar with the soft-drink industry while, in contrast, the defense presented two witnesses, who had little or no experience in the industry, and relied on the testimony of a witness whose testimony, according to the referee, had less than marginal credibility; the trial court also properly confirmed the recommendation that the corporate veil and the limited liability company veil be pierced because the referee and the trial court properly considered several factors, including, inter alia, that the assignee was inadequately capitalized and that the assignee and the corporation had overlapping personnel and failed to observe certain formalities such as keeping certain records. Evidence of custom and practice was properly considered, and, based on partial performance, oral agreements were removed from the ambit of the statute of frauds. Last Time Beverage Corp. v F &V Distrib. Co., LLC, 98 A.D.3d 947, 951 N.Y.S.2d 77, 2012 N.Y. App. Div. LEXIS 6092 (N.Y. App. Div. 2d Dep't 2012).

Confirmation of a referee's report in its entirety was error because the record did not support the referee's finding of the total amount borrowed pursuant to the loan agreement, which was inconsistent with the testimony. JNG Constr., Ltd. v Roussopoulos, 170 A.D.3d 1136, 96 N.Y.S.3d 655, 2019 N.Y. App. Div. LEXIS 2370 (N.Y. App. Div. 2d Dep't 2019).

Supreme court properly denied a company's motion to vacate an order of foreclosure and sale because it failed to demonstrate it was entitled to notice of the mortgagee's motion for foreclosure and sale; the motion was not an "application" for a default judgment but sought entry of a judgment of foreclosure and sale, and thus, the notice specified in CPLR 3215(g)(1) was

inapplicable and notice of that motion was instead governed by the general notice provisions applicable to all motions. 21st Mtge. Corp. v Raghu, 197 A.D.3d 1212, 154 N.Y.S.3d 84, 2021 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 2d Dep't 2021).

Unpublished decision: In light of the failure to produce evidence that might have been admissible to contest the referee's computations, defendants failed to reveal error by the supreme court in confirming the referee's report and awarding a judgment of foreclosure and sale on this ground. Carrington Mtge. Servs., LLC v Fiore, 206 A.D.3d 1306, 171 N.Y.S.3d 209, 2022 N.Y. App. Div. LEXIS 3855 (N.Y. App. Div. 3d Dep't 2022).

In a mortgage foreclosure action, plaintiff failed to lay a proper foundation for the records relied upon by the referee to establish defendant's alleged default as the loan servicer employee did not attest that the records of any other entity were provided to it, that it routinely relied upon such records in its business, or that the affiant had familiarity with the business practices and procedures. Therefore, the referee's findings were not substantially supported by the record. U.S. Bank N.A. v Winnie Realty Group, LLC, 237 A.D.3d 871, 232 N.Y.S.3d 63, 2025 N.Y. App. Div. LEXIS 2039 (N.Y. App. Div. 2d Dep't 2025).

Confirming a referee's report and ordering sale of the property in a foreclosure action was error because the record did not substantially support the referee's computation of the amount due, which was premised upon business records that failed to sufficiently identify the loan or the borrower and did not provide an adequate explanation for the completeness of the figures; moreover, the referee failed to identify the basis for recommending the property be sold in one parcel. Wilmington Sav. Fund Socy., FSB v Blick, 2025 N.Y. App. Div. LEXIS 3632 (N.Y. App. Div. 2d Dep't 2025).

No authority is conferred upon a party to move to dismiss his own pleading under this section. Farkas v Farkas, 47 Misc. 2d 827, 263 N.Y.S.2d 214, 1965 N.Y. Misc. LEXIS 1680 (N.Y. Sup. Ct. 1965).

A preference will not be granted unless an action is noticed properly to be placed on the calendar. Vinal v New York C. R. Co., 48 Misc. 2d 362, 264 N.Y.S.2d 824, 1965 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1965).

Plaintiff's failure to timely move to confirm referee's report recommending that personal jurisdiction over defendant be upheld did not bar plaintiff from having report confirmed since statutory 15-day time limitation from date of filing exists to provide parties opportunity to voice objection before court acts and does not affect court's inherent power to act on report. Gould v Venus Bridal Gown & Accessories Corp., 148 Misc. 2d 589, 561 N.Y.S.2d 355, 1990 N.Y. Misc. LEXIS 520 (N.Y. Sup. Ct. 1990).

Trial court rejected a portion of a judicial hearing officer's report, pursuant to N.Y. C.P.L.R. § 4403, which determined that child support arrears were to be reduced to a judgment in favor of a deceased wife's estate, pursuant to N.Y. Dom. Rel. Law § 236(B)(9)(b), as the children lived with the widower after their mother's death, and a judgment in favor of the estate would reduce the amount of finances available for the support of the children; in the unique circumstances of the case at bar, to enforce the arrearage would result in a "grievous injustice," and the arrearage was accordingly vacated. Dembitzer v Rindenow, 799 N.Y.S.2d 373, 8 Misc. 3d 683, 233 N.Y.L.J. 99, 2005 N.Y. Misc. LEXIS 962 (N.Y. Sup. Ct. 2005), rev'd, 35 A.D.3d 791, 828 N.Y.S.2d 139, 2006 N.Y. App. Div. LEXIS 15866 (N.Y. App. Div. 2d Dep't 2006).

Because a referral order specifically asked a judicial hearing officer (JHO) to address the issue of a husband's concession of service, and because the JHO's report made no mention of the point, the husband's N.Y. C.P.L.R. 4403 motion to confirm the report was denied. Raihan v Chowdhury, 240 N.Y.L.J. 13, 2008 N.Y. Misc. LEXIS 4569 (N.Y. Sup. Ct. June 12, 2008).

After a trial on equitable distribution, the referee's recommendation of equal division was confirmed as amended because the wife made considerable and unremunerated efforts as wife and step-mother to the husband's children during a 17-year marriage, at the expense of

amassing any financial assets of her own, and she waived maintenance. S.E. v M.E., 52 Misc. 3d 1224(A), 43 N.Y.S.3d 769, 2016 N.Y. Misc. LEXIS 3209 (N.Y. Sup. Ct. 2016).

II. Under Former Civil Practice Laws

A. Motion For New Trial

i. In General

2. Generally

A motion for a new trial upon the ground that under the evidence the nonsuit granted was improper could only be made upon a case and exceptions. Harris v Gregg, 4 A.D. 615, 38 N.Y.S. 844, 1896 N.Y. App. Div. LEXIS 1635 (N.Y. App. Div. 1896), dismissed, Sackett & Wilhelms Lithographing Co. v Comstock, 153 N.Y. 668, 48 N.E. 1107, 153 N.Y. (N.Y.S.) 668, 1897 N.Y. LEXIS 787 (N.Y. 1897).

The granting of a new trial in an action is governed by former CPA §§ 549 (§ 4404(a), (b) herein), 575, and Rule 221, and should be made before the judge who heard the case. In re Laudy's Will, 14 A.D. 160, 43 N.Y.S. 689, 1897 N.Y. App. Div. LEXIS 230 (N.Y. App. Div. 1897).

A new trial could not be granted except upon a motion made at the term before the justice who tried the action as prescribed by CPA § 549 (§ 4404(a), (b) herein), or upon a case and exceptions as prescribed by RCP 221. Wilcox v Fox, 112 A.D. 560, 98 N.Y.S. 769, 1906 N.Y. App. Div. LEXIS 725 (N.Y. App. Div. 1906).

Notwithstanding CPA §§ 549 (§ 4404(a), (b) herein) and 553 (§ 4403 herein), the trial court to which special issues arising between two defendants in an action for partition were referred for separate trial by jury was without jurisdiction, in view of this rule, to entertain a motion to set

aside the verdict and for a new trial. Marks v Mullen, 195 N.Y.S. 764, 119 Misc. 82, 1922 N.Y. Misc. LEXIS 1419 (N.Y. Sup. Ct. 1922).

Court at Special Term had power to grant a new trial where the motion was made upon a settled and signed case, and was made before the judge who presided at the trial and within the time allowed by law for an appeal from the judgment. Landon v Frank Improv. Co., 211 N.Y.S. 373, 125 Misc. 509, 1925 N.Y. Misc. LEXIS 921 (N.Y. Sup. Ct. 1925).

Where motion was made at succeeding special term and heard by a different judge, case had to be made and settled. Preleson v Ali, 255 N.Y.S. 111, 142 Misc. 296, 1931 N.Y. Misc. LEXIS 1003 (N.Y. Sup. Ct. 1931).

Generally a motion for a new trial had to be heard at special term on a case made pursuant to this rule. Hinman v Stillwell, 34 Hun 178 (N.Y.).

3. On separate trial of special issues

A motion for a new trial, where specific questions of fact have been tried by a jury, could be made before the justice presiding at the trial upon the minutes; but when made at the term where the motion for final judgment was made, the motion had to be made upon a case settled. Friedman v Friedman, 204 N.Y.S. 550, 122 Misc. 700, 1924 N.Y. Misc. LEXIS 846 (N.Y. Sup. Ct. 1924), rev'd, 212 A.D. 823, 207 N.Y.S. 839, 1925 N.Y. App. Div. LEXIS 9830 (N.Y. App. Div. 1925).

4. On trial by court without a jury

A motion by defendant for a new trial, on the ground of newly-discovered evidence, of an action which had been tried by the court without a jury, could not be granted where no case was settled and signed in accordance with this rule. Sachs v Blum, 241 A.D. 384, 272 N.Y.S. 334, 1934 N.Y. App. Div. LEXIS 8256 (N.Y. App. Div. 1934).

On a motion for a new trial in an action tried before a court or referee without a jury, a case and exceptions had to be signed and settled before the judge presiding or referee. Green v Roworth, 23 N.Y.S. 777, 4 Misc. 141, 1893 N.Y. Misc. LEXIS 471 (N.Y.C.P. 1893).

In case the decree of a surrogate was not rendered upon the trial of an issue of fact, an appeal could be brought on without a case under the practice provided for by the latter part of this rule. In re Final Accounting of Jackson, 32 Hun 200 (N.Y.).

5. In Appellate Division

On motion for a new trial in the appellate division case had to be made as above required and according to former CPA § 576. Butts v Abrahams, 232 A.D. 437, 249 N.Y.S. 577, 1931 N.Y. App. Div. LEXIS 13836 (N.Y. App. Div. 1931).

6. Waiver

Where parties argued motion for a new trial upon the ground of newly discovered evidence, at the special term upon the pleadings and affidavits without any objection that case should have been made under former CPA § 575, the special term had power to decide the application. McIver v Hallen, 50 A.D. 441, 64 N.Y.S. 26, 1900 N.Y. App. Div. LEXIS 1005 (N.Y. App. Div. 1900).

The regular practice was that a motion for a new trial should be made on a case, but if the motion is made without a case on affidavit, and the counsel opposing proceeds to argument without objection on that score, he waived his right to require a case to be made, but the affidavit should clearly give the court the information which is usually supplied by the case and which is necessary to a proper decision of the motion. Schuster v Tompkins, 180 A.D. 503, 168 N.Y.S. 187, 1917 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 1917).

A motion for a new trial upon the ground of newly discovered evidence could be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case

was necessary could not be raised for the first time upon appeal from the order entered on such motion. Rosenthal v Bell Realty Co., 103 N.Y.S. 194, 53 Misc. 265, 1907 N.Y. Misc. LEXIS 206 (N.Y. App. Term 1907).

Case on motion for a new trial for newly discovered evidence could be waived. Finkelstein v Grodsky, 248 N.Y.S. 779, 139 Misc. 571, 1931 N.Y. Misc. LEXIS 1179 (N.Y. City Ct. 1931); Appelt v Timpone, 88 N.Y.S.2d 43, 195 Misc. 68, 1949 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct.), rev'd, 275 A.D. 1046, 91 N.Y.S.2d 869, 1949 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div. 1949).

Necessity for a case on motion on grounds of newly discovered evidence was waived by defendant by making the motion on the judge’s minutes. Finkelstein v Grodsky, 248 N.Y.S. 779, 139 Misc. 571, 1931 N.Y. Misc. LEXIS 1179 (N.Y. City Ct. 1931).

7. Divorce cases

In wife’s action for divorce where the jury was required to pass upon the question of adultery of both parties, but left the conduct of plaintiff undecided, the court, at trial term, was authorized to set the defective verdict aside and grant a new trial. Arnold v Arnold, 239 N.Y.S. 98, 136 Misc. 29, 1930 N.Y. Misc. LEXIS 960 (N.Y. Sup. Ct.), aff'd, 230 A.D. 79, 243 N.Y.S. 344, 1930 N.Y. App. Div. LEXIS 8550 (N.Y. App. Div. 1930).

Phrase “triable by the court” does not include adultery issue in divorce case. Lubuk v Lubuk, 42 N.Y.S.2d 594, 181 Misc. 852, 1943 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1943).

8. Review

Dismissal of motion for new trial on ground of false testimony and of newly discovered evidence because not made upon a case settled was not reviewed on appeal. Levine v Krohnberg, 206 N.Y.S. 711, 123 Misc. 921, 1924 N.Y. Misc. LEXIS 1253 (N.Y. App. Term 1924).

ii. Motions On Specific Grounds

9. On ground of newly discovered evidence

Before the 1951 amendment a motion for a new trial on the ground of newly discovered evidence had to be made upon a case. Davis v Grand Rapids Fire Ins. Co., 5 A.D. 36, 39 N.Y.S. 71, 1896 N.Y. App. Div. LEXIS 1661 (N.Y. App. Div. 1896).

It was said that a motion for a new trial upon the ground of newly discovered evidence should be made upon case containing the evidence as well as upon affidavits. In re Rose, 153 A.D. 263, 137 N.Y.S. 1079, 1912 N.Y. App. Div. LEXIS 9251 (N.Y. App. Div. 1912).

Where a motion for a new trial on the ground of newly-discovered evidence and the order granting the same were based only on the affidavits and the pleadings, the settled case could form no part of the record on appeal. Lopez v Margulies, 246 A.D. 391, 286 N.Y.S. 190, 1936 N.Y. App. Div. LEXIS 9510 (N.Y. App. Div. 1936).

Motion for new trial for newly discovered evidence could only be made at Special Term and on settled case, whether jury or non-jury case. Bobowski v New York, 276 A.D. 353, 94 N.Y.S.2d 391, 1950 N.Y. App. Div. LEXIS 4858 (N.Y. App. Div. 1950).

A motion for a new trial on the ground of newly discovered evidence could only be made upon a case properly settled and signed. Boyd v Boyd, 32 N.Y.S. 295, 11 Misc. 357, 1895 N.Y. Misc. LEXIS 142 (N.Y.C.P. 1895).

A motion for a new trial upon the ground of newly discovered evidence could only be heard on a case settled and signed by the judge who tried it, as prescribed in Rules Civ Prac 221, and should only be granted on terms. Solowye v Hazlett, 71 N.Y.S. 486, 35 Misc. 197, 1901 N.Y. Misc. LEXIS 334 (N.Y. City Ct. 1901).

It was said in one instance that the requirement of a settled case was “probably not applicable in a non-jury trial, but does apply to jury cases.” Appelt v Timpone, 88 N.Y.S.2d 43, 195 Misc. 68,

1949 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct.), rev'd, 275 A.D. 1046, 91 N.Y.S.2d 869, 1949 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div. 1949).

RCP 221, requiring motion for new trial on grounds of newly discovered evidence to be made on "settled case," applied. Appelt v Timpone, 88 N.Y.S.2d 43, 195 Misc. 68, 1949 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct.), rev'd, 275 A.D. 1046, 91 N.Y.S.2d 869, 1949 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div. 1949).

10. For surprise

A case is not necessary where the motion for a new trial is made on the ground of surprise, but where combined with ground of newly discovered evidence motion was not granted on latter ground without a case. Stoddard v Stoddard, 37 N.Y.S.2d 605, 1942 N.Y. Misc. LEXIS 2076 (N.Y. Sup. Ct.), aff'd, 264 A.D. 980, 37 N.Y.S.2d 488 (N.Y. App. Div. 1942).

11. In furtherance of justice

New trial granted in interests of justice, where numerous interruptions, questions and comments of the trial justice comprised a "rather extended participation of the trial justice." Murray v McLean Trucking Co., 5 A.D.2d 780, 170 N.Y.S.2d 1, 1958 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 2d Dep't 1958).

Where prejudicial atmosphere and confusion was created by improper introduction, out of order, of letter creating inference conflicting with testimony of a defendant's witness, defendant was denied a fair trial and a new trial was granted. Henry v Pasqua, 5 A.D.2d 950, 171 N.Y.S.2d 372, 1958 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 4th Dep't 1958).

It is proper, in the interests of justice, to direct a new trial where the jury was not properly instructed as to the material issue, even if no exception was taken to the charge. Peerless Casualty Co. v Bordi, 6 A.D.2d 21, 174 N.Y.S.2d 489, 1958 N.Y. App. Div. LEXIS 5685 (N.Y. App. Div. 3d Dep't 1958).

New trial properly ordered by trial court in interests of justice where verdict against weight of evidence. Joy v Jamestown, 7 A.D.2d 619, 179 N.Y.S.2d 423, 1958 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 4th Dep't 1958).

There can be no question but that the court has broad inherent power to act under proper circumstances (not found in this instance) to direct a new trial in furtherance of justice and without being bound by technical rules. Stoddard v Stoddard, 37 N.Y.S.2d 605, 1942 N.Y. Misc. LEXIS 2076 (N.Y. Sup. Ct.), aff'd, 264 A.D. 980, 37 N.Y.S.2d 488 (N.Y. App. Div. 1942).

12. For irregularities

The irregularities referred to by this rule as entitling a party complaining thereof to move for a new trial without making a case are merely irregularities of practice; they do not include instances of substantial error in rulings on the part of the trial court. Martin v Bronsveld, 29 N.Y.S. 1118, 9 Misc. 375, 1894 N.Y. Misc. LEXIS 720 (N.Y. Super. Ct. 1894).

13. On judge’s minutes on grounds specified in CPA § 549 (CPLR § 4404(a), (b))

A motion for a new trial on the minutes is properly made at the Trial Term. Tousey v Tousey, 214 A.D. 785, 210 N.Y.S. 928, 1925 N.Y. App. Div. LEXIS 7727 (N.Y. App. Div. 1925).

The last sentence of RCP 221 applied only to such motions as were properly made at Special Term, and did not relate to motions made upon the judge’s minutes. Consolidated Laundries Corp. v Roth, 241 A.D. 48, 270 N.Y.S. 881, 1934 N.Y. App. Div. LEXIS 8163 (N.Y. App. Div. 1934).

Practice of entertaining motions for new trial upon the minutes should only be approved where error is plainly manifest, and where questions are doubtful or complicated, parties should move on a case. O'Connor v Healey, 161 N.Y.S. 582, 96 Misc. 278, 1916 N.Y. Misc. LEXIS 928 (N.Y. Sup. Ct.), aff'd, 175 A.D. 962, 161 N.Y.S. 1137, 1916 N.Y. App. Div. LEXIS 11207 (N.Y. App. Div. 1916).

Motion for new trial on a case involves the setting aside of a verdict, and a motion on the minutes is not an exclusive remedy. O'Connor v Healey, 161 N.Y.S. 582, 96 Misc. 278, 1916 N.Y. Misc. LEXIS 928 (N.Y. Sup. Ct.), aff'd, 175 A.D. 962, 161 N.Y.S. 1137, 1916 N.Y. App. Div. LEXIS 11207 (N.Y. App. Div. 1916).

Where motion for new trial for newly discovered evidence was heard on the minutes, plaintiff was not entitled to same costs as upon appeal. Finkelstein v Grodsky, 248 N.Y.S. 779, 139 Misc. 571, 1931 N.Y. Misc. LEXIS 1179 (N.Y. City Ct. 1931).

No motion can be made on the minutes except those made on the grounds specified in CPA § 549 (§ 4404(a), (b) herein) and, therefore, no motion comes within the exception contained in this rule except those made on the grounds specified in said section. Hart v Ithaca Conservatory, 258 N.Y.S. 741, 144 Misc. 400, 1932 N.Y. Misc. LEXIS 1505 (N.Y. Sup. Ct. 1932).

A motion for new trial may be made on minutes of judge, under CPA § 552 (§ 4404(a), (b) herein) on grounds specified in CPA § 549 (§ 4404(a), (b) herein). Pliss v 83rd Foundation, Inc., 69 N.Y.S.2d 727, 1947 N.Y. Misc. LEXIS 2305 (N.Y. City Ct. 1947).

It was not needful to make a case to move for a new trial upon the minutes of the judge who presided at a trial by jury. Healy v Twenty-Third Street R. Co. (N.Y.C.P. Dec. 4, 1882).

14. Following mandamus order

In view of CCP §§ 2082 and 2083 governing the status of proceedings following an application for a mandamus order, and this rule, the making of a case was not a prerequisite to a motion for a new trial following the granting of application for a mandamus order. People ex rel. Wieland v Knox, 78 A.D. 344, 79 N.Y.S. 989, 1903 N.Y. App. Div. LEXIS 44 (N.Y. App. Div. 1903).

B. Review Of Interlocutory Reference Or Inquisition

15. Generally

Where the court assessed damages on defendant's failure to plead, this rule did not apply. McClelland v Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 252 N.Y. (N.Y.S.) 347, 1930 N.Y. LEXIS 631 (N.Y. 1930).

RCP 222 did not provide for an assessment of damages in the trial court, or for a review thereof, but only an assessment by a writ of inquiry out of the court. Yaw v Whitmore, 66 A.D. 317, 72 N.Y.S. 765, 1901 N.Y. App. Div. LEXIS 2399 (N.Y. App. Div. 1901).

Where on the trial by a referee, no request is made for a finding on a question of fact, the evidence of which is conflicting, an appellant from the decision cannot claim a reversal on the ground that the preponderance of evidence was in his favor. Clark v Swift, 14 N.Y.S. 61, 59 Hun 628, 1891 N.Y. Misc. LEXIS 1853 (N.Y. Sup. Ct. 1891), aff'd, 131 N.Y. 646, 30 N.E. 867 (N.Y. 1892).

RCP 222 applied to proceeding in surrogate's court. In re Bayer's Estate, 7 N.Y.S. 566, 54 Hun 189, 1889 N.Y. Misc. LEXIS 1175 (N.Y. Sup. Ct. 1889).

When an interlocutory judgment is entered on the report of a referee, the only method of reviewing it which existed March 2, 1893, was by a motion for a new trial upon exceptions under the provisions of CPA § 447. Garczynski v Russell, 27 N.Y.S. 461, 75 Hun 512 (1894).

C. Review Where Specific Questions Are Tried By Jury

16. Generally

CPA § 556 seemed to change the rule adopted in Johnson v Youngs, 65 N.Y. 599, 1875 N.Y. LEXIS 415 (N.Y. 1875).

CPA § 553 and § 429 (§ 4102(b) herein) were to be construed together in the light of the historic distinction between cases where a jury trial of an issue of fact was a matter of favor or a matter

of right. Bolognino v Bolognino, 241 N.Y.S. 445, 136 Misc. 656, 1930 N.Y. Misc. LEXIS 1202 (N.Y. Sup. Ct.), aff'd, 231 A.D. 817, 246 N.Y.S. 883, 1930 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1930).

The court may set aside the determination of the jury upon any complete issue in the action which constitutes in effect a separate verdict, but may not reject findings upon interrelated and dependent questions of fact going to make up such an issue, as may be done in the discretion of the court where a jury trial is a matter of favor, not of right. Bolognino v Bolognino, 241 N.Y.S. 445, 136 Misc. 656, 1930 N.Y. Misc. LEXIS 1202 (N.Y. Sup. Ct.), aff'd, 231 A.D. 817, 246 N.Y.S. 883, 1930 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1930).

17. Motion at different term

A motion for a new trial on the minutes is properly made at the Trial Term. Tousey v Tousey, 214 A.D. 785, 210 N.Y.S. 928, 1925 N.Y. App. Div. LEXIS 7727 (N.Y. App. Div. 1925).

An application for new trial of specific questions of fact in an action for absolute divorce tried before a judge and jury at Trial Term, cannot be made at the Equity Term upon the minutes of the trial, but must be upon a settled case. Friedman v Friedman, 204 N.Y.S. 550, 122 Misc. 700, 1924 N.Y. Misc. LEXIS 846 (N.Y. Sup. Ct. 1924), rev'd, 212 A.D. 823, 207 N.Y.S. 839, 1925 N.Y. App. Div. LEXIS 9830 (N.Y. App. Div. 1925).

18. Conclusiveness of findings of jury

It is no ground for setting aside a verdict that it is contrary to what the court would have decided upon fact. Tatum v Tatum, 151 N.Y.S. 448, 88 Misc. 674, 1915 N.Y. Misc. LEXIS 1211 (N.Y. Sup. Ct. 1915).

The court is not governed by the findings of the jury upon questions submitted to them. Jones v Stewart.

19. Cause tried by referee

CPA § 553 did not apply to a cause tried by a referee. Smith v Lapham, 87 N.Y. 631, 1882 N.Y. LEXIS 50 (N.Y. 1882).

20. Divorce

A verdict rendered upon issues framed in an action for divorce to try an allegation of adultery, disputed by the defendant, is not one to enlighten the conscience of the court but is governed by the same rules as apply to a verdict in any action at law triable by a jury and is conclusive unless set aside for some proper reason. Fries v Fries, 70 N.Y.S. 295, 34 Misc. 478, 1901 N.Y. Misc. LEXIS 967 (N.Y. Sup. Ct. 1901).

21. Partition

Notwithstanding CPA § 553 and § 549 (§ 4404(a), (b) herein) the Trial Term to which special issues arising between defendants in an action for partition were referred for separate trial by jury was without jurisdiction, in view of RCP 221 (§ 4403 herein), to entertain a motion to set aside the verdict and for a new trial. Marks v Mullen, 195 N.Y.S. 764, 119 Misc. 82, 1922 N.Y. Misc. LEXIS 1419 (N.Y. Sup. Ct. 1922).

22. Will contest

Where there was a verdict that testatrix had testamentary capacity, surrogate, though he could set it aside, could do so only by also ordering a new trial by jury. In re Dunn, 158 N.Y.S. 119, 94 Misc. 578, 1916 N.Y. Misc. LEXIS 1239 (N.Y. Sur. Ct. 1916), aff'd, 180 A.D. 860, 168 N.Y.S. 131, 1917 N.Y. App. Div. LEXIS 9070 (N.Y. App. Div. 1917).

Research References & Practice Aids

Cross References:

This rule referred to in § 4213.

Effect of judgment, CLS RPAPL § 1531.

Applicability in certain courts, CLS SCPA §§ 201., 209.; Ct Cl Act § 9.; NYC Civ Ct Act § 1001.; UCCA § 1001.; UDCA § 1001.; UJCA § 1001.

Federal Aspects:

Form of motions in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 7.

Proceedings before masters in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 53.

Motion for new trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59.

Time of motion for new trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59(b).

Motion to alter or amend a judgment in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59(e).

Jurisprudences:

48 NY Jur 2d Domestic Relations § 2398. .

73A NY Jur 2d Jury § 121. .

92 NY Jur 2d References §§ 3., 32., 46., 47. .

105 NY Jur 2d Trial §§ 278., 572., 573., 598. .

15 Am Jur Pl & Pr Forms (Rev ed), Judgments, Forms 41.– 60.

Law Reviews:

Motion practice under the CPLR. 9 NY L Forum 317.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4403, Motion for New Trial or to Confirm or Reject or Grant Other Relief After Reference to Report or Verdict of Advisory Jury.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.10.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 502.14, 505.03, 506.07, 506.08.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.04. Trial by the court.

CPLR Manual § 23.05 . Referees and trial by referees.

CPLR Manual § 23.06. Trial and post-trial motions.

CPLR Manual § 26.03. Appealability — Appellate Division.

CPLR Manual § 31.16. An alternative to arbitration: simplified procedure for judicial determination of disputes.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.04. Seeking Motion In Limine.

LexisNexis AnswerGuide New York Civil Litigation § 9.22. Conducting Trial Before Judge Without Jury.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property §§ 24.61, 103.111.

Annotations:

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trail. 57 ALR4th 1049.

Duty of District Court to hold evidentiary hearing before acting upon magistrate's findings of fact and recommendations submitted pursuant to 28 USCS § 636(b)(1)(B). 49 ALR Fed 763.

Matthew Bender's New York Checklists:

Checklist for Submitting Pre-Trial Memorandum of Law, Marked Pleadings, and Other Papers to Court LexisNexis AnswerGuide New York Civil Litigation § 9.02.

Checklist for Conducting Trial by Judge Without Jury LexisNexis AnswerGuide New York Civil Litigation § 9.20.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4403:1 et seq.

LexisNexis Forms FORM 75-CPLR 4403:1.—Notice of Motion to Confirm Report of Referee.

LexisNexis Forms FORM 75-CPLR 4403:10.—Affirmation in Support of Motion to Confirm Special Referee's Report Setting Reasonable Legal Fees and Expenses Incurred in Post-Judgment Contempt Proceeding.

LexisNexis Forms FORM 75-CPLR 4403:2.—Supporting Affidavit Upon Motion to Confirm Report.

LexisNexis Forms FORM 75-CPLR 4403:3.—Order Confirming Report of Referee.

LexisNexis Forms FORM 75-CPLR 4403:4.—Notice of Motion to Reject Referee's Report.

LexisNexis Forms FORM 75-CPLR 4403:5.—Order to Show Cause Why Referee's Report Should Not Be Confirmed.

LexisNexis Forms FORM 75-CPLR 4403:6.—Affidavit in Support of Motion to Reject Referee's Report.

LexisNexis Forms FORM 75-CPLR 4403:7.—Affidavit in Support of Motion to Reject Referee's Report and for a New Hearing Where Report Was Preliminary to Court Determining Other Issues.

LexisNexis Forms FORM 75-CPLR 4403:8.—Affidavit in Support of Motion to Confirm, in Part, and to Disaffirm, in Part, Referee's Report Matrimonial Action.

LexisNexis Forms FORM 75-CPLR 4403:9.—Notice of Motion to Confirm Special Referee's Report Setting Reasonable Legal Fees and Expenses Incurred in Post-Judgment Contempt Proceeding.

LexisNexis Forms FORM 380-21:401.—Notice of Motion to Confirm Report of Referee.

LexisNexis Forms FORM 380-21:402.—Order to Show Cause Why Referee's Report Should Not Be Confirmed.

LexisNexis Forms FORM 380-21:403.—Supporting Affidavit Upon Motion to Confirm Report.

LexisNexis Forms FORM 380-21:404.—Order Confirming Report of Referee.

LexisNexis Forms FORM 380-21:405.—Notice of Motion to Confirm Report of Referee and for Judgment of Foreclosure.

LexisNexis Forms FORM 380-21:406.—Supporting Affidavit Upon Motion to Confirm Referee's Report and for Foreclosure Judgment.

LexisNexis Forms FORM 380-21:407.—Notice of Motion to Reject Referee's Report.

LexisNexis Forms FORM 380-21:408.—Affidavit in Support of Motion to Reject Referee's Report.

LexisNexis Forms FORM 380-21:409.—Affidavit in Support of Motion to Reject Referee's Report and for a New Hearing Based on Referee's Erroneous Exclusion of Evidence.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 21:101 et seq. .(trial motions).

Hierarchy Notes:

NY CLS CPLR, Art. 44

Forms

Forms

Form 1

Body of Notice of Motion For An Order Confirming Referee's Report and For A Judgment of Foreclosure*

SIRS:

PLEASE TAKE NOTICE that upon the report of _____, Esq., Referee, to whom it was referred by an Order of this Court, to ascertain and compute the amount due to plaintiffs for principal and interest on the bond and mortgage set forth in the Complaint, and to examine and report whether the mortgaged premises can be sold in parcels, which report was filed in the Office of the _____ County Clerk simultaneously herewith, and upon the Order of reference made and entered herein on or about _____, 20_____ and on all the other pleadings and proceedings heretofore had in this matter, the plaintiffs will move this Court at the _____ County courthouse, _____, New York on the _____ day of _____, _____

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

20_____, at _____ a.m./p.m. or as soon thereafter as counsel can be heard for an Order confirming said report of said Referee and for the relief demanded in the Complaint, and for the usual judgment of foreclosure and sale and for such other and further relief as may be just and equitable.

A Judgment, a copy of which is annexed hereto, will at the same time and place be submitted to the above-named Justice for signature.

This action is brought to foreclosure a mortgage on real property.

Pursuant to CPLR 2214(b) answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days before the return date of this motion.

Form 2

Body of Affirmation In Support of Motion For An Order Confirming Referee's Report and For A Judgment of Foreclosure*

_____, Esq., an attorney duly admitted to practice before the courts in this State, hereby affirms the following under penalties of perjury:

1. I am associated with _____, _____, _____, & _____, P.C., attorneys for the plaintiffs herein. I am fully familiar with all the pleadings and proceedings heretofore had in this matter.

2. I submit this Affirmation of Regularity pursuant to R.P.A.P.L. § 1321(2) in support of Plaintiffs' Motion for Confirmation of the Referee's Report and Entry of a Judgment of Foreclosure. This affirmation is further submitted in support of Plaintiff's Application for the Awarding of Reasonable Attorneys Fees as part of the Judgment.

R.P.A.P.L. § 1321

3. This action was brought to foreclose a mortgage upon the premises described in the Complaint, located in the Towns of _____ and _____

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

Land Development Associates, _____, which mortgage was dated _____, 20_____, was executed by the defendant, _____ Land Development Associates, to secure the payment of the principal sum of $500,000.00 plus interest, and was duly recorded in the office of the _____ County Clerk on _____, 20_____ at Liber _____, page _____.

4. That according to the Complaint, there is now due and payable upon said mortgage the principal sum of $345,972.64, together with interest as follows: 11% per annum from _____, 20_____ to _____, 20_____; 16% per annum from _____, 20_____ to _____, 20_____; one year's interest at 8% per annum; and statutory interest from _____, 20_____ to the present.

5. That on or about the _____ day of _____, 20_____, a complaint was duly filed in the office of the Clerk of the County of _____; that at the same time as the filing of said complaint, a Notice of Pendency of this action containing, as your affiant believes, correctly and truly, all the particulars required by law to be stated in such notice was filed in the office of the Clerk of the County of _____, that being the county in which the mortgaged premises are situated, and that since the filing of the said Notice the complaint in this action has not been amended by making new parties to the action, or so as to affect other property not described in the original complaint, or so as to extend the claims of the plaintiff against the mortgaged premises.

6. That all of the defendants are of sound mind, and that none of them are infants or absentees.

7. That all of the defendants have been duly personally served with the summons and complaint in this action or have duly appeared herein by their respective attorneys as more fully appears by the affidavits of service and notices of appearances which are hereunto annexed collectively as Exhibit "A".

8. That more than thirty days have elapsed since such service.

9. That all of the defendants have appeared and answered in this action.

10. That all of the proceedings herein have been regular and in conformity with the rules and practice of this court.

SERVICES RENDERED

11. This action was instituted in _____, 20_____ when it first became obvious to plaintiffs that defendant _____ Land Development Associates would be unable to fulfill its obligations to plaintiffs pursuant to the Note and various Modification Agreements, executed between the parties.

12. The following is a statement of some of the services performed by this firm, on behalf of plaintiffs:

(a) Numerous communications with the owner of the mortgaged premises in an effort to obtain payment of the sums due and owing to plaintiff and to negotiate a settlement of this action without resorting to a foreclosure sale;

(b) ordered Mortgage Foreclosure certificate;

(c) Reviewed the Mortgage Foreclosure certificate furnished by title company;

(d) Obtained from Plaintiff the original mortgage documents and computation of the amount due and owing at the time of preparation of the complaint;

(e) Prepared summons and complaint and Notice of pendency of Action and arranged for filing of papers in the _____ County Clerk’s Office;

(f) Filed documents;

(g) Arranged with a process service bureau to effectuate service of the summons and complaint on the necessary party defendants herein;

(h) prepared motion for summary judgment and reply papers, including memorandum of law;

(i) By order of Honorable _____ dated _____, 20_____, _____, Esq. was appointed Referee to Compute;

(j) Arranged for a hearing before the Referee, appointed herein by this Court to compute, and attendance at said hearing to present the proof required by said Order of Reference after first obtaining the necessary information and documents from Plaintiff;

(k) Prepared, for the said Referee's signature, his Report, Oath and Schedules "A", "B", "C" and "D" to be attached thereto.

(l) Preparation of Judgment of Foreclosure for signature by the Court;

(m) Preparation of plaintiff's Bill of Costs, and taxation of same with the County Clerk;

(n) In addition to the foregoing, I shall, of course, attend to the filing of said Referee's Report, Judgment and Bill of Costs, in the County Clerk's Office;

(o) I shall then be obligated to prepare the Notice of Sale and I shall, of course, also have to arrange for publication of said notice as directed by the judgment herein, and to obtain proper affidavits of publication; and shall then be obliged to attend the foreclosure sale;

(p) Upon the completion of the sale it will, of course, be necessary for me to prepare a deed for the signature of the Referee and Report of Sale to be submitted to this Court;

(q) I shall then be obliged to prepare a proposed Order confirming the sale, and to attend to the due filing thereof herein;

(r) There also will invariably be the numerous telephone calls from speculators and investors who wish to bid on the property.

13. I respectfully call this Court's attention to Paragraph "2" of the Rider to the Mortgage, concerning plaintiff's right to recover a fair and reasonable attorney's fee for services rendered in this foreclosure action if the loan is discontinued prior to the actual foreclosure sale. Said paragraph "2", in part, reads as follows:

PARAGRAPH "2"

The mortgager also agrees to bear all expenses (including reasonable attorneys' fees for legal services of every kind) for the enforcement of any provisions hereof, or enforcement, compromise, or settlement of any of the collateral pledged hereunder, and for the curing thereof or defending or asserting the rights and claims of the mortgagee in respect thereof, by litigation,

including any action of foreclosure hereunder, and will pay to the mortgagee any such expenses incurred. Such expenses shall be deemed an indebtedness secured by this mortgage and shall be collectible in like manner as the principal indebtedness secured by this mortgage. All rights and remedies of the mortgage shall be cumulative and may be exercised singly or concurrently.

14. Attached hereto as Exhibit "B" are this firm's bills for the period _____, 20_____ through _____, 20_____. As can be seen, almost sixty (60) hours have been spent on this case. Moreover, until _____, 20_____, plaintiffs have only been charged $150.00 per hour, an extremely reasonable fee relative to the work performed.

15. Based upon all of the foregoing, plaintiffs request that they be awarded the sum of $15,000.00 in legal fees. Referee's Report

16. Finally, plaintiffs respectfully request that this Court confirm the Report of the Referee, submitted and filed herewith

WHEREFORE, Plaintiffs respectfully pray for a Judgment of Foreclosure in the form herewith submitted and that such judgment confirm the Report of the Referee and provide for an award to plaintiff of a reasonable counsel fees in the sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS or such other sum as this court may deem fair and reasonable.

Form 3

Body of Notice of Defendant's Cross-Motion For An Order Rejecting Referee's Report and Denying Defendant's Application For A Judgment Of Foreclosure*

SIR AND/OR MADAM:

PLEASE TAKE NOTICE that upon the annexed affirmation of _____, Esq., dated _____, 20_____, and upon the papers and proceedings heretofore had herein, a cross-motion will be made before the Honorable _____, the

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

Judge of this Court assigned to hear this matter under the individual assignment system, on the _____ day of _____, 20_____, at _____ a.m./p.m., at the _____ County Court House, _____ Street, _____, New York, or at such other date, time and location as Judge _____ shall determine, for an order rejecting the referee's report and denying the application for judgment of foreclosure, together with such other and further relief as to the Court may seem just and proper, with the costs and disbursements of this motion.

This is a mortgage foreclosure action.

This action is not on the trial calendar.

Form 4

Body of Affirmation In Opposition To Plaintiff's Motion For An Order Confirming Referee's Report and For A Judgment of Foreclosure and In Support of Defendant's Cross-Motion For An Order Rejecting Referee's Report and Denying Plaintiff's Application For A Judgment of Foreclosure*

_____, Esq., an attorney duly admitted to the practice of law in the State of New York, affirms the truth of the following under penalty of perjury:

1. I am the attorney for defendant _____ Mortgage Investors and submit this affirmation in support of the cross-motion to reject the referee's report and in opposition to the motion in chief to confirm the referee's report and for a judgment of foreclosure.

THE GROUNDS FOR REJECTION OF THE REFEREE'S REPORT

2. Defendant _____ Mortgage Investors was entitled to notice of a hearing before the referee and the actual conduct of a hearing pursuant to the provisions of the Civil Practice Law and Rules.

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* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

3. Your affirmant never received notice of hearing before the referee. Upon information and belief, no such notice was ever given. Rather, upon information and belief, the referee's report was prepared in the office of counsel for plaintiffs, was submitted to the referee, and was signed and is now submitted all without notice and all without an opportunity to be heard.

4. In lieu of a detailed memorandum of law, I annex hereto and make a past hereof as EXHIBIT A a copy of Section _____ from the leading text, _____ on New York Mortgage Foreclosures, by _____. The relevant portion of the text basically states that unless defendants have waived the right to a hearing, a hearing must be held, unless the defendants, after receiving notice of a hearing, waive the right to a hearing, either formally or by not attending the hearing.

5. Defendant _____ Mortgage Investors has appeared. A copy of the answer of defendant _____ Mortgage Investors heretofore served and filed is annexed hereto and made a part hereof as EXHIBIT B. Defendant _____ Mortgage Investors did not initially waive a hearing and has not subsequently waived a hearing. This Court's Decision of _____, 20_____ and its subsequent Order of _____, 20_____ granting summary judgment to plaintiff and appointing a referee to compute and for related purposes do not have the legal effect of taking away defendant _____ Mortgage Investors's right to notice of a hearing and a hearing before the referee. A copy of this Court's Decision and Order are annexed hereto and made a part hereof, respectively, as EXHIBITS C AND D for the convenience of the Court.

6. Without regard to the pending appeal before the Third Department concerning the aforesaid Decision and Order, your affirmant repeats that the Decision and Order granting summary judgment, even if ultimately affirmed, do not constitute an elimination or waiver of defendant _____ Mortgage Investors' right to notice of a hearing and a hearing before the referee.

7. Defendant _____ Mortgage Investors has an interest in presenting evidence before the referee to show the dollar amount of priority claimed by Defendant _____ Mortgage Investors pursuant to the Court's determination in its Decision that the _____ mortgage has priority as to the difference between the outstanding balances under the terms of the first and second modifications. This provision is set forth in the next to last paragraph at page 6 of the Court's Decision.

8. Defendant _____ Mortgage Investors also has the right to a hearing to elicit testimony and proof of the dollar amount paid by defendants _____ Land Development Associates and, accordingly, the dollar amount that was held to be prior to Defendant _____'s lien.

9. Schedule C of the referee's report calculates the sum due to Defendant _____ Mortgage Investors on a priority basis, the difference between interest rates of 11% under the first modification and 16% under the second modifications, as $5,293.80. The calculation only goes through _____, 20_____.

10. Defendant _____ Mortgage Investors intends to present proof before the referee that the calculation should be made through current date with a per diem sum going beyond the date of the referee's report until the date of judgment and that the sum should be in the range of $40,000 to $50,000 and not some $5,000.

11. Article 43 of the CPLR covers the subject of trial by a referee. Under CPLR Section 4320, a reference to report requires a referee to conduct a trial in the same manner as a court trying an issue without a jury and to provide a transcript. This statutory provision clearly includes within its words the right to cross-examine witnesses and the right to present witnesses. CPLR Section 4318 provides for the referee to conduct a trial in the same manner as a court trying an issue without a jury unless specified otherwise in the order of reference. There is no specification to the contrary in this Order of reference.

CONCLUSION

12. The referee's report should be rejected. Plaintiff has failed to comply with the requirements for notice of hearing and a hearing before the referee. Given the rejection of the referee's report, the application for a judgment of foreclosure must, similarly, be denied. The Court should direct the establishment of a bearing, on notice, before the referee.

Form 5

Body of Reply Affirmation In Further Support of Plaintiff's Motion For An Order Confirming Referee's Report and For A Judgment of Foreclosure*

_____, an attorney duly admitted to the practice of law in the State of New York does hereby affirm the following under penalties of perjury:

1. I am associated with _____, _____, _____, & _____, P.C., attorneys for the plaintiffs _____ and _____. As such I am fully familiar with the facts heretofore had in this matter as well as those set forth below. I submit this Affirmation in response to the Affirmation of the defendant _____ Mortgage Investors in opposition to plaintiffs' motion to confirm the Report of the Referee and for entry of a Judgment of Foreclosure.

2. I note, that although denominated a cross-motion, and Affirmation in Opposition, the only relief sought by defendant _____ Mortgage Investors in their affirmation is a denial of the relief sought by plaintiffs in their moving papers. As defendant _____ Mortgage Investors seeks no affirmative relief, their response, is incorrectly denominated a cross-motion. Since no affirmative relief is sought this Court need not entertain defendant _____ Mortgage Investors's notice of motion, nor should it allow a response to plaintiffs' Reply. Indeed, the denomination of an Affirmation in Opposition as a cross-motion, seems to be a common ploy by defendant

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

_____ Mortgage Investors's counsel, so as to provide him with an opportunity to "get the last word in" when he is otherwise not statutorily entitled to do so.

3. Defendant _____ Mortgage Investors's sole basis for asking this Court to reject the relief sought by plaintiffs' is that the Referee failed to conduct a hearing on notice, to ascertain and compute the amounts due to plaintiffs under the terms of the note and mortgage which are the subjects of this foreclosure action.

4. In support of its claim, defendant _____ Mortgage Investors's counsel submits as Exhibit "A" to his affirmation, a section of what he characterizes as "the leading text" regarding mortgage foreclosures. Apparently, defendant's counsel limited his research to this particular text. Had he reviewed _____, § _____ as well as _____, § _____, he would have learned that it is generally understood that a Referee's authority is derived from the order of reference and is limited by the order's terms as well as by the statute and rules authorizing the particular reference. He would also have learned that a reference to compute is distinguishable from a reference for the trial of issues raised by the pleadings. It appears as if the greater weight of authority suggests that the rights to which a defendant is entitled, are limited by the order of reference, and that a reference to compute, as is the case here, is distinguishable from a reference for the trial of issues raised in pleadings.

5. The order of reference issued by this Court, is attached in relevant part, as Exhibit "D" to _____ Mortgage Investors' counsel's Affirmation in opposition. As set forth therein, the order appointing the Referee, directs him to "ascertain and compute the amount due". In effect, the Referee has been directed to perform a ministerial act, based upon the pleadings and proceedings heretofore had in this matter which were submitted to the Court on plaintiffs' motion for summary judgment. All the evidence needed by the Referee to perform his calculations were submitted therein. As such, there was no need for this Court to direct the Referee to conduct a plenary hearing on this issue. Perhaps the best evidence of this, is the fact that in his Affirmation in Opposition, _____ Mortgage Investors's counsel,

raises no new arguments or even suggests new evidence which he would submit before the Referee.

6. As the order of this court merely directs the Referee to compute and ascertain the amounts due plaintiff, and does not direct that a hearing be conducted, no hearing is required.

7. Defendant _____ Mortgage Investors's claim that it has an interest in presenting evidence to the Referee to show the dollar amount of its priority claim, is of no moment.

8. Indeed, such claim is totally disingenuous. This Court specifically stated in its decision, which is annexed to defendant's counsel's affirmation as Exhibit "C", that defendant _____ Mortgage Investors was entitled to the difference in the dollar amount between the 11% interest rate originally charged by plaintiffs to defendant _____ Land Development Associates and the 16% subsequently charged by plaintiffs to _____ Land Development Associates. This is no more than a mathematical calculation based upon the date upon which the interest rate changed and the date upon the note charging said rate expired. Notably, ... Mortgage Investors fails to elaborate upon their evidence. The reason it fails to do so is that the only evidence which it could produce is the mathematical calculation already set forth by the referee.

9. This Court has found that _____ Mortgage Investors has a priority claim over that of plaintiffs, only to the extent that there was a difference in interest rates between the First and Second Modification Agreements. Upon the expiration of the Second Modification Agreement, the note became due and both plaintiffs and _____ Mortgage Investors returned to the same footing. As such, _____ Mortgage Investors's claim that it is entitled to more than the $5,293.00 which the Referee found to be the difference between the interest rates for the period of the Second Modification Agreement is unfounded and illogical.

10. Defendant _____ Mortgage Investors states that it intends to present proof that the calculations should be made through the current date as opposed to the end of

_____, 20_____. It fails miserably again however in presenting to this Court any basis for its claim, nor does it make a showing as to what that proof may be. Since the adjustment of the amount due, calls merely for a calculation, it would have been appropriate for defendant to submit its proof or make its argument to the Court in a proper cross-motion to reject the Referee's Report, which sought affirmative relief, asking the Court to modify the Referee's Report to the extent that it believes such modification is warranted. The Court has the authority to modify the Referee's Report and enter judgment as it deems appropriate.

11. For all the reasons set forth herein above, plaintiffs' motion for confirmation of the Referee's Report and for entry of a Judgment of Foreclosure should be granted in its entirety, together with such other and further relief as this Court deems just and proper.

Form 6

Body of Supplemental Affirmation In Support of Defendant's Cross-Motion For An Order Rejecting Referee's Report and Denying Plaintiff's Application For A Judgment of Foreclosure*

_____, an attorney duly admitted to the practice of law in the State of New York, affirms the truth of the following under penalty of perjury:

1. I am the attorney for Defendant _____ Mortgage Investors. This supplemental affirmation is submitted to the Court pursuant to the letter of _____, 20_____ from Justice _____. A copy of the letter directing this submission is annexed to this affirmation as EXHIBIT A.

CALCULATION OF THE PRIORITY SUM IN FAVOR OF DEFENDANT
_____ MORTGAGE INVESTORS

2. In this Court's prior Decision, the Decision of _____, 20_____, thereafter reduced to an Order dated _____, 20_____, this Court held that the _____ mortgage, the mortgage sought to be foreclosed in this action, retained priority over the _____ mortgage as to the outstanding _____

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

balance under the terms of the first modification agreement of the _____ mortgage. This Court further held that as to the difference between the outstanding balances under the terms of the first and second modifications due and owing to _____, the _____ mortgage has priority.

3. In paragraph 3 of the referee's report now before the Court, the referee ascertained and computed the amount due to Defendant _____ Mortgage Investors by reason of the difference between the outstanding balances due to plaintiffs under the terms of the first and second modifications. His conclusion was that there is due to defendant _____ Mortgage Investors, as of _____, 20_____, the sum of Five Thousand Two Hundred Ninety Three and $^{80}/_{100}$ ($5,293.80). Schedule C of his report sets forth the calculations he used. He obtains the interest at 16%, the interest under the second modification agreement, from _____, 20_____ to _____, 20_____. He then makes the same computation for the same period of time for interest at 11%, the interest under the first modification agreement. Having obtained these two figures, he subtracts the interest at 11% from the interest at 16%, and arrives at the difference, to wit, the sum of $5,293.80. He recites that he has based his calculations upon a principal balance of $345,972.64.

4. It is respectfully submitted that the above calculation and interpretation by the referee is erroneous.

5. At page 6 of this Court's Decision of _____, 20_____, next to last paragraph, the Court held that the _____ mortgage retained priority over _____'s mortgage as to the outstanding balance under the terms of the first modification. According to Schedule B of the referee's report, the outstanding balance under the terms of the first modification was $345,972.64 together with per diem interest from _____, 20_____ to _____, 20_____ in the additional amount of $36,430.29. Adding these two figures together, we get $382,402.93.

6. The Court's Decision then went on to hold that as to the difference between the outstanding balances under the terms of the first modification, the above stated sum, and the second modification, the _____ mortgage has priority.

7. According to the referee's computations, the total due as of the computation date of _____, 20_____, per Schedule B, is $474,290.59. Subtracting the balance due as _____, 20_____ from the total balance due reported by the referee, the difference is $91,887.66. It is this sum of $91,887.66 that is the sum to which the _____ mortgage was afforded priority by this Court's Decision together with priority for per diem interest at $69.19 from _____, 20_____ until the sale.

8. Based upon the letter of _____, 20_____ (Exhibit A), your affirmation asks this Court to determine that the dollar amount of priority due to the _____ mortgage is $91,887.66, plus per diem interest.

THE OTHER CLAIMS OF DEFENDANT _____ MORTGAGE INVESTORS

9. As noted above, this supplemental affirmation responds to the _____, 20_____ letter from Judge _____ and contains an analysis of the referee's report based upon the holding of this Court in its decision.

10. The above analysis, while correct insofar as it goes, is made prejudice to the continuing assertions by _____ Mortgage Investors including:

(a) the continuing claim, now on appeal, that the _____ mortgage is prior in its entirety;

(b) the request for a hearing before the referee; and

(c) the assertion that the _____ reply affirmation is untimely and should be rejected by the Court.

Form 7

Body of Supplemental Affirmation by Plaintiff's Attorney in Opposition to Supplemental Affirmation In Support of Defendant's Cross-Motion For An Order Rejecting Referee's Report and Denying Plaintiff's Application For A Judgment of Foreclosure*

_____, an attorney duly admitted to practice before the Courts of this state does hereby affirm the following under the penalties of perjury:

1. I am associated with _____, _____, _____, & _____, P.C., attorneys for the plaintiffs, _____ and _____. As such, I am fully familiar with the facts heretofore had in this matter as they are maintained in the files of this office, as well as those facts set forth below.

2. I submit this Supplemental Affirmation in opposition to the Supplemental Affirmation of _____, Esq., counsel for defendant, _____ Mortgage Investors. That Affirmation claims that the sum due to ..... Mortgage Investors as a result of the change in interest rates between the First and Second Modification Agreements is not $5,293.80, as set forth in the Referee's Report, but rather should be $91,887.66. As set forth more fully below, the calculation submitted by _____ Mortgage Investors, can best be characterized as being based solely on creative accounting.

3. On page 6, of its Decision of _____, 20_____ (appended hereto as Exhibit "A"), this Court held that:

The _____ mortgage retains priority over the _____ Mortgage Investors mortgage as to the outstanding balance under the terms of the first modification. As to the difference between the outstanding balances under the terms of the first and second modifications due and owing to _____, the _____ Mortgage Investors mortgage has priority over that sum.

Subsequently, in its Order of _____, 20_____ (appended hereto as Exhibit "B"), the Court directed the Referee to:

_____

* This form was submitted courtesy of Richard Cantor, Esq., Poughkeepsie, New York.

Compute such sums as may be due to defendant _____ Mortgage Investors as a result of the difference between the outstanding balances due to plaintiffs under the terms of the first and second modifications of the rate of interest charged on the principle balance of the note between plaintiffs and defendant _____ Land Development Associates.

4. In its Decision, and subsequent Order, this Court found that to the extent that _____ Mortgage Investors suffered any prejudice, it was due solely as a result of the change in the interest rates, charged in the First Modification Agreement (11%) and Second Modification Agreement (16%). (See page 5 of the Court's Decision.) As such, any prejudice which accrued to _____ Mortgage Investors would be the result of the changed interest rate calculated over the period of time during which that change was in effect.

5. It is well settled that absent a provision in the contract to the contrary, the rate of interest set forth in a note is chargeable only to the date upon which that note matures. Thereafter, upon a default in payment, interest is to be computed at the statutory rate.

6. As set forth in the Referee's Report, upon maturation of the note on _____, 20_____, plaintiffs were not entitled to receive interest at the rate set forth in the Second Modification Agreement, but rather merely at the statutory rate of 9%. Thus, to the extent there was any prejudice to _____ Mortgage Investors, as a result of the difference in interest rates charged in the Modification Agreements, that prejudice ended on the maturation date of the note, _____, 20_____.

7. _____ Mortgage Investors cannot possibly claim that it was materially prejudiced by application of the statutory interest rate, to which plaintiffs would have been entitled no matter what the terms of the Modification Agreements were, once the note matured, and fell into default. Moreover, if defendant _____ Land Development Associates was in default in its mortgage payments to _____ Mortgage

Investors, (of which there has been no evidence), _____ Mortgage Investors would be accruing interest on its note either at the interest rate contained therein, or at the statutory rate of 9%. _____ Mortgage Investors cannot look to plaintiff to satisfy any shortfalls it may have incurred as a result of the default of the mortgagor defendant _____ Land Development Associates.

8. _____ Mortgage Investors has improperly sought to bootstrap those payments due to plaintiffs, by virtue of the imposition of the statutory interest rate, into an obligation owed to it by plaintiff. This is neither the law, nor does it accurately reflect the Decision and Order of this Court.

9. While _____ Mortgage Investors is to be admired for its creative calculations, those calculations have no basis in either law nor fact. As set forth above, the prejudice, if any, sustained by _____ Mortgage Investors, relates solely to the changed interest rate in the Modification Agreements. Upon maturation of the note, any prejudice which accrued to _____ Mortgage Investors ended. The imposition of the statutory interest rate from _____, 20_____ forward, cannot be held to have been materially prejudicial to _____ Mortgage Investors. If that argument were taken to its logical conclusion, then any imposition of a statutory interest rate on default of the first mortgage holders' mortgage would necessarily be prejudicial to a second mortgage holder.

10. While _____ Mortgage Investors has attempted to bootstrap statutory interest into its calculation, it fails to explain how the imposition of statutory interest from _____, 20_____ to the date of the Referee's Report, _____, 20_____, was prejudicial to _____ Mortgage Investors. It also fails to explain why plaintiffs should pay _____ Mortgage Investors for statutory interest, which has accrued since that date to the date of the Referee's Report. Indeed, he has not offered any explanation because he cannot – none exists!

11. As set forth in Schedule C of the Referee's Report, the Referee determined that the Second Modification Agreement, changing the interest rate chargeable on the principal balance of $345,972.64, from 11% to 16%, became effective on _____, 20_____. That Modification Agreement expired on _____, 20_____, the date on which the note became due. The difference between interest at 16% and interest at 11% during that five month period (_____, 20_____ to _____, 20_____) was $5,293.80. As such, the Referee determined that, to the extent _____ Mortgage Investors was prejudiced as a result of the change in interest rates, that prejudice amounted to $5,293.80. From _____, 20_____ to _____, 20_____, the date of the Referee's Report, the Referee calculated interest due to the plaintiffs at the statutory rate of 9%. Plaintiffs would be entitled to that statutory amount irrespective of when the note became due. In fact, had the plaintiffs not agreed to a Second Modification Agreement, the note would have become due _____, 20_____ and statutory interest would have accrued from that date. Under those circumstances, _____ Mortgage Investors would not be entitled to any priority in any amount.

12. Since, upon the foreclosure sale of this property, it is likely that plaintiffs will purchase the property by virtue of a credit bid, and therefore be required to satisfy all outstanding senior liens, such as taxes, and any priority amount award to _____ Mortgage Investors, the issue of the amount to which _____ Mortgage Investors is entitled to priority is of paramount importance.

13. As the law is clear that the interest rate set forth in the Second Modification Agreement ended on the due date of the note, and thereafter interest accrued at the statutory rate, it cannot be said that _____ Mortgage Investors was prejudiced beyond the note's due date, _____, 20_____. Under all the circumstances, plaintiffs respectfully submit that the calculations of the Referee, as set forth in his Report, were correct in

all respects. As such, plaintiffs respectfully request that this Court confirm the Referee's Report as submitted and enter a judgment or foreclosure in favor of plaintiffs.

WHEREFORE, you affirmant respectfully requests that this Court deny the relief requested by _____ Mortgage Investors, confirm the Referee's Report as submitted and enter a judgment of foreclosure in favor of plaintiffs, together with such other and further relief as this Court deems just and proper.

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