

<b>Wells Fargo Bank, N.A. v Brown</b>
2018 NY Slip Op 33063(U)
November 16, 2018
Supreme Court, Suffolk County
Docket Number: 0011380/2010
Judge: James Hudson
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**Supreme Court of the County of Suffolk  
State of New York - Part XL**

**PRESENT:**  
**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*

X-----X  
WELLS FARGO BANK, N.A. AS TRUSTEE  
FOR OPTION ONE MORTGAGE LOAN TRUST  
2007-6 ASSETS-BACKED CERTIFICATES,  
SERIES 2007-6,

Plaintiff,

-against-

MARIA BROWN, SWINTON BROWN, "JOHN  
DOES # 1-5", and "JANE DOES # 1-5" said names  
being fictitious, it being the intention of Plaintiff to  
designate any and all occupants, tenants, persons or  
corporations, if any, having or claiming an interest in  
or lien upon the premises being foreclosed herein,

Defendants.

X-----X

INDEX NO.:011380/2010

MOT. SEQ. NO.: 006 - Mot D  
009 - MD  
010 - MG  
011 - MD

HINSHAW & CULBERTSON, LLP  
Attorneys for Plaintiff  
800 Third Avenue, 13<sup>th</sup> Floor  
New York, NY 10022

Maria Brown and Swinton Brown  
Defendants *Pro Se*  
17 Santam Court  
Bay Shore, NY 11706

STEVEN R. SCHLESINGER, ESQ.  
Referee  
Jaspan Schlesinger, LLP  
300 Garden City Plaza  
Garden City, NY 11530

Upon the following papers numbered 1-60 read on this Motions; and supporting papers for Application for Fees (mot. seq. no.:006); to Set Aside the Deed (mot. seq. no.:009); Writ of Assistance; (mot. seq. no.:010); Default Judgment (mot. seq. no.011; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (seq. no.:006) of Referee Steven R. Schlesinger, Esq., requesting additional referee's fees pursuant to CPLR §§2004, 8003 is adjourned to a hearing to be held on **Wednesday, December 19<sup>th</sup>, 2018 at 10:00 am** at the New York State Supreme Court of Suffolk County, One Court Street, Riverhead, NY, Part XL; and it is further

**ORDERED** that the motion (seq. no.:009) of Defendant Swinton Brown requesting that the Title Deed be set aside pursuant to RPL §392, is denied in its entirety; and it is further

**ORDERED** that the motion (seq. no.:010) of Plaintiff requesting an order of possession directing the Suffolk County Sheriff to put Plaintiff into possession of the subject premises pursuant to RPAPL §221 is granted in its entirety; and it is further

**ORDERED** that the motion (seq. No.: 011) of Defendant Swinton Brown requesting:

“...default judgment for failure to plead in a timely manner pursuant to CPLR §3012(d) service of pleading and CPLR §2005 excusable default to set aside title deed, any title registration procured by or as result of fraud may be set aside, in the same manner and by the proceedings as in a case of a deed, RPL §392 and CPLR §2003 irregularity of judicial sale, providing further relief, at a time of one year after a sale made pursuant to judgment of order, but not thereafter, the court, upon such terms as may be just, may set the sale aside for failure to comply with the requirements of the civil practice law and rules as to the notice, time or manner of such sale, if the substantial right of a party was prejudice by the defect” is denied in its entirety.

### **Preliminary Matters**

The case has a long history. There have been eleven (11) motions (inclusive of the four [4] decided here), and hearings on motions. Defendant Swinton Brown (“Defendant”) filed both a Federal District Court action in the Eastern District under Civil Action No.:CV 13-3258, (decided and appeal decided), and an EDNY Chapter 7 Bankruptcy Case:17-75265-AST, resulting in bankruptcy discharge.

The December 12<sup>th</sup>, 2012 Judgment of Foreclosure and Sale states, in pertinent part:

“...showing that each of the defendants herein has been duly served with the summons and complaint in this action or has voluntarily appeared, *and stating that more than the legally required number of days has elapsed since defendants were so served and/or appeared; and that none of the defendants has served any answer to said Complaint, nor has their time to do so been extended...*” (italicized for emphasis).

The Defendants are in default. A review of the extensive case file record reveals no motion to extend the time to answer nor any motion to vacate the default of Defendants or any one of them, including Swinton Brown. The time to appeal that default has expired. The premises were sold on November 23<sup>rd</sup>, 2015 by Referee's Deed from Referee Steven R. Schlesinger, grantor to Wells Fargo Bank, N.A., grantee.

**Motion Sequence No.:006 - Referee's Motion for Additional Referee's Fees**

It is noted that a hearing was held on the Referee's motion (seq. no.:006) before Justice Molia on March 29<sup>th</sup>, 2016. Justice Molia did not render a decision on the motion. On June 14<sup>th</sup>, 2017 Justice Molia recused herself from the case. This matter is governed by Judiciary Law §21, which states that:

“ A judge other than a judge of the Court of Appeals, or of the Appellate Division of the Supreme Court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.” McKinney's Judiciary Law §21 [2018].

It has been held that a trial court lacked the authority to render a decision on a motion for review and reversal of referee's discovery order, in light of fact that the justice rendering the decision did not preside at the earlier oral argument (*State v. General Elec. Co.*, 215 AD2d 928, 626 NYS2d 861 [3d Dept 1995]). The provision prohibiting a decision by a judge not present for oral argument applies not only to oral argument of motions but to the taking of the testimony (*People v. Cameron*, 194 AD2d 438, 599 NYS2d 256 [1<sup>st</sup> Dept 1993]). Where a judge disqualifies himself or herself after hearing testimony, the successor judge, who did not hear the testimony may not enter an order (*Fellows v. Fellows*, 25 AD2d 865, 270 NYS2d 143 [2d Dept 1966]).

**CPLR Rule 4321. Fees and Expenses**, provides, in pertinent part:

“1. An order or stipulation for a reference shall determine the basis and method of computing the referee's fees and provide for their payment. The court may make an appropriate order for the payment of the reasonable expenses of the referee. Unless the court otherwise orders or the stipulation otherwise provides, such fees and expenses of the referee shall be taxed as costs.” McKinney's CPLR Rule 4321 [2018].

**CPLR §8003. Referees**, provides, *inter alia*:

“(a) **Generally.** A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead.”

The Referee’s fee for his services is limited to the statutory rate of \$50.00 per day, where there is no stipulation by parties and no specific rate set forth by the Court in its order of reference (*Pittoni v. Boland*, 278 AD2d 396, 717 NYS2d 646 [2d Dept 2000], *leave to appeal den.*, 96 NY2d 712, 729 NYS2d 439, 754 NE2d 199 [2001]). Unless an order of reference states how the referee’s fee is to be computed or parties stipulate to any arrangement, referee’s fees are limited to the statutory *per diem* of \$50.00 (*Neuman v. Syosset Hosp. Anesthesia Group, PC*, 112 AD2d 1029, 493 NYS2d 26 [2d Dept 1985]). The Second Department Appellate Division, in contrast to the Third and Fourth Departments has consistently ruled that under CPLR §8003(a) the referee is limited to \$50.00 per day where no other fee has been specified in the order of the court in advance of the reference and there is no written stipulation by the parties (*NYCTL 1998-2 Trust v. Kahan*, 9 Misc3d 1119[A], 862 NYS2d 809 [Table], 2005 WL 2681599 [Sup Ct Kings Cty 2005]; *citing Al Moynee Holdings, Ltd. v. Deutsche*, 254 AD2d 443, 679 NYS 2d 400 [2d Dept 1998]; *Pittoni, supra.*; *Matter of Charles F.*, 242 AD2d 297, 660 NYS2d 594 [2d Dept 1997]).

A decision by this Court cannot rely upon the testimony taken previously before Justice Molia. The decision on the Referee’s motion (seq. no.:006) is adjourned subject to a hearing limited to this issue to be held **Wednesday, December 19<sup>th</sup>, 2018, at 10:00 am.**

**Motion Sequence No.:009 - Defendant’s Motion To Set Aside Title Deed RPL §392**

It is noted at the inception of this discussion that Defendant is in default and has failed to vacate his default. Defendant lacks standing to plead and the ensuing discussion of his motion does not imbue validity to the motion nor serve as vacatur of Defendant’s default. It is merely a courtesy.

We now turn to the Defendant’s argument concerning fraud. RPL §392 provides in salient part: “Any title registration procured by or as the result of fraud may be set aside...No action or proceeding or appeal shall lie or be commenced except on the ground of fraud...” McKinney’s RPL §392 [2018]. Certificates of Title cannot be attacked in the absence of fraud and where more than thirty (30) days have elapsed since registration became complete (*Floral Park Mut. Fuel Co. v. Fiske*, 128 Misc 349, 218 NYS 128, *appeal dismissed*, 220 AD 778, 222 NYS 804, *appeal dismissed* 246 NY 622, 159 NE 676 [1926]).

In the instant case, the Referee's Deed was executed November 23<sup>rd</sup>, 2015. Defendant's motion (seq. no.:009) was filed July 22<sup>nd</sup>, 2016. The sole available claim in motion sequence no.:009 is fraud. Defendant, however, alleges mistakes in the deed, not fraud. Defendant asserts that the Referee in the Referee's Deed being the grantor is a mistake. Defendant alleges that the stated deed consideration is inadequate. Defendant offers no evidence of fraud in his motion. Defendant's motion (seq. no.:009) seeking an order setting aside the Referee's deed is denied in its entirety.

**Motion Sequence 010 - Plaintiff's Motion for Order of Possession pursuant to RPAPL §221.**

This statute contains the following language:

“Where a judgment affecting the title to, or the possession, enjoyment or use of, real property allots to any person a distinct parcel of real property...it also may direct the delivery of possession of the property to the person entitled thereto...If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, by order, in its discretion, besides punishing the disobedience as contempt, may require the sheriff to put that person into possession...”

Applying the above statutory criteria, it has been held that the purchaser of property at a foreclosure sale was entitled to a writ of assistance evicting the occupants from the premises, where the occupants were parties to the underlying foreclosure action, had been served with a copy of the judgment of foreclosure and sale, and were duly apprised of the sale of the property (*Tri-Land Properties, Inc. v. 115 West 28<sup>th</sup> St. Corp.*, 267 AD2d 142, 701 NYS2d 16 [1<sup>st</sup> Dept 1999]). A court has the power to summarily place a purchaser at a foreclosure sale in possession of the premises sold (*Casella v. Casella*, 202 Misc 1067. 118 NYS2d 448 [County Court, Broome Cty 1953]; see also *Lincoln First Bank, N.A. v. Polishuk*, 86 AD2d 652, 446 NYS2d 399 [2d Dept 1982]).

Plaintiff comes before this Court unopposed in its application (mot. seq. no.:010) for an order compelling delivery of possession of the subject real property in the instant foreclosure case pursuant to RPAPL §221. Defendant filed an affidavit in opposition to Plaintiff's application.

It is noted that the Court examined Defendant's assertion that he is under the protection of the United States Bankruptcy Court for the Eastern District of New York. Defendant Swinton Brown had filed for Chapter 7 Bankruptcy protection, under case number 17-74265-AST. Defendant's bankruptcy resulted in his being granted a discharge in bankruptcy. That case was closed January 5<sup>th</sup>, 2018.

Plaintiff's unopposed motion sufficiently demonstrates its entitlement to the relief requested (*see Deutsche Bank Natl. Trust Co. v. Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Plaza Equities, LLC v. Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Jessabell Realty Corp. v. Gonzalez*, 116 AD3d 908, 985 NYS2d 897 [2d Dept 2014]). Plaintiff's motion (seq. no.:010) requesting an order pursuant to RPAPL §221 compelling delivery of possession of the subject real property to Plaintiff and directing the Suffolk County Sheriff to put Plaintiff into possession of the subject premises is granted in its entirety.

#### **Motion Sequence 011 - Defendant Swinton Brown**

Motion Sequence No.:011 of the Defendant Swinton Brown makes the following requests:

"...default judgment for failure to plead in a timely manner pursuant to CPLR §3012(d) service of pleading and CPLR §2005 excusable default to set aside title deed, any title registration procured by or as result of fraud may be set aside, in the same manner and by the proceedings as in a case of a deed, RPL §392 and CPLR §2003 irregularity of judicial sale, providing further relief, at a time of one year after a sale made pursuant to judgment of order, but not thereafter, the court, upon such terms as may be just, may set the sale aside for failure to comply with the requirements of the civil practice law and rules as to the notice, time or manner of such sale, if the substantial right of a party was prejudice by the defect."

The Court declines to speculate as to the meaning of the foregoing language. The request for relief in motion (seq. no.:011) fails to request anything which is legally cognizable and therefore constitutes a nullity. The Court must reiterate and emphasize: the Defendant is in default. There is no record of a motion to vacate the default being filed or granted. The motion (seq. no.:011) of Defendant Swinton Brown is denied in its entirety.

*Wells Fargo Bank, N.A., et al. v*

*Maria Brown, et al. Index No.:011380/2010*

The proposed Order directing the Suffolk County Sheriff to put the Plaintiff, Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2007-6 Asset-Backed Certificates 2007-6, into possession of 17 Santam Court, Bay Shore, New York 11706, also known and designated as and by District 0500, Section 290.00, Block 01.00, Lot 031.000 will be signed simultaneously with this decision.

The foregoing decision constitutes the Order of the Court.

**DATED: NOVEMBER 16<sup>th</sup>, 2018**  
**RIVERHEAD, NY**

  
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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*