

**Washington Mut. Bank v Faison**

2007 NY Slip Op 30414(U)

March 22, 2007

Supreme Court, Queens County

Docket Number: 0013499

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

WASHINGTON MUTUAL BANK f/k/a  
WASHINGTON MUTUAL BANK, F.A.

Plaintiff,

-against-

SANDRA FAISON, ET AL.

Defendant

Index No:13499/05

Motion Date: 1/24/07

Motion Cal. No.: 36

The following papers numbered 1 to 9 read on this motion by plaintiff for an Order directing the Referee to account, ordering that the Referee to remit the amount due to the plaintiff from the proceeds of the foreclosure sale plus interest and directing the referee to reimburse plaintiff for the transfer taxes

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 6
Replying Affidavits.....	7 - 9

Upon the foregoing papers it is ordered that this motion is determined as follows.

Pursuant to the Judgment of Foreclosure and Sale the mortgaged property was sold at auction on December 2, 2005 for \$440,000.00. The plaintiff prepared and forwarded to the referee the proposed closing statements including the Referee's Report of Sale together with a computation page. A closing with the purchaser at the foreclosure sale took place on January 25, 2006. At the closing the referee paid the amounts as expressly directed in the Judgment, as well as the New York City and New York State Transfer taxes.

After the closing, the plaintiff and referee became involved in a dispute as to the contents of the computation page in the referee's report of sale, what amounts the plaintiff was due and

whether the referee properly paid the transfer taxes. The dispute remained unsolved and the instant motion ensued.

The plaintiff now moves to compel the referee to account for the proceeds of the sale, to distribute the amounts due to the plaintiff without deducting therefrom the amount he paid for transfer taxes plus interest on said amount at the rate of 9% from January 25, 2006, the date of transfer of the deed. By Order dated January 29, 2007, the motion was held in abeyance pending an accounting by the referee of the disposition of the proceeds from the sale.

Plaintiff asserts that the dispute as to the computations arose as a result of the referee wrongfully paying the transfer taxes and deed recordation costs because the judgment of foreclosure is silent in this regard and paragraph EIGHTH of the terms of sale provides, inter alia, that transfer taxes and deed recordation costs, shall be paid by the purchaser. Plaintiff further maintains that the wrongful act was compounded by the referee deducting the amounts he paid for transfer taxes from the amount due to the plaintiff. In response, the referee states that the judgment directs the referee to pay taxes and thus, he was obligated to pay all the taxes including the transfer taxes.

A referee appointed to conduct a foreclosure sale serves as an officer of the court (see Ercolani v. Sam & Al Realty Co., 17 NY2d 299 [1966]; Crisona v. Macaluso, 33 AD2d 569 [1969] and must conduct the sale upon terms in conformity with the judgment, including the terms of sale contained therein, and applicable statutes.

Tax Law § 1404(a) and the Administrative Code of the City of New York, § 11-2104 obligates the grantor or transferor to pay transfer taxes, which in the context of a foreclosure sale is the referee since he executes and delivers the deed (see, RPAPL § 1353[1]; Tax Law § 1401[g]). While it is reasonable to conclude that the referee is obligated to pay the transfer taxes, it does not follow that he then becomes personally obligated to do so since he serves as a judicial officer in a representative capacity. The only possible funds from which the referee could make payment are the proceeds of the sale which constitute expenses of the sale pursuant to RPAPL 1354(2) and payable prior any distribution, including the amount due to the plaintiff (see Trefoil Capital Corp. v. Creed Taylor, Inc., 125 Misc.2d 152, 157 [1984] rev'd on other grounds 121 AD2d 876 [1986]). In addition, while failure to pay the transfer taxes does not result in a lien upon the property, it prevents purchaser from recording the deed (Tax Law § 1410 [b]). A good faith purchaser for value is entitled to receive a deed in recordable form which the referee cannot convey unless the transfer taxes have been paid.

Accordingly, the court finds that the referee in this case properly paid the transfer taxes and deed recordation costs. While some previous decisions have held that a purchaser is bound by the "Terms of Sale" as announced at the time of the auction, such findings were made in the context of a motions by the purchaser, or the referee on behalf of the purchaser, objecting to the terms of sale which obligated the purchaser to pay the transfer taxes. In such cases the court found that the purchaser "agreed" to the terms of sale and cannot, therefore, complain (see e.g. Regency Savings Bank, F.S.B. v. Terry-ross Associates, N.Y.L.J., Nov. 27, 2002, at p. 21,col. 4 (Sup.Ct., Queens County [Price,J.]; Mortgage Electronic Registration System, Inc. v. Rodriguez, Sup. Ct., Queens County, January 31, 2005, Dorsa,J., Index No. 33382/02). In the instant case, the dispute is not between the referee and a purchaser at the foreclosure sale.

It is evident from the papers submitted that the referee paid the transfer taxes from the moneys due to the plaintiff. While payment of the transfer taxes was proper, it should have not been paid out of the amounts due to the plaintiff as it effectively placed the obligation on the plaintiff which is not in accordance with the judgment, or any statute or even the terms of sale.

After a review of all of the documents submitted by both the plaintiff and the referee the court finds the following to be the correct Statement of Sale and Computation of Deficiency or Surplus.

**SALE PRICE..... \$ 440,000.00**

Referee's payments at closing:

Real Estate Taxes (3rd quarter).....	\$	434.40	
Real Property Transfer Tax.....		4,400.00	
NYS Doc Stamps.....		1,760.00	
ACRIS Forms.....	+	150.00	
		Total Expenses.....	-\$ 6,744.40
		<b>NET PROCEEDS OF SALE.....</b>	<b>\$ 433,255.60</b>

Amount Due plaintiff per judgment.....	\$	99,841.63	
Additional Interest 8/14/05-9/15/05.....	+	476.52	
Interest from 9/16/05 - 1/25/06.....	+	3,190.44	
Total amount due plaintiff per judgment.....			\$103,508.59

Disbursements /Advances by plaintiff:

Advertising costs.....	\$ 1,400.83	
Statutory Costs and Disbursements.....	1,205.00	
Taxes and Other Advances.....	8,663.03	
Inspection.....	86.50	
Attorney Fees awarded in judgement.....	+ 1,800.00	
Total Disbursements/Advances to plaintiff.....		<u>\$ 13,155.36</u>

TOTAL AMOUNT DUE PLAINTIFF..... \$116,663.95

FINAL Distribution from Net proceeds as per judgment:

<b>REFEREE FEE</b> .....	\$ 500.00
<b>TOTAL AMOUNT DUE PLAINTIFF</b> .....	\$116,663.95
<b>SURPLUS REMAINING</b> .....	\$316,091.65

In view of the above, the plaintiff's motion is granted to the extent that the referee is directed to turn over the total amount he has on deposit, including all accrued interest, for the account of the plaintiff within 10 days of the entry of this Order by a check payable to the attorney for plaintiff. The plaintiff shall recover the remaining \$6310.00 from the surplus money on deposit. Accordingly, it is

**ORDERED**, that upon being served with a certified copy of this order with notice of entry, the Clerk of Queens County, the Commissioner of Finance of the City of New York or any other persons or agencies having possession of the subject surplus funds shall refund and turnover to the plaintiff's attorney the sum of \$6310.00 and amend the records to reflect that the amount of surplus on hand is \$316,091.65.

The remainder of the plaintiff's application to recover accrued interest on the proceeds from January 25, 2006 to the date of payment is denied. Plaintiff may seek recovery by plenary action.

A copy of this Order is being mailed to plaintiff's attorney and the referee.

Dated: March 22, 2007  
D# 30

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J.S.C.