

**NYCTL 2005 - A Trust v Wright**

2010 NY Slip Op 32956(U)

September 27, 2010

Supreme Court, Queens County

Docket Number: 11181/06

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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NYCTL 2005- A TRUST AND THE BANK OF  
NEW YORK, AS COLLATERAL AGENT AND  
CUSTODIAN FOR THE NYCTL 2005- A TRUST,

Index No.: 11181/06  
Motion Date: 5/26/10  
Motion Cal. No.: 22  
Motion Seq. No.: 4

Plaintiff,

-against-

GERTIE MAY WRIGHT, RUTH WRIGHT ALLEN,  
NED HOGUE and FRANCES GIBSON, et. al.,

Defendants.  
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The following papers numbered 1 to 12 read on this motion by defendant Gertie May Wright for an order, pursuant to RPAPL 1355(2) and 1361(2), confirming the referee’s report of sale and appointing a referee to ascertain and report to defendant Gertie May Wright the owner of the equity of redemption; and on the confirmation of the report on such reference, distribution of said surplus monies to Gertie May Wright.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits.....	5 - 8
Reply Affirmations-Exhibits.....	9 - 12

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is an action to foreclose a mortgage on property known as 108-36 New York Boulevard, Queens, New York, previously owned by defendants Gertie May Wright, Ned Hogue and Francis Gibson, all of whom are deceased. By Order of Reference dated February 22, 2007, Lishowma Henry was appointed the referee in this matter, and on May 17, 2007, a Judgment of Foreclosure was signed. The property was sold on September 5, 2008, and Referee Henry filed the Referee’s Report of Sale on October 22, 2008, whereby surplus monies in the amount of \$169,981.68 was deposited into the Court, and thereafter the County Clerk’s Office deposited those monies with the Department of Finance of the City of New York on that day. Subsequent thereto, Notices of Claims to Surplus Money were filed by Sylvia Spann (“Spann”) and Calvin Hogue (“Hogue”), distributees of the

Estates of Frances Gibson and Ned Hogue, on November 18 and December 29, 2008, respectively, by and through their attorney, Augustine A. Diji, Esq. Further, a Notice of Claim to Surplus Money was also filed by the Estate of Gertie May Wright (“Wright”) on March 13, 2009, by and through its attorney, Kevin S. Golding, Esq. By Memorandum decision of this Court, dated June 23, 2009, the motion by Spann and Hogue for an order confirming the Referee’s Report of Sale and appointing a Referee to ascertain and report the amounts due, and for distribution of the surplus monies to the respective Estates, was granted without opposition. The Memorandum decision directed the submission of an order, which was signed by this Court on June 30, 2009, and appointed Gilbert Parris, Esq., as Referee.

Referee Parris notified all concerned parties on August 11, 2009, that a hearing to entertain any claims to surplus funds was scheduled for September 11, 2009. On that day, a conference was conducted in which counsel for the respective parties appeared, as well as counsel from the Law Office of Jay Markowitz, P.C., who appeared on behalf of Gotham Asset Locators Fund, Inc. (“Gotham”), which claims to have purchased, for the sum of \$5,000.00, a one third interest in the foreclosed property from Ruth Allen, the daughter of decedent Wright, pursuant to Agreement dated July 19, 2007. A Notice of Claim to Surplus Money dated September 24, 2008, was filed by Gotham on October 8, 2008, by and through Attorney Markowitz. Subsequently, Referee Parris conducted a hearing on March 23, 2010, in which evidence was adduced from Spann and Hogue with regard to their claims to the surplus funds.

It is upon the foregoing that Wright moves for an order confirming the referee’s report of sale and appointing a referee to ascertain and report the amount due to Wright as to the distribution of said surplus monies. In opposition to the motion, Gotham contends that this Court already granted the relief being sought by order dated June 30, 2009, and a hearing was already conducted on the matter by Referee Parris. Thus, Gotham asserts that the motion is redundant and moot. In reply Wright’s attorney, Golding, contends that at the hearing, Attorney Diji, attorney for the Estates of Frances Gibson and Ned Hogue, stated on several occasions, “that the Referee could only decide and report on what was relevant to his clients, defendants, since he was the moving party.” He further asserts that Referee Parris did not address the issues with regard to any distribution to Wright. Attorney Golding asserts that after the September 11, 2009 surplus funds conference (“conference”), he made attempts to contact Attorney Diji and Referee Parris in an effort to arrange a conference call to resolve the matter, to no avail.

In support of the instant motion pertaining to the Wright claim for surplus funds, Attorney Golding proffers the affidavit of Vanessa Nixon (“Nixon”), who is the granddaughter of decedent Wright and the Executrix of her estate, pursuant to the Last Will and Testament of decedent Wright dated December 23, 2002. Nixon asserts that she attended the conference, and states the following concerning that conference:

The attorney for Francis Gibson and Ned Hogue, Augustine Diji, and the Referee did not discuss the issues pertaining to the distribution of the surplus to the Estate of Gertie May Wright. Mr. Parris stated that

this could not be done because it was Mr. Diji's motion and that we would have to file our own motion in order to get our issues addressed.

With regard to the interest of Gotham, Nixon states that she learned for the first time at the conference that Ruth Allen, her aunt and the daughter of decedent Wright, purported to have an interest in the premises which was allegedly transferred to Gotham for \$5,000.00. She states, in pertinent part, the following:

I am the Executor of the Estate and there are no other interest parties to the estate of Gertie May Wright. This is supported by the agreement signed by all parties (see Exhibit C), the Will and marriage certificate (see Exhibit D). Furthermore, at the time of the alleged conveyance of said interest, Ruth Allen had no interest to transfer, since the Last Will and Testament of the mother of Ruth Allen, Gertie May Wright, duly attested to on the 23<sup>rd</sup> of December, 2002, bequeathed \$2000.00 to her only, with the remainder and residue to myself, Vanessa Nixon. Moreover, at the time of the alleged transfer in July 2007, Ruth Allen was in rehabilitation after suffering a stroke from which she could neither talk nor move. She was paralyzed from around 2006 until her death in January 2010.

Based upon the foregoing, there is no legitimate claim to the estate or surplus designated to Gertie May Wright and we request the third interest to which she is entitled.

Nixon also proffers a Stipulation of Settlement dated June 5, 2009, signed by her as the Executrix of Wright, Attorney Golding on her behalf, Spann as distributee of the Estate of Frances Gibson, Attorney Diji, on behalf of "Ned Hogue and Frances Gibson."<sup>1</sup> The agreement provides the following:

1. The defendants Ned Hogue and Frances Gibson, through their designated representatives, are the prior deed owners of the equity of redemption herein and claims 66% of the surplus monies.
2. The defendant, Vanessa Nixon, on behalf of the Estate of Gertie May Wright claims 33% of the surplus money.
3. Defendants, Ned Hogue and Frances Gibson, through their

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<sup>1</sup> The Stipulation of Settlement was not signed by Calvin Hogue, as distributees of the Estate of Ned Hogue.

duly appointed and authorized representatives and distributees have agreed to pay Vanessa Nixon on behalf of the Estate of Gertie May Wright the sum of Five Thousand Dollars (\$5000.00) within ten (10) days after the receipt by the parties hereto of surplus funds from the New York State Department of Finance.

4. The payment of \$5000.00 is in full satisfaction of any and all claims to the surplus by the Estate of Gertie May Wright, through her duly authorized representative Vanessa Nixon, against Ned Hogue and Frances Gibson. There are no other claims by the Estate of Gertie May Wright and Vanessa Nixon is the only authorized representative entitled to collect the surplus money.
5. A faxed signed copy of this Stipulation shall have the same force and effect as if an original.

Thus, Wright contends that the appointment of a referee is necessitated to “address my clients’ issues or in the alternative, an order stating that all the relevant parties reconvene and appear at the office of the Referee to resolve all issues concerning the distribution of the surplus monies in this matter.”

From the outset, this Court notes that while this motion was pending, on July 14, 2010, Referee Parris filed a Referee’s Report To Distribute Surplus Money to the Estate of Ned Hogue (“Hogue Report”), in which he reported that “ $33^{1/3}$  of the surplus monies plus interest from October 22, 2006 be paid to claimant, the Estate of Ned Hogue subject to any statutory fees, and expenses, including Referee’s fees. He further recommended that the surplus monies be distributed as follows:<sup>2</sup>

- a. In the discretion of the Court, allow a fee of \$750.00 for the undersigned Referee’s fees in connection with this matter; and
- b. That  $33^{1/3}$  of the total surplus deposit shall be paid to the Estate of Ned Hogue, prior deed owner of the equity of redemption.
- c. That the surplus amounts due to the Estate of Ned Hogue

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<sup>2</sup> A Referee’s Report To Distribute Surplus Money to the Estate of Frances Gibson (“Gibson Report”) dated June 25, 2010, which was not filed with the County Clerk’s Office, seeks the same distributions recommended in the Hogue Report, but on behalf of the Gibson Estate.

together with accrued interest thereon and be made payable to Augustine A. Diji, P.C., as attorney for the Estate of Ned Hogue.

Thereafter, Spann and Hogue submitted separate motions, under “Motion Sequence No. 5” and “Motion Sequence No. 6,” regarding the distribution of the subject funds, and by Memorandum decisions on September 9, 2010, on the separate motions, this Court granted without opposition, the following requests for orders:

Motion Sequence No. 5

(a) confirming the Referee’s Report of the Distribution of the surplus monies and directing the Commissioner of Finance, after first deducting their fees and commissions allowed by law, to pay to Augustine A. Diji, PC, as attorney for the Estate of Frances Gibson 33 and 1/3% of the surplus monies, plus interest and (b) paying the Referee in this proceeding, Gilbert C. Parris, for his fees as such referee is due.

Motion Sequence No. 6

(a) confirming the Referee’s Report of the Distribution of the surplus monies and directing the Commissioner of Finance, after first deducting their fees and commissions allowed by law, to pay to Augustine A. Diji, PC, as attorney for the Estate of Ned Hogue 33 and 1/3% of the surplus monies, plus interest; and (b) paying the Referee in this proceeding, Gilbert C. Parris, for his fees as such referee is due.

However, notwithstanding the Memorandum decisions granting the respective applications, and the further directives for the submission of orders to confirm the referee’s report in this surplus money proceeding, which were annexed to the moving papers, in light of the numerous concerns that have been raised on this application, it is clear those applications should not have been granted.

Real Property Actions and Proceedings Law § 1361, entitled, “Application for Surplus; Reference,” states:

1. Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name, or by his attorney, at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of sale is filed, a written notice of such claim, stating the nature and extent of his claim and the address of himself or his attorney.

2. On the motion for confirmation, or at any time within three months thereafter, on notice to all parties who have appeared in the action or filed claims, on motion of any party to the action, or any person who has filed a notice of claim on the surplus moneys, the court, by reference or otherwise, shall ascertain and report the amount due to him or any other person who has a lien on such surplus moneys, and the priority of the several liens thereon and order distribution of surplus moneys.
3. The owner of the equity of redemption, or any party who has appeared in the action or any person who files a notice of claim or who has a recorded lien against the property shall be given notice by mail or in such other manner as the court shall direct, to attend any hearing on disposition of surplus money.

“The surplus funds of a foreclosure sale stand in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land.” NYCTL 1999-1 Trust v. N.Y. Pride Holdings, Inc., 68 A.D.3d 952 (2<sup>nd</sup> Dept. 2009). Thus, contrary to the purported contentions that all claims could not be addressed by Referee Parris at the conference due to the fact that the Referee was appointed by motion of Spann and Hogue, “a referee may inquire into and determine all questions of law and fact, and consider the equities of the claimants in a surplus money proceeding ‘to the end that it may be decided in such proceedings finally and on the merits to whom such surplus moneys belong’ (citations omitted).” Chase Manhattan Mortg. Corp. v. Hall, 18 A.D.3d 413, 414 (2<sup>nd</sup> Dept. 2005); see, American Holdings Inv. Corp. v. Josey, 71 A.D.3d 927 (2<sup>nd</sup> Dept. 2010); NYCTL 1999-1 Trust v. N.Y. Pride Holdings, Inc., 68 A.D.3d 952 (2<sup>nd</sup> Dept. 2009). More pointedly, a “referee may inquire into and determine all questions of law and fact, usury, fraud or the like, and every question tending to show the equities of the claimant,” not simply for the benefit of the moving party, but for all who have claims to the surplus funds. Shankman v. Horoshko, 291 A.D.2d 441, 442 (2<sup>nd</sup> Dept. 2002). “Pursuant to RPAPL 1361(2), the court must ascertain the amount due to any claimants with liens on the surplus money and the priority of the liens in order to distribute the surplus money.” Id. at 442.

Here, neither the Hogue Report, dated June 25, 2010 and filed with the County Clerk’s Office on July 14, 2010, nor the Gibson Report, also dated June 25, 2010, but not filed with the Court, mention the Notices of Claims to Surplus Money filed by Gotham and the Estate of Wright on October 8, 2008 and March 13, 2009, respectively. Indeed, the Referee’s reports state that the hearing on March 23, 2010, was based upon testimony and documentation proffered by Attorney Diji and representatives of Spann and Hogue, notwithstanding the claims of Wright and Gotham. The reports do not make any references to the appearances of any of the additional claimants at the September 11, 2009 conference, and the claims asserted thereupon. Moreover, Referee Parris failed to make any specific findings with regard to Wright and Gotham and the validity or invalidity of their respective claims, particularly in view of the Agreement entered into between Gotham and

Ruth Allen, and the Stipulation of Settlement entered into by Nixon on behalf of Wright, with Spann on behalf of the Estate of Frances Gibson.

Accordingly, as the instant application illuminates the numerous, unaddressed issues that need to be determined in this surplus proceeding, the Memorandum decisions on September 9, 2010, on the separate motions by Spann and Hogue, identified as “Motion Sequence No. 5” and “Motion Sequence No. 6,” hereby are vacated and set aside, and any orders flowing therefrom are also vacated. The March 23, 2010 hearing conducted by the Referee and the reports flowing therefrom hereby are declared to be of no force or effect. The instant motion by defendant Gertie May Wright for an order, pursuant to RPAPL 1355(2) and 1361(2), confirming the referee’s report of sale and appointing a referee to ascertain and report to defendant Gertie May Wright the owner of the equity of redemption, and upon the confirmation of the report on such reference, distribution of said surplus monies to Gertie May Wright, is granted to the extent that matter is set down for a conference before this Court on November 10, 2010, at 10:00 a.m., in Courtroom 63. The Referee and all interested parties are directed to appear.

Dated: September 27, 2010

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J.S.C.