Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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WELLS FARGO BANK, N.A. as Trustee for Citicorp Mortgage Loan Trust, Series 2004-OPT1, Asset-Backed Pass-Through Certificates,,

Plaintiff,

-against-

DANIEL J. PELOSI and GERARD J. SWEENEY, as Temporary Administrator of the Estate of R. Theodore Ammon,

Defendants.

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REFEREE:
RUDOLPH H. CARTIER, JR., ESQ.
100 Austin Street
Patchogue, New York 11772

INDEX NO.: 11689/05
MOTION DATE: 12/15/12
MOTION NO.: 008 MG; 009 MD

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Upon the following papers numbered 1 to 128 read on this motion to confirm referee's report of claims to surplus monies and cross-motion to reject referee's report : Notice of Motion/ Order to Show Cause and supporting papers 1- 21 ; Notice of Cross Motion and supporting papers 22-23 ; Answering Affidavits and supporting papers 24-46; 47-48; 49-50; 51-56; 57-89; 90-91; 92-93 ; Replying Affidavits and supporting papers 94-103 ; Other 104-128 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 008) of defendant/claimant Gerard J. Sweeney, as Temporary Administrator of the Estate of R. Theodore Ammon, for an order confirming the report of the referee and directing a distribution of the surplus monies in accordance therewith and providing for payment of costs, referee's fees and expenses of this reference is granted in all respects; and it is further

ORDERED that the cross-motion (motion sequence no. 009) of claimant James D. Reddy, Esq. for an order purportedly pursuant to CPLR R. 4404 and NYCRR §202.44 rejecting in its entirety the referee's report of Special Referee Rudolph Cartier dated August 25, 2011 and further granting judgment to claimants James D. Reddy, Esq. and Richard Mischel, Esq. for the relief requested in this surplus money proceeding; and, pursuant to CPLR R. 4403, making new findings with or without taking additional testimony, or ordering a new hearing; and, pursuant to CPLR §213(8), dismissing any claims to challenge, invalidate or set aside the June 1, 2005 mortgages of the claimants herein on the ground that such claims are time-barred, is denied in all respects; and it is further

ORDERED that the referee is directed to forthwith serve a copy of his Affirmation of Services dated November 14, 2011 on the attorneys for Gerard J. Sweeney, as Temporary Administrator of the Estate of R. Theodore Ammon, and to file a copy of his affidavit of service thereof with the Court; and it is further

ORDERED that the Temporary Administrator of the Estate of R. Theodore Ammon shall have 30 days after such service to submit opposition, if any, to the referee's application for fees, and thereafter a further order/judgment of this Court shall issue setting forth the amount of fees to be awarded to the referee; and it is further

ORDERED that after the payment of the referee's fees to be awarded as set forth hereinabove, and any fees due to the Suffolk County Treasurer, the balance of surplus money remaining, together with accrued interest, shall be distributed to Gerard J. Sweeney, as Temporary Administrator of the Estate of R. Theodore Ammon.

On December 13, 2004, Daniel J. Pelosi ("Pelosi"), the defendant-mortgagor in the above-captioned foreclosure action, was convicted of the murder of R. Theodore Ammon ("Ammon") and is currently serving a sentence of 25 years to life. After his conviction, Pelosi stopped paying the mortgage on his residence in Center Moriches, New York, which was ultimately sold pursuant to this Court's judgment of foreclosure and sale on November 16, 2006. The sale resulted in a surplus of $143,408.96 which was deposited in the office of the Suffolk County Treasurer by the referee.

A notice of claim to the surplus money was filed by Gerard J. Sweeney as Temporary Administrator (the "Administrator") of the Estate of R. Theodore Ammon (the "Estate") predicated on a judgment in the amount of $46,748,471.86 entered against Pelosi on April 5, 2006 for the wrongful death of Ammon. Notices of claim were also filed by Pelosi's attorney in the wrongful death action, James D. Reddy, Esq. ("Reddy"), his appellate attorney, Richard E. Mischel, Esq. ("Mischel"), his current wife, Jennifer Zolnowski, and his former wife, Tamara Pelosi (collectively, the "Pelosi claimants"), all predicated on mortgages dated June 1, 2005 purportedly given to secure written assignments dated January 18, 2005 of Pelosi's equity in the mortgaged property. The assignments and mortgages – all of which were drafted by Reddy – were purportedly given in exchange for legal services provided or to be provided to Pelosi by Reddy's law firm and Mischel's law firm and in payment of child support obligations allegedly owed by Pelosi to his wife Jennifer Zolnowksi and child support/maintenance obligations allegedly owed to his ex-wife Tamara Pelosi. Reddy recorded his mortgage in the amount of $75,000.00 on April 11, 2006, and recorded the mortgages to Mischel, Neumann & Horn, P.C. in the amount of $96,000.00, Tamara Pelosi in the amount of $48,000.00 and Jennifer Zolnowski in the amount of $25,000.00 on November 15, 2006 – the day before the foreclosure sale.

The Administrator commenced this surplus money proceeding by way of a motion pursuant to RPAPL §1355 and §1361 for an order confirming the referee's report of sale and for an order distributing all of the surplus money to the Estate on the ground that the purported mortgages and assignments to the Pelosi claimants were fraudulent conveyances pursuant to the Debtor and Creditor Law. In a cross-motion, purportedly submitted on behalf of all of the Pelosi claimants, Reddy claimed priority for his mortgage and requested that the balance of the surplus money remaining after payment to him be paid to the other Pelosi claimants to the exclusion of the Estate.

Pursuant to an order dated February 14, 2008, this Court (BAISLEY, J.) granted the Estate's motion to confirm the report of sale, and appointed Rudolph H. Cartier, Esq. as referee:

> "to hear and determine all questions of law and fact presented herein, including the validity of the various assignments and mortgages and the priority of the several claims to the surplus monies herein, or any other person who has a lien on the surplus monies, and to report thereon with all convenient speed, to the end that on the coming in and confirmation of the report on the reference, a further order may be made for the distribution of the surplus monies as may be just."

No objections to the appointment of the referee were made by any of the parties or the claimants and the order appointing the referee was not appealed (CPLR §4317(b); *Matter of Carlos G. (Bernadette M.)*, 96 AD3d 632 [1st Dept 2012]).

On or about August 25, 2011, a copy of the referee's report and determination, dated August 25, 2011, was served on the parties and filed with the Court, together with a copy of the transcript of the testimony.[1] The report reflects that the referee conducted a pre-hearing conference on April 11, 2008. All claimants were given an opportunity to submit affidavits, affirmations, memoranda of law and documentary evidence, and Pelosi participated in the conference telephonically. Extensive pre-hearing submissions were made by the Estate and by Reddy on behalf of himself and Mischel. Ultimately a hearing was held before the referee on June 26, 2009, attended by Michael H. Reich, Esq. representing the Administrator and the Estate[2]; Reddy on behalf of himself and Mischel; Tamara Pelosi (the former wife of Pelosi) and her attorney Patricia A. Condon, Esq. of McGuire, Condon; and Jennifer Zolnowski Pelosi (the present wife of Pelosi), appearing *pro se.* Pelosi participated in the hearing by telephone from the Elmira Correctional Facility where he is incarcerated. Only Pelosi and Reddy testified at the hearing; the other claimants did not testify. A court reporter took the minutes of the hearing.

The determination of the referee was that "the entire surplus should be awarded to Gerard J. Sweeney, as temporary administrator of the estate of R. Theodore Ammon." The Administrator thereafter interposed the instant motion to confirm the referee's report and Reddy cross-moved, on behalf of himself and Mischel as claimants, to reject the report. An affidavit in opposition to the motion to confirm the report was filed by Mischel and affidavits in opposition to the motion to confirm the report and in support of the cross-motion to reject the report were filed by claimants Tamara Pelosi and Jennifer Zolnowski Pelosi.

Upon a review of the parties' submissions, the referee's report and the record of the proceedings before the referee, the Court grants the Administrator's motion to confirm the referee's report and denies the cross-motion.

A surplus money proceeding is a "special proceeding" within the meaning of CPLR Article 4 and accordingly is a proper forum for the determination of the claimants' competing

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[1] Although it appears that the referee did not file with his report copies of the exhibits and documents that were before him at the hearing, claimant Reddy has purported to rectify that omission with the submission of a "Supplemental Record" to which no other party has objected and which the Court has therefore considered to the extent its contents are referenced in the referee's report.

[2] Mr. Reich's firm also represents the Estate of Generosa Ammond, R. Theodore Ammond's widow, who married Pelosi less than three months after her husband's murder. Generosa Ammond died on August 22, 2003.

claims to surplus moneys (*Velleman v Rohrig*, 193 NY 439 1908]; *Roslyn Savings Bank v Jones*, 69 Misc 2d 733 [Sup Ct 1972]). Pursuant to RPAPL §1361(2), the Court in a surplus money proceeding is required, "by reference or otherwise," to ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus money. A referee appointed by the Court pursuant to RPAPL §1361(2) is authorized to "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[s], to the end that it may be decided in such proceedings finally and on the merits to whom such surplus moneys belong'" (*Citibank, N.A. v Schroeder*, 266 AD2d 332 [2d Dept 1999], citing *Corporate Investing Co. v Mount Vernon Metal Products Co.*, 206 AD 273 [2d Dept 1923], quoting *Wilcox v Drought,* 36 Misc 351, 352-353 [1901], *affd* 71 AD 402 [1902]; CPLR §4317(b)). A referee appointed to hear and determine the issues regarding entitlement to the surplus has "all the powers of a court in performing a like function" (CPLR §4301). "The decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court" (CPLR §4319). The decision must set forth the pertinent facts on which the referee relied for his determination (CPLR §4213(b); *Tri-State Sol-Aire Corp. v United States Fidelity & Guar. Co.*, 198 AD2d 494 [2d Dept 1993]). Moreover, "it is the function of the Referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility" (*Muir v Cuneo*, 267 AD2d 439 [2d Dept 1999]). The role of the appointing Court in reviewing the determination of a referee appointed to "hear and determine" is limited to ascertaining whether the referee exceeded the scope of the issues referred to him for determination (*Kucherovsky v Excel Medical & Diagnostic, P.C.*, 93 AD3d 531 [1st Dept 2012]; *Chase Manhattan Mortg. Corp. v Hall*, 18 AD3d 413 [2d Dept 2005]).

The order of reference dated February 14, 2008 authorized the referee to hear and determine all issues of both fact and law that pertain to the parties' various claims. In particular, the order expressly authorized the referee to determine the validity of the various assignments and mortgages as well as the priority of claims as between and among the claimants and any other lienholders. The principal issue to be determined was whether the assignments and mortgages given by Pelosi to his wife, his ex-wife, and his attorneys were "fraudulent conveyances" under the Debtor and Creditor Law, as alleged by the Estate.

Pursuant to Debtor and Creditor Law §273, "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Sections 273-a and 276 of the Debtor and Creditor Law provide, respectively, as follows:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages…is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment" (§273-a).
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> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors" (§276).

It is well established that antecedent debt may constitute "fair consideration" for a conveyance, provided it is proven by competent evidence (Debtor and Creditor Law §272; *Prudential Farms of Nassau County v Morris*, 286 AD2d 323 [2d Dept 2001]). However, prospective obligations and promises to provide future services are, as a matter of law, inadequate consideration under the Debtor and Creditor Law *(Kleinfeld v Pedersen*, 116 AD2d 970 [4th Dept 1986]).

Claim of Tamara Pelosi for "Child Support"

The referee's report reflects that Pelosi was divorced from his then-wife Tamara Pelosi on January 11, 2002, shortly after the murder of Ammon on October 22, 2001, and four days before Pelosi's marriage to Ammon's widow, Generosa Ammon, on January 15, 2002. Although the affirmation of Tamara Pelosi's attorney submitted to the referee reflects that the Pelosis' judgment of divorce provided for child support of $740.67 per week for the Pelosis' three children and maintenance of $5,000.00 per month, no admissible proof was offered as to the date of Pelosi's alleged default in payment of court-ordered child support or maintenance or the amount of any alleged arrears. Tamara Pelosi herself did not testify or submit an affidavit at the hearing, and the record before the referee reflected that Tamara Pelosi took no steps to enforce the child support obligation after Pelosi allegedly ceased paying child support. It is undisputed that no judgment or order fixing the amount of any arrears for child support was ever entered pursuant to Domestic Relations Law §244 so as to give rise to an enforceable judgment. The judgment of divorce does not itself give rise to a lien upon the property (CPLR §5203; *Gaines v Gaines*, 109 AD2d 866 [2d Dept 1985]).

Moreover, Pelosi's testimony at the hearing established that the purpose of the assignment to his ex-wife was not to secure the payment of an antecedent debt but to provide support for the Pelosis' three children into the future. The referee's report reflects that Pelosi, who claimed never to have even seen the divorce papers setting forth his child support obligations with respect to the children of his marriage with Tamara Pelosi, simply invented a formula to calculate what he believed "was fair for each child" (Hearing Transcript [hereinafter "Tr"] p 25). Pelosi determined this amount to be the total sum of $1,000.00 a month for 48 months, which he testified "started running from...December of the year before" (Tr p 24) and was calculated going forward into the future (Tr p 25). Since the assignment to Tamara Pelosi was executed on January 18, 2005, only a minimal amount of arrears would have accrued since the preceding December (*Century Center, Ltd. v Davis*, 100 AD2d 564 [2d Dept 1984]). The affidavit of Tamara Pelosi submitted in support of Reddy's cross-motion concedes that she had no part in deciding the amount of the assignment and mortgage, which was "purely the idea of Daniel Pelosi."

In sum, no competent evidence was submitted before the referee to establish the existence of any calculable amount of arrears in child support and/or maintenance actually owed to Tamara Pelosi at the time of the execution of the assignment with respect to the Pelosis' three children. Accordingly, the referee properly determined that the assignment and mortgage to Tamara Pelosi were not given for "fair consideration."

Claim of Jennifer Zolnowski

As to the claim of Jennifer Zolnowski Pelosi, who is currently married to Pelosi but was not at the time of the assignment, the referee found Pelosi's assignment "for child support" in the

amount of $25,000.00 to be equally unsupported in the record. Although she appeared at the hearing *pro se*, Jennifer Zolnowski Pelosi did not testify and submitted no evidence in support of her claim, the basis of which, the referee, found, "has never been articulated" (Referee's Report [hereinafter "Rep"] p 8). The referee noted that Ms. Pelosi not only has no judgment of arrears of child support, but has not obtained an order for child support with respect to the child born prior to her marriage to Pelosi. Pelosi testified that the $25,000.00 amount of the assignment to Jennifer Zolnowski for the support of their child, to whom Pelosi concededly had "not given a dime...since he was born" (Tr p 25), was "based on the same calculation" as the assignment to Tamara Pelosi (Tr p 26). In her affidavit submitted in opposition to the motion to confirm the report and in support of the cross-motion, Jennifer Zolnowski Pelosi confirms that she "had no part in deciding the amount of the assignment and mortgage," which "was purely the idea of Daniel Pelosi." Although acknowledging the legal and moral obligation of a parent to support his child, the referee properly concluded that, in the absence of an order or judgment obligating Pelosi to pay child support in a particular amount, Pelosi's execution of an assignment in the arbitrary amount of $25,000.00 in favor of his current wife is insufficient to establish the existence of a valid antecedent debt.

Claim of Mischel for Legal Fees

Pelosi's purported assignment of $96,000.00 of his equity in the property to Mischel, Neuman & Horn, P.C. (now known as Mishel & Horn) reflected that it was given as a legal fee for the prosecution of an appeal of Pelosi's criminal conviction for Ammon's murder. Mischel, who was represented at the hearing by fellow claimant Reddy (having waived the apparent conflict in being represented by a potentially competing claimant in a telephone conference with the referee), did not appear or testify at the hearing and did not submit an affidavit (other than in opposition to the Estate's motion to confirm the referee's report). The referee noted that no documentary submissions were made in connection with the Mischel claim other than the notice of claim executed by Reddy on behalf of the Mischel firm and a letter agreement on the letterhead of Mischel, Neuman & Horn, P.C. dated March 28, 2005 – more than two months after the assignment was executed. That letter makes reference to Pelosi's *intention* to retain the firm's services in connection with a prospective appeal to the Appellate Division, Second Department. It further referenced the parties' *tentative agreement* that the fees for the representation would not exceed $125,000.00, and further provided that, after reviewing the record (for which Pelosi had already paid the firm $30,000.00), the remaining fee to perfect the appeal would be agreed upon and memorialized in a separate agreement that would authorize the firm to proceed with the appeal. Pelosi's signature acknowledging receipt of the letter and agreement to its terms appears on the document, but there was no evidence before the referee that any further agreement was ever executed. Notably, the March 28, 2005 letter agreement makes no reference to an assignment of equity and there is no provision therein for a mortgage to secure the legal fees if the appeal were to proceed.

Reddy testified that he did not recall whether he had any conversations or discussions with Mischel prior to preparing the assignment for his benefit, and asserted attorney-client privilege when asked who told him the amount that was to be included in the assignment (Tr p 63). Reddy testified that the original amount set forth in the assignment he drafted was $200,000.00, which Pelosi himself changed – twice – before writing in the $96,000.00 amount (Tr p 63). Reddy did not know the amount of the retainer (Tr p 63), and did not know whether Mischel had performed any legal services at the time of the assignment (Tr p 64).

The referee found that the assignment did not represent a "just debt" as there was no attorney-client relationship in existence at the time of the assignment and no evidence that any legal services had been performed.

Claim of Reddy for Legal Fees

The $75,000.00 assignment of equity to Reddy, who claims priority over all of the other Pelosi claimants by virtue of his prior-recorded mortgage (which he personally recorded six months before recording the mortgages of the other Pelosi claimants), recites that it was given as a legal fee relating to the Estate's wrongful death action "and other related court actions involving Daniel Pelosi." Reddy testified that Pelosi agreed to pay him $75,000.00 as a cap "for all of the civil litigation" (Tr p 61). Reddy produced three "letters of engagement" in support of his claim, which he testified encompassed both past and future services (Tr p 62). The referee's report reflects that one such letter of engagement is an undated agreement signed on behalf of Pelosi by a purported attorney-in-fact relating to Workers' Compensation, State Insurance Fund and other liens for which a $4,000.00 retainer was payable and legal services were to be billed at $250.00 an hour. A second letter of engagement was dated January 9, 2005 and encompassed claims relating to lifting the lis pendens filed by the Estate to enable the planned private sale of Pelosi's property to a third party to proceed. That agreement provided for a $10,000.00 flat fee, "to be paid only if as when title closes and deed and property is transferred and sold." A third letter of engagement was dated January 18, 2005 and encompassed claims relating to enforcement and validity of a post-nuptial agreement and wills of Generosa Ammon-Pelosi. That agreement provided for payment as follows: "I hereby give and assign to James D. Reddy, P.C. one-third of my one-third outright share as the beneficiary under the will dated just prior to the July 2003 will of Generosa Ammon, a/k/a Generosa Ammon-Pelosi, a/k/a Generosa Pelosi." The referee noted that no retainer agreement was produced for the performance of legal services other than those previously set forth, and specifically that there is no retainer agreement relating to the wrongful death action "and other related actions" (*see* 22 NYCRR §1215.1).

Reddy also produced 14 pages of "activity reports" purporting to show the legal services he performed on behalf of Pelosi during the period from January 1, 2004 to June 29, 2009 in connection with various separately delineated matters. The referee noted that the activity reports were so heavily redacted that they were virtually useless, and that in any event they did not reflect an agreement for a fee of $75,000.00 or a cap on fees of $75,000.00. According to the activity reports, the majority of the legal services for which Reddy is seeking to be paid were performed after the execution of the assignment to Reddy on January 18, 2005. The only exception is the matter entitled "Lien releases," which is covered by the first letter of engagement described above and on which a balance of only $2,775.00 is owed. The referee further noted that inasmuch as two of the letters of engagement provided for contingent or flat fee arrangements, there is no evidence of a "just debt" for past services owing to Reddy by Pelosi and no agreement that covers the provision of future legal services in the maximum amount of $75,000.00. Reddy's testimony before the referee confirmed that Pelosi did not owe him $75,000.00 on January 18, 2005 when the assignments were executed (Tr p 61). Inasmuch as Reddy had the perspicacity to enter into retainer agreements with respect to his other engagements with Pelosi, the absence of a retainer agreement for the $75,000 worth of undefined and unspecified legal services allegedly to be performed in the future was compelling evidence to the referee that there was no such agreement.

Claim of the Estate

The Estate's claim to the surplus moneys is predicated on its judgment in the amount of $46,748,471.86 which was recovered in the wrongful death action it commenced against Pelosi under Index No. 25620/2003. The record reflects that the judgment in that action was not appealed. The initiatory motion papers that brought on the instant surplus money proceeding reflected the Estate's allegation that the assignments and mortgages to the Pelosi claimants constituted fraudulent conveyances as to the Estate pursuant to the Debtor and Creditor Law. The Estate thus claims the entire amount of the surplus moneys in partial satisfaction of its judgment. The evidence adduced upon the hearing supported the Estate's claims, and accordingly the referee determined that the Estate is entitled to the entire surplus after payment of the referee's fee.

The Referee's Findings of Fact and Determinations of Law

The referee's report reflected his review of the parties' numerous submissions in connection with the instant surplus money proceeding, including their post-hearing submissions, as well as the record of the foreclosure action including prior motions and exhibits. The report also reflects the referee's summary and analysis of the applicable law, including the authorities cited by the parties.

The report reflects that the referee considered and rejected Reddy's argument that Pelosi was merely exercising his legal right to favor certain creditors over others. While a debtor has the right to determine the priority of payment of debts to which no legal priority attaches (*Bedell v Chase*, 34 NY 386 [1866]), the validity of those debts must be established by competent evidence (*Prudential Farms of Nassau County, supra*, 286 AD2d at 323). The referee found that no such evidence was produced.

The referee also acknowledged the correctness of the principle of law cited by Reddy on behalf of the Pelosi claimants to the effect that a mortgage becomes a lien on property as of the date it is made, not the date it is recorded, and that an unrecorded mortgage has priority over a judgment that is recorded after the date the mortgage was given (*Dime Savings Bank v Roberts*, 167 AD2d 674 [3d Dept 1990]). The referee concluded, however, that the actual intent of Pelosi to hinder, delay or defraud the Estate from enforcing its judgment negated that principle and that accordingly the Pelosi claimants' mortgages are not entitled to any priority over the Estate's judgment.

Upon reviewing the extensive record, the referee found and determined, *inter alia*, that the conveyances of the assignments and mortgages were made without fair consideration as defined in the Debtor and Creditor Law, had the effect of rendering Pelosi insolvent, and were intended to hinder, delay and defraud the Estate so that no assets would be available to satisfy the wrongful death judgment of the Estate against Pelosi (Debtor and Creditor Law §273, §276). The referee found that there was no retainer agreement to support the $75,000.00 assignment to Reddy's law firm, that there was no attorney-client relationship in existence at the time of the assignment to Mischel's law firm, that the claims of Tamara Pelosi and Jennifer Zolnowski were "virtually worthless without a judgment of arrears of child support,"and Pelosi's own hearing testimony reflected that he "had no money" when he gave the assignments. The referee also found and determined that Pelosi, Reddy, and the other Pelosi claimants knew that Pelosi was the defendant in a wrongful death action by the Estate at the time the assignments were executed. It is undisputed that the wrongful death judgment obtained in that action has not been satisfied. Thus,

pursuant to Debtor and Creditor Law §§273, 273-a, and 276, the referee determined that the conveyances were fraudulent as to the Estate (*see, Matter of BSL Dev. Corp. v Aquaboque Cove Partners,* 212 AD2d 694).

The Court's Determination

The Court's determination is limited to reviewing whether the referee exceeded the scope of the issues referred to him for determination (*Kucherovsky v Excel Medical & Diagnostic, P.C., supra*). Clearly he did not. The order of reference dated February 14, 2008 was broad and expansive, authorizing the referee to hear and determine "all questions of law and fact presented herein." The referee was specifically charged with determining the validity of the assignments and mortgages to the Pelosi claimants, and the priority of such claims as he found to be valid. The Court finds that the referee's report is an extensive summary and analysis of the complex facts and legal issues presented by the parties' various submissions. The report reflects that the referee considered all of the claimants' arguments, weighed the facts, defined the issues, researched, analyzed and applied the law, assessed the credibility of the witnesses, and came to a conclusion that is fully supported by the record. The referee's findings and determinations with respect thereto stand as the decision of the Court (CPLR §4319).

Reddy's arguments that the Estate's fraudulent conveyance claims are time-barred are without merit. Having interposed its claims in this surplus money proceeding within six years after the assignments and mortgages were given or their existence was or reasonably could have been discovered, the Estate's fraudulent conveyance claims are timely (CPLR §213(8)). Moreover, Reddy's arguments regarding the absence of a pleading are without merit. Although a surplus money proceeding is a "special proceeding" within the meaning of CPLR Article 4 (*Velleman v Rohrig, supra)*, it may be commenced under the index number and caption of the underlying foreclosure action by means of a motion to confirm the referee's report of sale (RPAPL §§1361, 1362). A formal "pleading" is not required by the statute.

Neither Reddy nor any of the other claimants indicated in the pre-hearing procedures that they required any discovery with respect to the Estate's claims that the mortgages were fraudulent as to the Estate under the Debtor and Creditor Law. In fact, the record reflects, and Reddy readily admits, that it was he who suggested that Pelosi assign his equity to the Pelosi claimants, and who subsequently suggested that the assignments be secured by mortgages; that it was Reddy who prepared all of the assignments and all of the mortgages; and that it was Reddy who arranged for the recording of all of the assignments and the mortgages. In light of the fact that all of the information was within Pelosi's or Reddy's personal knowledge, Reddy's assertion that the claimants were denied due process by being denied discovery is meritless.

Furthermore, there are no jurisdictional issues that limit the referee's authority to hear and determine the validity of the assignments and mortgages. The Pelosi claimants are all parties to the surplus money special proceeding, having filed notices of claim herein, and having all appeared at and/or participated in the hearing before the referee. Contrary to Reddy's argument, a plenary action is not required.

The fact that the referee failed to file his decision within 30 days after the matter was finally submitted is irrelevant, as the Pelosi claimants waived any objections by failing to timely move for a new trial pursuant to CPLR §4319.

In light of the foregoing, the Court grants the Administrator's motion to confirm the report of the referee and grants judgment to the Administrator in the amount of all of the proceeds remaining after payment of the referee's fee, which will be determined as set forth hereinafter, and any fees of the Suffolk County Treasurer, together with all accrued interest thereon. The cross-motion is denied.

Referee's Fee

The affirmation of services submitted by the referee, dated November 14, 2011, reflects that the referee and/or associates of his law firm spent a total of 79.70 hours determining the rights of the various claimants to the surplus moneys. The referee seeks a total legal fee of $12,024.00 predicated on an hourly rate of $365.00 for attorneys and $175.00 for paralegal services. The Court notes that in light of the complexity of the legal issues involved, the volume of the record and submissions presented to and reviewed by the referee, and the amount of time expended, the requested fee appears to be reasonable (*Pindus v Newmat Leasing Corp.*, 71 AD2d 948 [2d Dept 1979]).

The Court further notes, however, that notice of the fee application was not served on the claimants. Because the referee's fee diminishes the amount of surplus money available for distribution to the parties ultimately determined to be entitled thereto, the application should have been served on all claimants and lienholders in accordance with Real Property Actions and Proceedings Law §1361 *(Wells Fargo Bank Minnesota, N.A. v Davis*, 8 Misc 3d 561 [Sup Ct 2005]). Accordingly, the determination of the referee's fee application is held in abeyance, and the referee is directed to forthwith serve a copy of his affirmation on the attorneys for the Estate, which this Court has determined is entitled to the entirety of the surplus money on deposit herein, and to file a copy of his affidavit of service thereof with the Court. If within thirty days after service of the affirmation on the Estate no objection to the affirmation or the fee is received, the fee application will be deemed to be unopposed and will be granted in the amount sought therein. If the Estate opposes the referee's fee application, the Court will thereupon determine the amount of the fee to be granted to the referee and set forth the amount in the judgment to be submitted in accordance herewith.

The Estate is directed to submit a proposed judgment, with provision for the payment of the fees of the referee, within 60 days of the date of entry of this order.

Dated: April 26, 2013

PAUL J. BAISLEY. JR.

J.S.C.