

**MEMORANDUM**

**SUPREME COURT : QUEENS COUNTY**  
**IAS TERM, PART 19**

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BANK OF NEW YORK as Trustee for the  
Certificate Holders of CWABS, INC.  
ASSET-BACKED CERTIFICATES, SERIES 2005-14  
C/O COUNTRYWIDE HOME LOANS, INC.,

By: Satterfield J.  
Index No: 9919/06  
Motion Date: 10/10/07  
Motion Cal. No: 3  
Motion Seq. No: 3

Plaintiff,

-against-

CHINETHA J. BROWN, AS HEIR TO THE ESTATE  
OF ARCHIE BROWN, SURVIVING SPOUSE OF  
RUBY TURNS BROWN, CORNELIUS TURNS AS  
HER HEIR TO THE ESTATE OF ARCHIE BROWN  
SURVIVING SPOUSE OF RUBY TURNS BROWN,  
et al.,

Defendants.

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This is a mortgage foreclosure action commenced by plaintiff against, inter alia, defendant Chinetha K. Brown (“defendant Brown”), the daughter of Archie Brown and Ruby Turns Brown, and defendant Cornelius Turns (“defendant Turns”), the son of Ruby Turns Brown. An Order of Reference was signed by this Court on July 27, 2006, and entered on August 8, 2006, and a Judgment of Foreclosure was signed and entered on October 3 and October 24, 2006, respectively. A Foreclosure Sale of the mortgaged premises, to wit, 113-32 204<sup>th</sup> Street, St. Albans, N.Y., was conducted on December 8, 2006, and sold to third-party purchaser Mukesh Persaud for the sum of \$320,000.00. A closing was held on January 12, 2007, whereby the property was conveyed to Mr. Persaud by Referee’s Deed. By order of this Court dated June 7, 2007, defendant Brown’s motion to vacate the Judgment of Foreclosure on the ground of lack of personal jurisdiction was denied. Subsequent to the sale, surplus monies in the sum of \$109,503.43 were deposited in the court; a notice of claim to surplus monies was filed by defendant Brown on August 24, 2007. Defendant Brown now moves, pursuant to Real Property Action and Proceedings Law §§1355 and 1361, to confirm the referee’s report of sale and direct the New York City of Finance to distribute said surplus proceeds in the amount of \$109,503.43, plus all applicable interest to her. Defendant Turns cross moves for an order rejecting the referee’s report, and granting a hearing where evidence can be heard. Alternatively, defendant Turns seeks to be awarded fifty percent (50%) of the proceeds, and allowed to intervene as a party.

Real Property Actions and Proceedings Law § 1361, entitled “Application for surplus; reference,” states, in relevant part, the following:

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.

At issue is whether this Court may consider the claims now asserted by defendant Turns, who has been a party to this foreclosure action since its commencement in 2006. Defendant Turns, the son of Ruby Turns Brown (“decedent”), contends that the subject property was granted to decedent by Will dated February 24, 1989, and was held in fee by decedent until November 4, 2004, when decedent deeded the property to herself and her husband, Archie Brown, who were married in 1985. Defendant alleges that he was unaware of such transfer until he inquired about the status of the property after the death of Archie Brown, who died nine months after decedent on October 17, 2005. Defendant Turns further alleges that at the time of the transfer, decedent was suffering with breast and brain cancer which left her “incoherent and not capable of executing a deed or transfer documents.” Defendant Turns asserts that as the November 4, 2004 transfer was fraudulent, and the signature of decedent was a forgery, a constructive trust should be impressed upon the property. As such, defendant Turns contends that as the heir of decedent, he is minimally entitled to one half of the surplus proceeds.

“The usual elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (citations omitted). [T]he ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed ‘when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest’(citations omitted).” O'Brien v. Dalessandro, 43 A.D.3d 1123, 1124 (2<sup>nd</sup> Dept. 2007); see, Losner v. Cashline, L.P., 41 A.D.3d 789 (2<sup>nd</sup> Dept. 2007); Rocchio v. Biondi, 40 A.D.3d 615 (2<sup>nd</sup> Dept. 2007); Osborne v. Tooker, 36 A.D.3d 778 (2<sup>nd</sup> Dept. 2007); Cruz v. McAneney, 31 A.D.3d 54 (2<sup>nd</sup> Dept. 2006). Here, notwithstanding defendant Turns’ assertions, other than a confidential or fiduciary relationship

existing between Archie Brown and decedent, as husband and wife, the requirements for the imposition of a constructive trust have not been demonstrated.

Furthermore, the deed in question is properly subscribed and acknowledged, thereby giving rise to a presumption of due execution by decedent, which may be rebutted only upon a showing of clear and convincing evidence to the contrary. See, In re Seviroli, 44 A.D.3d 962 (2<sup>nd</sup> Dept. 2007); Paciello v. Graffeo, 32 A.D.3d 461 (2<sup>nd</sup> Dept. 2006); Koslowski v. Koslowski, 245 A.D.2d 266 (2<sup>nd</sup> Dept.1997); Spilkv v. Bernard H. La Lone, Jr., P.C., 227 A.D.2d 741, 743 (2<sup>nd</sup> Dept.1996). Moreover, notwithstanding defendant Turns' assertion that decedent was incapable of executing the deed, "something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." Banco Popular North America v. Victory Taxi Management, Inc., 1 N.Y.3d 381, 384 (2004); see, Acme American Repairs, Inc. v. Uretsky, 39 A.D.3d 675 (2<sup>nd</sup> Dept. 2007). Defendant's assertions and comparisons of decedent's signature as being dispositive on the issue of whether the deed is a forgery, is insufficient to raise an issue of fact as to its validity. See, In re Seviroli, 44 A.D.3d 962 (2<sup>nd</sup> Dept. 2007); 39 College Point Corp. v. Transpac Capital Corp., 22 A.D.3d 663 (2<sup>nd</sup> Dept.2005); Giamundo v. McConville, 309 A.D.2d 895 (2<sup>nd</sup> Dept. 2003); Spilkv v. Bernard H. La Lone, Jr., P.C., 227 A.D.2d 741, 743 (2<sup>nd</sup> Dept.1996). As defendant Turns has failed to rebut the validity of the November 4, 2004 transfer, the ownership interest in the subject property was properly vested in decedent and Archie Brown, her husband, by tenancy by the entirety.

"A tenancy by the entirety is a form of real property ownership available only to parties married at the time of the conveyance (citation omitted). As tenants by the entirety, both spouses enjoy an equal right to possession of and profits yielded by the property (citation omitted). Additionally, 'each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other' (citation omitted). Once the legal relationship between husband and wife is judicially altered through divorce, annulment or legal separation, the tenancy by the entirety converts to a tenancy in common (citation omitted)." Goldman v. Goldman, 95 N.Y.2d 120 (2000).

While these features of tenancies by the entirety are also characteristic of tenancies in common, the tenancy by the entirety is further distinguished by the fact that it confers on the surviving spouse a right to absolute ownership of the property upon the other spouse's death (citation omitted).

What makes this right of survivorship unique and differentiates it from the right of survivorship inherent in an ordinary joint tenancy is that it remains fixed and cannot be destroyed without the consent of both spouses (citations omitted). As long as the marriage remains legally intact, both parties continue to be seized of the whole, and the death of one merely results in the defeasance of the deceased spouse's coextensive interest in the property (citation omitted). V.R.W., Inc. v. Klein, 68 N.Y.2d 560, 564 (1986).

Thus, upon the death of decedent, Archie Brown acquired sole ownership of the subject property, to which defendant Chinetha Brown, as the purported sole distributee of Archie Brown, would have been entitled to own the property in fee upon his death, and therefore is solely entitled to the surplus funds at issue.

Accordingly, the motion by defendant Chinetha Brown, for an order confirming the report of sale, and directing the New York City of Finance to distribute to her said proceeds in the amount of \$109,503.43, plus all applicable interest, is granted in its entirety. Defendant Corenelius Turns' cross motion for an order rejecting the referee's report, and granting a hearing where evidence can be heard, or alternatively, awarding defendant Turns fifty percent (50%) of the proceeds, and allowing him to intervene as a party, is denied.

Submit Order.

Dated: December 18, 2007

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J.S.C.