

Russo Realty Corp. v Orlando

2008 NY Slip Op 30069(U)

January 9, 2008

Supreme Court, Suffolk County

Docket Number: 0023287/1996

Judge: Paul J. Baisley

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

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

-----X
 RUSSO REALTY CORP.,

Plaintiff,

-against-

ELISE ORLANDO, ERICK WOLF, BRIAN
 DONNOLLY, et al.,

Defendants.

-----X

INDEX NO.: 23287/1996

MOTION DATE: 6/14/2007

MOT. NO.:015 MOT D

016 MOT D

PLAINTIFF'S ATTORNEY:

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DEFENDANT'S ATTORNEY:TARTAMELLA, TARTAMELLA &
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Upon the following papers numbered 1 to 61 read on this motion to modify order and cross-motion to confirm report of sale and for final judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers 22-47; Answering Affidavits and supporting papers 48-55; Replying Affidavits and supporting papers 56-61; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 015) of defendant ELISE ORLANDO for an order modifying the prior order of this Court (BAISLEY, J.) dated January 25, 2006 and the interlocutory judgment entered May 16, 2006 by reinstating and confirming the finding of referee Vincent G. Berger, Esq., in his report of February 8, 2000 that plaintiff should reimburse defendant for mortgage payments and real estate taxes from 1968 through 1991 and for real estate taxes from 1991 through 1995 in the amounts determined by the referee in said report; modifying the said order and interlocutory judgment by vacating the determination therein that the fair rental value of the premises is deemed to be \$1,100.00 per month and reinstating the referee's finding that defendant is to be charged with collection of rent in the monthly amount of \$550.00 after June 1998, and recomputing the amount to be credited to plaintiff for rent collected after June 1998 based upon that lesser amount; modifying said order and interlocutory judgment to vacate the modification and reduction of the credit to defendant for 1996 real estate taxes in said report from \$4,561.00 to \$2,280.50, and reinstating that former credit in full; vacating and setting aside the provisions in paragraph "Eleventh" of said interlocutory judgment for the deduction and payment of the one-half share of the referee's fee of defendant ELISE ORLANDO, plus any and all interest claimed due thereon, and vacating and setting aside the money judgment obtained by said referee against defendant, which judgment was entered on December 3, 2002, for that fee share, upon the submission of conclusive evidence by defendant that said fee share was paid by defendant ELISE ORLANDO; crediting defendant for payment of real estate taxes, and adjusting for the rents received by defendant in the amount of \$550.00 per month, from the date of the referee's report to the date of final judgment, and determining and fixing the distribution of the proceeds of the sale of the premises, subject to the foregoing adjustments between the parties to this action, is determined as follows; and it is further

ORDERED that the cross-motion (motion sequence no. 016) of plaintiff RUSSO REALTY CORP. for an order pursuant to Real Property Actions and Proceedings Law §925 and §931 confirming the report of sale of Vincent G. Berger, Jr., Esq., Referee, dated April 16, 2007 which was filed in the Office of the Suffolk County Clerk on April 16, 2007, and, pursuant to RPAPL §931 directing the referee to execute a deed to the premises to the defendant ELISE ORLANDO or her assignee upon payment of \$250,000.00; fixing the fee of Vincent G. Berger, Esq., as referee to sell; sanctioning defendant for frivolously extending these proceedings and repeatedly perjuring herself; determining the amount of the credit owed by ELISE ORLANDO to RUSSO REALTY CORP.; pursuant to RPAPL §931 and §981, entering final judgment directing distribution of the sales proceeds; pursuant to RPAPL §933, decreeing that plaintiff and anyone claiming under the plaintiff be forever barred from all claim or claims to an estate in these premises or a lien or encumbrance thereon of any nature whatsoever and that the defendant ELISE ORLANDO or her assignee will receive title free and clear of any right of the plaintiff, is determined as follows:

In this action for partition of real property, this Court (BAISLEY, J.), in a short-form order dated January 25, 2006, confirmed in part, rejected in part, and modified in part the referee's final report dated February 8, 2000, and directed that the subject premises be sold at public auction. The order directed that a hearing be held prior to entry of final judgment to determine the adjustment to be accorded the parties for rents and expenses from the date of the referee's final report to the date of the sale. An interlocutory judgment predicated on the order and appointing a referee to conduct the sale was granted on April 24, 2006 and entered on May 16, 2006. Thereafter, the premises were sold at auction to defendant ELISE ORLANDO, the highest bidder, for \$251,000.00. The referee's report of sale was filed in the office of the Clerk of Suffolk County on April 16, 2007. The parties waived a hearing and agreed to submit the issue of rents and expenses accrued subsequent to the date of the referee's final report to the Court on written submissions. The instant motion and cross-motion ensued.

Upon a review of the parties' submissions, the Court is constrained to agree with plaintiff that defendant's motion is in reality a motion to reargue and renew plaintiff's prior motion to confirm in part, reject in part and modify in part the referee's final report. Defendant is asking the Court to revisit issues previously decided adversely to defendant and to modify its prior order and judgment to require that plaintiff reimburse defendant for mortgage payments and real estate tax payments and to modify the amount of rental income imputed to defendant from \$1,110 a month to \$550 a month. To the extent defendant's motion seeks reargument, the submissions establish that the motion is untimely, notice of entry of the order having been served on defendant more than 30 days before the motion was interposed. CPLR R. 2221(d)(3). Moreover, defendant's submissions fail to establish that the Court overlooked or misapprehended matters of fact or law in determining the prior motion. The case upon which defendant relies, *Berlin v. Wojnarowski*, 32 A.D.3d 810, 820 N.Y.S.2d 855 (2d Dept. 2006), is factually and legally distinguishable from the matter at hand and does not mandate a modification of the Court's prior determination. Accordingly, the motion for reargument is denied.

To the extent the motion seeks renewal, predicated on the newly proffered affidavit of defendant's son, Dale Orlando, sworn to March 29, 2007, defendant's submissions fail to contain

a reasonable justification for the failure to present such evidence on the prior motion (CPLR R. 2221(e)). Moreover, defendant's submissions fail to address defendant's failure to properly account for her rent receipts during the period from June 1998 through November 1999 despite numerous demands from plaintiff and court orders directing her to do so, which was a major underpinning of the Court's determination with respect to the amount of rent collected by defendant. Accordingly, the motion for renewal is denied.

So much of defendant's motion as seeks to vacate and set aside the money judgment entered against defendant by Vincent G. Berger, Jr. on December 3, 2002 is granted. Defendant's submissions, together with the referee's affirmation dated April 16, 2007, establish that defendant previously paid one-half of the referee's fee of \$5,780.00 as directed pursuant to the order dated July 21, 2000. Accordingly, as conceded by the referee, the money judgment should properly be vacated.

As to plaintiff's cross-motion to confirm the referee's report of sale and for a final judgment directing the distribution of the sale proceeds, the motion is granted as follows: The referee's report of sale filed April 16, 2007 is hereby confirmed and the referee is authorized and directed to deliver a deed to the defendant, ELISE ORLANDO, or her assignee, upon the payment to the referee of the purchase price pursuant to the terms of sale and the "So-ordered" stipulation dated June 29, 2006. A fee of \$500.00 is awarded to the referee pursuant to CPLR §8003(b) to be paid out of the sale proceeds. *Schorner v. Schorner*, 128 Misc. 2d 415, 488 N.Y.S.2d 575 (Sup. Ct. 1985). In addition, plaintiff is to be reimbursed the sum of \$376.40 for the cost of advertising the sale. Any real estate taxes which are liens upon the premises as of the date of sale shall be paid in accordance with the interlocutory judgment and the terms of sale. The remaining balance, if any, shall be divided between plaintiff RUSSO REALTY CORP. and defendant ELISE ORLANDO in equal shares, adjusted to reflect the following credits:

The interlocutory judgment entered herein provided for a credit to plaintiff of \$23,100.00 for rent receipts from June 1996 through November 1999, and for a credit to defendant of \$6,911.25 for real estate taxes (second half 1996 through first half 1999) paid through during the same period covered by the referee's report. Defendant's submissions herein establish that during the period December 1999 through July 2006 (the date of the sale of the premises to defendant ELISE ORLANDO), defendant paid real estate taxes totaling \$25,574.98. (Contrary to defendant's assertions, the copies of checks annexed to the motion papers as exhibits do not add up to \$31,813.87.) In addition, predicated on the Court's prior finding with respect to the amount of monthly rent received and defendant's failure to substantiate her rent receipts, the submissions establish that during the period December 1999 through July 2006 defendant received rent proceeds totaling \$88,000.00. Accordingly, the Court determines that plaintiff is entitled to a further credit of \$44,000.00, for a total credit to plaintiff of \$67,100.00; and defendant is entitled to a further credit of \$12,787.49, for a total credit to defendant of \$19,698.74. The referee is directed to file his report of disposition of proceeds with the Suffolk County Clerk in accordance with RPAPL §973 within sixty days after entry of final judgment.

The Court declines to grant so much of plaintiff's motion as seeks to impose sanctions on defendant. Moreover, the Court declines to award plaintiff attorney's fees. However, plaintiff is

awarded the costs of this action together with the additional discretionary allowance provided by CPLR §8302(a), to be charged against defendant's share of the sale proceeds.

Plaintiff is directed to settle a judgment. A copy of this order shall accompany any judgment submitted to the Court.

Dated: January 9, 2008

PAUL J. BAISLEY, JR.

J.S.C.