

**Fenaroli v Costello**

2011 NY Slip Op 33278(U)

July 12, 2011

Supreme Court, Queens County

Docket Number: 17443/1991

Judge: Augustus C. Agate

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this partition action concerning two pieces of real property known as 23-26 28<sup>th</sup> Street, Astoria, New York and 29-03 23<sup>rd</sup> Avenue, Astoria, New York, respectively (the subject properties), the court-appointed Receiver (Receiver/Referee) also served as the Referee appointed to ascertain the shares and interests of the parties in the properties, and conduct the sale. The Receiver/Referee herein was also appointed the receiver and the referee in a separate partition action entitled *Fenaroli v Costello*, (Supreme Court, Queens County, Index No. 2069/1991), involving the real property known as 23-32 28th Street, Astoria, New York.

Following the sale of the subject properties by public auction, the Receiver/Referee issued a report and accounting, and moved to confirm the final report and accounting, in which the Receiver/Referee reported, among other things, that he had cash on hand. By order of Justice Simeon Golar, dated September 12, 2002, the report and accounting were confirmed (as amended by the court).

The Receiver/Referee subsequently moved for, among other things, to authorize him to withhold the sum of \$14,055.46 from defendant Robert Costello in full satisfaction of the amount owed by Robert Costello in the action entitled *Fenaroli v Costello*, (Supreme Court, Queens County, Index No. 2069/1991), authorize the Receiver/Referee to disburse the sum of \$14,055.46 to defendant Andrew Costello in full satisfaction of the amount due Andrew Costello in the action under Index No. 2069/1991, fix the reasonable attorneys' fees for Jaspan Schlesinger Hoffman LLP for legal services incurred in making the motion on behalf of the Receiver/Referee, and authorize the Receiver/Referee to disburse the sum of \$16,137.71, less such attorneys' fees, to defendant Robert Costello, in full satisfaction of the amount due Robert Costello in this action. In support of the motion, the Receiver/Referee indicated that he made certain distributions of the sale proceeds in the action under Index No. 2069/1991, which included some distributions in erroneous amounts to plaintiff

Elizabeth Fenaroli and defendant Robert Costello, and issued a check to defendant Andrew Costello, which was returned for insufficient funds. The Receiver/Referee also indicated that upon his demand, plaintiff Elizabeth Fenaroli refunded the excess amount distributed to her in error, but defendant Robert Costello refused to do likewise, and defendant Andrew Costello was still owed monies as a consequence of the bounced check and overpayment to Robert Costello. The Receiver/Referee also indicated that he discovered he was holding an additional sum of \$123,555.68 in escrow in connection with this action, and as a consequence he had made certain distributions out of that sum.

By order dated February 2, 2008, the branch of the motion by the Receiver/Referee for leave to make the proposed disbursements was denied, without prejudice to renewal upon proper papers and service, following the service and filing of an account by the Receiver/Referee relative to the newly discovered escrow funds, including an accounting as to any interest which accrued, fees paid and distributions made from such funds, and upon confirmation of the account. The court directed the account be served and filed within 20 days of the date of the order, and that a copy of the order be annexed to any subsequent motion to confirm the account. The court determined that the Receiver/Referee had failed to establish that the court had authority to permit a receiver/referee to withhold funds from a person in one action as an offset against an overpayment by a receiver/referee in another partition action. The court also determined that the Receiver/Referee failed to establish entitlement to an award of reasonable attorneys' fees in relation to the making of the motion. The court noted that the Receiver/Referee had failed to explain the source of the escrowed funds and the reason the funds had not previously been discovered. The court further noted that the Receiver/Referee failed to explain whether any interest had accrued on the funds, or the reason for the claimed entitlement to administrative fees and the need to pay fees to a surety.

In support of the instant motion by the Receiver/Referee, the Receiver/Referee submits a final amended accounting dated December 1, 2010 (see Exhibit "E" annexed to the affirmation of the Receiver/Referee dated December 1, 2010),<sup>1</sup> and indicates that he employed the services of an accountant to assist him in reviewing files and the trust ledgers of the Jaspan Schlesinger LLP.

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The Receiver/Referee also offers another document denominated "Receiver's Amended Final Accounting" dated July 28, 2009, which he prepared in relation to Index No. 2069/1991 (see Exhibit "C" of the Receiver/Referee).

The Cross Movants oppose the motion by the Receiver/Referee, and cross move for an opportunity to conduct discovery regarding the "accounts at issue," and following discovery, for a hearing to be held prior to the approval of the amended final accounting.

Defendant Robert Costello opposes the motion by the Receiver/Referee. He asserts that the proposed final accounting is inadequate, and unsupported by any proper documentation. Defendant Robert Costello also asserts Referee/Receiver should account for the administration of the funds in question and should be surcharged for any shortfall.

Plaintiff Renato Berzolla opposes the motion to the extent the Receiver/Referee seeks to recover a distribution made to him. Plaintiff Renato Berzolla asserts the Receiver/Referee should be surcharged for any shortfall due to overpayments made by the Receiver/Referee. Counsel for plaintiff Renato Berzolla informs the court that he previously had filed a notice of appearance on behalf of plaintiff Rev. Guido Berzolla a/k/a Guido Berzolla, but Rev. Guido Berzolla, a resident of Parma, Italy, is now deceased.

Counsel for plaintiff Renato Berzolla is correct that his relationship with plaintiff Rev. Guido Berzolla is terminated. The death of a client automatically terminates the attorney-client relationship (see *Hart v Blabey*, 286 NY 75 [1941]; *Velasquez v Katz*, 42 AD3d 566 [2007]; *Matter of Estate of Gutches*, 117 AD2d 852 [1986]).

The death of a party divests the court of jurisdiction and automatically stays the proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a) (see *Matter of Einstoss*, 26 NY2d 181 [1970]; *Singer v Riskin*, 32 AD3d 839 [2006]; *Gonzalez v Ford Motor Co.*, 295 AD2d 474 [2002]). Any determination rendered without substitution generally will be considered a nullity (see *Singer v Riskin*, 32 AD3d 839 [2006], *supra*; *Lewis v Kessler*, 12 AD3d 421 [2004]; *Hicks v Jeffrey*, 304 AD2d 618 [2003]; *Meehan v Washington*, 242 AD2d 286 [1997]). On the other hand, "where a party's demise does not affect the merits of a case ... there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" (*Bova v Vinciguerra*, 139 AD2d 797, 799 [1988]; see *Alaska Seaboard Partners Ltd. Partnership v Grant*, 20 AD3d 436, 437 [2005]).

In this instance, where the Receiver/Referee seeks, among other things, to have plaintiff Rev. Guido Berzolla a/k/a Guido Berzolla pay back an amount previously distributed to Berzolla, the proceedings must be stayed pending substitution. A fiduciary with limited powers to defend an action may be appointed by the

Surrogate's Court upon petition of a party in a pending case (see SCPA §§ 702, 1002; see *Jones v Vetter*, 188 Misc 2d 475 [2001]; see also *Hicks v Jeffrey*, 304 AD2d 618 [2003], *supra*; *Meehan v Washington*, 242 AD2d 286 [1997], *supra*). On rare occasions, the Supreme Court will exercise its power as a court of general jurisdiction to appoint a temporary administrator for the purpose of acting for the estate in a pending civil action (see *Harding v Noble Taxi Corp.*, 155 AD2d 265 [1989]; *Batan v Schmerler*, 155 Misc 2d 46 [1992]; *cf.* *Jones v Vetter*, 188 Misc 2d 475 [2001], *supra*; *Abecasis v Fontanazza*, 10 Misc 3d 195 [2005]; *Butts by Butts v Marx*, 148 Misc 2d 405 [1990]).

Here, counsel for plaintiff Renato Berzolla admits that he has not been authorized to act on behalf of the Estate of Guido Berzolla, and is unaware if a personal representative for the Estate of Guido Berzolla has been appointed.

Under such circumstances, the Receiver/Referee is directed to investigate whether a personal representative of the Estate of Guido Berzolla has been appointed, and report to the court his findings. If there has been no personal representative appointed, the Receiver/Referee is directed to apply for the appointment of a personal representative for Guido Berzolla in Surrogate's Court within 60 days of the date of this order, and upon said appointment, to apply for substitution of the administrator as a party defendant. Such direction is without prejudice to any other party's moving for substitution.

The motion and cross motion are denied without prejudice to renewal after the stay herein is lifted.

The action is stayed except for a motion for substitution of the estate representative for the decedent.

A copy of this order is being faxed on this date to the counsel for the Receiver/Referee, who shall serve a copy of this order upon all other parties within 10 days from the date hereof.

Dated: July 12, 2011

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AUGUSTUS C. AGATE, J.S.C.