

74 Eldert LLC v Sharp Realty, LLC
2014 NY Slip Op 31241(U)
May 8, 2014
Supreme Court, Kings County
Docket Number: 502964/2012
Judge: Ann T. Pfau
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At an IAS Term, Part Comm 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of May, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

-----X
74 ELDERT LLC,

Plaintiff,

DECISION and ORDER

- against -

Index No. 502964/2012

SHARP REALTY, LLC, ET AL.,

Defendants.
-----X

The following papers read on motion sequence 18:

All papers e-filed with the New York State Courts E-Filing (NYSCEF) system in connection with this motion and the relevant orders on file.

On October 8, 2013 a judgment was entered in favor of attorney Gregg Star, Esq., and against defendants Sharp Realty LLC, Sharp Family Realty LLC and Michael Sharp (the Judgment Debtors), in the amount of \$92,4239 (Judgment, NYSCEF doc. no. 535). The Judgment arises from Star's motion to withdraw as counsel for the Judgment Debtors in this action, which was granted along with his request for a charging lien. The order of Justice David Schmidt, dated January 3, 2013, states that "the matter is set down for a hearing before a special referee to determine the amount of the charging lien" (NYSCEF doc. no. 164). However, in the Kings County Supreme Court, justices only may

request a reference to a special referee from the Administrative Judge, who actually issues the order of reference. In this case, the order of reference was made by Justice Barry Kamins, then the Administrative Judge of the Kings County Supreme Court, Civil Term, who referred the issue of the amount of the charging lien to a special referee to hear and report with recommendations (Order of Reference, dated January 4, 2013, NYSCEF doc. no. 164).

In this motion, Michael Sharp and Cie Sharp move *pro se* to vacate the Judgment. The caption on the notice of motion refers to Special Referee Miriam Sunshine, suggesting that the motion is made to her. This irregularity, from *pro se* litigants, is purely ministerial and no substantial right of a litigant is prejudiced, so the court will disregard it (CPLR 2001). The corporate judgment debtors did not move to vacate the Judgment. Their attorney was permitted to withdraw as counsel pursuant to an order dated July 23, 2013 (NYSCEF doc. no. 530), and no new counsel appeared, so the corporate debtors were unrepresented when this motion was made. This motion was submitted without opposition.

Michael Sharp, one of the Judgment Debtors and a principal of the corporate debtors, avers that he was not notified of the special referee's hearing.¹

The motion is granted not only because it is unopposed, but also because the Judgment is defective. The Judgment states that it is based upon an order to hear and

¹ The motion is larded with a litany of irrelevant arguments from Cie Sharp setting forth his dissatisfaction with the entire litigation, none of which was considered in this decision and order.

determine, when in fact Justice Kamins' Order of Reference states that the reference is to hear and report. The special referee issued an order dated June 24, 2013, which awarded the Star Law Firm a fee in the amount of \$92,423.24 (NYSCEF doc. no. 542), states that the case was referred to her to hear and determine, which is not consistent with Justice Kamins' Order of Reference. Although dated June 24, 2013, the special referee's order was not filed with NYSCEF until October 11, 2013, three days after the Judgment was entered, so Judgment Debtors would not have notice of its content before the Judgment was entered.² Attached to the special referee's order is a copy of the Order of Reference with handwritten notations added, including the word "copies" on top, and Justice Kamin's name crossed off and the name of Justice Knipel, the successor Administrative Judge, added with a signature. The document also has been altered to check the box indicating that the reference shall also be to hear and determine pursuant to the stipulation of the parties, and it is initialed "GS", suggesting that Gregg Star consented to convert the reference to hear and determine, but there is no indication that any Judgment Debtor consented as well. This altered document was never filed as an order of the court, and appears in the record only as an attachment to the special referee's order filed on October 11, 2013, more than three months after the special referee determined the issue.

It is undisputed that Michael Sharp was not notified of the hearing date, and he makes no mention of consenting to change the reference to a reference to hear and

² An amended order was filed the same day as the Judgment, with the only apparent amendment being a statement that "judgment is granted to the Star Law Firm, . . ." (NYSCEF doc. no. 534), which language was not in the original special referee's order.

determine. There is no indication in the record that any Judgment Debtor ever consented to alter the terms of the Order of Reference to permit the special referee to hear and determine the issue.

“A referee derives his or her authority from an order of reference by the court” (*Matter of Martinborough v Martinborough*, 98 AD3d 511, 512 (2d Dept 2012), citing CPLR 4317 and *Matter of Gale v Gale*, 87 AD3d 1011, 1012 [2d Dept 2011]). Where the order of reference referred the matter to the referee to hear and report only, not to hear and determine, the referee lacks jurisdiction to determine the issue as a matter of law (*Matter of Martinborough, supra*). In the recent decision in *Matter of Aslan v Senturk*, the Second Department held that the court attorney referee lacked jurisdiction to issue an order determining the matter referred to her to hear and report with recommendations, and the special referee’s order was deemed a report and remanded for further proceedings pursuant to CPLR 4403 before a judge (2014 NY Slip Op 2774 [2d Dept, April 23, 2014]).

In addition, the special referee’s June 24, 2013 order and October 8, 2013 amended order, which form the basis for the Judgment, only award attorney fees to an entity called “The Star Law Firm”, which is not a party mentioned in the Order of Reference, and no attorneys fees are awarded to Gregg Star, Esq., as provided for in the Judgment.

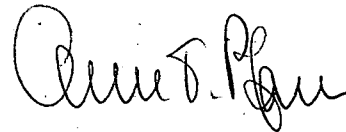
Therefore, the motion to vacate the Judgment is granted not only because it is unopposed, but on the merits as well. In light of the foregoing, the order and amended order from the special referee are deemed a report with recommendations requiring a motion to confirm pursuant to CPLR 4403 (*Matter of Aslan v Senturk, supra*).

Since the Judgment is defective, it is vacated in its entirety even though the corporate Judgment Debtors did not move to vacate it. Accordingly, it hereby is

ORDERED that the motion is granted, and the judgment dated October 8, 2013 in favor of Gregg Star, Esq. against the Sharp Realty LLC, Sharp Family Realty LLC and Michael Sharp in the amount of \$92,423.25 hereby is vacated; and it further is

ORDERED that the order of the special referee dated June 24, 2013 and the amended order of the special referee, dated October 8, 2013, together hereby are deemed a report with recommendations, and a party's time to move pursuant to CPLR 4403 to confirm or reject the report shall commence upon service of a copy hereof with notice of entry.

ENTER,



J. S. C.

HON. ANNT. PFAUS