

Morais v Malguarnera
2015 NY Slip Op 31831(U)
September 21, 2015
Supreme Court, Suffolk County
Docket Number: 21211/2013
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2-27-15
ADJ. DATE 4-17-15
Mot. Seq. # 002 - MotD
003 - MD

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MARIA MORAIS, as Executrix of the Estate of
Antonio Casimiro,

Plaintiff,

- against -

SALVATORE MALGUARNERA, JOAN
SALOMON, as Executrix of the Estate of Joseph
Salomon, PEOPLE'S UNITED, and
JOHN DOE #1 to JOHN DOE #10, these names
being fictitious and unknown to the plaintiff,

Defendants.

PETER C. KAITERIS, P.C.
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Attorney for Defendant People's United
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MARIA MORAIS, as Executrix of the Estate of
Antonio Casimiro,

Plaintiff,

- against -

SALVATORE MALGUARNERA, JOAN
SALOMON, as Executrix of the Estate of Joseph
Salomon, PEOPLE'S UNITED BANK, and
JOHN DOE #1 to JOHN DOE #10

Defendants.

PETER C. KAITERIS, P.C.
Attorney for Plaintiff

RICHARD I. SCHEYER, ESQ
Attorney for Defendant Malguarnera

NOVAK, JUHASE & STERN, ESQS
Attorney for Defendant Salomon

JASPAN SCHLESINGER LLP
Attorney for Defendant People's United

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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 17 - 31 ; Answering Affidavits and supporting papers 13 - 14, 34 - 37 ; Replying Affidavits and supporting papers 15 - 16, 38 - 39 ; Other memorandum of law 32 - 33 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that for the purposes of this order, the above captioned actions are consolidated; and it is further

ORDERED that the motion by the plaintiff (#002) for an order pursuant to CPLR 3212 awarding her summary judgment on her complaints in the above entitled actions in which she seeks the partition and sale of eleven parcels of real party held by the plaintiff and defendant Malguarnera is considered under RPAPL Article 9 and granted solely to the extent that the several references contemplated by RPAPL Article 9 on the matters required to be determined by the court prior to the issuance of an interlocutory judgment are referred to a referee to hear and report; and it is further

ORDERED that the entry Clerk shall enter the plaintiff's motion (Sequence #002 above) for summary judgment as Sequence #001 in the electronic file maintained by the court in the second action above captioned bearing Index Number 09770/2014 and shall further enter this order as the court's determination thereof as Motion Decided (MOTD); and it is further

ORDERED that the cross motion (#003) by the defendant, People's United Bank, for an order pursuant to CPLR 3212 granting it summary judgment on the counterclaim and the cross claim asserted in its answer herein is denied; and it is further

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ORDERED that Kenneth Sordani, Fiduciary ID # 215143, with offices located at 50 Route 111 South Plainfield NJ 07080, hereby appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the parties to this action in the properties described in the complaints filed in the above entitled action in which partition and sale is sought, and an abstract of the conveyances by which the same are held, and to take proof of the plaintiffs' title and interest in the subject properties, as well as, those of the other parties to the action, if any, and of the several matters set forth in the complaint such as, the value of the repairs made thereto, and the insurance, taxes and other expenses of the subject premises as may have been paid by the parties, after affording such parties an opportunity to account for such items, and to report on these matters; and to report whether the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without real prejudice to the owners, and if said appointed referee arrives at the conclusion that a sale of the properties, or any part thereof, is necessary, then said referee is to ascertain whether there is any creditor, not a party to this action, who has a lien on the undivided share or interest of any party; which report is required prior to the issuance of an interlocutory judgment and it is further; and it is further

ORDERED that within thirty days of the date of this order, plaintiff shall serve upon the Referee a search certified by the Suffolk County Clerk of any and all liens outstanding against the subject property;

and if the referee ascertains the existence of at least one creditor or non-party creditor, said referee shall cause a notice in the form set forth below to be published once in each week for four (4) successive weeks in the South Shore Press, requiring each person not a party to this action who, at the date of this order, has a lien upon any undivided share or interest in the property to appear before the referee at a specified place and on or before a specified day to prove his or her lien and the true amount due to him or her by reason thereof and to further serve all such named party creditors with such notice by mail at such creditor's last known address, if known to the referee, not less than twenty (20) days prior to the specified hearing date; and it is further

ORDERED that the notice to nonparty creditors required by RPAPL § 913, if any, shall issue by the referee in the following form:

NYS SUPREME COURT, COUNTY OF SUFFOLK		
-----X		
MARIA MORAIS, as Executrix	:	Index No. 21211/2013
of the Estate of Antonio Casimiro	:	AND
	:	Index No. 9770/2014
	:	
Plaintiff,	:	Assigned to:
	:	Justice Whelan
-against-	:	
	:	
SALVATOR MALGUARNERA,	:	
JOAN SALOMON, as Executrix	:	
of the Estate of Joseph Salamon,	:	
PEOPLES UNITED BANK, and	:	
JOHN DOE #1 to JOHN DOE #10	:	
these last 10 names being fictitious and	:	
unknown to the plaintiff	:	
Defendant.	:	
-----X		

TO ALL CREDITORS NOT PARTIES TO THE ABOVE ENTITLED ACTION WHO HAVE LIENS ON THE UNDIVIDED SHARE OR INTEREST OF ANY PARTY:

PLEASE TAKE NOTICE that each and every person whether a party or not a party to the above entitled action who, at the date of the order appointing the undersigned referee namely, _____ (date) had a lien upon any undivided share or interest of a party in the property hereinafter described, is hereby required to appear before the undersigned at _____ (address), _____ (city), New York, on or before _____ (date), to prove such lien and the true amount due or to become due by reason thereof.

The properties herein are described in the complaint as follows:
_____.

DATED: _____ (Referee).

and it is further,

ORDERED the Referee shall serve notice of all hearings to all parties joined to these actions regarding the matters referred to above referee not less than 20 days prior to the hearing date of the RPAPL § 913 hearing date and is empowered to conduct such further hearings on like notice to the parties with respect to issues related to the other matters embraced by the reference framed above; and it is further

ORDERED that the Referee shall report to the Court as to all matters embraced by the reference contained herein, with all deliberate speed, following the hearings conducted, and it is further

ORDERED that pursuant to CPLR 8003(a), the compensation of the referee herein appointed is fixed at the rate of a reasonable hourly fee not exceeding \$250.00 per hour and the calculation thereof shall be included in the report of the referee and supported by an affirmation of services which shall be attached to said report and served upon all parties, and the compensation of the referee, as fixed and determined by the court, shall be assessed against the parties as directed by the court in a subsequent order; and it is further

ORDERED that pursuant to 22 NYCRR §36.1, the referee herein appointed shall be subject to Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that by accepting this appointment, the appointee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, section 36.2(c) ("Disqualifications from Appointment"), and section 36.2(d) ("Limitations on appointments based on compensation"), and if the appointee is disqualified from receiving an appointment pursuant to the provisions of Part 36, the appointee shall notify the appointing Judge forthwith.

In August of 2013, the plaintiff commenced the first action captioned above for the partition and sale of the following improved parcels of real property: 1) 465 Blue Point Road, Farmingville, New York; 2) 360 Hawkins Avenue, Lake Ronkonkoma, New York; and 3) 532 Route 25A, Rocky Point, New York. This claim is premised upon allegations that the plaintiff's decedent and defendant, Salvatore Malguarnera (Malguarnera), are the owners as tenants in common of the properties, and that a partition of the properties is not feasible, requiring a sale thereof. In a second cause of action, the plaintiff demands an accounting of the expenses of the subject parcels due to the fact that the plaintiff has been denied adequate information from Malguarnera regarding rents collected on the properties, as well as, the sums paid for the maintenance thereof. As to the remaining known defendants, namely, Joan Salomon, as the Executrix of the Estate of Joseph Salomon (Salomon), and the People's United Bank (PUB), the plaintiff alleges that they are joined herein due to their status as judgment-creditors possessing possible liens on Malguarnera's one-half interest in the properties.

The plaintiff is the daughter of the deceased, Antonio Casimiro (Casimiro). It is undisputed that Casimiro and Malguarnera were long-time business partners who purchased the properties as tenants in common with each party owning an undivided one-half interest, that they developed said properties, and

that they then caused them to be rented in whole or in part to third-parties. Casimiro passed away on February 5, 2011, and the plaintiff was issued letters testamentary by the Suffolk County Surrogate's Court. After commencing the action, the plaintiff learned that her father and Malguarnera had purchased an additional eight parcels of undeveloped real property as tenants in common. She thus commenced the second action captioned above (Action #2 bearing Index Number 09770/2014) against the same defendants in which she seeks a judgment of partition and sale of those eight parcels and accounting of the expenses thereof. By order dated October 8, 2014 (Garguilo, J.), the court granted the plaintiff's motion for consolidation by directing a joint trial of this action with Action #2.

In his answer to the complaint served in the first action, Malguarnera admits that he and the plaintiff are tenants in common regarding the properties, and that the plaintiff has an undivided one-half interest therein. Malguarnera also sets forth a single affirmative defense that alleges, among other things, that he and Casimiro had an oral agreement that the properties would not be sold without the consent of the both of them, that he had explained to Casimiro before his death that the "real estate market was not good and selling would not produce enough income to justify the sale," and that the equities do not favor the plaintiff. In addition, Malguarnera sets forth a counterclaim alleging that he has not been reimbursed for paying the real estate taxes on his own, and claiming additional "management and real estate fees" for maintaining and managing the properties.

The plaintiff now moves for summary judgment on the complaints served in both actions in which she demands a judgment of partition and sale as to each of the eleven properties specified therein and an accounting of the expenses of each parcel. Defendant Malguarnera, through the affirmation of his counsel, consents to the partition and sale of the eight undeveloped parcels that are the subject of the second action captioned above. However, Malguarnera, challenges the plaintiff's entitlement to partition and sale and the complaint served in the first action captioned above which targets the three parcels which were improved with commercial buildings by Malguarnera and the plaintiff's decedent. While the court is without receipt of opposing papers from defendant Salomon, who appeared herein by answer, defendant Peoples United Bank seeks summary judgment on its counterclaim against the plaintiff and its cross claim against defendant Malguarnera in which said defendant seeks a turnover of any monies the plaintiff or Malguarnera may recover in this action.

In light of the consent by defendant Malguarnera to the plaintiff's demands for partition and sale of the eight undeveloped properties that are the subject of the second action bearing Index Number 9770/2014 and the lack of opposition to those portions of this motion wherein the plaintiff seeks such relief from the other appearing defendants, those portions of this motion wherein the plaintiff seeks summary judgment on its complaint in the second action captioned above is granted to the extent that the plaintiff is entitled to an interlocutory judgment of the type contemplated by RPAPL § 915, subject to determination by the court of the matters referred to the referee appointed herein to hear and report as directed.

Those portions of the plaintiff's motion for summary judgment on its complaint served in the first action captioned above, which targets for partition and sale three parcels of commercially developed land is likewise granted for the reasons set forth below.

RPAPL §901(1) provides: "A person holding and in possession of real property as a joint tenant or a tenant in common, in which he has an estate of inheritance ... may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners." A party jointly owning real property with another may, as a matter of right, seek a partition of the property or a partition and sale when he or she no longer wishes to jointly own or use the property (*Manganiello v Lipman*, 74 AD3d 667, 905 NYS2d 153 [1st Dept 2010]). If a plaintiff demonstrates her ownership and the right of possession of the subject property and that a partition cannot be made without prejudice to its owners, she is entitled to judgment, as a matter of law, on her partition and sale action, unless a triable issue of fact is raised by a defendant (*see Galitskaya v Presman*, 92 AD3d 637, 937 NYS2d 878 [2d Dept 2012]; *Donlon v Diamico*, 33 AD3d 841, 823 NYS2d 483 [2d Dept 2006]). While an agreement between the parties not to bring an action for partition is a good defense to such an action (*see McLoughlin v McLoughlin*, 67 AD3d 751, 889 NYS2d 610 [2d Dept 2009]), it is well settled that if the agreement is not in writing, its enforcement is barred by the statute of frauds (*see Goldberg v Goldberg*, 173 AD2d 679, 570 NYS2d 333 [2d Dept 1991]; *Casolo v Nardella*, 193 Misc 378, 84 NYS2d 178 [Sup Ct., 1948], *aff'd* 275 AD 502, 90 NYS2d 420 [3d Dept 1949]).

Partition, although statutory, is equitable in nature (*see Koniosis v Tsororos*, 83 AD3d 665, 920 NYS2d 403 [2d Dept 2011]), and the court "may compel the parties to do equity between themselves when adjusting the distribution of the proceeds of the sale" (*Freigang v Freigang*, 256 AD2d 539, 540, 682 NYS2d 466 [2d Dept 1998]; *see also Berlin v Wojnarowski*, 32 AD3d 810, 820 NYS2d 855 [2d Dept 2006]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a co-tenant (*see Worthing v Cossar*, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). Thus, the court is obligated to ensure that there is an accurate accounting before entry of an interlocutory judgment directing a sale of the property (*see* RPAPL §§ 911, 915; *Colley v Romas*, 50 AD3d 1338, 857 NYS2d 260 [3d Dept 2008]; *Donlon v Diamico*, 33 AD3d 841, *supra*).

Before a partition may be directed, a determination must be made as to the rights, shares, or interests of the parties and, in those cases wherein a sale is demanded, rather than an actual physical partition, whether the property or any part thereof is so circumstanced that a partition thereof cannot be made without great prejudice to the owners (*see* RPAPL § 915). Such determinations must be included in the interlocutory judgment contemplated by RPAPL § 915 along with either a direction to sell at public auction or a direction to physically partition the premises (*see* RPAPL § 911; § 915; *Hales v Ross*, 89 AD3d 1261, 932 NYS2d 263 [2d Dept 2011]; *see also Lauriello v Gallotta*, 70 AD3d 1009, 895 NYS2d 495 [2d Dept 2010]; *Wolfe v Wolfe*, 187 AD2d 628, 590 NYS2d 504 [2d Dept 1992]). Determinations of the rights and shares of the parties must be made by declaration of the court directly or after a reference to take proof and report (*see* RPAPL § 911; § 907; *Mary George, D.M.D. & Ralph Epstein, D.D.S., P.C. v J. William*, 113 AD2d 869, 493 NYS2d 794 [2d Dept 1985]; *see also Colley v Romas*, 50 AD3d 1338,

supra). Inquiry and ascertainment by the court or by reference into the existence of creditors having liens or other interest in the premises is also required and, if there be any such creditors, proceedings thereon must be held as required by RPAPL § 913. While the court may accept proof of the absence of the existence of any such creditor and dispense with this reference and the proceedings required thereon, a finding to that effect should issue.

Upon its review of the moving papers the court finds that the plaintiff has established her prima facie entitlement to summary judgment on her first cause of action seeking a partition or sale of the property as a matter of right (*see* Real Property Actions & Proceedings Law Article 9; *Donlon v Diamico*, 33 AD3d 841, *supra*; *Tedesco v Tedesco*, 269 AD2d 660, 702 NYS2d 459 [3d Dept 2000], *lv denied* 95 NY2d 791, 711 NYS2d 158 [2000]; 24 NY Jur 2d, Cotenancy and Partition §§ 126-131; 3 Warren's Weed NY Real Property, Common Ownership of Real Property § 27.18[1]-[3]). The plaintiff further demonstrated, that the affirmative defense set forth in the answer of Malguarnera, which is premised upon claims of a downturn in the real estate market and its long lasting poor quality, is not a cognizable defense to an action for partition.

In opposition to the motion, Malguarnera submits the affirmation of his attorney who repeats the allegations set forth in Malguarnera's affirmative defense and further contends that Malguarnera has a "major defense" to the statute of frauds as the subject "oral contract [was] fully performed by the parties for almost 20 years," and that "[a]ll the equities have to favor the Plaintiff, they do not." In addition, counsel for Malguarnera contends that the plaintiff's motion for summary judgment is premature as no discovery has been conducted. He avers that "[w]hat the parties knew, or what they acted upon are the appropriate subject for discovery," and that Malguarnera's counterclaim itself requires discovery. Here, Malguarnera submits the affidavit of his attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (*see Sanbria v Paduch*, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). Regardless, said affirmation does not set forth any factual allegations regarding the equities between the parties. In addition, Malguarnera has failed to set forth a reason to conduct discovery. Here, it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence.

However, the court rejects the contention that Malguarnera has raised an issue of fact whether the alleged oral agreement is enforceable under an exception to the statute of frauds for "full performance" is without merit. Pursuant to GOL 5-703(3), "[a] contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent." Black's Law Dictionary defines performance as "[t]he successful completion of a contractual duty, [usually] resulting in the performer's release from any past or future liability; execution (2) Also termed full performance. Through his counsel, Malguarnera claims that the alleged oral agreement has been partially performed by Casimiro and Malguarnera.

Part performance, also an exception to the statute of frauds, will “render a contract enforceable only where such performance is unequivocally referable to the alleged agreement” (see *Town of Oyster Bay v Doremus*, 94 AD3d 867, 942 NYS2d 546 [2d Dept 2012], quoting *Jonestown Place Corp. v 153 W. 33rd St. Corp.*, 53 NY2d 847, 440 NYS2d 175 [1981]). That is, the acts relied upon to indicate part performance must be “unintelligible, or at least extraordinary” unless incident to the contract (*Anostario v Vicinanza*, 59 NY2d 662, 463 NYS2d 409[1983]; see *Pinkava v Yurkiw*, 64 AD3d 690, 882 NYS2d 687 [2d Dept 2009]). If the actions of the parties are reasonably explicable on some other ground, they are not sufficient to take the case out of the statute (see *Klein v Klein*, 79 NY2d 876, 581 NYS2d 159 [1992]; *745 Nostrand Retail Ltd. v 745 Jeffco Corp.*, 50 AD3d 768, 854 NYS2d 773 [2d Dept 2008]).

Here, even accepting as fact the allegation that Casimiro and Malguarnera did not sell the properties “for almost 20 years,” Malguarnera’s contention that said act should be interpreted as part performance of an alleged oral contract “not to sell without the consent of both parties” is without merit. The fact that the property was not sold for an extended period of time is not the only reasonable explanation of that act.

The court also rejects Malguarnera claim that the plaintiff’s motion is premature due to the absence of discovery. CPLR 3212(f) provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just”. Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must “offer an evidentiary basis to show that discovery may lead to relevant and admissible evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff” (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; see *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (see *KeyBank Nat. Ass'n v Chapman Steamer Collective, LLC*, 117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; *Anzel v Pisotino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013] *Swedbank, AB v Hate Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Zheng v Evans*, 63 AD3d 791, 881 NYS2d 461 [2d Dept 2009], *supra*).

Here, the opposing papers submitted by Malguarnera were insufficient to satisfy the aforementioned statutory burden as he failed to offer an evidentiary basis to show that discovery may lead to relevant and admissible evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff. In addition, Malguarnera failed to show that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact. The claim of prematurity is thus rejected as unmeritorious.

The plaintiff's moving papers further established the plaintiff's entitlement to the accounting demanded in her second cause of action which sounds in accounting, as does Malguarnera's in a counterclaim asserted in his answer. Since the court is directing a reference which includes the issues that encompass an accounting, the parties demands for such relief are granted to that extent of such reference. Accordingly, the plaintiff's motion for summary judgment in her favor on pleaded claims for partition and sale of the eleven properties that are the subject of the two complaints filed and served and her demands for an accounting with respect to each of said properties is granted to the extent that the plaintiff is entitled to an interlocutory judgment of the type contemplated by RPAPL § 915, subject to determination of the court of the matters referred to the referee appointed to hear and report as herein directed.

The cross motion (#003) by defendant, Peoples United Bank (PUB), for summary judgment in its favor on the counterclaim asserted against the plaintiff and the cross claim asserted against Malguarnera is denied. As indicated above, PUB seeks an order directing the respective parties to turnover any proceeds from the income or sale of the properties directly to PUB in partial or full satisfaction of two money judgments for foreclosure deficiencies against Malguarnera. In support of its motion, PUB submits the pleadings in this action and Action #2, copies of two money judgments obtained against Malguarnera, and the court order setting these actions down for joint trial. The motion is opposed by defendant Salomon.

The court finds, however, that PUB's motion is an ill-fated attempt to utilize the procedures in CPLR Article 52 to enforce its judgments against Malguarnera and/or the plaintiff. A judgment debtor may seek to enforce its judgment by making an application for an order directing the judgment creditor or a person in possession of money or property of the judgment creditor to turnover such property. CPLR 5225(a) provides that when the person against whom such an application is made is the judgment debtor, the procedure is a mere "motion ... upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money ..., to deliver any other personal property, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." In addition, the motion is to be made in the action which resulted in the subject judgment and should bear the caption of that action and court subject to certain exceptions not relevant herein. Here, the motion is not made in the actions which resulted in the judgments against Malguarnera, neither has PUB submitted evidence that Malguarnera was given proper notice of the motion.

CPLR 5225(b) provides that when the person against whom such an application is made is "a person in possession or custody of money or other personal property in which the judgment debtor has an interest," the application is made "[u]pon a special proceeding commenced by the judgment creditor." Setting aside for the moment whether the plaintiff is a "person in possession or custody of money or other personal property" in which Malguarnera has an interest pursuant to said Article, PUB has not commenced

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a special proceeding against the plaintiff herein. Accordingly, PUB's motion is procedurally defective and it is denied in its entirety.

More importantly, PUB has not established the priority of its lien against Malguarnera's undivided one-half interest in the properties relative to Salomon or any other lien holders that may be discovered in the process mandated by statute upon the reference made herein. Before the Court can render an interlocutory judgment for the sale of the properties, it must ascertain, by reference or otherwise, whether there is any creditor not a party who has a lien on the undivided share or interest of any party (*see* RPAPL § 913[1]). The fact that PUB and Salomon have been named as permissible defendants herein pursuant to RPAPL § 904 does not establish that there are no other parties with liens against the properties.

In any event, the referee appointed herein must serve all defendant creditors and all non-party creditors, if any, with the notice of hearing set forth above at which it may present evidence of its lien. The court thus finds that PUB's right to recover against the properties is more properly adjudicated within the context of the process set forth in statutes governing this partition action. Accordingly, PUB's motion for summary judgment on its counterclaim and cross claim is denied.

Dated: September 21, 2015



THOMAS F. WHELAN, J.S.C.