

Iannucci v Fiorentino
2017 NY Slip Op 30411(U)
January 20, 2017
Supreme Court, Suffolk County
Docket Number: 4904/15
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/26/16; 11/18/16
SUBMIT DATE 11/18/16
Mot. Seq. # 003 - Adj. To 6/16/17
Mot. Seq. # 004 - Adj. To 6/16/17
CDISP: NO

JOSEPH IANNUCCI, JR.,	-----X	
	:	NATALE J. TARTAMELLA, ESQ.
	:	Atty. For Plaintiff
Plaintiff,	:	235 Brooksite Dr.
	:	Hauppauge, NY 11788
-against-	:	
	:	AHERN & AHERN, ESQS.
NICOLE FIORENTINO,	:	Attys. For Defendant
	:	1 Main St.
Defendant.	:	Kings Park, NY 11754
	:	
	:	STEPHEN L. O'BRIEN, ESQ.
	:	Referee
	:	168 Smithtown Blvd.
	:	Nesconset, NY 11767
	-----X	

Upon the following papers numbered 1 to 17 read on this motion for confirmation of the report of the referee appointed pursuant to RPAPL Article 9 and cross motion by plaintiff for an order rejecting said report and other relief; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering papers 7-8; Reply papers 9-10; Other: 11-12 (post trial memorandum of law); 13-17 (Affirmation and Supplemental Affirmation of Referee, Report and Report; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#003) by the defendant for an order confirming the initial report of the referee appointed herein pursuant to order dated October 28, 2015 is adjourned to **June 16, 2017**, pending the completion of the matters directed below; and it is further

ORDERED that the cross motion (#004) by the plaintiff for an order rejecting such report and for an order declaring the plaintiff's entitlement to an escrow refund check that the plaintiff

Iannucci v Fiorentino
Index No. 4904/15
Page 2

failed to present to the referee at the hearings held are adjourned to **June 16, 2017**, pending the completion of the matters directed below; and it is further

ORDERED that the prior order of this court dated October 28, 2015 is modified so as to delete from the first Ordered paragraph appearing on page 7 of said order, the directive requiring the plaintiff to serve the referee with a search, certified by the Suffolk County Clerk, as to the existence of any and all liens against the subject property; and it is further

ORDERED that the prior order of this court dated October 28, 2015 is modified so as to designate the **Smithtown News** as the paper in which the referee shall forthwith secure publication of the notice to creditors mandated by RPAPL § 913; and it is further

ORDERED that all other provisions of the prior order of this court dated October 28, 2015, shall remain in full force and effect as they are neither modified nor altered by the terms of this order; and it is further

ORDERED that the referee shall forthwith file a further report incorporating by reference the findings in his first filed report, reporting the results of the proceedings conducted with respect to creditors and detailing his findings with respect to the rights of ascertained creditors and the effect of the priority of their liens upon the application of the proceeds of sale as contemplated by RPAPL § 961.

This partition action arises out of the parties' engagement to be married and their purchase, as joint tenants with survivorship rights, of an improved parcel of residential real property in Smithtown, New York in November of 2013. In addition to the remedy of partition and sale, the plaintiff seeks declaratory and/or mandatory injunctive relief with respect to his entitlement to an engagement ring given to the defendant by the plaintiff, recovery of the value of a vacuum cleaner and the amount of wedding events allegedly expended by the plaintiff. According to the plaintiff, the defendant vacated the subject premises on August 30, 2014, without the consent of the plaintiff, while the defendant claims that the plaintiff ousted her by changing the locks and by barring her from returning to said premises.

In the answer served, the defendant counterclaimed for a judgment of partition and sale, distribution of the proceeds of the sale in accordance with the parties' rights, shares and interests as determined by a referee, a claim for, in effect, a judicial declaration that the defendant is entitled to keep the engagement ring, recovery of wedding expenses paid by the defendant and the recovery of legal fees incurred by the defendant.

The parties each moved for summary judgment in August and September of 2015 with respect to the pleaded claims for partition and sale. By order dated October, 28, 2015, the court granted those motions to the extent that it found that the parties' cross demands for partition were meritorious and that no issues of fact existed so as to preclude the court from awarding summary judgment on their respective claims for that limited relief. The court further found that the parties were entitled to the remedy of partition and sale rather than actual partition because the premises were so circumstanced that actual partition could not be made without great prejudice to the parties pursuant to RPAPL § 915 (*see* Order dated October 28, 2015, page 5). However, an immediate sale of the premises was precluded due to the existence of other matters in need of determination, including, an ascertainment of the rights, shares and interests of the parties by due proof thereof and a determination of the adjustments of those rights as each of the parties demanded so in their pleadings. The resolution of these matters would then control the division of the proceeds derived from the sale in accordance with the dictates of the equities of such parties and the rights of creditors, should any exist.

The court went on to appoint, pursuant to RPAPL § 911, Stephen L. O'Brien, Esq., as referee to ascertain the rights, shares and interests of the parties to this action by due proof of an abstract of the conveyances by which the same are held, and to take proof of the parties' title and interest in the subject properties, and of the several matters set forth in the pleadings. Such matters included the cost of insurance, taxes and other expenses of the subject premises as may have been paid by the parties and their entitlements to adjustments thereof, if any, and the receipt of income, rents and profits and whether adjustments thereto have been proved. In addition, because the court determined that the premises were so circumstanced that an actual partition could not be made without great prejudice to the parties, the court further directed the referee to ascertain, pursuant to RPAPL § 913, whether there are any creditors, not a party to this action, who have liens on the undivided share or interest of any party and, if so, the amount and the priorities of such lien, and to report upon all of the matters to the court as indicated in its October 28, 2015 order.

This second creditors reference was contingent upon the plaintiff's service upon the referee of a search, certified by the Suffolk County Clerk, as to the existence of any and all liens against the subject property, and upon that showing the existence of at least one non-party creditor, the issuance a publication of a notice for four (4) successive weeks in a local newspaper requiring each person not a party to this action who had 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. The referee was further directed to serve all known 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.

The record reflects that due to a clerical error, the October 28, 2015 order failed to specify a newspaper in which publication of the notice to creditors was to be made, an error which could and should have been easily and immediately remedied had any person of interest notified the court of such error. The record further reflects that the plaintiff failed to serve the referee with the certified search by the Suffolk County Clerk regarding the existence of creditors as directed in the October 28, 2015 order, and instead, submitted a judgment and lien search from a title company as proof of the existence creditors. Therein, only one lienholder creditor was reported; namely, JPMorgan Chase Bank, the mortgagee who funded the parties' purchase of the subject premises in November of 2013. Accordingly, the referee did not publish the notice to creditors that was required by the October 28, 2015 order of the court prior to conducting hearings on the issues referred to him pursuant to RPAPL § 911 regarding his ascertainment of the shares and interests of the parties and their rights, if any, to equitable adjustments thereto.

In his filed report dated September 26, 2016, the referee requests that the court provide a further order naming the newspaper in which publication of the notice to creditors should be made. Alternatively, the referee suggests that the court may amend its prior order so to delete the directives to the plaintiff with respect to service of the certified search for creditors by the Suffolk County Clerk required by RPAPL § 915 and deem the judgment and lien search by the title company, Reliable Abstract Corp., which the plaintiff produced and placed into the record at the hearings conducted by the referee without objection (*see* Exhibit P). Neither the defendant nor the plaintiff consented, objected or otherwise commented upon this alternative request for relief in their moving papers or other submissions to the court.

A review of the provisions of RPAPL § 913 reveals that while a certified search by the Clerk is sufficient proof of the non-existence of creditors so as to permit the court to issue a finding that publication of the notice to creditors is not necessary, the statute allows for the determination as to the existence of creditors with liens by the court or by reference. Accordingly, the court hereby modifies its October 28, 2015 order so as to delete the directive that the plaintiff supply the referee with a certified search for lienholders. Since, however, the title report received in evidence revealed the existence of at least one creditor; namely, JPMorgan Chase Bank, the lender who advanced the purchase monies, the referee remains obligated to publish the notice in a newspaper published in Suffolk County in accordance with the dictates of RPAPL § 913(2). The referee is thus directed to publish said notice in the *Smithtown News* "with all convenient speed" (RPAPL § 913[2]).

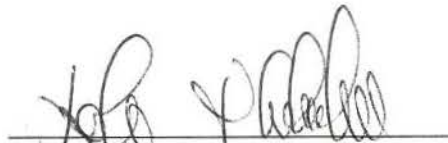
In the absence of a completed "Inquiry as to Creditors" and the filing of a report to the court with respect thereto, confirmation or rejection of the September 26, 2016 report of the referee reference is premature. This result is mandated by the provisions of RPAPL § 913 which directs that "before an interlocutory judgment for the sale of real property is rendered, the court shall ascertain

Iannucci v Fiorentino
Index No. 4904/15
Page 5

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” and the requirement that a notice of hearings for purposes of proving the lien of any non-party and for the referee to report thereon. Since the judgment after sale must direct application of the proceeds (*see* RPAPL § 931) and the sum chargeable upon a share or interest of the partitioning parties to satisfy a lien thereon paid to the creditor, or retained, subject to an order of the court (*see* RPAPL § 961), the priorities and the effect of any proven lien upon the shares and interests of the partitioning parties should be included in the report of the referee.

Accordingly, the instant motion (#003) and cross motion (#004) by the parties for confirmation and rejection of the initial report of the referee are adjourned to **June 16, 2017**. By that date, a supplemental affirmation of services and supplemental report of the referee as to his findings following the hearing held by him pursuant RPAPL § 913 is expected to be filed and served upon counsel for the parties. The parties will be afforded sufficient time to amplify or formally amend their pending motions to seek either confirmation or rejection of this supplemental report of the referee and his requests for compensation for all services rendered by him.

DATED: 1/20/17


THOMAS F. WHELAN, J.S.C.