

Iannucci v Fiorentino
2017 NY Slip Op 31679(U)
July 25, 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 DATES: 10/26/16;11/18/16
SUBMIT DATES: 06/16/17
Mot Seq: # 003 - MG
Mot. Seq # 004 - XMOTD
Conference Scheduled: 9/8/17
CDISP: NO

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JOSEPH IANNUCCI, JR.,	:	NATALE J. TARTAMELLA, ESQ.
	:	Atty. For Plaintiff
Plaintiff,	:	235 Brookside 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 23 read on this motion for confirmation of the first 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); 13-18 (Affirmation and Supplemental Affirmation of Referee, Report of Referee; 19 Short Form Order dated January 20, 2017; 20-21 2nd Supplemental Affirmation of Referee and Supplemental Report of Referee regarding creditor hearing; 22-23 Correspondence from counsel indicating no contest or objection to supplemental report of referee regarding ascertainment of creditors; it is,

ORDERED that this motion (#003) by the defendant for an order confirming the September 26, 2016 first Report of the referee appointed herein pursuant to order dated October 28, 2015 is considered under CPLR Articles 43 and 44 and is granted; and it is further

ORDERED that those portions of the cross motion (#004) by the plaintiff for an order rejecting such Report is considered under Articles 43 and 44 of the CPLR and is denied; and it is further

ORDERED that the remaining portions of the cross motion (#004) by the plaintiff, which were not opposed by the defendant, for an order declaring the plaintiff's entitlement to the monies denominated in a mortgage escrow refund check which the plaintiff failed to present to the referee at the hearings held and other alternative relief with respect to said check is granted only to the extent that the court declares plaintiff is alone entitled to collect the monies represented by such check without payment of any of the proceeds to the defendant; and it is further

ORDERED that upon the court's own motion, the Supplemental Report of the referee dated May 25, 2017, which is limited to the matters embraced by the creditor ascertainment reference directed in the prior orders of this court is hereby confirmed pursuant to CPLR 4403; and it is further

ORDERED that the parties' respective claims for partition and sale, ascertainment of shares rights and interests, adjustments of those rights and accountings between the parties and for moneys expended in excess of their ownership interests and/or by reason of ouster and/or use and occupancy *are severed* from all other pleaded claims set forth in the complaint and in the answer of the defendant, which *severance* shall be reflected in the interlocutory judgment to be submitted and entered hereon and in the final judgment of partition and sale; and it is further

ORDERED that the parties' respective claims for partition and sale of the premises known as 39 Fulton Avenue, Smithtown, New York 11787 are granted as this court has found that said premises are so circumstanced that an actual physical partition thereof cannot be made without great prejudice to the plaintiff and to the defendant, who together jointly own said premises with rights of survivorship, and said premises shall be sold at a public auction as directed in the interlocutory judgment to be submitted and issued herein as directed below; and it is further

ORDERED that the parties' claims for the ascertainment of the rights, shares and interests of the parties are granted and said rights, shares and interests are as follows; that the plaintiff is seized in fee simple absolute of an equal undivided joint interest in the premises as is the defendant, each having rights of survivorship therein and that no others are seized of any ownership interest in said premises; and it is further

ORDERED that the parties' claims for an adjustment to their respective 50% ownership shares and interests in the subject premises are denied as determined by the referee in his first Report

dated September 26, 2016, which Report is hereby confirmed, and the net proceeds derived shall be distributed equally to the plaintiff and the defendant in a 50% division thereof; and it further

ORDERED that as reported in the Supplemental Report of the referee dated May 20, 2017, after the publication of a notice to unknown creditors, a certified mailing of said notice to the only known creditor, and after conducting a hearing pursuant to RPAPL § 913, the subject premises are encumbered by a mortgage lien in favor of JPMorgan Chase Bank, N.A., issued to the plaintiff and the defendant as joint obligors on November 5, 2013, the outstanding balance of which, shall be equally charged against the parties' 50% respective share interest in the gross proceeds derived from the public sale of the premises and, pursuant to RPAPL § 962, the referee of sale shall, after deduction of the costs, expenses and fees including those set forth in RPAPL § 963(2), then chargeable to the plaintiff and the defendant, pay into court on account of the mortgagee its successor or assigns, the portion of the proceeds of sale which equal the amount jointly owed by the parties to the mortgagee, or its successors or assigns, and the funds so paid into court shall, upon further order of the court, be distributed to said mortgagee, its successors or assigns in satisfaction of the mortgage debt then due in accordance with RPAPL § 963 and; and it is further

ORDERED that in accordance with the terms of the order dated October 28, 2015, in which the fee of Stephen L. O'Brien, Esq., as referee to ascertain the parties' rights, shares and interests and their respective claims for adjustments thereto, was fixed at \$250.00 per hour, and a reading of the referee's three affirmations of services, the court hereby awards said referee the sum \$20,000.00, inclusive of disbursements, as compensation for the services he rendered in the proceedings held herein to date, which amount represents the fair and reasonable value of the services performed by said referee under the references contained in the October 25, 2015 and January 20, 2017 orders of this court; and it is further

ORDERED that the respective parties shall each bear liability for payment of 50% of the fee awarded above to Stephen L. O'Brien, Esq., as referee to ascertain shares and adjustments if any, which shall be paid to him first out of the proceeds derived from the sale of the premises, and the court hereby directs that any deficiency in the payment of this fee shall be the subject of a money judgment which shall be rendered against the plaintiff and the defendant, jointly, in favor of the referee as provided in the interlocutory judgment and if necessary in the final judgment to be entered hereon; and it is further

ORDERED that the referee of sale shall, following payment of the fee of the referee to ascertain shares awarded above, and his deposit into court of amounts equal to the amount of the mortgage debt in an insured account or accounts, deposit the net proceeds into an interest bearing account or accounts, and hold them subject to the disposition directed by the further order of the court

and as may be included in the final judgment to be entered herein, which shall also provide for the payment and equal allocation by the parties of costs, fees, disbursements and allowances if any, awarded by further order of the court; and it is further

ORDERED that the submission any proposed interlocutory judgment of partition and sale or counter judgment must include a copy of this order and copies of the first Rport and Supplemental Report of the referee that were confirmed herein; and it is further

ORDERED that all remaining claims for relief demanded in the complaint and the answer served which relate, among other things, to disputes over personal property items and liability for wedding expenditures and the like, shall alone continue herein and shall be the subject of the next compliance conference which is now scheduled for **September 8, 2017**.

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.

In its October 28, 2015 order, the court appointed, pursuant to RPAPL § 911, attorney 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' rights, title and interest in the subject properties and the several other 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, accountings by and between and the other claims asserted by the parties with respect to these matters. 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 parties to this action, having liens on the undivided share or interest of any party and, if so, the amount and the priorities of such lien, and to report to the court as to all matters referred in the October 28, 2015 order.

The second reference for purposes of ascertaining creditors 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 requested that the court provide a further order naming the newspaper in which publication of the notice to creditors should be made or modifying its prior order to delete this requirement by deeming 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) sufficient within the contemplation of RPAPL § 915. Although the parties took no position upon this alternative request for relief in their submissions on their motions, the court denied this request for alternative relief.

By order dated January 20, 2017, the court directed the referee to publish the notice to creditors required by RPAPL § 913 whenever at least one creditor is known, in the *Smithtown News* “with all convenient speed” (RPAPL § 913[2]). The court further directed the referee to conduct a hearing with respect to the matters embraced in the ascertainment of creditors reference directed in the October 28, 2015 order of this court. The court thus adjourned the motion (#003) and cross motion (#004) now before it to June 16, 2017 to allow the referee to complete the creditor reference hearing as directed in the court’s order of January 20, 2017 and to file a Supplemental Report with respect thereto together with a supplemental affirmation regarding the time spent by the referee on these matters to aid the court in determining his compensation, the hourly rate of which, was fixed in the October 28, 2015 order of the court.

In accordance with these directives, the referee issued the requisite notices to creditors and held a hearing duly noticed on April 25, 2017, at which no creditor appeared. On June 1, 2017, the referee filed a Supplemental Report dated May 25, 2017, finding only one creditor of record, namely, JPMorgan Chase Bank, N.A., as having a lien against the premises. The defendant’s motion (#003) for confirmation of the first Report of the referee and the cross motion (#004) by the plaintiff for rejection of that Report now before this court, were marked submitted on the adjourned dates of June 16, 2017. In correspondence to the court dated July 19, 2017, counsel for the respective parties indicated that they had no objections to the matters reported upon in the Supplemental Report of the referee which is limited to the identification of but one creditor, namely, JPMorgan Chase Bank, N.A., as the owner of a purchase money mortgage given to the plaintiff and the defendant on November 5, 2013.

Upon a reading of the Supplemental Report of the referee dated, May 25, 2017, and the transcript of the hearing held by said referee, both being limited to the ascertainment of creditors as contemplated by RPAPL § 913, the court hereby confirms said Report and the findings of the referee contained therein. The court thus adopts the finding that there is but one creditor of record, namely, JPMorgan Chase Bank, N.A., who issued a mortgage to the plaintiff and defendant on November 5, 2013, that the plaintiff and defendant are the joint obligors under said note and mortgage and that such mortgage is a lien against the property and that there are no other liens or encumbrances of record against the subject premises.

The court also confirms the first Report of the referee dated September 26, 2016 and each of the findings and conclusions set forth therein. It is well established that the determination of a referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue, since the Referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand (*see Frater v Lavine*, 229 AD2d 564, 564, 646 NYS2d 46, 47 [2d Dept 1996]). “Where, as here, a referee is appointed to hear and report, the referee’s report and recommendation ‘should be confirmed if the findings in the report are supported by the record’” (*Ferentini v Ferentini*, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010; quoting *Frater v Levine*, 229 AD2d 564, 564, *supra*).

The first Report of the referee dated September 26, 2016 is based upon the record of the hearings he conducted at which the parties appeared and offered evidence in support of their respective claims. Said Report includes findings and determinations of the referee with respect to the matters referred to him pursuant to RPAPL §§ 911 and 915 in the order of this court dated October 25, 2015, namely, ascertainment of the rights, shares and interests of the parties to this action upon due proof of an abstract of the conveyances by which the same are held, and the taking of other proof as to the parties’ title and interest in the subject properties and of the several matters set forth in the pleadings. Such matters also 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 claimed adjustments thereto have been proved or are otherwise warranted under equity principles as well as the claims of ouster by the defendant and the plaintiff’s claims for contribution and/or reimbursement for improvements made to the premises by him.

Upon its review of the referee’s first Report, the transcript of the hearings conducted, the evidentiary exhibits and other submissions of the parties, the court finds a rational basis of support in the record for the referee’s determinations that the parties are joint tenant owners of the premises

with rights of survivorship. They are thus entitled to an equal share of liabilities for the encumbrance of record against the premises, the liabilities incurred in this actions and to an equal 50% division of the net proceeds derived from the public sale of the premises which this court previously found was the appropriate partition remedy to be accorded to the parties. The referee's further determinations of the parties' claims for adjustment of this equal division of the net proceeds of sale were either not established or warranted under the circumstances of the parties or the equities existent in this action, also have a rational basis in the voluminous record of the proceedings conducted herein. None of the objections to the referee's determinations, rulings or findings posited by counsel for the plaintiff in his cross moving papers have merit and all are rejected by the court as lacking therein (*see Turrisi v Severino*, 77 AD3d 914, 910 NYS2d 504 [2d Dept 2010]; *Kiernan v Martin*, 48 AD3d 641, 852 NYS3d 351 [2d Dept 2008]; *Shen v Shen*, 21 AD3d 1078, 1079, 803 NYS2d 579 [2d Dept 2005]; *Frater v Lavine*, 229 AD2d 564, 564, *supra*; *Johnston v Martin*, 183 AD2d 1019, 583 NYS2d 615 [3d Dept 1992]; *Hufnagel v Bruns*, 152 AD2d 459, 542 NYS2d 652 [1st Dept 1989]).

Settle, on not less than fifteen (15) days notice, an interlocutory judgment of the type required by RPAPL § 915 *et. seq.*, providing in blank for the court's appointment of a referee of sale, those otherwise required by law RPAPL Article 9 and the other matters set forth in this order, including, the severance of the parties' claims partition and sale and related matters directed herein.

DATED: 7/25/17


THOMAS F. WHELAN, J.S.C.