

Laffey v Laffey Fine Homes Intl., LLC

2018 NY Slip Op 33588(U)

December 4, 2018

Supreme Court, Nassau County

Docket Number: 609757/17

Judge: Stephen A. Bucaria

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PHILIP LAFFEY, MARK LAFFEY,
U.S.1 LAFFEY REAL ESTATE CORP.,
U.S.1 LAFFEY REAL ESTATE OF
BELLEROSE, INC. and LAFFEY FINE HOMES
OF NEW YORK LLC,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiffs,

INDEX No. 609757/17

MOTION DATE: 11/20/18

Motion Sequence 004-006

-against-

LAFFEY FINE HOMES INTERNATIONAL, LLC,
LAFFEY ASSOCIATES, LLC, LAFFEY FINE HOMES
INTERNATIONAL OF WOODBURY LLC, LAFFEY
FINE HOMES OF WOODBURY LLC, LAFFEY
INTERNATIONAL REALTY, LLC, LAFFEY REAL
ESTATE LLC, LAFFEY REFERRAL NETWORK, INC.
and U.S.1 LAFFEY OF WILLISTON PARK, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion.....XXX
- Affirmation in Support.....XXX
- Affirmation in Opposition.....XX
- Reply Affirmation.....X

Motion (seq. # 4) by plaintiffs Philip Laffey, Mark Laffey, U.S.1. Laffey Real Estate Corp., U.S. 1 Laffey Real Estate of Bellerose, Inc. and Laffey Fine Homes of New York LLC for leave to clarify and reargue the court's order of June 14, 2018 is **denied**. Motion (seq. # 5) by receiver John Spellman for an order determining issues related to the receiver's

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compensation is **granted** to the extent indicated below. Cross-motion (seq. # 6) for an order directing Emmett Laffey to pay his one-third share of the receiver's commissions and fees for secondary appointments is **granted** in part and **denied** in part.

The present action is the latest chapter in the ongoing dispute between the Laffey brothers concerning their residential real estate brokerage business.

Emmett Laffey and plaintiffs Philip and Mark Laffey are brothers. Their father, Thomas Laffey, was a real estate broker who operated several offices in Queens and Nassau. In 1991, Thomas Laffey transferred a real estate brokerage company to each of his three sons. Emmett Laffey was given a real estate brokerage office in Williston Park. Philip was given a real estate brokerage in New Hyde Park, and Mark Laffey was given a real estate brokerage in East Norwich.

In 1996, Thomas Laffey transferred his remaining office, which was located in Bellerose, to his sons in equal one-third shares. Over the years, the parties opened eleven additional jointly-owned real estate offices in Great Neck, Huntington, Jackson Heights, Little Neck, Manhasset, Northport, Port Washington, Syosset, Westbury, and two offices in Greenvale. The jointly-owned brokerages were owned by U.S. 1 Laffey Real Estate Corp. On February 10, 2012, Emmett Laffey formed a new, wholly-owned company, Laffey Fine Homes International, LLC.

In 2012, Philip and Mark Laffey, or companies which they controlled, commenced an action against Emmett Laffey in Supreme Court, Nassau County, alleging that Emmett was improperly competing with one of the jointly owned companies. Emmett commenced a separate action seeking, in addition to other relief, a declaration that the joint entities operated as partnerships, subject to a unanimous vote (Index No 13360/12 and Index No 7703/12). The actions ("Laffey I") were assigned to Justice Driscoll. In January 2013, Justice Driscoll appointed James Leonard as receiver over U.S. 1 Laffey Real Estate Corp., as well as three other Laffey companies, Laffey Associates, LLC, ERealty Title Agency Corp., and 55 Northern Blvd., LLC. The receiver operated the companies until Justice Driscoll's final decision.

On August 24, 2015, Justice Driscoll issued his decision after trial. Justice Driscoll held that Emmett Laffey was properly removed without cause as a member of defendant Laffey Associates, LLC and as an officer and/or director of eRealty Title Agency Corp. However, Justice Driscoll did not award damages to Mark and Philip Laffey based upon his finding that the "proof at trial" did not support a breach of fiduciary duty claim (Doc 23 at 12).

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Following Justice Driscoll's decision, the parties engaged on a course of economic warfare and adopted a "scorched earth" policy with regard to the Laffey real estate brokerage companies. In October 2015, Emmett Laffey solicited agents employed by the jointly-owned Syosset and Northport companies to join his company, Laffey Fine Homes International.

Mark and Philip Laffey not only solicited agents, but also transferred agents, listings, leases, business records, and other assets to their newly-formed company, Laffey Fine Homes of New York, LLC, in which Emmett had no legal interest. These self-help measures jeopardized the existence of the jointly-owned U.S. 1 Laffey Real Estate Corp. as a viable business entity and currently rendered it inactive as a business.

On December 19, 2016, Emmett Laffey commenced an action against Phillip and Mark Laffey and various Laffey companies which they had formed (Index 609953/2016) ("Laffey II"). Emmett Laffey alleged that Philip and Mark Laffey "unilaterally transferred" the cash, telephone numbers, website, office furnishings and equipment, computer systems, brokerage licenses, real estate listings, and "company and office goodwill" of U.S. 1 Laffey Real Estate Corp. to their new company, Laffey Fine Homes of New York, LLC (complaint at ¶ 47). Emmett alleged that Laffey Fine Homes of New York misappropriated real estate commissions of over \$17 million dollars that belonged to U.S. 1 Laffey Real Estate Corp. Alleging that he had "no adequate remedy at law," Emmett sought a declaratory judgment that he had a 1/3 interest in Philip and Mark's company Laffey Fine Homes of New York, LLC on the theory that it was the "successor in interest" to U.S. Laffey 1 Real Estate Corp. (Id at 81-82). Emmett also asserted claims for breach of fiduciary duty and a judicial accounting.

On December 20, 2016, Emmett Laffey moved by order to show cause for the appointment of a receiver of Philip and Mark's company Laffey Fine Homes of New York LLC, as well as certain jointly held Laffey companies, including U.S. 1 Laffey Real Estate Corp. In the order to show cause, the court issued a temporary restraining order prohibiting Philip and Mark Laffey from selling, transferring, or disposing of the corporate assets and property of the jointly held companies, or their new Laffey company, except in the ordinary course of business. Subsequently, after he was appointed, the receiver directed that no party was to remove any item from the headquarters of Laffey Fine Homes of New York, LLC.

In opposition to Emmett's motion for the appointment of a receiver, Philip and Mark disputed Emmett's claim that their father had intended for the brothers to compete against one another (Index No 609953/16 Doc 79 at ¶ 8). Indeed, Philip and Mark conceded that their individually owned offices appeared as "mere branches" of U.S. 1 Laffey Real Estate

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Corp. (Id at ¶10). While Philip and Mark reserved the right to compete for agents, they acknowledged that the net commissions, after deduction of the agent's commission, were required to be deposited into the U.S. 1 Laffey Real Estate Corp. account (Id at ¶10-11). Although arguing that a receiver should not be appointed because Emmett had "unclean hands," Philip and Mark made no alternative request, as just one example, that if a receiver was appointed, the receivership should include Emmett's companies.

By order dated January 12, 2017, the court granted Emmett Laffey's motion for the appointment of a temporary receiver as to U.S. 1 Laffey Real Estate Corp., U.S. 1 Laffey Real Estate of Bellerose, Inc., Laffey Fine Homes of New York, Laffey Real Estate LLC, Laffey Associates, LLC, eTitle Land Services, LLC, TCG Group LLC, eRealty Title Agency Corp., and 55 Northern Blvd., LLC.

CPLR § 6401 provides that upon motion of a person having an "apparent interest" in property which is the subject of an action in the Supreme or County Court, a temporary receiver may be appointed. Ordinarily, plaintiff must allege a legal interest in the property subject to the action in order to have an "apparent interest" in the property. However, in "extraordinary circumstances," where the defendant is under a fiduciary obligation to plaintiff, and plaintiff seeks an accounting with respect to the property subject to the action, plaintiff may seek the appointment of a receiver, even though plaintiff does not assert a legal interest in the property (**Meurer v Meurer**, 21 AD2d 778 [1st Dept. 1964]). Since Philip and Mark, in violation of their fiduciary duties, took listings and agents, as well as licenses, from U.S. 1 Laffey Real Estate Corp. and placed them in companies in which Emmett had no legal interest, Emmett and U.S. 1 Laffey Real Estate Corp. had an "apparent interest" in those companies, sufficient to seek a receivership.

The doctrine of collateral estoppel does not apply to pure questions of law (**American Home Assur Co. v Intern'l Ins**, 90 NY2d 433, 440 [1997]). Since the issue of whether Philip and Mark Laffey owed Emmett Laffey a fiduciary duty was a pure question of law, this court was not bound by Justice Driscoll's decision in Laffey I that the proof at trial did not support a breach of fiduciary duty claim.

Real estate sales agents in the same office may compete with each other by working with different buyers who are bidding on the same property. Similarly, two agents in the same office may compete by soliciting the same seller to obtain the listing. Although real estate brokers tend to focus their efforts on specific areas, brokers often compete with brokers in nearby communities for sales and real estate listings.

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Nevertheless, in view of their family relationship and their jointly-held brokerages, Philip and Mark Laffey owed a fiduciary duty to Emmett Laffey with respect to U.S. 1 Laffey Real Estate Corp. In violation of their fiduciary duty to Emmett, Philip and Mark created a complex web of companies to deprive Emmett of his share of corporate opportunities rightly belonging to U.S. 1 Laffey Real Estate Corp. As noted above, Philip and Mark conceded that their individually owned offices appeared as “mere branches” of U.S. 1 Laffey Real Estate Corp. and that the net commissions, after deduction of the agent’s commission, were required to be deposited into the U.S. 1 Laffey Real Estate Corp. account (Id at ¶10-11). In these extraordinary circumstances, Emmett had an “apparent interest” in the Laffey companies formed by Philip and Mark Laffey.

The court found that on December 27, 2016, Philip and Mark Laffey had locked Emmett out of the office in clear violation of the terms of the temporary restraining order. At the headquarters of Laffey Fine Homes of New York, LLC files were being removed, computers were sequestered, spy cameras were installed covering key employees, security was compromised, managerial employees were being given contradictory directives by the parties, third party vendors were given conflicting directives, banking relationships were being jeopardized, and agents were conflicted with respect to loyalty to the company, all to the detriment of U.S. 1 Laffey Real Estate Corp. These acts required the appointment of a temporary receiver to protect the assets of that company. The court determined that the parties had demonstrated that they were incapable of conducting the business of the jointly-held U.S. 1 Laffey Real Estate Corp. Thus, there was a danger of irreparable loss or waste to the jointly-held company, if a receiver was not appointed. The receiver, John Spellman, Esq., was granted authority to manage and operate the aforesaid companies. On March 10, 2017, the Appellate Division denied Mark and Philip Laffey’s motion for a stay of all proceedings in the action, pending their appeal of the order granting a receiver.

After qualifying and filing his oath, the receiver immediately took control of the companies for which he was responsible. On a daily basis, he approved all deposits, reviewed the mail log, reviewed invoices, reviewed all proposed payments of commissions, reviewed and approved third party contracts, and approved all transactions for eRealty. On a bi-weekly basis, he approved payroll. On a weekly basis, the receiver appeared at company headquarters to sign or approve all checks, meet with staff and give direction to the company. He also approved capital projects, settled lawsuits and monitored all aspects of the company. He maintained continual contact with the court concerning the operation of the company.

By order dated June 13, 2017, Emmett Laffey’s motion for partial summary judgment was granted to the extent that the court impressed a constructive trust upon the income and

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assets of Laffey Fine Homes of New York LLC in favor of U.S. 1 Laffey Real Estate Corp. While the court rejected Emmett's "successorship theory," it noted that, in asserting that he had no adequate remedy at law, Emmett invoked the equitable jurisdiction of the court.

A constructive trust is the formula through which the "conscience of equity" finds expression (**Kaprov v Stalinsky**, 145 AD3d 869 [2d Dept. 2016]). When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee (*Id.*). The elements of a constructive trust are 1) a fiduciary or confidential relationship, 2) an express or implied promise, 3) a transfer in reliance on the promise, and 4) unjust enrichment (*Id.*). As these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established (*Id.*). Although the elements must be established by "clear and convincing evidence," the constructive trust doctrine is given a broad scope to respond to all human implications of a transaction in order to satisfy the demands of justice (*Id.*).

The court noted that Philip and Mark Laffey had engaged in self-help in the form of diversion of real estate commissions and listings by the artifice of purporting to form new Laffey companies in which Emmett had no legal interest. In view of the fiduciary duties which Philip and Mark owed to Emmett Laffey, the diversion of commissions, listings, and licenses were sufficient "transfers" to implicate the constructive trust doctrine. Thus, Emmett Laffey could "trace" the listings, personnel, and commissions by imposing a constructive trust upon Philip and Mark Laffey's new companies. Having imposed a constructive trust for the benefit of U.S. 1 Laffey Real Estate Corp., the court determined that Emmett had a 1/3 equitable interest in Philip and Mark Laffey's companies

In the June 13, 2017, order the court clarified the receivership to the extent of placing the New Hyde Park and Brookville offices under the control of the receiver. The court noted that the New Hyde Park office was originally owned by Philip Laffey and the Brookville (East Norwich) office was owned by Mark Laffey. In view of the diversion of business from U.S. 1 Laffey Real Estate Corp., and Philip and Mark Laffey's transfer of U.S. 1 Laffey's brokerage licenses to their new company, Laffey Fine Homes of New York, it was necessary for the New Hyde Park and Brookville offices to be subject to the receivership. The receiver was directed to take possession of the books and records of the New Hyde Park and Brookville offices and to exercise all other powers in connection with those offices as provided in the January 12, 2017 receivership order.

The present action ("Laffey III") was commenced on September 19, 2017. Essentially, plaintiffs Philip and Mark Laffey recite the history of their business dispute with their brother, Emmett Laffey, beginning with Emmett's forming Laffey Fine Homes

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International, LLC in February 2012. Plaintiffs assert claims for conversion and commingling of U.S. 1 Laffey Real Estate Corp. assets, including Laffey marketing materials, agent salaries, and contract information, and for a judicial accounting from September 2015. Plaintiffs' claim for deceptive business practices under General Business Law § 349 has previously been dismissed by the court. Plaintiffs have named as defendants eight companies formed by Emmett Laffey. Despite the tortured history of Laffey I and Laffey II, plaintiffs still did not seek the dissolution of any Laffey company. Indeed, even with respect to companies in which the brothers purported to deprive each other of an interest, the parties continued to use the name Laffey.

On December 21, 2017, the court granted Philip and Mark's motion for the appointment of a receiver for the defendant Laffey companies which Emmett Laffey had formed. Receiver John Spellman was appointed the receiver because of his intimate knowledge of the relationships among the parties and their companies. By order to show cause dated January 11, 2018, the Laffey companies created by Emmett moved for leave to reargue the provision in the December 21, 2017 order which extended the receivership to Emmett Laffey's companies. In the order to show cause, the court granted a temporary stay of the receivership over Emmett Laffey's companies (Doc 85).

On June 6, 2018, the court received a letter from the receiver, John Spellman, advising that the significant problems previously facing the Laffey companies had been resolved, as a result of the receiver's efforts (Doc 385 Index No 609953/16). The court noted that all parties had recently requested that the court terminate the receivership. Accordingly, the receiver's authority to operate and manage the Laffey companies was terminated effective 9:01 a.m. on June 18, 2018, except for making certain payments enumerated below.

On June 12, 2018, the receiver submitted his final report (Index No 609953/16 Doc 400), to which no party raised any objection. In his report, the receiver stated that \$23,983,215.71 was disbursed and passed through his hands. In its order of June 14, 2018, the court awarded a total commission to the receiver of 2.5% of that amount, or \$600,000.00. This amount was also consented to by the parties. In view of Emmett Laffey's 1/3 interest in U.S. 1 Laffey Real Estate Corp., the beneficiary of the constructive trust, it was appropriate that he bear a 1/3 share of the receiver's commissions, and necessary expenses, including secondary appointments, assuming sufficient funds were on hand to pay those sums at the end of the receivership. The receiver had previously been granted an interim commission of \$423,500.00, of which \$290,000.00 had been paid. Deducting the \$423,500.00 previously granted interim commission from the \$600,000.00 total commission, the net commission was \$176,500.00, plus \$133,500.00.00, which was owed to the receiver from the first award, resulted in a total due the receiver of \$310,000.00.

Emmett Laffey, Philip Laffey, and Mark Laffey were each directed to pay 1/3 of the costs of the receivership, including the receiver's commissions, and secondary appointments approved by the court, as well as the receiver's original and renewal bond. The court was

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aware that the interim awards to the receiver and counsel to the receiver which had been paid were paid by Philip and Mark Laffey's companies. The court noted that in view of Emmett's one-third interest in those companies, upon the final accounting and dissolution of the jointly -owned companies, a separate credit to Emmett Laffey might be granted.

The receiver was directed to pay \$11,538.75 to the court-appointed accountant, as previously ordered (Doc 402). The receiver was directed to pay the \$30,687.50 balance due to the court-appointed counsel to the receiver, for a total counsel fee of \$73,633.50, and as to which no party has taken objection (Doc 401). The receivership was terminated and the receiver discharged upon the making of those payments. In the June 12, 2018 order, the court denied Philip and Mark's motion to extend the receivership to Emmett Laffey's companies as moot, based upon the termination of the receivership.

By notice of motion dated July 19, 2018, plaintiffs Philip and Mark Laffey move to "clarify and/or reargue" the June 14, 2018 order. Plaintiffs argue that constructive trust is a provisional, rather than a final, remedy, and therefore the court cannot rule, at this stage, that Emmett Laffey has a 1/3 equitable interest in Philip and Mark's companies.

Under the CPLR, constructive trust is not listed as a provisional remedy (See CPLR § 6001). However, income from property may be placed in a constructive trust, pending a final determination of the parties' rights in the property, in similar fashion to a provisional remedy (See, **Northern Trust v Delley**, 60 AD3d 1345 [4th Dept. 2009]). Nevertheless, a constructive trust may also be imposed as a final remedy, as where a court imposes a constructive trust on a marital asset, as part of equitable distribution in a final judgment in a matrimonial action (See, **Kaprov v Stalinsky**, supra, 145 AD3d 869.)

In the present case, the court need not elucidate further the nature of constructive trust as a provisional or final remedy. Suffice it to say, the constructive trust was imposed on Philip and Mark Laffey's companies, upon Emmett Laffey's motion for partial summary judgment in Laffey II, based upon the court's determination, as a matter of law, that Philip and Mark Laffey had violated their fiduciary duties to Emmett Laffey. While the constructive trust may actually have been imposed as a provisional remedy, it may ripen into a final remedy upon a final judgment, providing for dissolution of the Laffey companies. Plaintiffs' motion to clarify or reargue so much of the court's June 14, 2018 order as determined that Emmett Laffey had a 1/3 equitable interest in Philip and Mark Laffey's companies is **denied**.

By notice of motion dated August 15, 2018, receiver John Spellman moves for an order setting the matter down for a hearing to determine issues relating to the receiver's compensation and entering a judgment for unpaid commissions. The receiver states that, to

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date, he has been paid \$346,745.81 by Philip and Mark Laffey, or their companies, and \$0 by Emmett Laffey. The receiver states that the remaining commission due is \$253,254.19. Finally, the receiver states that, upon the termination of the receivership on June 18, 2018, there were insufficient funds on hand to pay the balance of his commissions.

In opposition to the receiver's motion, Emmett Laffey argues that he should have no obligation to pay the receiver's commissions because his companies were never subject to the receivership. Additionally, Emmett Laffey argues that he lacked sufficient financial information in order to make an informed decision as to whether to oppose the receiver's application for commissions. Since the \$346,745.81 commissions were paid from companies which are subject to a constructive trust in favor of Emmett Laffey, Emmett is entitled to a credit of 1/3 of that amount.

CPLR 8004(b) provides that if, at the termination of the receivership, there are "no funds" in the hands of the receiver, upon application of the receiver, the court may fix the compensation of the receiver and the fees of his attorney, "in accordance with the respective services rendered," and may direct the party who moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver.

As a general rule, commissions are to be paid only out of the funds in the receiver's hands at the termination of the receivership (**Amusement Distributors v Oz Forum, Inc** 113 AD2d 855 [2d Dept. 1985]). CPLR 8004(b) is a codification of the exception to the rule, and allows the court to impose on the party who moved for a receiver's appointment the obligation to compensate the receiver if "special circumstances" exist (*Id.*). Special circumstances exist where the receiver's application has "unusual merit," or where delinquency on the part of the moving party has resulted in an increase in the necessary expenses of the receivership or has precluded the greater receipts. The court concludes that both examples of special circumstances exist in the present case.

The acrimony which had developed among the Laffey brothers led them, not only to divert business, but also to sabotage the offices and computer system of the company and to make conflicting demands upon the employees. These self-help measures rendered the brokerage business dysfunctional to the point where the company might have gone bankrupt, but for the intervention of the receiver. Thus, the receiver literally saved the Laffey companies. While Emmett Laffey's companies were technically subject to the receivership for only 20 days, Emmett's companies nonetheless received the benefit of Mr. Spellman's managerial and mediating services throughout the course of the receivership. The court concludes that the receiver's application has unusual merit.

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Far from being an innocent partner, Emmett Laffey fully participated in the solicitation of agents, and other forms of diversion of business, particularly in the fall of 2015 following the conclusion of Justice Driscoll's case. The court concludes that Emmett Laffey's delinquency has resulted in increased necessary services on the part of the receiver and has precluded greater receipts for Mark and Philip Laffey's companies. In these circumstances, it is appropriate that Emmett Laffey bears his fair share of the receiver's unpaid commissions.

By notice of cross-motion dated September 12, 2018, Philip and Mark Laffey move for an order directing Emmett Laffey to immediately pay a one-third share of the receiver's commissions and the fees of all secondary appointments. Among other expenses, Philip and Mark request that Emmett be required to pay, not only one-third of the receiver's commissions, but also one-third of the \$73,633.50 fee of the counsel to the receiver, one-third of the \$11,538.75 paid to the court-appointed accountant, and one-third of the \$50,000 premium on the receiver's surety bond. In opposition, Emmett Laffey reiterates his opposition to the receiver's motion.

Since CPLR 8004(b) refers to the situation where there are insufficient funds on hand to pay both the receiver's commission and his attorney's fees, it is not clear that the statute authorizes the court to require the party who moved for the appointment of a receiver to indemnify the other parties for expenses of the receivership which have already been paid. Moreover, Philip and Mark Laffey have not established that the counsel fees, the accountant's fee, and the bond premium would not have been incurred but for Emmett Laffey's delinquency. Accordingly, so much of Philip and Mark Laffey's application as requests an order directing Emmett Laffey to pay one-third of the fees of secondary appointments and other expenses of the receivership is **denied**.

With regard to the branch of the motion seeking an order directing Emmett to pay one-third of the receiver's commissions, the court similarly concludes that CPLR 8004(b) does not authorize the court to require the moving party to indemnify the other parties for receiver commissions which have already been paid. However, in view of the unusual merit to the receiver's application, Emmett Laffey's 1/3 equitable interest in the companies subject to the

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receivership, and Emmett Laffey's delinquency, it is appropriate that Emmett Laffey pay one-third of the unpaid commissions of the receiver. Accordingly, the receiver's motion and Philip and Mark Laffey's motion are **granted** to the extent that Emmett, Philip and Mark Laffey shall each pay the receiver \$84,418.06 within ten days of the e-filing of this order. The receiver may enter individual judgments in these amounts with the clerk, without interest, in the event that any party's share of the commissions is not paid.

So ordered.

Date: 4 December 2018

Stephen A. Luciani
J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE