

Scheer v De Cruze

2019 NY Slip Op 31236(U)

May 2, 2019

Supreme Court, Suffolk County

Docket Number: 659/2011

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 659/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 STEPHANIE L. SCHEER,

Plaintiff,

-against-

CARL DE CRUZE,

Defendant.

ORDER**PLAINTIFF'S ATTORNEY:**

BECKER & POLIAKOFF, LLP
 45 BROADWAY - 17TH FLOOR
 NEW YORK, NEW YORK 10006
 212-599-3322

SELF-REPRESENTED DEFENDANT:

CARL DE CRUZE
 PITINI HOUSE
 SYMI 85600
 DODECANESE, GREECE

REFEREE:

HOWARD BERGSON, ESQ.
 194 MAIN STREET
 SETAUKET, NEW YORK 11733
 631-675-6996

Upon the Notice of Presentment dated March 29, 2019, and the Letter Application of the Referee dated April 14, 2019;

WHEREAS, by Order dated November 3, 2017 ("November 2017 Order"), this Court granted the unopposed motion by plaintiff STEPHANIE L. SCHEER confirming the referee's report dated March 7, 2017, and directing the sale of the premises known as 35 Bay Avenue West, Hampton Bays, New York ("Hampton Property") in accordance with the findings of said report;

WHEREAS, by the November 2017 Order, this Court appointed Howard M. Bergson, Esq., Fiduciary ID 528163, as Referee to conduct the judicial sale of the Hampton Property pursuant to RPAPL Article 9 and RPAPL 231 (1);

WHEREAS, by the November 2017 Order, this Court set the Referee's interim fee at \$5,532.50 ("Referee's Interim Fee");

WHEREAS, by the November 2017 Order, this Court ordered that the Referee's fees shall be computed pursuant to CPLR 8003 and shall be paid from the gross proceeds of the subject sale;

WHEREAS, by the November 2017 Order, this Court determined, among other things, that: (i) plaintiff is entitled to 77% of the net equity of the Hampton Property; and (ii) plaintiff is entitled to a credit against defendant CARL DE CRUZE's share of the net equity in the Hampton Property in an amount equal to 77% of the remaining balance of the home equity mortgage on the Hampton Property as of November 14, 2016, in the event that plaintiff waives her claim for a constructive trust in the equity of the premises known as Pitini House, Symi 85600, Dodecanese, Greece ("Greek Property");

WHEREAS, by Order dated September 27, 2018, this Court authorized the Referee to retain The Corcoran Group and Linda Nasta of the Corcoran Group (Fiduciary ID 354732) to market and sell the Hampton Property in accordance with the terms set forth in the Exclusive Right to Sell Agreement annexed to that Order;

WHEREAS, the Corcoran Group and Linda Nasta found a buyer ready, willing and able to purchase the Hampton Property upon terms and conditions that are acceptable to the Referee but subject to the Court's approval;

WHEREAS, the Referee drafted the Residential Contract of Sale (which is subject to the Court's approval), and is holding the down payment of the buyers in the amount of \$52,500.00 in escrow in accordance with the terms thereof and has been in communication with the buyers' attorneys and attorneys for plaintiff;

NOW THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Referee is authorized to sign and enter into the Residential Contract of Sale whereby the Hampton Property would be sold in accordance with the terms set forth therein;

2. The Referee is authorized to sign the deed transferring the ownership of the Hampton Property from STEPHANIE L. SCHEER and CARL DE CRUZE to Andrew Donato and Eric Donato as set forth in the Residential Contract of Sale;

3. The Referee is authorized to pay all normal and customary costs and expenses of the seller at closing out of the gross proceeds of the subject transaction;

4. The Referee is authorized to pay the 5% commission due to The Corcoran Group and Linda Nasta of the Corcoran Group in accordance with the terms set forth in the Exclusive Right to Sell Agreement in the amount of \$26,250.00 out of the gross proceeds of the subject transaction;

5. The Referee is authorized to pay himself the Referee's Interim Fee in the amount of \$5,532.50 out of the gross proceeds of the subject transaction;

6. After payment of: (i) all of the normal and customary costs and expenses of the seller in the subject transaction; (ii) the commission due to the Corcoran Group and Linda Nasta in connection with the subject transaction; and (iii) the Referee's Interim Fee in the amount of \$5,532.50 in accordance with the November 2017 Order, the Referee shall retain and hold in escrow the sum of \$13,125 from the gross proceeds, representing 2.5% of the contract price, for the purpose of securing any further sums this Court may award to the Referee. The Referee shall distribute the balance of the gross proceeds to plaintiff and defendant in accordance with the November 2017 Order by delivery of an attorney's check made payable to plaintiff for her share of the balance of the gross proceeds and by depositing defendant's share of the balance of the net proceeds into Court;

7. The Referee is also authorized to pay the balance of plaintiff's attorneys' fees incurred in this action as well as their fees associated with the closing of this transaction out of plaintiff's share of the balance of the gross proceeds of the subject transaction upon the presentation of an invoice to the Referee, which is consented to by plaintiff, which payment shall require an endorsement of "payment approved" to be executed by plaintiff at the time of closing;

8. As per plaintiff's affidavit sworn to on April 17, 2009, she waived her claim for a constructive trust in the equity in the Greek Property and the Referee shall issue plaintiff a credit against defendant's share of the net equity in the Hampton Property in the amount of 77% of the remaining balance of the home equity mortgage;

9. By the November 2017 Order, this Court, among other things, ordered that the Referee's fees shall be computed pursuant to CPLR 8003, which fees shall be paid from the gross sales proceeds of the subject sale.

CPLR 8003 in its current form provides as follows:

§ 8003. Referees.

(a) Generally. A referee is entitled, for each day spent in the business of the reference, to three hundred fifty dollars unless a different compensation is fixed by the Court or by the consent in writing of all parties not in default for failure to appear or plead.

(b) Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed seven hundred fifty dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may deem proper.

(c) This section shall not apply to judicial hearing officers who have been designated referees

(CPLR 8003).

The Referee has failed to set forth the necessary specifics in accordance with the requirements of CPLR 8003 – the statute provides the methods of compensation and the criteria applicable for the various methods of compensation. In the absence of a properly supported application, the Court has directed the sum of \$13,125 be held in escrow by the Referee subject to the submission of a properly supported application for fees, on notice to all parties, in accordance with the requirements of CPLR 8003, together with a statement of all sums paid and received by the Referee in connection to this matter (see CPLR 8003 [b]). The Referee should be guided by the Second Department’s recent holdings in *Citibank, N.A. v Dulfon*, 2019 NY Slip Op 02496 (2d Dept) and cases cited therein. The Referee is also reminded of his filing obligations under Part 36 of the Rules of the Chief Judge.

The foregoing constitutes the decision and Order of the Court.

Dated: May 2, 2019



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION