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SHORT FORM ORDER

INDEX No. 09-25258

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-11-12
ADJ. DATE
Mot. Seq. # 007 - MotD

DONNA SALTALAMACCHIA, as Executrix of the Estate of ELEANOR MORAN,

Plaintiff,

- against -

ROBERT MICELI,

Defendant.

JOANNE FANIZZA, ESQ.
Attorney for Plaintiff
111 Conklin Street
Farmingdale, New York 11735

CARMAN, CALLAHAN & INGHAM, LLP
Attorney for Defendant
266 Main Street
Farmingdale, New York 11735

Howard Bergson, Esq., Referee
11 Linda Lane
Setauket, New York 11733

Upon the following papers numbered 1 to 10 read on this motion to reject the Referee's report; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 10; Replying Affidavits and supporting papers ____; Other ___; it is,

ORDERED that the motion by plaintiff pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.44 to reject the Referee's report is determined herein; and it is further

ORDERED that plaintiff is to provide the Referee with certified search results for creditors pursuant to RPAPL 913 (1) within thirty (30) days of the entry date of this Order.

This is an action for partition of real property known as 9 Poplar Court, Miller Place, New York owned by plaintiff and defendant, her son, as joint tenants with right of survivorship. The property was purchased in October 2005 and is improved by a single-family residence. By Order of this Court dated April 7, 2011, plaintiff's unopposed motion for partial summary judgment was granted to the extent of granting partition in accordance with a reference to ascertain the rights, shares and interests of the parties in the property. The Order of reference dated July 14, 2011, appointed Howard M. Bergson, Esq. as

Referee. The hearing before the Referee occurred on January 6, 2012, after which the Referee rendered his report.

Plaintiff seeks to reject the report of the Referee on the grounds that some of the facts recited by the Referee do not comport with the parties' sworn deposition and hearing testimony and that the incorrect law was applied to this action. She asserts that the agreement of the parties provided that the children of defendant's companion were not to reside in the house, plaintiff was to have a place to reside expense-free for the rest of her life and defendant, her nurse-son, would provide her necessary end-of-life care. Plaintiff claims that she was not ousted as characterized by the Referee in his report, but instead was constructively evicted or underwent an "implied ouster" through a toxic living environment created by the behavior of defendant's companion, who resided with the parties with defendant's permission. Plaintiff refers to alleged statements by defendant's companion that she wished plaintiff were dead and would see her dead, which caused plaintiff to fear for her life, to have strokes and to leave the premises in order to protect her health. In addition, plaintiff asserts that based on the foregoing there is no support to the Referee's claim that there was no testimony or evidence to support the conclusion that it was unsafe or improper for plaintiff to continue to reside in the garage-apartment or that plaintiff was forced to leave the premises.

Plaintiff also asserts that she did not unconditionally give the house to her son as a gift and even if it were a transfer in consideration of the parties' agreement as characterized by the Referee, defendant breached the agreement at the outset by failing to make the first five mortgage payments, to pay for the septic tank replacement, and to ensure that plaintiff had a safe place to live. Plaintiff argues that the "gift" issue was decided by the Order granting her unopposed motion for partial summary judgment. Plaintiff further asserts that the Referee failed to cite any case law in his report to support his position on the issues that he addressed or his conclusions, and that the law supports plaintiff's claims, including her entitlement to the full amount of all the monies that she paid for the house comprising of the full down payment, closing costs, the five mortgage payments, the costs of renovations and repairs, and rents owed from defendant and rents paid by plaintiff due to her constructive eviction or implied ouster. Finally, plaintiff argues that publication to ascertain creditors pursuant to RPAPL 913 is unnecessary given that plaintiff was authorized during a pre-trial conference on October 20, 2011, to order a title search, which plaintiff has done. In support of her motion, plaintiff submits the Order of reference, the Referee's report, the transcript of the hearing before the Referee, and the deposition transcripts of the parties.

Defendant submits an affirmation in opposition asserting that the Referee properly determined the rights of the parties in all respects.

"Partition, although statutory (RPAPL 9), is equitable in nature 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]). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (*see* ***Worthing v Cossar***, 93 AD2d 515, 517, 462 NYS2d 920 [4th Dept 1983]). These include acquisition payments, such as down payments and mortgage payments (*see* ***Quattrone v Quattrone***, 210 AD2d 306, 307, 619 NYS2d 773 [2d Dept 1994]; ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893 [3d Dept

1973]; *see also* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175 [2d Dept 2009]), and the reasonable value of improvements and repairs to the property, if they were made in good faith and are of substantial benefit to the premises (*see* ***Vlcek v Vlcek***, 42 AD2d 308, 311, 346 NYS2d 893). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (*see* ***McIntosh v McIntosh***, 58 AD3d 814, 872 NYS2d 490 [2d Dept 2009]; ***Misk v Moss***, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]).

"The decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court" (*see* CPLR 4319). The Court may confirm or reject the referee's report, in whole or in part, and make new findings (*see* CPLR 4403; ***Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp.***, 270 AD2d 303, 704 NYS2d 613 [2d Dept 2000]). The report and recommendations of a referee should be confirmed if the findings are supported by the record (*see* ***MacNiallias v Potter***, 82 AD3d 718, 917 NYS2d 895 [2d Dept 2011]; ***Ferentini v Ferentini***, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]; ***Capili v Ilagan***, 26 AD3d 354, 810 NYS2d 480 [2d Dept 2006]).

Although plaintiff now challenges the Referee's use of the term "ouster," it is notable that the Referee expressly stated at the hearing on January 6, 2012, that there were two issues to be resolved, one of which was whether or not there was an ouster of plaintiff from the premises, and plaintiff's attorney never disputed the use of the term "ouster" at the hearing and instead stated that "my concern is I want the record to be clear on the matter of ouster" and agreed on the record with the Referee's statement that "the act of oustering [sic] ended on or about the time she [plaintiff] moved out." Plaintiff cannot now raise new issues of whether plaintiff was constructively evicted or was the subject of an implied ouster, which were not raised or addressed at the hearing. In addition, plaintiff's hearing testimony reveals that it was plaintiff who initially verbally confronted defendant's companion, telling her that she would have to move out because it was plaintiff's house, during the incident in which defendant's companion allegedly responded that she wished plaintiff were dead, and that this incident and others arose out of plaintiff's perception that defendant's companion was not warm to her and resented her and that plaintiff was not being informed of, invited to, or included in events involving her granddaughter or family and that defendant's companion was the cause of this exclusion. A review of the hearing testimony as well as the deposition testimony supports the Referee's findings that "[t]he personal disputes, the arguments, the name calling and the perceived slights testified to by the plaintiff do not rise to the level that would support a conclusion of an 'ouster' " and that "there was no testimony or evidence that would support a conclusion that it was unsafe or improper for the plaintiff to continue to reside in the apartment or that the plaintiff was forced to leave" (*compare* ***H & Y Realty Co. v Baron***, 193 AD2d 429, 597 NYS2d 343 [1st Dept 1993]; ***Johnston v Martin***, 183 AD2d 1019, 583 NYS2d 615 [3d Dept 1992]).

Moreover, the Referee determined that plaintiff's payment of the $400,000.00 down payment, the closing costs of the home, and the approximately $13,500.00 cost of renovating the garage-apartment's kitchen were not gifts but rather transfers in consideration of the oral agreement between the parties that plaintiff would reside in the garage-apartment for the rest of her life and promises made and obligations assumed by defendant, including his payment of the five mortgage payments and the cost of the cesspool repair. Plaintiff claims that defendant breached the oral agreement at the outset by failing to make said

mortgage payments or to pay the cesspool repair cost, and seeks full reimbursement of the down payment, closing costs and renovation costs.

Essentially, consideration "consists of either a benefit to the promisor or a detriment to the promisee" (***Weiner v McGraw-Hill, Inc.***, 57 NY2d 458, 464, 457 NYS2d 193 [1982]), which has been bargained for by the parties to the contract (*see* ***Payne v Connelly***, 32 AD2d 693, 299 NYS2d 1013 [3d Dept 1969]; Restatement [Second] of Contracts § 71). "Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny" (***Apfel v Prudential-Bache Sec.***, 81 NY2d 470, 476, 600 NYS2d 433 [1993] [citation omitted]; *see* ***Janian v Barnes***, 294 AD2d 787, 789, 742 NYS2d 445 [3d Dept 2002]). However, an agreement cannot be said to be supported by any consideration unless "something of 'real value in the eye of the law' was exchanged" (***Apfel v Prudential-Bache Sec.***, *supra* at 476, 600 NYS2d 433 [citation omitted]; *see* ***Von Bing v Mangione***, 309 AD2d 1038, 1040, 766 NYS2d 131 [3d Dept 2003]).

Where parties enter into an oral agreement, their obligations may be determined based upon the evidence, including their course of conduct (*see* ***Bubba Gump Fish & Chips Corp. v Morris***, 90 AD3d 592, 933 NYS2d 723 [2d Dept 2011]; ***Czernicki v Lawniczak***, 74 AD3d 1121, 904 NYS2d 127 [2d Dept 2010]). Defendant did breach the oral agreement to the extent that he did not make his obligatory payments. However, defendant did not breach the agreement to the extent that plaintiff will not be residing in the apartment for the rest of her life (*compare* ***Johnston v Martin***, 183 AD2d 1019, 583 NYS2d 615). Plaintiff did not merely live rent-free on the promise that she would receive a life estate but actually became co-owner of the premises with right of survivorship in return for her financial assistance (*compare id.*). Thus, there was no initial breach of the agreement requiring reimbursement of her financial assistance inasmuch as plaintiff obtained a survivorship interest in the premises upon payment of the down payment and the closing costs. Moreover, there is no evidence that the parties contemplated or agreed to the reimbursement by defendant of any portion of the down payment, closing costs and renovation costs paid by plaintiff on his behalf (*compare* ***Czernicki v Lawniczak***, 74 AD3d 1121, 904 NYS2d 127). Plaintiff's Estate is entitled to recover the payments that plaintiff made to cover defendant's obligation for the five mortgage payments and the cost of the cesspool repair that defendant failed to satisfy (*see e.g.* ***Lerner v Ayervais***, 66 AD3d 644, 886 NYS2d 498 [2d Dept 2009]). Thus, the portions of the Referee's report concerning the nature of the agreement between the parties, the issue of ouster, the partition and sale of the premises, the division of the net proceeds of the sale, defendant's reimbursement of the five mortgage payments and the costs of the cesspool repair, and defendant's accounting and payment of an amount equal to the rental received from the time plaintiff vacated the premises to the time of the sale are all supported by the record (*see* ***MacNiallias v Potter***, 82 AD3d 718, 917 NYS2d 895; ***Ferentini v Ferentini***, 72 AD3d 882, 899 NYS2d 335 [2d Dept 2010]). The Court confirms said portions of the Referee's report.

However, plaintiff is correct in her assertion that publication to ascertain creditors pursuant to RPAPL 913 is not required by the Court in this matter. The scope of a referee's duties are defined by the Order of reference (*see* CPLR 4311; ***First Data Merch. Services Corp. v One Solution Corp.***, 14 AD3d 534, 789 NYS2d 198 [2d Dept 2005]; ***Fidelity New York FSB v Madden***, 228 AD2d 473, 643 NYS2d 1020 [2d Dept 1996]).

RPAPL 913 (2) provides:

> Where a reference is directed, the referee shall cause a notice to be published once in each week for four successive weeks in such newspaper published in the county wherein the place of trial is designated as shall be designated by the court directing said reference, and also, where the court so directs, in a newspaper published in each county wherein the property is situated, requiring each person not a party to the action who, at the date of the order, 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 lien and the true amount due or to become due to him by reason thereof. The referee shall report to the court with all convenient speed the name of each creditor whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof and the amount due or to become due thereupon.

The Order of reference submitted herein merely directs the Referee "to ascertain the interest of creditors who may have liens on the undivided shares of the parties in the subject property" but does not direct the Referee to cause notice to be published. The Referee has not been authorized by the Court to have notice published to ascertain the interest of creditors (*see* RPAPL 913; ***First Data Merch. Services Corp. v One Solution Corp.***, 14 AD3d 534, 535, 789 NYS2d 198). The Referee noted in his report that the parties had obtained a title report which, he was informed, did not disclose the existence of any liens. "A search certified by the clerk or by the clerk and register of the county where the property is situated that there is no such outstanding lien is sufficient proof of the absence of such creditor" (RPAPL 913 [1]). Inasmuch as plaintiff represents to the Court that she has the results of a title search indicating the absence of any creditors with liens on the property, plaintiff is directed to provide the Referee with certified search results for creditors pursuant to RPAPL 913 (1) within thirty (30) days of the entry date of this Order. Therefore, under the circumstances presented, the portion of the Referee's report indicating that the language of RPAPL 913 (2) is mandatory and that upon the designation by the Court of a Suffolk County newspaper, the appropriate notice must be published is rejected (*see* ***Brady v Varrone***, 65 AD3d 600, 602, 884 NYS2d 175).

Dated: July 17, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION