

McCue v Holton

2017 NY Slip Op 32533(U)

November 29, 2017

Supreme Court, New York County

Docket Number: 162421/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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CASSANDRA McCUE,

Plaintiff,

Index No.
162421/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 003

WILLIAM HOLTON, WILLIAM HOLTON
CONSTRUCTION, LLC. BILLY HOLTON
CONSTRUCTION, LLC and SKYLINE SOUTH CUSTOM
METAL ROOFS,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Cassandra McCue (“McCue”) commenced this action for fraud and rescission of an oral general partnership agreement against defendants, William Holton (“Holton”), William Holston Construction, LLC (“WHC”), Billy Holton Construction, LLC (“BHC”), and Skyline South Custom Metal Roofs (“Skyline”) (“collectively, “Defendants”). On October 16, 2015, McCue moved for an Order, pursuant to CPLR 3215, granting judgment on default against Defendants. On March 28, 2016, this Court granted default judgment and ordered an assessment of the damages. This assessment was assigned to the Honorable Ira Gammerman, J.H.O. (“Judge Gammerman”), who heard this matter on July 7, 2016. The resulting transcript of the hearing was so ordered by Judge Gammerman on September 22, 2016.

McCue now moves for an Order confirming Judge Gammerman’s recommendation of damages. The transcript, of which there is only 13 pages, provides as follows,

“Special Referee Gammerman: [Holton] offered to give you a 25 percent interest in a particular company called

Skyline South Custom Metal Roofs for \$15,000?” (tr at 3)

“Ms. McCue: That is correct.” (tr at 3)

“Special Referee Gammerman: He was also going to buy some property for you. Is that correct? . . . You paid him \$27,600. Correct?” (tr at 4)

“Ms. McCue: I paid for property and the lawyers for 27 . . . [f]or that payment I was supposed to receive the deed to the property in my name, which I did not. He put his name on the deed of the property.” (tr at 4)

“Special Referee Gammerman: Okay. And what happened as a result of that transaction?” (tr at 5)

“Ms. McCue: Nothing happened. The house – whatever was – it never went through because [Holton] never worked again. He never did another roof again . . . I’ve been paying the taxes on the property that I purchased.” (tr at 5)

“Special Referee Gammerman: But, it’s not in your name? Correct?” (tr at 5)

“Ms. McCue: It was in both of our names.” (tr at 5)

“Special Referee Gammerman: I’m sorry. This was a deed that was supposed to be --” (tr at 5)

“Ms. McCue: In my name.” (tr at 6)

“Special Referee Gammerman: Alone?” (tr at 6)

“Ms. McCue: Correct.” (tr at 6)

“Special Referee Gammerman: His name is still on the deed?” (tr at 6)

“Ms. McCue: I got his name off the deed. I got a

quick deed.” (tr at 6)

“Special Referee Gammerman: So the property is now in your name?” (tr at 6)

“Ms. McCue: Yes, but --” (tr at 6)

“Special Referee Gammerman: What’s the but?” (tr at 6)

“Ms. McCue: On the first deed that I did not know of until years later he has liens on his name, the cost of \$16,000. So now I cannot sell the property without paying his liens.” (tr at 6)

“Special Referee Gammerman: Okay. Because he put his name on the deed --” (tr at 6)

“Ms. McCue: First deed.” (tr at 6)

“Special Referee Gammerman: -- there is a lien on the property based on his obligation or his debt?” (tr at 6)

“Ms. McCue: Yes.” (tr at 6)

“Special Referee Gammerman: Which you are obligated to satisfy before you can sell the property?” (tr at 6)

“Ms. McCue: Correct?” (tr at 7)

“Special Referee Gammerman: And how much is that lien?” (tr at 7)

“Ms. McCue: \$16,000, something like that. (tr at 7)

“Special Referee Gammerman: Do you have the

exact amount?" (tr at 7)

"Ms. McCue: My lawyer has it." (tr at 7)

"Special Referee Gammerman: So, your damages are \$15,000." (tr at 7)

"Ms. McCue: Correct." (tr at 7)

"Special Referee Gammerman Plus the lien."
(tr at 7)

"Ms. McCue: Correct." (tr at 7)

"Special Referee Gammerman: Anything else?"
(tr at 7)

"Ms. McCue: I don't think so." (tr at 7)

"[Counsel for McCue]: So, the \$27,000 that she paid."
(tr at 7)

"Special Referee Gammerman: But she has the property." (tr at 7)

"[Counsel for McCue]: [T]hey can't sell the title because there's a cloud – can't sell the property because there's a cloud on the title." (tr at 8)

"Ms. McCue: So there are two problems, there is liens and cloud." (tr at 8)

"Special Referee Gammerman: Where is the evidence of the cloud on the title?" (tr at 8)

"[Counsel for McCue]: There is a preliminary lien and title report prepared by – for Ms. McCue by the attorney who represented Mr.

Holton. (tr at 8)

“Special Referee Gammerman: There is a cloud on the title because of what?” (tr at 8)

“[Counsel for McCue]: Two things, there are judgment lien against Billy Holton --” (tr at 8)

“Special Referee Gammerman: That’s the \$16,000.” (tr at 8)

“[Counsel for McCue]: And the other cloud on the title is that the seller of the property did not have clear title?” (tr at 8)

“Special Referee Gammerman: How do we assess the damages as a result of that?” (tr at 8-9)

“[Counsel for McCue]: The damages are what she paid for the property --” (tr at 9)

“Special Referee Gammerman: No. The damages are diminution of the value of the property as a result of the cloud. That’s not the full value of the property.” (tr at 9)

“[Counsel for McCue]: But the property has no value --” (tr at 9)

“Special Referee Gammerman: Counselor, you are going to have to give me an opinion from somebody as the diminution and value of the property as a result of the value of the cloud.” (tr at 9)

“Ms. McCue: Is the tax assessment proper?” (tr at 9)

“Special Referee Gammerman: No. An expert

is going to say this property is now worth X. Somebody will buy it, they will buy it. They just won't pay as much as they would ordinarily pay." (tr at 9)

"[Counsel for McCue]: But" (tr at 10)

"Special Referee Gammerman: Counselor, listen to me, in my view you can take this up with Judge Rakower if you disagree with me. In my view, the cloud just diminishes the value of the property, but I don't know how much and I need some testimony from someone with some expertise as to that diminution." (tr at 10)

"Special Referee Gammerman: Off the record." (tr at 11)

"Special Referee Gammerman: As I understand it, there's a judgment against Mr. Holton which attaches to that property based on the fact that his name was on the deed at some point --" (tr at 11-12)

"Ms. McCue: The first deed." (tr at 12)

"Special Referee Gammerman: -- is contrary to [Holton's] representation to you that your name will be the only name on the deed. Correct?" (tr at 12)

"Ms. McCue: Correct" (tr at 12)

"Special Referee Gammerman: And how much is that lien?" (tr at 12)

"Ms. McCue: \$16,491.28" (tr at 12)

"Special Referee Gammerman: And then there's money that you laid out – the 14,000

-- \$1445.92 is taxes that you paid on the property that you own?" (tr at 12)

"Ms. McCue: Correct." (tr at 12)

"Special Referee Gammerman: That's not damages. I will make your damages \$31,491.28 which is the amount I recommend to Justice Rakower." (tr at 12)

Confirmation of Report

Pursuant to CPLR § 4403, the Court has the power to confirm or reject "in whole or in part ... the report of a referee . . . and may order a new trial or hearing." A referee's report should be confirmed where the report "clearly defined and addressed the issues raised, resolved matters of credibility, and made findings substantiated by the record." (*Gass v. Gass*, 42 AD3d 393 [1st Dept 2007].)

Statute of Frauds

"The statute of frauds is inapplicable to an agreement to create a . . . partnership because an oral agreement for an indefinite period creates a partnership . . . at will." (*Moses v Savedoff*, 96 AD3d 466, 469 [1st Dept 2012].) However, an alleged oral contract for transfer and reconveyance of a parcel of real property is void under the statute of frauds. (*see Bowman v Di Placidi*, 27 AD3d 259, 259-260 [1st Dept 2006].)

Discussion

Here, the referee did not make findings substantiated by the record because the evidence adduced did not correlate to the oral partnership agreement. (*see Bowman v Di Placidi*, 27 AD3d 259, 259-260 [1st Dept 2006].) In assessing damages, the referee was charged with recommending a value for McCue's partnership interest. That the partnership was not memorialized in writing is of no moment to the Court. (*see Moses v Savedoff*, 96 AD3d 466, 469 [1st Dept 2012].) However, it appears from the transcript, that in considering the \$16,491.28 judgment as damages, the referee erroneously assumed the existence of an oral contract for the transfer and reconveyance of a parcel of real property. (*see Bowman v Di Placidi*, 27 AD3d 259, 259-260 [1st Dept 2006].) Accordingly, the Court rejects the recommendation of the referee. (*see* CPLR 4403)

Wherefore, it is hereby

ORDERED that Plaintiff Cassandra McCue's request to confirm the Report and Recommendation issued by the Honorable Ira Gammerman, J.H.O., for an assessment of damages in the amount of \$31,491.28 is denied; and it is further

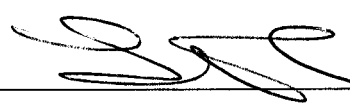
ORDERED that a new inquest is directed; and it is further

ORDERED that the assessment of damages is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: November 29, 2017



Eileen A. Rakover, J.S.C.