

Gomez v Ingegno

2018 NY Slip Op 30827(U)

May 3, 2018

Supreme Court, Suffolk County

Docket Number: 30108/08

Judge: Jr., Paul J. Baisley

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

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
NELSON J. GOMEZ,

Plaintiff,

-against-

PATRICK INGEGNO and SUSAN INGEGNO,

Defendants.
-----X

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MOTION DATE: 6/8/17

MOTION SEQ. NO.: 018 MD

MOTION SEQ. NO.: 019 MD

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Upon the following papers numbered 1-3 read on these motions to vacate prior order: Notice of Motion/Order to Show Cause and supporting papers 1-2; Affirmation of Referee in Response 3; it is,

ORDERED that the motion (motion sequence no. 019) of *pro se* defendant Susan Santangelo f/k/a Susan Ingegno ("Santangelo"), brought on by order to show cause (BAISLEY, J.) dated May 9, 2017, with an original return date of June 8, 2017, and the motion (motion sequence no. 018) of Santangelo, brought on by order to show cause (BAISLEY, J.) dated May 12, 2017, with an original return date of May 18, 2017, are considered together and denied as set forth hereinafter¹; and it is further

ORDERED that the calendar clerk serve a copy of this order on each of the *pro se* parties and on the referee.

As a preliminary matter, the court is constrained to summarize the procedural precedents to the instant orders to show cause: This action for partition or sale of residential real property was commenced in 2008 and was assigned to Acting Supreme Court Justice Hon. Ralph T. Gazzillo. The matter first came to the attention of the undersigned in January 2017 via the clerk of the fiduciary part, who sought the intervention of this justice in connection with an order that Judge Gazzillo had signed in mid-December 2016 shortly before he left the bench at the end of 2016. (Substantially all of Judge Gazzillo's civil IAS inventory was administratively reassigned to the undersigned as of January 1, 2017.)

¹ The motion sequence numbers appear to have been assigned by the motion clerk on the basis of the original return dates set forth in the respective orders to show cause, but chronologically, the order to show cause assigned motion sequence no. 19 was signed first, and the order to show cause assigned motion sequence no. 18 was signed second. The chronology is significant, as the second order to show cause sought to modify the temporary restraining order granted in the May 9, 2017 order to show cause.

It appears that Judge Gazzillo had signed the proposed order of Joy E. Jorgensen, Esq., the substitute referee herein (hereinafter the "referee"), confirming her report dated November 14, 2016, and authorizing the disbursement of monies held in her attorney escrow account from the sale of the parties' premises. Judge Gazzillo had, however, failed to execute the portion of the order setting forth the dollar amount of each party's distributive share and allocating the referee's fee in accordance with one of the two alternative proposals set forth in the referee's report (Judge Gazzillo had previously ordered that the referee's legal fees be paid by the plaintiff). The fiduciary clerk could not process the order as it did not specify the amount awarded as the referee's fee, and it was determined that the matter had to be reassigned to a new judge so that the imperfectly executed order could be rectified.

Upon reassignment of the matter to the undersigned, this court became aware of the pendency of a motion to withdraw as counsel (motion sequence no. 016) submitted by the attorney of record for defendant Santangelo, Douglas Valente, Esq. ("Valente"), returnable December 8, 2016; and a motion (motion sequence no. 017) by purportedly *pro se* defendant Santangelo to reject the referee's report and appoint a new referee to conduct the accounting and render a new report, returnable January 12, 2017. By separate short-form orders dated March 7, 2017, this court granted Valente's motion for leave to withdraw as counsel, subject to a 30-day stay from the date of service upon Santangelo of notice of entry of the order, and denied Santangelo's motion to reject the referee's report on the ground that she was still represented by counsel of record at the time she interposed the *pro se* motion.

On April 27, 2017, after reviewing the referee's report and fee affirmation and the entire record of this matter, including the record of the referee's hearing conducted on August 30, 2016, and mindful that the prior assigned judge who was fully familiar with the protracted history of this contentious litigation had already signed an order confirming the referee's report (although the order was defective), this court executed a new order confirming the referee's report. In doing so the court implicitly acceded to the referee's determination to forego an evidentiary hearing and to render her report and analysis on the basis of the parties' submissions as directed at the August 30, 2016, hearing. The court noted the referee's assessment that the voluminous documentary proof submitted by Santangelo was largely uncorroborated by paid receipts, cancelled checks, etc. that clearly connected the alleged expenses to the subject premises, and that much of the submitted paperwork was duplicative. The court further noted the referee's observation that although Santangelo claimed to have paid most of the expenses associated with the property, she also apparently received and retained all of the rent proceeds, while the property taxes remained unpaid to the extent of \$74,567.48.

Upon consideration of all of the foregoing, the court adopted the recommendation of the referee to distribute the net proceeds in accordance with the parties' percentage of ownership interest in the premises, to wit, 25% to Nelson Gomez and 37.5% to each of the defendants. The court also concluded, on the basis of the information set forth in the report and reflected in the court file, that the referee's legal fees should be reallocated to defendant Santangelo, whose profligate motion practice and obstructive litigation tactics appear to have unduly prolonged and complicated the resolution of this matter.

On May 9, 2017, defendant presented the first of the two orders to show cause under consideration herein, followed, three days later, by the second. Both motions seek relief with respect to the April 27, 2017, order of this court (BAISLEY, J.) confirming the referee's report. The order to show cause dated May 9, 2017, seeks an order vacating the April 27, 2017 order on the grounds that there was a court-imposed stay in effect on the date the order was issued and that Santangelo was denied an opportunity to object to confirmation of the report. The order to show cause granted a temporary restraining order ("TRO") restraining the referee from disbursing the subject funds to the extent not already done so. The subsequent order to show cause dated May 12, 2017 reflects Santangelo's acknowledgment that the subject funds had already been disbursed at the time of the May 9, 2017 order to show cause, and seeks an order modifying and extending the previously granted TRO to restrain the parties from dissipating any of the proceeds received from the referee and to direct them to pay the money into court. The court signed the order to show cause but declined to modify the TRO granted in the May 9, 2017 order to show cause.

With regard to Santangelo's argument that the April 27, 2017 order is a nullity because it was issued while a court-ordered stay was in effect, the court finds such argument to be disingenuous and without genuine merit. The March 7, 2017 order granting Valente's motion to withdraw as counsel for Santangelo directed Valente to serve his client with notice of entry of the order within ten days after the order was entered, and stayed proceedings herein for 30 days thereafter to permit Santangelo to obtain substitute counsel "if she be so advised" (the so-called "discharge order").² In accordance with the usual custom and practice of the court, a copy of the order was mailed to Valente at his office address, as well as to all unrepresented parties, and to the referee, on or about March 7, 2017. The order was entered on March 20, 2017. Accordingly, by the terms of the order Valente was required to have served his client with notice of entry of the order no later than March 30, 2017, and the 30-day stay would have expired no later than April 29, 2017.

The record reflects, however, that Valente did not serve the order on his client until April 20, 2017.³ Santangelo states, incorrectly, that the order was served on her on April 27, 2017, and that accordingly the stay remained in effect until May 27, 2017. While it appears that the court inadvertently executed the order two days prior to expiration of the stay contemplated by its order, the court finds that vacatur of the order is not required or appropriate in the circumstances presented here.

The purpose of the stay imposed by the March 7, 2017 order was to ensure that Santangelo received notice that her attorney's motion had been granted (she having already been served with the order to show cause bringing on the motion), and to enable Santangelo to obtain

² Contrary to Santangelo's representations, the copy of the order annexed to both of Santangelo's motions as an exhibit is not the discharge order. However, the court takes judicial notice of its own order.

³ The affidavit of service annexed to Santangelo's May 9, 2017, order to show cause as "Exhibit B" does not identify the order that was purportedly served (and the order accompanying it is the order denying Santangelo's motion to reject the referee's report), but since the affidavit reflects service of the "order" on Santangelo by certified mail, as was directed in the discharge order, the court surmises that it was the discharge order that was served on April 20, 2017.

substitute counsel “if she be so advised.” Santangelo already had notice that the motion was granted – in fact, the court’s file contains a letter from Santangelo dated April 21, 2017, informing the court that prior thereto she herself had provided Valente with a copy of the discharge order, which Valente in turn then “served” on Santangelo. Moreover, it is apparent that Santangelo did not and does not intend to retain substitute counsel, and that instead she intends to proceed *pro se* – as she has in the past at various times throughout this litigation, and as are the plaintiff and co-defendant herein. Accordingly, adherence to the punctilio of the stay was not required in these circumstances (*Diamadopolis v Balfour*, 152 AD2d 532 [2d Dept 1989]; *Imor v Imor*, 119 AD2d 913 [3d Dept 1986]).

Moreover, the court finds that any potential prejudice to Santangelo has been ameliorated by the fact that Santangelo has now had a full and fair opportunity to present all of her arguments and evidence in favor of rejecting the referee’s report, which have been fully considered by the court upon its review of Santangelo’s two motions. (The court notes that Santangelo also had the benefit of the advice of her former attorney of record, whose November 29, 2016 letter to her contains detailed legal advice and suggested legal arguments as to how to proceed to challenge the referee’s report – advice which she clearly has followed.)

The court also finds that the referee’s determination to proceed to render her report and analysis without conducting an evidentiary hearing was not improper. The January 27, 2014 order of Judge Gazzillo appointing the substitute referee herein expressly granted the referee the sole discretion to determine whether a hearing is necessary for the completion of the referee’s accounting, including but not limited to the issues of expenditures by plaintiff and defendants. The referee was directed to ensure that the parties’ rights are fixed in such a manner that “any order which may issue from this Court will work full and complete justice as between them.”

The subsequent order of Judge Gazzillo dated February 10, 2015 (determining motion sequence nos. 012 and 013) directed that the property be sold and the proceeds held in the referee’s escrow account pending the court’s approval of the referee’s accounting. Nothing therein specified the manner in which the accounting should be conducted or required that an evidentiary hearing be held. The record of the hearing before the referee on August 30, 2016, reflects that the referee directed the parties to provide verified, sworn statements with documentation and backup as to “each and every claim they have,” which the parties apparently did. It was within the referee’s discretion to forego an actual evidentiary hearing and to render her determination upon the voluminous documentary submissions of the parties. (The court notes that the court’s record contains an affidavit dated March 27, 2017 of *pro se* defendant Patrick Ingegno in support of the referee’s report.)

As to Santangelo’s claim that her judgment of divorce and October 12, 2005, so-ordered stipulation of settlement of the matrimonial action entitled her to a 65% and her former husband defendant Patrick Ingegno to a 35% share of their joint interest in the subject property, Santangelo has submitted no admissible proof to substantiate her claim. The court did not locate a copy of the purported judgment of divorce in the file of this matter, and the copy of the transcript of the Ingegno’s on-the-record stipulation of settlement submitted as an exhibit is not “so-ordered” as required by the express terms of the settlement.

Moreover, the record of the hearing before the referee on August 30, 2016 reflects that “the parties have stipulated and agreed that there is a deed from February 19, 1986 that sets forth their percentages of ownership to the subject premises, and all parties agree that that deed is the basis for the subject litigation.” Accordingly, upon this record it was not improper for the referee to conclude that the net proceeds should be distributed in accordance with the parties’ deeded interest.

Finally, the court finds that the referee did not err in rendering her computations herein. The amount she reported as presently on deposit in her escrow account is consistent with the closing statement, and Santangelo’s submissions fail to raise a factual issue with respect thereto.

With respect to Santangelo’s remaining arguments, the court finds them to be either without merit, or an improper attempt to relitigate matters that have already been decided herein by the previously assigned judge.

In light of all of the foregoing, the court denies the motions in their entirety.

Dated: May 3, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.

