Evans v Webb
2018 NY Slip Op 30942(U)
May 15, 2018
Supreme Court, New York County
Docket Number: 153949/14
Judge: David B. Cohen

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

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DEREK R. EVANS,

Plaintiff, Index No. 153949/14

-against- **Decision and Order**

RACHELLE M. WEBB,

Defendant.

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DAVID BENJAMIN COHEN, J.S.C.:

Plaintiff Derek R. Evans, moves, pursuant to CPLR 4403, for an order confirming the Report of Special Referee Marilyn T. Sugarman dated October 6, 2016 (the Report), and directing that defendant Rachelle M. Webb pay him: (1) $135,751.91 in credits owed to him (the Credits); (2) 50% of the equity of the condominium unit, located at 1485 Fifth Avenue, New York, New York (the Apartment), remaining after the deduction of the Credits from the stipulated value of the Apartment of $1,330,000; and (3) $3,000, pursuant to CPLR 8303 (a) (3). He also seeks an order directing that defendant remove his name from the mortgage of the Apartment within 9 months, and be solely responsible for paying the mortgage, all carrying charges, and any late charges, interest, fees, penalties, costs and legal fees resulting from her failure to timely pay the mortgage and/or carrying charges. Defendant cross-moves for an order referring this matter to Justice Donna M. Mills, rejecting the Report, and directing that, in exchange for a deed of his interest in the Apartment and assumption of the mortgage by defendant, plaintiff should also pay her the sum of $160,840 and other costs, until the closing of the Apartment between the parties.

Background

The parties became engaged to be married in 2008, and purchased the Apartment in 2012. The parties dispute whether they were still engaged at the time of the purchase. It is undisputed, however, that they resided together in the Apartment for some time after the closing, and that defendant exclusively resided therein since early 2013. On April 24, 2014, plaintiff commenced the instant action for partition and sale of the Apartment.

In July 2015, plaintiff filed a motion for summary judgment. Pursuant to the decision and order of Justice Donna M. Mills issued on December 31, 2015, the issues of the Apartment and "the proper payment amount to be paid to plaintiff for his share as joint tenant" of the Apartment were referred to a Special Referee to hear and report, with recommendations, and plaintiff's application for summary judgment was held in abeyance pending the receipt of such report and recommendations and a motion, pursuant to CPLR 4403 (the SJ Decision). The matter was assigned to Special Referee Marilyn T. Sugarman on March 1, 2016, and adjourned to March 24, 2016, after a conference with the parties' counsel. On the adjourned date, both parties appeared with counsel, and stipulated to the value of the Apartment, i.e., $1,330,000, thus resolving the first issue. After unsuccessful settlement discussions relating to the second issue, a hearing was commenced, which continued on the next day, March 25, 2016. The parties were the only witnesses to testify at the hearing. The Referee issued her report on October 6, 2016.

In addition to opposing plaintiff's motion to confirm the Report, defendant moves, pursuant to CPLR 2217 (a), to have this matter referred back to Justice Mills. She claims, inter alia, that, since Justice Mills issued the SJ Decision, she is more familiar with the particular circumstances of the instant action. Plaintiff opposes this branch of plaintiff's application.

Pursuant to CPLR 2217 (a), "any motion may be referred to a judge who decided a prior motion in the action." As noted by the Referee in her decision, when Justice Mills was reassigned from the Supreme Court, New York County to the Supreme Court, Bronx County, her entire inventory was reassigned to the Honorable Michael L. Katz. Further, when Justice Katz joined the Matrimonial Division, his inventory was taken over by the Honorable David B. Cohen, who now presides in Part 58, and over the instant action. In view of the foregoing, the parties' instant applications are properly before this court. As acknowledged by defendant, this court is the ultimate arbiter of the parties' dispute, which can confirm or reject the Report or make its own findings (see CPLR 4403; *Federal Deposit Ins. Corp. v 65 Lenox Road Owners Corp.*, 270 AD2d 303, 304 [2d Dept 2000]). Defendant fails to demonstrate any compelling reason that would necessitate the transfer of this action to Justice Mills in the Bronx County Supreme Court, or the inability of this court to consider the evidence and arguments presented by the parties in issuing a determination of the parties' respective applications. Therefore, this branch of her application is denied.

The Referee's Report

The Special Referee reported, inter alia, that since the parties stipulated that the value of the Apartment was $1,330,000, the only issue before her was the "proper payment amount to be paid to plaintiff for his share as joint tenant." She found that defendant had ousted plaintiff from the Apartment, and recommended that defendant bear sole responsibility for the payment of the mortgage, common charges, taxes and other carrying expenses of the Apartment after the ouster. She also recommended that defendant's request for credits for the repairs and renovations made to the Apartment be rejected, and that plaintiff's request for a credit for his financial contributions to the purchase of the Apartment in the aggregate amount of $135,573.91 be

granted. Additionally, she found that there was no need for a sale of the Apartment, and recommended that plaintiff receive 50% of the equity in the Apartment, after his reimbursement of the above noted credit and the deduction of the underlying mortgages. She also recommended the rejection of defendant's request that the value of the Apartment be reduced by expenses that would normally be incurred at a closing for an open market sale. Finally, she recommended that plaintiff receive an award of counsel fees of $3,000, pursuant to CPLR § 8303 (a) (3).

Plaintiff and defendant respectively move, pursuant to CPLR 4403, to confirm and reject the Report. Pursuant to CPLR § 4403, a court may confirm or reject, in whole or part the report of a referee. The court may also make new findings with or without taking additional testimony *Jacynicz v 73 Seaman Assoc.*, 270 AD2d 83, 86 [1st Dept], *lv denied* 95 NY2d 761 [2000])). However, "where questions of fact are submitted to a referee, it is the function of that referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility" (*Freedman v Freedman*, 211 AD2d 580, 580 [1st Dept 1995] [citation omitted]). A referee's recommendations are entitled to great weight "since the Referee, as the trier of facts, had the opportunity to see and hear the witnesses and to observe them on the stand" (*Frater v Lavine*, 229 AD2d 564, 564 [2d Dept 1996]). Thus, as a general rule, a court will not disturb a referee's findings, and the report should be confirmed "whenever the findings contained therein are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility" (*Kaplan v Einy*, 209 AD2d 248, 251 [1st Dept 1994] [citiations omitted]).

The parties do not dispute that they stipulated to the value of the Apartment, i.e., $1,330,000. Defendant, however, challenges the Referee's rejection of her request that this value be reduced, prior to any buy-out, by the amount of brokerage fees, transfer taxes or any other

fees that would have ordinarily occurred if the Apartment had sold in an open market sale. She contends, inter alia, that, without these adjustments, upon a future sale, her equity in the Apartment would be less than the amount plaintiff will now receive as his equitable share of the Apartment.

In her Report, the Special Referee rejected defendant's request, noting that, after defendant's suggested deduction, the sales proceeds would be $1,225,927.50, which was $104,072.50 less than the value the parties agreed to in their stipulation. The Special Referee found that to make such adjustments when these expenses were not in fact incurred would constitute a windfall to the defendant, who was benefitting from the parties' stipulated value of the Apartment, a value that was likely to continue to appreciate. While Real Property Actions and Proceedings Law (RPAPL) § 981 requires that the costs and expenses of a sale in a partition action of the sale be deducted from the proceed of a sale made at public auction (*see Schorner v Schorner*, 128 Misc 2d 415, 425 [Sup Ct, Nassau County 1985]), here, defendant does not seek a sale of the Apartment, nor has a sale been directed. The Referee recommended a buy-out, which defendant does not object to. Further, this court notes that the record is absent of any testimony by defendant relating to such deductions. Her request was made in her post-hearing memorandum of law. Thus, there is no basis for directing the deduction of any expenses that have not been incurred. In view of the foregoing, this court concurs with the Referee's recommendation to reject defendant's request for the aforementioned adjustments.

Defendant also challenges the Referee's finding that defendant ousted plaintiff from the Apartment, and her recommendation to deny defendant's request for credits for the payments she made toward the mortgage and carrying charges since the ouster. She argues that there is no adverse possession by defendant, and, thus, no ouster of the plaintiff. Plaintiff seeks

confirmation of the Referee's finding and recommendation arguing that the ouster is supported by the record.

"The remedy [of partition] has always been subject to the equities between the parties" (*Hitech Homes, LLC v Burke*, 159 AD3d 489, 489 [1st Dept 2018]). As acknowledged by defendant, "[a]bsent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property" (*Degliuomini v Degliuomini*, 45 AD3d 626, 629 [2d Dept 2007]; *see also Klein v Dooley*, 120 AD3d 1306, 1307 [2d Dept 2014]). Exclusive occupancy by a co-tenant, alone, is not the equivalent of an ouster (*Klein v Dooley* 120 AD3d at 1307; *see also Gamman v Silverman*, 98 AD3d 995 [2d Dept 2012]). An ouster requires that the person holding possession act in a manner that prevents the other co-tenant from her or his use and enjoyment of the property (*see Freigang v Freigang*, 256 AD2d 539, 540 [2d Dept 1998). As noted by plaintiff, an actual ouster usually requires a possessing tenant to expressly communicate an intention to exclude or deny the rights of cotenants (*Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 749 [2d Dept 2010]); however, "common law also recognizes the existence of implied ouster in cases where the acts of the possessing cotenant are so openly hostile that the non- possessing cotenants can be presumed to know that the property is being adversely possessed against them" (*id.* [quotation marks and citation omitted]).

Here, the Referee properly exercised her discretion in finding plaintiff's testimony to be credible and making a finding, that defendant was ousted from the Apartment, that was substantially supported by the record (*Freedman v Freedman*, 211 AD2d at 580). The court notes that plaintiff testified, inter alia, that he resided in the Apartment until February 2013, when he was advised by defendant by email dated February 15, 2013(the Email; plaintiff's exhibit no. 7), that she removed his personal belongings and sent them to storage; that he never

requested that she move his belongings nor consented to such removal; and that, after February 14, 2013, he was never allowed back into the Apartment (transcript at 34 – 42). In the record, defendant admitted that she sent the Email, and that she packed up his belongings into boxes and arranged them in the storage unit (*id.* at 96, 116 - 117). Defendant also admitted that plaintiff had no knowledge that she did this, and that he did not sign any agreement with the storage facility (*id.* at 117-118).

Additionally, defendant testified that, after plaintiff threatened to change the lock to the Apartment so that she would be unable to get in, she went to family court to obtain an order of protection (*id.* at 99 -100; 131-132). Since the Referee found defendant's testimony confusing as to when she obtained the initial order of protection, she reviewed the Domestic Violence Registry, which disclosed that defendant had obtained three separate ex parte orders of protection from family court, the first having been issued in March 2013, which required plaintiff to stay away from the Apartment (Report at 9, fn 7). While defendant's counsel argues that the Referee improperly supplemented the record with her own research from the Domestic Violence Registry, it is well settled that the court, and, in this case, the Referee may take judicial notice of undisputed court orders, records and files (*see Matter of Kevin McK v Elixabeth A.E.*, 111 AD3d 124, 133 [1st Dept 2013]; *Matter of Khatibi v Weill*, 8 AD3d 485, 485-486 [2d Dept 2004]).[1]

The court finds that there is sufficient evidence in the record establishing that defendant acted in a manner to prevent plaintiff's use and enjoyment of the property. Accordingly, the Referee's finding that plaintiff was ousted from the Apartment by the defendant, and her recommendation that defendant is liable for the mortgage, common charges, taxes and other

[1] Defendant's counsel's conclusory allegation the Referee was biased against defendant is not supported by any evidence. Further, a review of the record fails to demonstrate any bias by the Referee.

carrying expenses of the Apartment since the ouster, are confirmed (Report at 16; *see also Kwang Hee Lee v Adjmi 936 Realty Asso.*, 34 AD3d 646, 648 [2d Dept 2006]).

Defendant also challenges the Referee's recommendation to deny her request for reimbursement for repairs and improvements she made in the Apartment since the ouster. Plaintiff seeks confirmation of the Referee's recommendation.

"A tenant in common may be allowed reimbursement for money expended in repairing and improving the property if the repairs and improvements were made in good faith and were necessary to protect or preserve the property" (*Frater v Lavine*, 229 AD2d 564, 564 [2d Dept 1996]). However, the mere fact that repairs or improvements were made "does not in itself necessarily give a right to an equitable allowance" (*Worthing v Cossar*, 93 AD2d 515, 518 [4th Dept 1983] [internal quotation marks and citation omitted]).

Defendant testified that, with the exception of one expense for $163.61, the remainder of the reimbursements she sought were for improvements to the property (transcript at 120-121), which included expenses of $16,858 for a custom wall unit (transcript at 121 – 122, 127, 128); approximately $15,500 for ventilation fans that were not required by the building (*id.* at 129); $7,520 for repainting the Apartment (*id.* at 129); $5,810 for a fireplace unit that had not been installed (*id.* at 132 - 133); $1,905 for wall mounting and power bridges to mount televisions so it would be aesthetically pleasing (*id.* at 133 - 134); and an undisclosed amount for an LG stackable washer/dryer unit to replace a washer/dryer unit that was still functioning (*id.* at 134). There is nothing in the record that demonstrates that the aforementioned improvements were made to preserve and/or protect the property, or actually improved the value of the Apartment. Further, defendant admits that she did not consult or obtain plaintiff's consent for these

expenditures. The court, thus, finds that there is sufficient evidence in the record supporting the Referee's finding that the majority of the work performed were enhancements and not repairs.

Further, as found by the Referee, the only expense that could arguably be considered a repair is the $163.31 payment to Valbar Electric (Report at 17; transcript at 119- 120). Defendant testified that this repair was made in November 2013, after plaintiff was no longer living in the Apartment (transcript at 121). This court agrees with the Referee that, since plaintiff was not consulted, and where there was an ouster, defendant is liable for all expenses incurred to maintain the property, including payment for this repair (Report at 17; *see Degliuomini v Degliuomini*, 45 AD3d at 629.

Defendant also challenges the Referee's finding that plaintiff made certain transfers, between February to April 2012, immediately preceding the purchase of the Apartment, to a joint account for convenience, and recommendation that he receive a credit for these transfer amounting to $124,723.91, which represents his financial contributions towards the purchase of the Apartment. She argues that, under Banking Law § 675, the deposit of separate funds by plaintiff into the joint account raised a presumption that they became joint property, and that this presumption was not rebutted by plaintiff. She disputes the Referee's finding that transfers made into the account by plaintiff were for convenience, and argues that plaintiff should not receive his financial contributions to the Apartment because the payments made towards the purchase of the Apartment were from the parties' joint funds. Plaintiff seeks the confirmation of the Referee's finding and recommendation.

Plaintiff testified that the following funds were transferred into the parties' joint bank account to be used to pay for the down payment and closing costs of the Apartment: $47,573.91 from his Salomon Smith Barney account (Transcript at 14-15); $25,000 gift from his

grandmother (*id.* at 16–18); a $35,650 loan taken from his 401 (k) (*id.* at 19-21); and a $16,500 early distribution from his IRA (*id.* at 23-24). Defendant admitted that plaintiff contributed funds from his 401 (k), his grandmother and his stock, but contended that these monies were a loan to her (*id.* at 105). She, however, acknowledged that there was no writing evincing a loan and admitted that no terms were discussed (*id.* at 105, 111). Later, in the hearing, defendant testified that, since these funds went into a joint account, they were commingled (*id.* at 106). In her post-hearing memorandum of law, defendant argued, that, that the deposits of plaintiff's funds into the joint account destroyed its individual character, and, there was no evidence that the funds were deposited for convenience (Defendant's post hearing memorandum of law at 6-8).

The Referee found that defendant's testimony that plaintiff offered to loan her these funds to purchase the Apartment, without any real ownership interest or plan to be repaid, when he had to borrow money from his 401(k) and take a distribution from his IRA, was not credible on its face (Report at 13). Additionally, the Referee found that there was no oral loan agreement for the purchase of the Apartment (*id.*). This court finds that these findings are supported by the record.

Further, as noted by defendant and the Referee, the transfer of separate funds into a joint account raises a presumption that each party is entitled to a share of the funds (*Brown v Brown*, 147 AD3d 896, 896 [2d Dept 2017]; *see* Banking Law § 675 [b]). This presumption, however, can be rebutted by evidence establishing that the funds were deposited into the joint account for convenience only, or that the funds were deposited into the account only briefly (*see id.* at 896-897). As found by the Referee, plaintiff testified that his separate funds were deposited into the joint account immediately preceding the purchase of the Apartment, i.e., between February through April 2012 (transcript at 15-23). Defendant does not dispute plaintiff's testimony, and

further admits that these funds were defendant's separate property prior to the transfer, and that they contributed to the down payment and costs associated with the Apartment (transcript at 105, 111). Thus, this court agrees with the Referee's finding that the funds transferred by plaintiff to the joint account were for convenience (*Brown v Brown*, 147 AD3d at 896; *see also Chamberlain v Chamberlain*, 24 AD3d 589, 593 [2d Dept 2005]), and confirms her recommendation that plaintiff receive a credit for his separate funds that contributed to the down payment and purchase of the Apartment (*see Frater v Lavine*, 229 AD2d 564, 564 [2d Dept 1996]).

Defendant also challenges the Referee's recommendation that the plaintiff was entitled to half of the money that was returned by the broker to defendant after the closing date of the Apartment. Plaintiff testified that Mr. Hubert Mitchell, a real estate agent who served as the parties' agent, agreed to waive his full commission in the amount of $26,700 in the sale of the Apartment, in exchange for a gift in the amount of $5,000 in cash from defendant (transcript at 27-30); and that a check, representing the forfeited commission, was made payable to the parties, deposited into the joint account, and withdrawn by defendant without his consent (*id.* at 31-32). On cross-examination, defendant testified that the agreement was between Mr. Mitchell and herself; that it was her understanding that the commission was to be forfeited to her, and that she did not offer to give any part of the commission to plaintiff (*id.* at 123-124). She acknowledged that she received the check, deposited it into the joint bank account, transferred the amount of the commission ($26,700) to a joint savings account, and used the money to pay the deposit for the wall unit and for other improvements in the Apartment (*id.* at 124-127). She also admitted that none of those funds were ever given to plaintiff (*id.* at 127). The record, therefore, supports the Referee's finding that, because the parties were joint tenants, plaintiff was entitled to a share of

the forfeited commission. Accordingly, this court confirms her recommendation that plaintiff receive half of the $26,700, less his half share of the $5,000 paid to Mr. Mitchell by defendant, for a total of $10,850.

With respect to the balance of the Report, the parties agree with the Referee's finding that counsel fees may not be awarded in a partition action under the RPAPL, and her recommendation that plaintiff's request for counsel fees thereunder be denied. Defendant, however, challenges the Referee's recommendation that plaintiff be awarded $3,000, as a discretionary award, pursuant to CPLR 8303, to be applied towards his expenses, including legal fees. Plaintiff seeks confirmation of the Referee's recommendation.

The Referee properly found that RPAPL 981 does not provide for an award of counsel fees as an incident to partition (*see Moskowitz v Wolchok*, 126 AD2d 463, 464 [1st Dept 1987]; *see also Fleming v Lundy*, 156 AD2d 965, 966 [4th Dept 1989]). She also properly relied on CPLR 8303 to recommend that plaintiff receive $3,000 to be applied towards counsel fees he incurred in this litigation. CPLR 8303 (a) (3) allows the court to award a discretionary allowance "to any party to an action for the partition of real property, a sum not exceeding five per cent of the value of the subject matter involved and not exceeding the sum of three thousand dollars." It has been held that a discretionary award, pursuant to CPLR 8303, may be granted for counsel fees (*Schorner v Schorner*, 128 Misc 2d at 426). The Referee based her recommendation on defendant's conduct in ousting plaintiff from the Apartment, defendant's pursuit of claims in this litigation and as a basis to compensate plaintiff in some small part for the expenses that he has incurred, which are sufficiently supported by the record. Therefore, this court confirms her recommendation.

Therefore, the branch of plaintiff's motion to confirm the Report is granted, and the branch of defendant's cross motion to reject the Report and for related relief are denied.

Accordingly, it is

ORDERED that the findings and recommendations of the Referee as set forth in her report dated October 6, 2016 are confirmed; and it is further

ORDERED that plaintiff is awarded the following: the sum of $135,571.91 ($124,723.91 + $10,850), which is to be subtracted from the stipulated value of the Apartment of $1,330,00; and (2) 50% of the equity after the deduction of the sum of $135,571.91, and the current outstanding balance of the mortgage as of the date the monies are paid to plaintiff; and it is further

ORDERED that the aforementioned sum shall be paid by defendant to plaintiff within 90 days from service of the within decision with notice of entry; and it is further

ORDERED that defendant is directed to remove plaintiff's name from the mortgages and obtain the consent, if necessary of the board of directors of the condominium within 180 days from service of the within decision with notice of entry. Until such time that plaintiff is removed from the title of the Apartment, and removed from responsibility for the common charges, defendant is solely responsible for the payment of the mortgage and carrying charges for the Apartment, any and all late charges, interest, penalties, costs and legal fees which may result from her failure to timely pay the carrying charges or mortgage when due. She is further directed to provide plaintiff with documentary proof that she has timely paid the mortgage and carrying charges until he is removed from the title of the Apartment; and it is further

ORDERED that defendant pay plaintiff the sum of $3,000, as allowed by CPLR 8303 (a) (3), within 90 days from service of the within decision with notice of entry.

EVANS v. WEBB 153949/2014

Dated: 5-15-2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.