

Mingo v Mitchell

2023 NY Slip Op 31800(U)

May 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 517446/2017

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE

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JORDAN MINGO,

Plaintiff,

Index No. 517446/2017

- against -

JUNE MITCHELL, TREVOR THOMPSON,
and BRITTANY MINGO,

DECISION AND ORDER

Defendants. MS #5

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's Motion:

<u>Papers</u>	<u>NYSCEF #'s</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	72
Cross-Motion and Affidavits/Affirmations.....	73, 76
Answering Affidavits/Affirmations.....	77
Reply Affidavits/Affirmations.....	

Upon the foregoing cited papers, and after oral argument, Plaintiff, Jordan Mingo ("Plaintiff") moves to confirm, the portion of the Amended Report of Referee Jeffrey Miller, Esq. of Miller, Leiby & Associates, P.C., 32 Broadway, 13th Floor, New York, NY 10004, dated May 27, 2022 ("Amended Referee's Report") which determined that (1) the property located at 9510 Avenue A, Brooklyn, New York ("subject property") is held one-quarter each party as tenants in common; (2) that any liens be paid at a closing of the sale of the subject property by the Referee; (3) that the Referee hold all net proceeds, and (4) that an interlocutory judgment of partition and sale be ordered. Plaintiff also moves to deny that part, which determined that Defendant, June Mitchell ("Mitchell") had spent approximately \$60,000 more in expenses related to the subject property, and that she is entitled to reimbursement.

The underlying action for partition arises out of the subject property. Pursuant to this Court's Order, dated 9/26/2019, the matter was referred to Referee Miller, to ascertain the rights,

shares, and interest of the parties in the subject property. Initially, Mr. Miller notified Plaintiff's counsel, and the Defendants, who at the time were self-represented, to submit evidence and a proposed report by 11/15/2019, at which time the need for a hearing would be assessed. Plaintiff was the only party to submit evidence to Mr. Miller, who thereafter determined that a hearing was not necessary. Mr. Miller issued a Referee's Report on 2/2/2020 (2020 Report), which, *inter alia*, determined that the subject property be partitioned. This Court by Order dated 1/12/2021, denied Plaintiff's motion to confirm the 2/2/2020 Referee's Report. To wit, the Court directed Mr. Miller to hold a live hearing and issue an Amended Referee's Report. A live hearing was held on 4/6/2021, wherein Defendant Mitchell testified.

The Amended Referee's Report found that the subject property was held as tenants in common, with each party owning one-quarter of the whole, and that a sale be ordered. The Amended Referee's Report also found that Defendant Mitchell had spent approximately \$60,000 more in expenses related to the subject property. According to the Amended Referee's Report, "Mitchell proffered that she has spent approximately \$60,000.00 more in expenses related to the Property than she has collected in rent from the Property, to which no objection by Plaintiff was made" (NYSCEF Doc. No. 74, Plaintiff's Exhibit "A," Amended Referee's Report, pg. 3, para. 4). Thus, the Referee's Report determined that "\$60,000.00 of the sale proceeds, after auction, should be attributed to the share of June Mitchell as reimbursement for her expenses in maintaining the Property, there being no further evidence of rents and expenses beyond her testimony." *Id.*

Defendant Mitchell testified that Mr. Fernandez had prepared an affidavit of accounting that she signed to substantiate her \$60,000 in expenses (*see* NYSCEF Doc. No. 75, Plaintiff's Exhibit "B", Mitchell Testimony, lines 6-21 pp. 38). The affidavit of accounting was not entered

into evidence, as Plaintiff's counsel objected that it was inadmissible hearsay since the accountant who prepared it was unavailable. *Id.* at 45. However, Defendant Mitchell was permitted to testify as to the expenses incurred based on personal knowledge.

Defendant Mitchell testified that in accordance with her mother's will, she buried her stepfather using the proceeds of the subject property. Consequently, Defendant-Mitchell, incurred the expense of, *inter alia*, replacing the boiler, replacing the toilets, tiling the basement, and repairing leaks. *Id. at 69.* Plaintiff did not offer any evidence to rebut Defendant Mitchell's testimony.

Plaintiff now seeks to confirm the Amended Referee's Report in part and deny it in part.

Specifically, Plaintiff contests that portion of the Amended Referee Report, which determined that Defendant Mitchell established that she spent \$60,000 more in expenses than the rents she collected at the subject property. According to Plaintiff, this is inconsistent with Referee's finding that Mitchell failed to provide evidence of those expenses.

In opposition, Defendant Mitchell argues that the Referee did not err in his computation of the amounts due to each party in this action. Further, Defendant's Counsel avers that Defendant Mitchell did provide evidence of the expenses by way of an accounting report, which was not admitted into evidence. Moreover, she notes that the Referee considered her un rebutted testimony as to the \$60,000 in expenses she incurred.

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2d Dept 2017]).

Here, the Referee's determination as to the expenses incurred by Defendant Mitchell for the maintenance of the subject property was based on her un rebutted testimony. Significantly,

Plaintiff failed to produce or offer any evidence to rebut her testimony, and did not object to Mitchell's testimony of the expenses incurred. Thus, this Court finds that the Amended Referee Report is substantially supported by the record.

Accordingly, it is,

ORDERED, that the Amended Referee's Report of Jeffrey Miller, Esq., is **CONFIRMED** in its entirety, and it is further,

ORDERED, that Plaintiff's motion to confirm the Amended Referee's Report in part and deny it in part is **DENIED**, and it is further,

ORDERED, ADJUDGED and DECREED, that the premises located at 9510 Avenue A, Brooklyn, New York, be sold as one parcel at public auction, subject to the rights and interests of each and all of the parties hereto, by and under the direction of Jeffrey Miller, Esq., who is hereby appointed the Referee for that purpose; that said Referee give public notice of the time and place of such sale, according to the law, the rules and practices of this Court; and that any of the parties hereto may purchase at such sale, and it is further,

ORDERED, ADJUDGED and DECREED, that immediately after completing the sale, said Referee, according to law, file with the Clerk of the County of Kings, his report thereof, and all of his proceedings, and that he execute and deliver a deed of the premises sold to the purchaser at said sale, upon compliance with the conditions upon which the said deed were to be delivered, and that the sale be valid and effectual forever, and it is further

ORDERED, ADJUDGED and DECREED, that the Referee deposits the monies received by him in escrow, and that all liens listed on the title report annexed to the Referee's Report, be paid out of the proceeds, after auction, and it is further

ORDERED, ADJUDGED and DECREED, that \$60,000 of the sale proceeds, after auction, be attributed to the share of June Mitchell as reimbursement for her expenses in maintaining the subject property, with the monies left over being deemed the net proceeds and that it is further,

ORDERED, ADJUDGED and DECREED, that the purchaser of said premises at such sale be let into possession, and that each party or other person upon whom this judgment is binding, who may be in possession of the premises purchased, or any part thereof, is hereby directed to deliver possession of the same to the purchaser on production of the Referee's deed and each party to this action is hereby required, on demand of the purchaser of said premises, to deliver to such purchaser all titles, deeds or writings under the control of such party that relate wholly to the premises bought by such purchaser or to any part thereof, and it is further,

ORDERED, ADJUDGED and DECREED, that the escrow of net sale proceeds be thereafter, upon clearance of all funds, be distributed as follows:

(1) reimbursement of legal fees of the Referee in the amount of \$6,780.45, as per the Order on proceedings of February 22, 2022;

(2) reimbursement to the Referee or other party who so advances the money for publication costs and noticing for the Notice of Publication;

(3) Payment to Siegel & Siegel, P.C., as counsel to Jordan Mingo, of 25% of the net proceeds of sale;

(4) Payment to Trevor Thompson, of 25% of the net proceeds of sale;

(5) Payment to Brittany Mingo, of 25% of the net proceeds of sale;

(6) The Referee is ordered to hold 25% of the net proceeds of sale to be given to Defendant June Mitchell in escrow, until such time as the tax lien, attributable solely to June

Mitchell on the title report admitted into evidence by the Referee, be discharged as of record, and it is further,

ORDERED, ADJUDGED and DECREED, that this case, after disbursement of the money pursuant to this Order and compliance with these terms, be and hereby is fully adjudicated, and that the Referee be discharged with no further liability hereto.

This constitutes the Decision and Order of the Court.

Date: 5/5 2023

ENTER



HON. CAROLYN E. WADE, J.S.C.

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05/26/2023