Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

FILED
11/22/2022
COUNTY CLERK
QUEENS COUNTY

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BARUCH MEYROV and ANGELA MEYROV, EDWARD MEIROV,

Plaintiff(s),

-against-

EDWARD MEIROV and EDWARD MEIROV AS THE GUARDIAN FOR THE PERSONAL NEED AND PROPERTY MANAGEMENT OF SIMCHA MEIROV,

Defendant(s).

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Index No.: 709714/2018

Motion Date: May 17, 2022 & May 24, 2022

Motion Cal. No.:

Motion Seq. No.: 5 & 6

The following papers numbered 1-4 read on this motion(sequence number 5) by plaintiffs to confirm the Referee's Report and Recommendation, dated February 7, 2022, pursuant to CPLR §4403; cross-motion by defendants to partially confirm the Referee's Report and Recommendation, and to assess use and occupancy and property taxes of the second and third floor apartments from November 2018 until the sale of the subject premises; and Order to show cause (sequence number 6) by defendants seeking to stay the trial in this matter, pending the confirmation, either in whole or in part, of the Referee's Report and Recommendation, and for severance of defendants' third counterclaim.

	Papers Numbered
Seq. #5	
Notice of Motion-Affidavits-Exhibits.....	EF 106-108
Notice of Cross Motion-Affidavits-Exhibits.....	EF 128
Answering Affidavits-Exhibits.....	EF 129
Reply Affidavits-Exhibits.....	EF 130

Seq. #6

Order to Show Cause-Affidavits-Exhibits..... EF 109-114,116-117
Answering Affidavits-Exhibits..... EF 118-119
Reply Affidavits-Exhibits..... EF 120-122

Upon the foregoing papers, it is ordered that the motion, cross-motion and Order to Show Cause are determined as follows:

Plaintiff Baruch Meyrov (Baruch) and his wife, Angela Meyrov, commenced this action for the partition and sale of premises located at 112-07 75th Avenue, Unit 12, Forest Hills, New York (subject premises). Baruch and defendants Edward Meirov (Edward) and Simcha Meirov (Simcha) became owners of the subject premises upon the death of their father, Eliezer Meyrov in December 2017. They own the subject premises as tenants in common, each owning an undivided one-third interest.

By Order dated October 5, 2020, Nicole Katsorhis, Esq. was appointed Referee in this partition action to, *inter alia*, conduct an accounting and to ascertain the rights, shares and interest of the parties in the subject premises. A three day hearing was conducted by the Referee on May 19, 2021, May 20, 2021, and June 4, 2021. All parties were present and represented by their respective counsel and had an opportunity to present evidence on all the issues. Upon the conclusion of the hearing, the Referee submitted her Report and Recommendation, dated February 7, 2022 to the Court.

Plaintiffs seek to have the Referee's Report and Recommendation confirmed. Defendants cross-motion, seeking an Order confirming the Referee's Report and Recommendation, in part, and for an assessment of the use and occupancy and property taxes of the second and third floor apartments from November 2018 until the subject premises are sold. Specifically, defendants contend that the Referee's use of May 21, 2021 as the end date of plaintiff's voluntary relinquishment of the premises, for purposes of calculating reasonable rent due from plaintiffs, is not substantially supported by the record. Additionally, defendants claim that the Referee failed to consider all the evidence in concluding that there was no ouster by plaintiffs.

Pursuant to her report, the Referee recommended that the subject premises, which consisted of three legal apartments, be sold, subject to the payment of various reimbursements and/or credits between the parties. The Referee's findings included that there was no ouster by Baruch's son in his use of the second floor apartment, as it was used with the permission of his father, who was entitled to occupy the property as a one-third owner, nor were any actions undertaken to prevent defendants from entering the second or third floor apartments

of the subject premises. The Referee found that there was no evidence to demonstrate that either Simcha, who has continuously resided in the first floor apartment, or Edward, who did not reside at the premises, was ousted from the subject premises by plaintiffs. The Referee found that during the time that Baruch was 1/3 owner of the subject premises, he was not liable to defendants for the payment of rent. However, the Referee found that Baruch voluntarily relinquished his interest in the subject premises when he transferred his one-third interest to a corporation, Emuna 614 Corp., on June 25, 2019. Although the Referee determined that the property was subsequently transferred back to Baruch by deed dated May 21, 2021, the Referee found that the use of the second floor apartment by Baruch's son was without the permission and consent of its owners during the period of June 25, 2019 through May 21, 2021, and thus, recommended that Baruch pay defendants reasonable rent, for the use and occupancy of the second floor by his son from July 1, 2019 through May 31, 2021, at the rate of $3,050.00 per month, totaling $70,150. The Referee recommended that defendants should be reimbursed their two-third share of chargeable rent, totaling $46,766.66.

CPLR §4403 provides that "[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, ... the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing."

It is well settled that the report of a Referee should be confirmed when the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility (*See Wells Fargo Bank, N.A. v. Emanuel*, 208 AD3d 825 [2022]; *33-37 Farrington, LLC v Global Universal Group, Ltd.*, 165 AD3d 1018 [2018]; *Ferentini v Ferentini*, 72 AD3d 882 [2010]; *Thomas v Thomas*, 21 AD3d 949 [2005]). "A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor." (*Minelli Constr. Co., Inc. v New York City Sch. Constr. Auth.*, 167 AD3d 593, 594 [2018] citing *Matter of Piller v Schwimmer*, 135 AD3d 766, 769 [2016]).

Here, the record substantially supports the Referee's findings that defendants were not ousted from the subject premises and thus, plaintiff does not owe defendants rent for the use and occupancy of the second floor apartment during the period that Baruch was one-third owner of the premises. The record also supports the Referee's finding that the apartment was used by Baruch's son without the permission and consent of its owners during the time that Baruch voluntarily relinquished his interest in the subject premises. Contrary to defendants' contention, the Referee's use of May 21, 2021 as the end date of plaintiff's voluntary relinquishment of the subject premises, for the purposes of calculating rent and occupancy, is supported by the record. As such, the Court confirms the Referee's Report and Recommendation dated February 7, 2022.

In light of this determination the branch of defendants' Order to Show Cause seeking a stay of the trial pending the confirmation of the Referee's report is denied as moot. The branch of the order to show cause seeking to sever defendants' third counterclaim, asserting prima facie tort and misuse of legal practice, is granted. Defendants have demonstrated that this counterclaim is unrelated to the damages sought in the partition action. Contrary to plaintiffs' contention, plaintiffs have not demonstrated that they would be prejudiced by severing the third counterclaim.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion and the branch of defendants' cross -motion seeking confirmation of the Referee's Report and Recommendation dated February 7, 2022, is granted, and the Referee's Report is hereby confirmed; and it is further

ORDERED, that the branch of defendants' cross- motion seeking and to assess use and occupancy and property taxes of the second and third floor apartments from November 2018 until the sale of the subject premises is denied; and it is further

ORDERED, that the branch of defendants' order to show cause seeking to stay the trial in this matter until such time the Referee's report is confirmed is denied; and it is further

ORDERED, that the branch of defendants' order to show cause seeking to sever their third counterclaim is granted.

Dated: 11/18/22

MARGUERITE A. GRAYS
J.S.C.