

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SHERRIE MATZA,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
FRANCISCO COUNTY,

Respondent,

EDWARD J. MURPHY, individually and
as Trustee, etc., et al.,

Real Parties in Interest.

A136755

(City & County of San Francisco
Super. Ct. Nos. CGC-06-457921,
CGC-06-456960, CGC-07-468399)

Petitioner Sherri Matza and real parties in interest Edward Murphy and Michael Joseph O'Donoghue were partners who jointly owned a multi-unit residential property (the Faxon property). Matza and O'Donoghue are both defendants and cross-complainants in *Murphy v. Matza*, San Francisco Superior Court Case No. CGC-06-457921, which has been consolidated with other cases below. Murphy's complaint against them sought the partition of the Faxon property and requested that the ownership percentages of each of the three partners be determined. Among her affirmative defenses, Matza asserted that she is entitled to an accounting of revenues and expenses during Murphy's management of the property. O'Donoghue also raised affirmative defenses claiming that he is entitled to a greater share of the property because of offsets.

Both Matza and O'Donoghue also filed cross-complaints seeking adjustments to Murphy's share of the Faxon property.

A trial was held before an appointed referee, the Honorable Laurence D. Kay (retired), who determined in a statement of decision issued January 26, 2011, that Murphy held a 50 percent interest in the property and Matza and O'Donoghue each owned a 25 percent interest. Based on the referee's statement of decision, Judge Karnow issued an interlocutory judgment which assigned the ownership proportions to each of the partners as determined by the referee, ordered that the Faxon property be sold, appointed a sales referee, and provided that the proceeds be deposited into an interest bearing account in the three partners' names, subject to withdrawal only upon further order of the referee. The interlocutory judgment also stated: "The referee retains jurisdiction to review the sale referee's report on the Faxon property sale and, following further hearing on claims of debits and credits from the parties partnership involving the Faxon property and Geary property, to order equitable adjustments that the referee considers just and appropriate from the net sales proceeds of the Faxon property that each party would be entitled to based on their percentage interest as provided above."

The property was marketed and sold by the sales referee; however, at an April 23, 2012 confirmation hearing, Matza and O'Donoghue successfully overbid the putative buyers' offer and obtained the property for \$2,021,750. They paid for the property with a \$250,000 cash deposit, a "credit bid" of their combined 50 percent interest in the property, and funds from a new loan. This permitted them to obtain nearly \$260,000 cash out of the transaction in addition to the income derived from the property itself.

Murphy's share of the proceeds, approximately \$822,000, is being held in escrow pending further court order or stipulation of the parties. Accordingly, Murphy moved the lower court for an order modifying the earlier order confirming sale of the real property. Specifically, he seeks to have his funds available for a 1031 property exchange.¹

¹ A "1031 property exchange" is a "like-kind" exchange of property pursuant to the provisions of 26 United States Code section 1031.

Although he is not specific about the property he intends to acquire or any deadlines which must be met to do so, he generally asserts he will suffer significant and irreversible tax consequences if his funds are withheld. The escrow on the sale of the Faxon property closed on June 22, 2012.

On September 20, 2012, Judge Kahn granted Murphy's motion for modification of the order confirming the sale of real property. The order directs the sales referee to instruct the title company to transfer the money it is holding on behalf of Murphy to a 1031 exchange company chosen by Murphy. The court, however, stayed its own order for 20 days.

On October 9, 2012, Matza filed her petition for a writ of mandate in this court and requested an immediate stay to restrain the distribution of funds. That same day we stayed the distribution of those funds, requested informal briefing on an expedited basis, and gave notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, that if circumstances warranted, we might issue a peremptory writ in the first instance. For the reasons given below, we now do so and direct the superior court to issue a new and different order as explained below.

DISCUSSION

I. Judge Kahn Lacked Both the Authority and a Basis to Modify Judge Karnow's Interlocutory Judgment.

The language of the interlocutory judgment is unambiguous: "*The referee retains jurisdiction to review the sale referee's report on the Faxon property sale and, following further hearing on claims of debits and credits from the parties partnership involving the Faxon property and Geary property, to order equitable adjustments that the referee considers just and appropriate from the net sales proceeds of the Faxon property that each party would be entitled to based on their percentage interest as provided above.*" (Italics added.) In other words, there is to be a further hearing on the credit and debit claims before the referee, who can then make appropriate adjustments to be paid out of the proceeds from the sale of the Faxon property.

Although a superior court judge generally has all the powers enumerated by the Code of Civil Procedure sections 872.010 et seq. (including the power to hear and determine motions, to order equitable compensatory adjustments, and the power to order the appropriate disbursement of sales proceeds), Judge Kahn lacked the authority to contravene Judge Karnow's interlocutory judgment and deprive Matza and O'Donoghue of the opportunity to prove to the referee they are entitled to claimed adjustments. (See *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 713 [subject to limited exceptions, which are inapplicable here, one superior court judge may not reconsider the prior ruling of another superior court judge].) There is no indication, for example, that Judge Karnow was unavailable when Judge Kahn modified the judgment. Rather, the case was assigned to Judge Karnow, but the motion to modify the order confirming the sale of real property was brought in the law and motion department.

Furthermore, Judge Kahn articulated no valid basis to deprive Matza and O'Donoghue of their opportunity to put on evidence regarding the credits and debits they claim. The superior court's analogy to attachment proceedings is not persuasive. A writ of attachment is a provisional remedy which allows creditors to preserve the value of their potential judgment. It protects creditors holding unsecured claims (or claims secured only by personal property) by creating a judicial lien on the debtor's property. It is designed to protect a plaintiff's priority from being subordinated to other claims. (See Code Civ. Proc., § 483.010, subd. (b).) It is, by its nature, an ancillary proceeding. (Code Civ. Proc., § 484.110, subd. (a).) Here, by contrast, the issue of the claimed adjustments is an issue raised by the lawsuit itself. The money to which any adjustments may be made is under the court's control, so there is no need to protect Matza and O'Donoghue's claims from other potential creditors. Consequently, the attachment procedures referenced by the superior court are inapposite.

II. Although Equity Does Not Demand That Murphy Have Immediate Access to His Funds, Considerations of Fairness Require That He Not Be Arbitrarily Precluded from Using Them for a 1031 Property Exchange.

Murphy also argues that it is unfair for Matza and O'Donoghue to have been allowed to benefit from their share of the Faxon property by using it to purchase the property, while he is deprived of the use of his funds and will suffer adverse tax consequences unless he is promptly permitted access to them. We see no inequity stemming from the fact that Matza and O'Donoghue already have use of their funds while Murphy does not. Either Murphy neglected to object to his former partners' obtaining credit for those funds for their purchase of the Faxon property or Murphy simply has no claim that any part of the funds for which Matza and O'Donoghue were credited are his. Matza and O'Donoghue, on the other hand, do have such claims against Murphy and have timely objected to his receiving those funds before their claims are adjudicated. Thus, the parties' positions are not comparable.

On the other hand, Murphy may well be harmed if he is precluded from timely using his funds to effect his 1031 exchange. If they have viable claims, it is incumbent on Matza and O'Donoghue to prosecute them in a timely manner.

III. The Five-Year Statute Was Not Violated.

Murphy also contends that Matza and O'Donoghue's claims are forfeited because they failed to bring them to trial within five years of bringing their respective cross-complaints. (See Code Civ. Proc., §§ 583.310, 583.360.) However, the affirmative defenses specified above raise the same issue of potential adjustments to the proceeds as do the cross-complaints and the trial on the complaint was begun within the five-year statutory period. (See *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 253-254 [Code of Civ. Proc., § 583.310 only requires that a trial be commenced, not concluded, within five years]; *Patapoff v. City of Los Angeles* (1959) 171 Cal.App.2d 635 [where an earlier trial determines a contested issue in a later trial, the later trial is deemed to be partially tried for purposes of Code of Civ. Proc., § 583.310].) Because the trial on

Murphy's complaint began in a timely manner and the issue of the appropriate adjustments was raised in that proceeding, dismissal of these claims pursuant to Code of Civil Procedure section 583.310 is not warranted.

DISPOSITION

The *Palma* procedure applies when "petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue" or because of particular urgency. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.) This case involves only straightforward legal issues and the looming deadline to apply Murphy's funds to a 1031 transfer creates special urgency.

Accordingly, the superior court's order modifying the order confirming the sale of real property is vacated. Matza and O'Donoghue are entitled to an opportunity to prove they are entitled to the adjustments they claim. The superior court is directed to issue a new order requiring all of Murphy's funds held in escrow, including accrued interest, be released to a 1031 exchange company of Murphy's choice on December 3, 2012, unless before that date (1) the referee determines and the superior court confirms that specific adjustments to that total amount should be made, or (2) the parties stipulate to the release of the funds, in which case the funds shall be distributed by December 3, 2012, in accordance with either the superior court's new order or the parties' stipulation, whichever is applicable.

The stay previously issued on October 9, 2012, is dissolved. This opinion is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).)

Each party shall bear its own costs related to this petition.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.