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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANN "BANO" CUMMINGS, et al., Plaintiffs and Respondents, v. GEORGE D. CUMMINGS III, Defendant and Appellant.	H041307 (Santa Clara County Super. Ct. No. 1-12-CV-222017)

In this appeal appellant George D. Cummings III seeks review of an order following a partition sale of property owned by appellant and his sisters, respondents Ann "Bano" Cummings, Mary Cummings, and Joan Chlarson. Appellant challenges the court's approval of both the distribution of sale proceeds and the fees and expenses incurred by the referee in the contested partition action. We find no abuse of discretion and will therefore affirm the order.

Background

The history of this litigation is summarized in this court's opinions in two of appellant's companion appeals, *Cummings et al. v. Cummings* (Nov. 23, 2016, H040069, H040710) [nonpub.opns.].[1] The underlying dispute focused on a 2.9-acre parcel and residence located in Los Altos Hills. The property had been owned by appellant and his

[1] This appeal is being considered together with *Cummings et al. v. Cummings* (Nov. 23, 2016, H041308, H040069, and H040710) [nonpub.opns.]. All four appeals are disposed of by separate opinion.

sisters' grandfather, George D. Cummings, and then by their father, George D. Cummings II. At his death in October 2010 the second George Cummings left a trust under which the trustee was granted the power to "make contracts of every kind" with respect to trust property, including selling or partitioning it. Ann Bano Cummings and Mary Cummings were the designated successor trustees. Appellant was at that time living on the property with his girlfriend. His sisters conceivably could visit, but they found it difficult to stay at the house because there was too much clutter and debris to make the bedrooms usable.

Appellant opposed his sisters' efforts to arrange a sale of the property. Because Los Altos Hills had a one-acre minimum restriction on lot size, the subject property could not be divided into any more than two parcels. None of the siblings could afford to buy the others out; Ann Bano Cummings testified that there was "no choice" but to sell the property, and appellant had not devised any solid, viable plan to retain it. On April 5, 2012, a year and a half after their father's death, respondents filed this action for quiet title and partition by sale.

After extensive delays attributable to discovery conflicts[2] and continuances, trial took place between June 26 and July 10, 2013, with appellant representing himself. After hearing the evidence and closing arguments, the trial court ruled that in this situation "only . . . partition by sale can be granted" because of the city's requirement that a subdivision produce at least one acre per lot. It was thus "not practical" to divide the land in kind equally among the interested parties. Consequently, partition by sale was both necessary and the most equitable "because of the nature of this property and the laws surrounding it." The court appointed a referee to carry out its order and directed

[2] Appellant's failure to respond to discovery requests led to an award of sanctions against him on May 3, 2013.

appellant to vacate within 30 days. The court set a compliance hearing for August 16, 2013, at which time a writ of possession would be issued in favor of the referee. Meanwhile, the referee was given broad power to "sign off on anything that would normally require [appellant] to have to sign off," including execution of listing agreements, sale agreements, escrow instructions, and closing documents.

The court filed its interlocutory judgment and order on August 13, 2013. Appellant challenged the judgment in his first appeal (H040069) and from the two ensuing orders awarding costs and attorney fees to respondents under Code of Civil Procedure sections 874.010, 874.020, and 874.040 (H040710, H041308).

The property was sold on January 9, 2014 for $8,157,000. At the February 14, 2014 hearing on the second attorney fee request (covering the entire period from September 1, 2013 through the date of the hearing) the court also considered a separate motion from the referee, Gregory Sterling, to approve the distribution of sales proceeds and payment of his fees and expenses. Having successfully evicted appellant and sold the property, Sterling submitted a detailed accounting of his fees and expenses in three categories: costs incurred in preparing the property for sale; costs related to the removal, storage, and disposition of appellant's personal possessions on the property; and costs and fees incurred in locating the heirs of Gloria Parker Tomaselli, who had a five percent interest in the property along with the interests of the parties.[3]

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[3] At the time of his death, George D. Cummings II actually held a 50 percent interest, the remaining interest having passed from his sisters to his children and to Gloria Parker Tomaselli. Gloria predeceased George D. Cummings II, thus necessitating a search for her heirs. Consistent with the trust of George D. Cummings II, the August 13, 2013 order specified that the proceeds of the sale, after certain fees and other expenses, would be divided 50 percent to the trust, 11.25 percent to appellant and each respondent (Joan Chlarson and her husband, Michael Chlarson, to hold one share), and 5 percent to the heirs of Gloria Parker Tomaselli.

The referee adopted an approach he believed to be consistent with the superior court's August 13, 2013 interlocutory judgment and order. In the first category, he deducted the direct property expenses from the net sale proceeds before distribution if those expenses "would have been required of any generic property owner to prepare the [p]roperty for sale (for instance, landscaping clean-up, removal of an underground fuel storage tank, cleaning costs, and the like)." The adjustments Sterling made to each owner's share of the proceeds included a charge to appellant for rent from October 23, 2010 (the date of his father's death) through September 17, 2013 (the date appellant was evicted from the property), calculated at 75 percent of the fair market rental value (the percentage set by the court in its judgment). Also consistent with the August 13, 2013 judgment was an allocation to appellant of all costs associated with the removal, storage, and disposition of his personal property. As specifically directed in the judgment, Sterling charged 82.6 percent of his own fees and expenses to appellant, with the remaining 17.4 percent charged to Gloria Parker Tomaselli's estate. Appellant ended up with a negative number, which Sterling reconciled by deducting it from his share of the amount recoverable by the trust.

In carrying out his duties under the order, Sterling explained, he was faced with "onerous obstacles and a supercharged emotional environment." At the outset he found preparation of the property for sale "extremely challenging," due to the "imponderable quantity of personal property left behind by George Cummings III and the neglect from which the [p]roperty suffered." Although he had tried to keep costs down, Sterling's difficulties in addressing the various issues with the property were "significantly exacerbated" by the "obstruction, interference and quarrelsome disputes caused by George Cummings III."

Sterling's eventual calculations produced net sales proceeds of $7,115,421.55. Before the hearing on his motion, however, he added $120,292.52, the balance of the amount held back in escrow after paying a state tax lien on appellant. That amount was

again to be deducted from appellant's share of the trust, thus yielding a recovery to appellant of $3,787,802.35.

Appellant opposed the referee's motion. He insisted that all of the referee's fees should be apportioned equally among the co-owners, and he challenged the award of rent to "co-tenant[s]" (his sisters) in the absence of an ouster by him. Appellant further disputed the amount he was required to pay for rent (75 percent of the $6,000 fair rental value) because the court had not stated in its judgment how it had arrived at that amount.[4] Finally, appellant urged the court to disallow some miscellaneous expenses and reduce the referee's billing rate to one consistent with that of the local probate rules for a conservator.

After considering the referee's motion and appellant's (untimely) opposition, the court heard oral arguments on February 14, 2014. On February 24, 2014, it entered its order approving the referee's recommended distribution of the net sale proceeds and approving payment of his requested fees and expenses. This appeal followed.

Discussion

Appellant renews his challenge to several aspects of the assignment of rent and referee's fees. He argues again that (1) he should not have been required to pay rent to respondents because there had been no "ouster" of them; (2) he should not have been charged with the cost of removal of his personal belongings because "much of the alleged clutter was their own belongings that they had not removed"; (3) insufficient evidence and insufficient findings supported the amount ordered by the court for rent and removal of the personal property; (4) the fees awarded to the referee were improperly charged to

[4] In its statement of decision and ensuing judgment the court explicitly relied on the testimony of a real estate professional, Pamela Page, who estimated the rental value to be $6,000 a month as of the date of her testimony, July 8, 2013.

appellant; (5) he was never given an opportunity to interview the referee before his appointment or to negotiate for lower rates; and (6) the referee's fees were excessive.

The first five arguments are beyond the scope of this appeal, as they pertain to issues resolved in the court's interlocutory judgment and order on August 13, 2013, the subject of the appeal in H040069.[5] On that occasion the court determined that appellant should be charged rent for his occupancy and "complete control" of the property after the death of the parties' father; that a fair amount of rent should be 75 percent of $6,000 per month; that appellant should be charged with 82.6 percent of the referee's hourly fee; and that the "accumulation of 'stuff' " was kept on the property by appellant, who "thwarted" respondents' efforts "to remove and destroy debris and junk." Sterling was appointed at the partition hearing on July 10, 2013, without objection; the court on that date stated that he was "the only referee that's been provided to me . . . and so that is the referee that I will appoint." The August 13, 2013 judgment included the observation that "there was no objection to the nominated [r]eferee."

Only the last contention, that the fees awarded to the referee were excessive, is cognizable in this appeal. Appellant does not dispute the authority of the trial court to order payment of the referee's fee and expenses. (See Code of Civ. Proc. §§ 1023, 645.1.) Instead he argues, as he did below, not that any particular expense was unjustified, but that "undesignated miscellaneous expenses" should be disallowed and that the billing rate for the referee ($350 per hour) was too high. In his view, the rate should have been between $115 and $165, the range afforded to a conservator in accordance with the Santa Clara County local rules.[6]

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[5] The issues relating to the interlocutory judgment of August 13, 2013 having been deemed moot, the appeal in H040069 was dismissed.

[6] Effective January 1, 2014, the maximum rate for a conservator's professional services was increased to $170 per hour. (Santa Clara County Rule 11(V)(4)(a).) Under the California Rules of Court, rule 7.756(c), a court may not set "an inflexible (continued)

As appellant's attorney acknowledged at the hearing, however, the local probate rules were inapplicable to this proceeding. Counsel responded with only the suggestion that they "would provide guidance on the type of services [the referee is] providing which are analogous to that of a conservator." But appellant does not argue on appeal that ordering payment of the requested amounts was an abuse of discretion, with the exception of the "undesignated miscellaneous expenses." As the referee pointed out in responding to appellant's objection, "[e]very single line item and expense item in the Referee's detailed billing contains a specific description of the expense [that] was incurred." Appellant does not demonstrate the inaccuracy of that statement by indicating which expenses were undesignated and unjustified. The trial court properly rejected appellant's protest regarding the referee's compensation.

Disposition

The February 24, 2014 order approving the referee's distribution of sales proceeds and approving his fees and expenses is affirmed. Respondents are entitled to their costs on appeal.

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maximum or minimum compensation or a maximum approved hourly rate for compensation."

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

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