

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1999-012351

05/27/2008

HON. CAREY SNYDER HYATT

CLERK OF THE COURT
C.I. Miller
Deputy

TERRY BRODKIN

MARK HYATT TYNAN

v.

CHARISSE BRODKIN

ELLIOT J PESKIND

EVIDENTIARY HEARING

COURTROOM 514-ECB

8:54 a.m. This is the time set for Evidentiary Hearing Regarding Appointment of a Real Estate Commissioner. Plaintiff Terry Brodtkin is represented by counsel, Mark Tynan. Defendant Charisse Brodtkin is present with counsel, Elliot Peskind.

Proceedings are recorded on CD (FTR) in lieu of a court reporter.

The court has received the parties' Memoranda requested by the court; however, Plaintiff's counsel apparently dated his memorandum May 23, 2008, but was it e-Filed on May 26, 2008.

Defendant's counsel moves to strike Plaintiff's Memorandum.

IT IS ORDERED denying Defendant's motion to strike.

Case status is discussed.

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Defendant has not filed a list of preferred real estate commissioners for appointment to sell the property; however, he has no objection to any person on the list submitted.

Terry Brodtkin and Charisse Brodtkin are sworn.

Terry Brodtkin, previously sworn, now testifies.

Charisse Brodtkin, previously sworn, now testifies.

Argument is heard regarding the Parties' legal memoranda and the court's intention to appoint a Special Real Estate Commissioner to sell the subject property.

Both sides rest.

Defendant Charisse Brodtkin stipulates to pay the full mortgage and escrow fees on the subject property in question **by June 2, 2008**.

IT IS ORDERED taking this matter under advisement and prior to appointing a Real Estate Commissioner to sell the property, the court will draft a Case Specific Order to Appoint a Real Estate Commissioner for review by counsel and the parties.

IT IS FURTHER ORDERED that the issue of attorney's fees and costs will abide the payment of the mortgage by Charisse Brodtkin, and that Terry Brodtkin is satisfied with the payment amount due him, or the property is sold by the Real Estate Commissioner.

9:55 a.m. Hearing concludes.

* * *

LATER:

This matter was originally brought in July of 2007 as an application for Temporary Restraining Order and Preliminary Injunction to enforce compliance by Defendant of various CC&Rs governing the property located at 8144 East Via de Viva, Scottsdale, Arizona (the "Residence"). Plaintiff is the record owner of the property and the debtor on the mortgage and Defendant has an equitable interest in the Residence stemming from a previous order dated August 16, 2001, entered by Judge Cathy Holt in this case. Plaintiff also sought to have this Court hold Defendant in contempt for her failure to comply with Judge Holt's order to refinance the Residence. Based upon the agreement of the parties, the Court granted the Temporary

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Restraining Order and set an evidentiary hearing on the application for Preliminary Injunction and the Contempt petition.

On August 20, 2007, the date of the evidentiary hearing, Plaintiff withdrew the Contempt petition as the parties both indicated that it was time barred. As to the remaining issues, the parties indicated that they had reached a settlement in that the Defendant was going to pay off the mortgage balance and any monies owed to Plaintiff, after which Plaintiff would deed the property to Defendant. All that was necessary to complete the settlement was an accurate mortgage payoff figure and an accurate total of amounts due Plaintiff for his having to paying some of Defendant's mortgage payments and homeowners' association dues to protect his credit due to Defendant's non-payment. The Court set a Status Conference for October 15, 2007, to ensure that the required information had been received and that the parties were proceeding to escrow.

Unfortunately, nine (9) months and seven (7) hearings later, the Residence and mortgage thereon remain in Plaintiff's name and Defendant has continued her pattern of non-payments and late payments of the mortgage and associated fees, causing Plaintiff to pay additional amounts on Defendant's behalf to avoid fines, assessments, and credit problems. Although an escrow had been opened to effectuate the parties' agreement, it was subsequently cancelled by the escrow company. Plaintiff provided the Court with several of Defendant's letters to the escrow agent, which set forth numerous and irrelevant demands that Defendant indicated were required to be met before she would agree to close escrow. In view of the inability and/or unwillingness of the parties to follow through on their agreement, the Court set today's evidentiary hearing for the purpose of determining whether the Court could and should simply appoint a Special Real Estate Commissioner to sell the Residence and to determine the exact amounts owed to Plaintiff for the payments made on behalf of Defendant for the mortgage and other related fees associated with the Residence.

In their separate pre-hearing memoranda, the parties spend most of their time reiterating the procedural history of this case and provided the Court with little legal support for their positions. Defendant's main contention is that this Court has no jurisdiction to enforce Judge Holt's 2001 judgment in the first instance because it was never renewed and therefore is time barred. In the second instance, assuming the Court has jurisdiction to enforce Judge Holt's judgment, Defendant contends that there is no authority in the rules or statutes for the appointment of a Special Real Estate Commissioner to sell the property. Plaintiff contends that the requirement of a renewal of judgment prior to the expiration of five (5) years is only with regard to money judgments citing to A.R.S. § 12-1612.

The Court has not been provided with any case law support for the Plaintiff's contention that the renewal of judgment requirement applies only to money judgments. However, the Court

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need not reach that issue in view of the fact that this judgment was renewed by action. A.R.S. § 12-1611 provides that “A judgment may be renewed by action thereon at any time within five years after the date of the judgment.” In the instant case, Plaintiff brought an action before Judge Holt on November 15, 2004, and requested a hearing pursuant to Rule 60(a) of the Arizona Rules of Civil Procedure, to clarify Judge Holt’s earlier judgment entered on August 16, 2001. In that action, Plaintiff contended that Defendant had not kept the existing debt on the property current and had not refinanced the property as ordered, but continued to reside in the property. *See Terry Brodkin v. Charisse Brodkin*, 1 CA-CV 06-0024 (Memo. Dec. 11/24/06) at p. 5. An evidentiary hearing was conducted and thereafter on August 5, 2005, Judge Holt reviewed the previous judgment and issued an additional money judgment against Defendant for payments Plaintiff made on Defendant’s behalf for the mortgage, homeowner’s fees and other miscellaneous payments. Although the Plaintiff had raised the issue of Defendant’s failure to refinance the property as previously ordered, the Court did not address that issue.

Defendant appears to believe that a judgment can only be renewed by affidavit pursuant to A.R.S. § 12-1612 or that some unspecified type of action, other than that which was filed in 2004, is required to renew a judgment. However, Defendant has not provided the Court with any authority to support these theories. This Court finds that the action brought in 2004 was an action on the 2001 judgment as contemplated by A.R.S. § 12-1611. Therefore, the judgment was renewed as of the date of that action and was valid at the start of the instant proceedings. As to Defendant’s second contention, the Court has the authority to appoint a Special Commissioner for the Sale of Real Property pursuant to Rules 53(a) and 70 of the Arizona Rules of Civil Procedure.

Defendant objected to this Court conducting an evidentiary hearing on the amounts owed to Plaintiff for the payments set forth above to finalize the issues presented herein. Defendant contends that a separate action would have to be filed to accomplish this. However, the parties have been in agreement over the course of proceedings herein that Plaintiff owes Defendant for his payments on her behalf and have only disagreed as to the exact amounts owed, which have continued to increase with each passing hearing. No purpose could possibly be served by requiring Plaintiff to file another motion asking for exactly what the parties have been fighting over for the passed nine (9) months in proceedings before this Court. Defendant cannot claim surprise. Thus, in the interest of judicial economy and in the interest of preserving the resources of the parties, the Court heard testimony from Plaintiff as to the amounts he is owed to date.

Pursuant to this Court’s Order dated March 3, 2008, Plaintiff’s Counsel sent a letter to the Court and Defendant’s Counsel containing a ledger of payments made by Plaintiff, along with copies of the cancelled checks supporting those amounts. The total amount owed by Defendant to Plaintiff as of the end of February, 2008, was \$7,534.25. No objection to this amount was ever filed by Defendant prior to today’s date, nor was an objection raised at today’s hearing.

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Plaintiff testified that after February, 2008, he had to make additional mortgage payments for the months of March and April due to the fact that as of the middle of each of those months, Plaintiff had not made the payments to the bank. Those two mortgage payments were for \$1,342.76 and \$1,357.76, respectively. Defendant testified that she did make a payment towards the mortgage in May, 2008, in the amount of \$1,260.00. However, Plaintiff testified that Defendant's payment was short and that he had to make up the full payment for May by paying an additional \$82.35. Therefore, the total amount of monies owed to Plaintiff by Defendant for payments for the period March of 2006 through May of 2008 is \$10,317.12. Defendant assured the Court that she would be making the June mortgage payment in full no later than June 2, 2008.

Due to the unusual circumstances involved in this case, the Court will fashion a proposed Order for Appointment of a Special Commissioner Regarding the Real Property in this case directing him or her to open and monitor an escrow account for the Defendant to pay off the current mortgage balance and all monies owed to Plaintiff in lieu of the sale of the Residence and/or to list the Residence for sale should Defendant fail to close the initial escrow as stated. The Proposed Order is set forth below. **On or before June 9, 2008**, the parties may file and hand deliver to the court their objections or suggested modifications, if any, taking into account the Court's rulings herein.

**PROPOSED ORDER FOR APPOINTMENT OF SPECIAL COMMISSIONER
REGARDING REAL PROPERTY**

The Court finds that the parties have an interest in real property and that pursuant to Rule 70 of the Arizona Rules of Civil Procedure, Defendant has failed to perform the specific act ordered by the Court in August of 2001 to refinance the property described below so as to pay off the mortgage for which Plaintiff is indebted and obtain title in Defendant's name alone. Therefore,

IT IS ORDERED that _____ (selected realtor) _____ is appointed Special Commissioner Regarding the Real Property (hereinafter Special Commissioner) located at: 8144 East Via de Viva, Scottsdale, Arizona, and more particularly described as:

(counsel to provide the Court with the complete legal description of the property)

IT IS FURTHER ORDERED that preliminarily, the Special Commissioner is to:

- 1) determine the mortgage payoff amount on the subject property as of June 20, 2008, plus per diem interest thereafter;

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- 2) determine the amounts owed to the homeowner's association, if any;
- 3) add to the above the figure of \$10,317.12 determined by this Court as owed to Plaintiff pursuant to the ruling of May 27, 2008;
- 4) determine all appropriate costs for closing escrow, including any fees associated with the title search and title insurance, and the amount of the Special Commissioner's commission for opening and monitoring the escrow; and,
- 5) open an escrow account with a title company chosen by the Special Commissioner for deposit by Plaintiff of the above combined total.

IT IS FURTHER ORDERED that both parties are directed to cooperate with the Special Commissioner regarding his or her requests for documentation and/or authorizations to gather information regarding the property and monies paid and owed thereon from Bank of America and the Property Management company and/or Homeowner's Association, among other entities.

IT IS FURTHER ORDERED that upon receipt of proof of the above-listed calculations from the Special Commissioner, which proof shall be mailed by the Special Commissioner to the Court, the Defendant, Defendant's Counsel, Plaintiff, and Plaintiff's Counsel, Defendant shall have five (5) business days to deposit the amounts calculated in the escrow account opened by the Special Commissioner or file an objection with Judge Hyatt specifying the objections to the Special Commissioner's calculations.

IT IS FURTHER ORDERED that if no objections to the Special Commissioner's calculations are filed, escrow shall close with the pay off of the current mortgage, the payment of the \$10,317.12 for reimbursements to Plaintiff, the payment of all closing costs, including the Special Commissioner's commission and transfer of title from Plaintiff to Defendant on or before July 31, 2008, unless a later date is requested by the Special Commissioner.

IT IS FURTHER ORDERED that if escrow does not close as above-specified, the Special Commissioner shall list the subject property for sale, and the following orders will then govern the conduct of the Special Commissioner and the parties.

**ORDER FOR APPOINTMENT OF SPECIAL COMMISSIONER
FOR SALE OF REAL PROPERTY**

(Regular Caption)
CV _____

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and

Name of Realtor

Phoenix, AZ

(602) _____
(602) _____(FAX)

**ORDER FOR APPOINTMENT OF SPECIAL COMMISSIONER
FOR SALE OF REAL PROPERTY**

Pursuant to the Court's Motion,

THE COURT FINDS the parties have an interest in real property, which property shall be sold in conjunction with the proceedings now before the Court.

Good Cause appearing,

IT IS ORDERED:

1. John Jones of _____ Realty is appointed Special Commissioner for Sale of Real Property (hereinafter, Special Commissioner), said real property located at:

Address of Subject Property _____, Phoenix, AZ

and more particularly described as:

(Complete legal description). ?????

2. The Special Commissioner shall maintain a policy of Errors and Omissions Insurance equal to at least three times the market analysis or appraised value (as applicable of the subject property during the pendency of this appointment.

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3. COOPERATION AND ACCESS. The parties and their attorneys shall cooperate in good faith in providing access to the property by the Special Commissioner. The party in possession of the premises shall provide the Special Commissioner with a key to the property within 48 hours after a request by the Special Commissioner. The Special Commissioner shall attempt to give reasonable notice to the parties before gaining access to the premises at reasonable times.

4. MARKET ANALYSIS AND APPRAISAL. The Special Commissioner shall, within ten days of being granted access to the premises, cause a market analysis of said property to be made, and shall deliver copies of said market analysis to the parties and (if applicable) to the parties' attorneys. Within ten days after receipt of the market analysis, either party may provide written comments about the market analysis to the Special Commissioner, and either party or the Special Commissioner may request an appraisal. The cost of the appraisal shall be paid by the requesting party(ies) upon demand. The Special Commissioner shall have no obligation to obtain an appraisal unless the parties advance the appraisal fee except in those cases when the Special Commissioner is requesting the appraisal. In such cases, the Special Commissioner shall advance the appraisal fee to be reimbursed from the proceeds of sale after close of escrow. The Special Commissioner shall select an appraiser agreed to by both parties except that if the parties are unable to agree, the Special Commissioner shall select an independent appraiser.

5. LISTING. The subject real property shall be listed for sale in a commercially reasonable manner at the value estimated by the market analysis or, if applicable, at the appraised value. The Special Commissioner shall execute a listing agreement substantially consistent with the current model listing agreement approved by Arizona Association of Realtors. As used in this Order, the term "commercially reasonable manner" includes, but is not limited to [a] listing the property on the Multiple Listing Service (hereinafter, MLS), [b] stating a fair description of the properties' features, and [c] a statement of terms the sellers and the Special Commissioner will, and (as appropriate) will not, consider. The listing shall contain a provision that "the sale is subject to Court approval."

6. REPORTS. The Special Commissioner shall upon request by either party or the Court, in writing, provide a report of the efforts made to sell the property. The Special Commissioner shall deliver copies of said report to both parties and (if applicable) their counsel, every 30 days. Said report shall include recommendations, if any, for changes to the offering terms. The report shall not be filed directly with the Court, however, either party may submit any or all reports for the Court's consideration in further proceedings.

7. The parties shall consider all written offers for purchase of the subject real property. Approval of terms of offer shall not be unreasonably withheld; approval, rejection, or

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counter-offer shall be made timely and in the manner necessary to consummate an arms-length real property transaction.

8. The Special Commissioner shall determine if reasonable changes are necessary to the terms of listing the property for sale if, after a period of not less than 90 days from the date of first publication in the MLS, the property remains unsold. As applied herein, "unsold" means the parties have not accepted a written offer for sale. The Special Commissioner shall make a recommendation in writing to the parties, and, if applicable, to their attorneys. If either party fails, neglects or refuses to deliver a written approval to/of changes to the terms of listing recommended by the Special Commissioner, the Special Commissioner or either party may petition the Court for hearing. Pending hearing, changes to the terms of listing suggested by the Special Commissioner shall be the terms which the property is offered for sale; the MLS listing shall note stated terms under these conditions to be "subject to Court approval". If neither party has requested a hearing within 10 days of mailing to their last known address or delivery of notice of the change recommended by the Special Commissioner, the recommendation shall be deemed accepted by the parties, and the phrase "subject to Court approval" may be removed from the MLS.

9. **OFFER REJECTED: REQUEST FOR HEARING.** If the Special Commissioner receives a written offer to purchase the subject real property which the parties, or either of them, reject, the Special Commissioner may petition the Court for an emergency or accelerated hearing and for acceptance of the offer. If, after emergency or accelerated hearing, the Court determines the offer should be accepted, the Court may direct the Special Commissioner or the Clerk of Court, pursuant to Arizona Rules of Civil Procedure, Rule 70, to make, execute and deliver the appropriate documents for consummation of sale. The Court shall impose sanctions against the party having unreasonably withheld approval of sale.

10. Net proceeds of sale shall be impounded by the title company engaged by the Special Commissioner, to be distributed pursuant to the Order of the Court dated October 25, 2007, and attached to this Order.

11. Upon close of escrow, the Special Commissioner and the selling broker shall be paid a commission consistent with the reasonable and customary fees paid to Realtors in similar transactions in Maricopa County, Arizona.

12. **PURCHASE OF PROPERTY BY A PARTY.** In the event either owner wishes to purchase the subject real property, the purchasing owner shall submit an offer to the other owner, in writing with a copy to the Special Commissioner. All such offers that are rejected may be submitted to the Court for approval. No party shall reject an offer unless that party can make a factual showing as to a reasonable basis for the rejection. In the event of an owner

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purchase or property withdrawal from sale based upon an agreement of the parties, Special Commissioner compensation shall be paid as follows:

a. Offers made and accepted prior to an executed listing agreement that are approved by the Court or agreed to by the parties shall result in a reasonable fee for the time expended, including preparation of the market analysis;

b. Agreements to sell by the parties or agreements approved by the Court after the listing agreement shall subject the offering owner to payment of a fee to the Special Commissioner. The fee shall be the greater of one percent (1%) of the total selling price or a reasonable hourly fee for the efforts expended by the Commissioner based upon reasonable hourly rates to be approved by the Court. In all such cases, the out-of-pocket expenses of the Commissioner shall be paid directly by the purchasing owner. All such fees and costs shall be paid from the proceeds of sale. In the event the proceeds of sale are insufficient to pay the Special Commissioner costs and fees, those fees shall be paid by the purchasing owner prior to close of escrow.

c. If, after receipt by the Special Commissioner of a *bona fide* offer to purchase the real property from a third party, either owner makes a written offer to purchase the real property, which offer is approved by the Court, the purchasing owner shall pay a commission to the Special Commissioner in the amount of three and one-half percent (3.5%) of the total selling price. A *bona fide* offer means an offer from a qualified purchaser presenting commercially reasonable terms. Payment of the Special Commissioner's fee shall be part of the Court's Order of approval requiring the payment as a contingency to the close of escrow.

13. SANCTIONS. The Court may impose additional sanctions for a party's unreasonable behavior under this order, including, but not limited to, adding an additional 1% of the selling price as compensation for services rendered as Special Commissioner, over and above the reasonable and customary fees paid for similar services not involving a Special Commissioner within Maricopa County. Other sanctions may include contempt, an award of attorney's fees, or removal from the premises.

Judge/Commissioner