

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009741

11/14/2019

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT

C. Avena

Deputy

MIGUEL MOLINA

MIGUEL MOLINA

126 W SOUTHGATE AVE

PHOENIX AZ 85041

v.

DANAE CARRILLO LOYA

MICHAEL E HURLEY

ALEX ROBAYO

1301 E BEVERLY LN

PHOENIX AZ 85022

JUDGE KEMP

MINUTE ENTRY

Courtroom 711 (ECB)

9:18 a.m. This is the time set for a telephonic Trial-Setting Conference. Plaintiff is neither present nor represented. Defendant, Danae Carrillo Loya is represented by counsel, Michael E. Hurley.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the status of the case.

The Court has considered Defendant's Motion for Summary Judgment filed on October 4, 2019. Plaintiff Miguel Molina did not file a Response nor a request for additional time to submit a response.

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The failure to respond to a motion may be treated as consent to its being granted. Ariz. R. Civ. P. 7.1(b). Moreover, an unopposed motion for summary judgment will be granted unless the moving party fails to present facts showing the absence of any materially disputed issue of fact. *E.g., Biondo v. General Motors Corp.*, 5 Ariz. App. 286, 291, 425 P.2d 856, 861 (1967) (affirming summary judgment); *see also Siner v. Stewart*, 9 Ariz. App. 101, 103, 449 P.2d 635, 637 (1969) (same). When, as here, the party against whom the motion is directed fails to respond, the facts asserted by the moving party are assumed to be true. *E.g., Sato v. Van Denburgh*, 123 Ariz. 225, 599 P.2d 181 (1979) (affirming summary judgment); *Schuldes v. National Surety Corp.*, 27 Ariz. App. 611, 617, 557 P.2d 543, 549 (App. 1976) (same). The motion and its accompanying statement of facts establish that there are no material facts in dispute that preclude granting the motion.

IT IS ORDERED granting Defendant's Motion for Summary Judgment filed on October 4, 2019. Judgment for partition by sale is granted, a Commissioner shall be appointed to list the property in question, and the net proceeds shall be divided equally between the parties without offset.

In Light of the Court's granting of Summary Judgment for Defendant Danae Carillo Loya,

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

Good cause appearing,

IT IS ORDERED:

1. Appointment. Alex Robayo is appointed Real Estate Special Commissioner (hereinafter Special Commissioner). The Special Commissioner shall market and sell the real property at: 126 W. Southgate Avenue, Phoenix, AZ 85041, and more particularly described as:

Lot 45, Southgate Park, According to Book 17 of Maps, Page 47, Records of Maricopa County, Arizona, according to the terms and conditions herein.

2. Insurance. The Special Commissioner shall maintain a policy of Errors and Omissions Insurance in an amount at least equal to the listing price of the property herein, however, in any instance, not more than \$1,000,000.

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 make contact with the Special Commissioner directly within 5 working days of the

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date of this order for the purpose of beginning the sales process and 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 5 working 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 5 working days after receipt of the market analysis, either party may provide written comments about the market analysis to the Special Commissioner, and either party may request an appraisal. The cost of the appraisal shall be paid by the requesting party or parties upon demand. The Special Commissioner shall have no obligation to obtain an appraisal unless the parties advance the appraisal fee. In the event that the requesting party or parties does not timely advance the appraisal fee, the Special Commissioner may do so, however, the Special Commissioner shall be reimbursed from the proceeds of sale after close of escrow, or as the Court may otherwise order. The Special Commissioner shall select any 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 and, unless the parties agree otherwise, at the value estimated by the market analysis or, if applicable, at the appraised value. The parties shall execute and deliver a listing agreement substantially consistent with the current model listing agreement approved by Arizona Association of Realtors, and shall so deliver said listing agreement within three (3) working days of presentation by the Special Commissioner. As used in this Order, the term "commercially reasonable manner" includes, but it not limited to [a] listing the property on a Multiple Listing Service (hereinafter, MLS), [b] stating a fair description of the properties' features, and [c] a statement of terms the sellers will, and (as appropriate) will not, consider. The Special Commissioner may not unilaterally establish a fee for their services, and such fee shall be as agreed to by the parties or set by Court order. If either party fails or refuses to execute the listing agreement within 3 working days of presentation, the Special Commissioner may sign for them. The listing shall contain a provision that "the sale may be subject to Court approval."

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

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7. Offers. 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 counter-offer shall be made within the time period stated in any offer to purchase, and in the manner necessary to consummate an arms-length real property transaction.

8. Changes. The Special Commissioner may from time to time determine if reasonable changes are necessary to the terms of listing the property for sale if the property remains unsold. As applied herein, "unsold" means the parties have not accepted a written offer for sale. The Special Commissioner shall make any recommendation in writing to the parties and to their attorneys. If one 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 shall request a Court hearing in writing. Until the Court rules otherwise, no changes shall be made to the listing absent a subsequent agreement of the parties. If both parties disagree with the recommendations of the Special Commissioner, there shall be no hearing requested, and no change to listing shall occur.

9. COURT APPROVAL. If the Special Commissioner receives a written offer to purchase the subject real property that either party rejects, the Special Commissioner shall make a written request to the Court for an accelerated hearing for consideration of the offer. If, after accelerated hearing, the Court determines the offer should be accepted, or that a counter-offer be made, the Court may direct the Special Commissioner or the Clerk of Court, pursuant to Rule 89, Arizona Rules of Family Law Procedure, to make, execute and deliver the appropriate documents. The Court may sanction the party having unreasonably withheld approval of sale. If the Special Commissioner receives a written offer to purchase the real property that both parties reject, or if both parties wish to put forth the same terms of a counter-offer, the Special Commissioner shall adhere to the agreement of the parties.

10. PROCEEDS. The parties' proceeds of sale shall be held by the title company engaged, until there is a written agreement of the parties or Order of the Court.

11. COMMISSION. Upon close of escrow, the Special Commissioner and the selling broker shall be entitled to, and paid a commission as negotiated by the parties at the time of signing the listing agreement, or as established by the Court if the parties cannot agree.

12. PURCHASE BY PARTY. In the event either party wishes to purchase the subject real property, the purchasing party shall submit a bona fide, fair market offer to the other party in writing along with a financial pre-qualification statement, and provide a copy to the Special Commissioner. No party shall reject an offer unless that party can make a factual showing as to a reasonable basis for the rejection. All such offers that are rejected may be submitted to the Court for approval upon request of either party or the Special Commissioner. In

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the event of an owner 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 by a party prior to any third party offer being made shall result in a reasonable fee for the time spent, including preparation of the market analysis, plus any reasonably incurred out-of-pocket costs or expenses incurred by the Special Commissioner. Payment of the Special Commissioner's fee and costs/expenses shall be part of the Court's order of approval or any written agreement between the parties as a contingency to the close of escrow or transfer of title.

b. If, after receipt by the Special Commissioner of a bona fide offer to purchase the real property from a third party, either owner, which owner is pre-qualified for financing at the time, makes a written offer to purchase the real property, which offer by the party is approved by the Court or accepted by the other party, the purchasing party shall pay a commission to the Special Commissioner in the full amount provided for in the listing agreement unless the parties and Special Commissioner agree otherwise. 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 sanction a party for unreasonable behavior under this order, including, but not limited to, adding an additional one percent (1%) of the selling price as compensation for extraordinary services rendered as Special Commissioner, over and above the fee negotiated for by the parties in the listing agreement. Other sanctions may include contempt, an award of attorney's fees, removal from the premises and daily monetary fines for holding up the close of escrow.

14. **TERMINATION.**

a. The expiration of the listing agreement referred to in Paragraph 5.a., above, shall operate only to terminate the immediate contractual arrangement between the parties and the Special Commissioner. This order shall remain in full force and effect until amended by the Court. The parties may renegotiate the listing with the Special Commissioner, or return to the Court for appointment of a new Special Commissioner. The Court shall not be obligated to change Special Commissioners, and any consideration for changing Special Commissioners shall be predicated upon consideration of the quality of the services rendered by the Special Commissioner, and their time and money expended in furthering the sale of the real property. The Court may consider compensation for the Special Commissioner's time and services afforded to the Court and the parties.

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b. By acceptance of the appointment herein, and by signing the listing agreement between the parties, the Special Commissioner agrees to be bound by the terms of this order and the further authority and orders of the Court in this matter. The Court may, for good cause shown, alter or amend the terms of this order, or terminate the services of the Special Commissioner without further compensation or remuneration, however, the Court shall not terminate the Special Commissioner without hearing and consideration of the Special Commissioner's time and services afforded to the Court and the parties.

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at:

<http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court.

DONE IN OPEN COURT this date: November 19, 2019

/s/ HONORABLE MICHAEL W. KEMP

JUDICIAL OFFICER OF THE SUPERIOR COURT
MICHAEL W. KEMP