

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-60907-CIV-MORENO/SELTZER

FEDERAL TRADE COMMISSION, and

STATE OF FLORIDA,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants and Relief Defendants.

Plaintiff's Objection to Report and Recommendation Doc. 419

With the concurrence of co-Plaintiff, Federal Trade Commission ("FTC"), the Office of the Attorney General, State of Florida, Department of Legal Affairs ("Plaintiff," and together with the FTC, "Plaintiffs"), respectfully files this Objection to the September 27, 2019 Report and Recommendation (Doc. 419), which recommends granting Non-party Amanda Finley's Expedited Motion for Imposition of Equitable Lien (the "Motion) on Real Property Located at 300 Royal Plaza Drive, Fort Lauderdale, Florida 33301 (the "Property") (Doc. 404).

This Court referred the Motion to Magistrate Judge Seltzer (Doc. 407), pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge Rules of the S.D. Fla., L.R., to submit a Report and Recommendation. Magistrate Judge Seltzer entered a Report and Recommendation on September 27, 2019 (the "Report") (Doc. 419).

Pursuant to 28 U.S.C. § 636(b)(1)(C), any party may serve and file written objections to the proposed findings and recommendations within fourteen days of being served a copy. Thereafter, pursuant to 28 U.S.C. § 636(b)(1)(C), "[a] judge of the court shall make a de novo

determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.”¹

Plaintiff respectfully objects to several factual findings and legal conclusions contained in the Report. Specifically, Plaintiff objects to the following factual findings listed in quotation marks in the order in which they appear in the Report² as well as the legal conclusions thereafter:

1. The Report stated, “[a]mong other things, the stipulations provided for the turnover of certain assets belonging to Defendant Jeremy Marcus, as well as injunctive relief and damages.” The stipulated orders provided, among other things for the turnover of assets, as well as injunctive relief and equitable monetary relief, not damages. (See Doc. 231, VII(A); Doc. 233, VII(A)).

2. The Report also found, “[i]t is undisputed that in exchange for Finley’s cooperation in marshalling receivership assets, and to eliminate the need to join her as a defendant in the underlying lawsuit, the Receiver recognized her potential right to assert an equitable lien in the Property based on her financial contributions to its purchase price.” The record evidence submitted shows that the Receiver wrote Ms. Finley a letter stating, in pertinent part, “[b]y quit claiming your interest in your home to Jeremy Marcus, the Receiver agrees that you are not waiving any potential right you may have to assert an equitable lien in the property based solely on a brokerage fee you claim to have earned in its purchase, which you agree will in no event exceed \$107,500.” (See

¹ Similarly, Rule 4 of the Magistrate Judge Rules of the S.D.Fla., L.R., provides that any party may appeal from a Magistrate Judge’s order determining a matter referred pursuant to 28 U.S.C. § 636(b)(1)(A) within fourteen days after being served with the Magistrate Judge’s order by filing written objections.

² The Report stated, “[t]he bulk of the underlying litigation between the plaintiffs and the individual defendants was concluded in April 2008 based on a series of stipulated orders (DE 212, 231, 232).” Plaintiff believes this was a scrivener’s error, as the record reflects the bulk of the underlying litigation between plaintiffs and the individual defendants was concluded by stipulated orders in April 2018. (Docs. 231, 233).

Exhibit C to the Motion). The Receiver cannot and did not determine who should be joined as a Defendant in Plaintiffs' underlying lawsuit. In addition, the Receiver did not agree that Ms. Finley contributed financially to the purchase price of the Property or that Ms. Finley was entitled to an equitable lien.

3. The Report also stated, "[b]ecause the Property was purchased in part by Marcus based on the proceeds of the fraud, this asset, or at least a portion of it, was subject to eventual turnover." However, the forensic evidence submitted by the Receiver, and unrefuted by Ms. Finley, traced 100% of the funds used to purchase the Property to Receivership Defendant monies. (Doc. 136 at Ex. D). Specifically, the Receiver's forensic accountant identified \$2,550,000 that originated from consumer escrow funds transferred to Receivership Defendant Cockburn & Associates, LLC ("Cockburn"), along with \$2,100,000 from Receivership Defendant Associated Administrative Services, LLC ("Associated"), and \$600,000 from Receivership Defendant Halfpay International, LLC ("Halfpay"). Thus, the entire \$5,250,000 purchase price was traced to the proceeds of the scam. Further, Plaintiffs obtained a Final Judgment on the Pleadings by Consent Against Halfpay, among others (Doc. 174) and a Default Final Judgment and Order for Permanent Injunctive Relief and Monetary Judgment against Cockburn and Associated, among others (Doc. 293).

4. The Report also found Ms. Finley rebated \$107,500 towards the purchase of the Property and concluded that Ms. Finley as the sales associate is entitled to a commission on the purchase transaction. However, these finding contradict the only evidence submitted and relied upon by Ms. Finley, which show that Florida Coastal Realty Group's total commission was \$157,500 and that Florida Costal, not Ms. Finley, credited \$107,500 towards the purchase of the Property. (See the Motion, Exhibit A, lines 701 and 209). Moreover, Ms. Finley is listed as a

Cooperating Sales Associate (See the Motion, Exhibit B, page 12). Based on the record evidence before the Court, Ms. Finley has no standing to pursue this claim, as Florida Coastal credited the \$107,500 that Ms. Finley claims to be owed. Further, Florida law prohibits real estate sales associates from commencing any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due. Section 475.42(1)(d), Florida Statutes. *See also Bergin v. Kickliter*, 538 So.2d 950, 951 (Affirming trial court's summary judgment on the ground that Section 475.42(1)(d) prohibits a real estate salesman from maintaining an action to collect a real estate brokerage commission).

5. The Report also found that the Receiver would be receiving an "improper windfall" if he were permitted to retain \$107,500 because "the commission Finley earned as a real estate sales associate is independent of the underlying fraud scheme that was the genesis of the receivership." The unrefuted forensic evidence submitted by the Receiver traced 100% of the \$5,250,000 cash purchase price of the Property as taken directly from Receivership Entities and consumers. (Doc. 136 at Ex. D). The Receiver is currently under contract for over \$1,000,000 less than the fully traced \$5,250,000 cash purchase price of the Property. (Doc. 413, II(F)). Therefore, the Receiver will not be receiving a windfall if the \$107,500 remains in the Receivership Estate - even with the \$107,500 included, the Receivership Estate, and therefore consumer victims, will be losing over a million dollars.

6. The Report also found that the Receiver did not establish an equitable lien because the Property was turned over by stipulation. Although the Property was turned over by stipulation, in the Receiver's Response in Opposition to Finley's Motion, the Receiver set forth the basis for

the Receiver to have an equitable lien on the Property. (Doc. 413). In *CFTC v. Hudgins*, 620 F. Supp.2d 790, the CFTC brought an action to permanently enjoin Hudgins' fraudulent activities, seek civil monetary penalties, and for other equitable relief. The Court appointed a Receiver to collect Hudgins' assets. *Id.* at 792. The Receiver discovered that Hudgins gave his girlfriend \$362,500, of which she used \$328,034.41 to pay off her existing mortgage. *Id.* The court reasoned that the girlfriend could not establish that she had any equity in the condominium since its last appraised value was \$260,000 and the girlfriend received over \$100,000 from Hudgins over what the Receiver would collect from the sale of her condominium. *Id.* at 795. As such, the court granted the Receiver an equitable lien on the condominium. *Id.* See also *In. re Fin. Federated*, 347 F.3d 880, 892 (imposing an equitable lien in the amount of the fraudulently obtained funds used to purchase the home, even though the home had substantially decreased in value). Similarly, here the Receiver has traced the entire \$5,250,000 purchase price of the Property to Receivership entities, and thus should be entitled to an equitable lien in the amount of \$5,250,000 even though the home has decreased in value. Further, Ms. Finley has no equity in the Property as the Property has decreased in value by over \$1,000,000.

7. In addition, the Report erroneously concludes that Finley's contributions to the Property "are akin to a purchase-money security interest, which would take priority over the Receiver's lien, even if he had one." The Report does not reference any caselaw for this conclusion, but rather cites generally to § 679.324. Section 679.324 contains the priority rules applicable to purchase-money security interests in goods. Official comment 2 § 679.324. A purchase-money security interest can only be created in goods and software. *Id.* Ms. Finley's real estate commission is not a good within the meaning of Section 679.324, Florida statutes, nor has it been perfected, and it is not akin to a purchase-money security interest.

8. Finally, the Report incorrectly concludes that contrary to the Receiver's assertions that the commission was comprised entirely of stolen funds, the commission was paid by the seller. The Report cites to the HUD submitted by Ms. Finley (Doc. 404, Ex. A, In. 703) as the basis for the conclusion that the commission was paid by the seller. Respectfully, this conclusion is incomplete and incorrect. Although the HUD indicates that the real estate commissions to Florida Coastal Realty Group and Coldwell Banker were "Paid from Seller's Funds at Settlement," (Doc. 404, Ex. A., In. 703), the HUD also reflects that the Property was purchased with all cash from the buyer (Doc. 404, Ex. A., In. 303) and no cash was provided from the seller (Doc. 404, Ex. A., In. 603). Therefore, any money that was paid from the seller's funds came directly from the cash buyer.

9. For all of these reasons, Plaintiff respectfully requests that this Court deny Ms. Finley's Motion for Imposition of Equitable Lien.

10. Co-Plaintiff FTC concurs in this filing.

Dated: October 11, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2019, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by the CM/ECF system, or for those counsel or parties who are not authorized to receive CM/ECF Notices of Electronic Filing, is being served in the manner specified.

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